

1999 DRAFTING REQUEST

Bill

Received: 08/26/1999

Received By: malaigm

Wanted: As time permits

Identical to LRB:

For: Alberta Darling (608) 266-5830

By/Representing: Jim Villa

This file may be shown to any legislator: NO

Drafter: malaigm

May Contact:

Alt. Drafters:

Subject: **Discrimination**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Employment discrimination based on conviction record; permit employer to refuse to employ or to terminate on that basis

Instructions:

See Topic

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Required</u>
/?	malaigm 08/31/1999	jgeller 09/01/1999		_____		S&L
/1			martykr 09/01/1999	_____	lrb_docadmin 09/01/1999	lrb_docadmin 09/16/1999

FE Sent For:

09-21-99

<END>

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/?	malaigm	1 <i>[Signature]</i>	<i>[Signature]</i>	<i>[Signature]</i>			

FE Sent For:

<END>



State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-3512/1

GMM.....

Note

soon

JG

gen

1 AN ACT ...; relating to: permitting an employer to refuse to employ or to
2 terminate from employment an individual who has been convicted of a felony,
3 misdemeanor or other offense and who has not been pardoned. ✓

Analysis by the Legislative Reference Bureau

Current law, subject to certain exceptions, prohibits discrimination in employment based on conviction record. Current law specifies, however, that it is not employment discrimination because of conviction record to refuse to employ or to terminate from employment any individual who has been convicted of any felony, misdemeanor or other offense, the circumstances of which substantially relate to the circumstances of the particular job. This bill expands that exception to the prohibition against employment discrimination based on conviction record by specifying that it is not employment discrimination because of conviction record to refuse to employ or to terminate from employment any individual who has been convicted of a felony, misdemeanor or other offense and who has not been pardoned, whether or not the circumstances of the felony, misdemeanor or other offense substantially relate to the circumstances of the particular job.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

4 SECTION 1. 111.335 (1) (c) of the statutes is amended to read:

1 111.335 (1) (c) Notwithstanding s. 111.322, it is not employment discrimination
2 because of conviction record to refuse to employ or license, or to bar or terminate from
3 employment or [✓]licensing, any individual who:

4 1. Has been convicted of any felony, misdemeanor or other offense the
5 circumstances of which substantially relate to the circumstances of the particular job
6 or licensed activity; or

7 2. Is not bondable under a standard fidelity bond or an equivalent bond where
8 such bondability is required by state or federal law, administrative regulation or
9 established business practice of the employer.

10 History: 1981 c. 334; 1991 a. 216; 1993 a. 98; 1995 a. 448, 461; 1997 a. 112.

10 ~~SECTION 2.~~ 111.335 (1) (cg) 3. of the statutes is repealed.

11 ~~SECTION 3.~~ 111.335 (1) (cm) of the statutes is amended to read:

12 111.335 (1) (cm) Notwithstanding s. 111.322, it is not employment
13 discrimination because of conviction record to refuse to employ as an installer of
14 burglar alarms or to terminate from employment [✓] a person who has been convicted
15 of a felony, misdemeanor or other offense and who has not been pardoned.

16 History: 1981 c. 334; 1991 a. 216; 1993 a. 98; 1995 a. 448, 461; 1997 a. 112.

16 SECTION 4. 565.02 (1) (b) (intro.) of the statutes is amended to read:

17 565.02 (1) (b) (intro.) Notwithstanding s. ~~ss.~~ 111.321, 111.322 and 111.335, [✓]no
18 person may serve as the administrator if he or she has been convicted of, or entered
19 a plea of guilty or no contest to, any of the following:

20 History: 1987 a. 119, 399; 1989 a. 31; 1991 a. 39, 269, 323; 1993 a. 16; 1995 a. 27; 1997 a. 27.

20 SECTION 5. 565.02 (2) (c) (intro.) of the statutes is amended to read:

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3512/1dn

GMM.....

↑
JLg

When taking the drafting request for this draft I began to explain the various nuances of the Fair Employment Law (FEL) and, based on those nuances, the various approaches that you can take to achieve your intent of giving an employer the right not to employ a person based on conviction record. This drafter's note will explain why this draft takes the approach that it does to achieve your intent. The drafter's note will also briefly explore other approaches that you might wish to consider.

This draft is based on 1995 AB 911, which provides 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. Note that this exception applies only to hiring and firing and not to other acts of discrimination described in s. 111.322 (1), stats., namely discrimination in promotion, compensation or in terms, conditions or privileges of employment. This draft covers hiring and firing, but not discrimination in promotion, compensation or in terms, conditions or privileges of employment for all of the following reasons:

1. It is logical 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. *Specifically,* it is 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 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, *Schwartz 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

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3512/1dn
GMM;jlg:km

September 1, 1999

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

Barman, Mike

From: Malaise, Gordon
Sent: Thursday, September 16, 1999 11:49 AM
To: Barman, Mike
Cc: Darling, Alberta
Subject: FW: Jacket LRB-3512/1

Mike:

Please jacket for introduction LRB-3512/1 in accordance with Sen. Darling's request. Thank you.

Gordon

-----Original Message-----

From: Darling, Alberta
Sent: Thursday, September 16, 1999 10:34 AM
To: Malaise, Gordon
Subject:

Gordon

Please jacket and send to my office LRB 3512

Thank you.
Alberta