DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3494/1dn
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September 1, 1999

As you will see, the attached draft is not a straight redraft of 1997 AB–409. Rather, the attached draft retains the operative provisions of 1997 AB–409 and deletes certain extraneous amendments of the statutes that, on further review, are not necessary to accomplish your intent of giving employers the right not to employ persons based on conviction record. By redrafting 1997 AB–409 in this manner, this draft is now truer to 1995 AB–911, which is the bill that you originally wanted redrafted for the 1997 session.

Specifically, 1995 AB–911 provided that it is not employment discrimination because of conviction record to refuse to employ or to terminate from employment a person who has been convicted of a felony, misdemeanor or other offense and not pardoned. In drafting 1997 AB–409, however, I discerned that "acts of employment discrimination" under s. 111.322 (1), stats., include not only refusing to hire and terminating from employment, but also discriminating in promotion, compensation or in terms, conditions or privileges of employment. Accordingly, I advised at the time that 1995 AB 911 was logically inconsistent insofar as it exempted hiring and firing from the Fair Employment Law (FEL), but did not exempt from the FEL discrimination in promotion, compensation or in terms, conditions or privileges of employment.

I now rescind that advice for all of the following reasons:

1. It is not logically inconsistent to permit an employer to hire and fire based on conviction record, but to continue to prohibit an employer from discriminating in promotion, compensation or in terms, conditions or privileges of employment based on conviction record. Indeed, it is quite logical to permit an employer, based on conviction record, to make the judgment call that a person is too risky to have around at all, but at the same time to require an employer, once the employer has decided to hire and retain an employe with a conviction record, to treat the employe equally with everyone else.

2. Moreover, the distinction between hiring and firing and discrimination in promotion, compensation or in terms, conditions or privileges of employment is well–established under current law. Specifically, the current exception for when the circumstances of the conviction substantially relates to the particular job, which exception has been in force since 1977, only applies to hiring and firing and not to discrimination in promotion, compensation or in terms, conditions or privileges of employment. Thus, if providing an exception for hiring and firing, but not providing

an exception for discrimination in promotion, compensation or in terms, conditions or privileges of employment were somehow problematical, surely the legislature would have acted by now.

3. The instant cases giving rise to this draft, that is, the case of the Milwaukee Public Schools boiler attendant and the case of Gerald Turner, both involve the issue of hiring and firing and not the issue of discrimination in promotion, compensation or in terms, conditions or privileges of employment. Therefore, an exception that is limited to hiring and firing would solve the instant problems without repealing the state's longstanding public policy of balancing the interest of safety and the interest of rehabilitation of persons with conviction records.

Accordingly, this redraft takes the approach originally taken in 1995 AB–911, which is to provide an exception for the hiring and firing of persons who have been convicted of a felony, misdemeanor or other offense and not pardoned. Other approaches, ranging from the most focused to the most far–reaching, include the following:

1. Limit the exception to schools and other places of employment where children and other vulnerable persons are present. You could further focus the draft by limiting its application to felons who would have unsupervised access to those vulnerable persons.

2. Eliminate conviction record, and perhaps arrest record, as bases of discrimination under the FEL altogether. As such, licensing agencies and labor organizations would also be able to deny licensure or labor organization membership based on conviction record. See, for example, 1995 AB–741. As a practical matter, however, licensing agencies would still probably be constitutionally required to continue to follow current law and deny licensure based on conviction record only if the conviction were substantially related to the particular licensed activity. That is because there is a large body of case law indicating that the criteria used to decide whether a license should be issued must relate specifically to the purpose for which the license is to be held. See, for example, *Schware v. Bd. of Bar Examiners*, 353 U.S. 232; *Dent v. W. Virginia*, 129 U.S. 117; and *Douglas v. Noble,* 261 U.S. 165.

If you have any questions concerning this draft or this drafter's note, please do not hesitate to contact me directly.

Gordon M. Malaise
Senior Legislative Attorney
Phone: (608) 266–9738
E–mail: Gordon.Malaise@legis.state.wi.us