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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2011-12

(session year)

Senate

(Assembly, Senate or Joint)

Committee on ... Labor, Public Safety, and Urban Affairs (SC-LPSUA)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Mike Barman (LRB) (July/2012)

LOCAL JUSTICE UNDER LAW

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LEGAL Action
OF WISCONSIN
40 Years of Justice

TO: Senate Committee on Labor, Public Safety and Urban Affairs

FROM: Bob Andersen

RE: **Senate Bill 207**, relating to: permitting an employer to refuse to employ or to bar or terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony and preempting cities, villages, towns, and counties from adopting provisions concerning employment discrimination based on arrest or conviction record that prohibit activity that is allowed under the state fair employment law.

DATE: October 24, 2011

This memo is written to: *(1) correct the misrepresentation that has been repeatedly made during by employer representatives that only 4 - 5 states that have these laws, when, in fact there are at least 11, and that many other states address this in other ways that may be even more restrictive* and *(2) to highlight the fact that if this bill is enacted, employers will have to maintain three processes for hiring and firing employees – one for minorities (under federal law) for felonies where a relationship test will have to be undertaken, one for non minorities under this bill where a person can be discriminated against based on felony alone, and one for misdemeanants where a relationship test is required under current law .*

As for this second consideration, there is no doubt that minorities are better served under current state law, but there still is a right for minorities under federal law which employers cannot ignore. Since the Equal Rights Division (ERD) administers federal law as well as state law, employers will still have to avoid claims under the ERD, as well as under federal entities, for minorities, by looking at the relationship of the offense to the job in question.

I. There Are in Fact *at Least* 11 States That Have Adopted Laws like Wisconsin's Law.

Employer representatives repeatedly testified that there are only 4 states with these kinds of laws, while in truth there are at least 11.

As I have testified many times on this legislation over the past 10-15 years, there are at least 11 states that have adopted this law, either through statutes or administrative policies. Employer representatives have heard my testimony and I have given them notice of the other states in question several times over the years – yet they persist in misrepresenting the number

of states that have these laws.

In addition, many other states follow this law through court decisions that follow federal law rulings that discrimination has a "disparate effect" on minorities and is therefore race discrimination – unless there has been a determination made of "business necessity" for the action ("business necessity" essentially is a question of the relationship of the offense to the job – see below).

Below are the states involved and the actions they have taken. As the employer representatives testified at the hearing, they do not know of any of these states who have repealed their laws. Neither do we.

Here are the states. Most use some form of "substantial relationship" or "direct relationship" test. Some states' laws are even tougher than Wisconsin's law.

Several states fair employment agencies and courts have issued decisions based on "disparate effect." Some have included "disparate effect" in their administrative rules or statutes, e.g. ***Iowa***. In addition, at least the following several states have created special laws -- either by statute or by administrative action of Human Rights Commissions -- prohibiting discrimination based on conviction:

Delaware recently enacted a law lifting the ban on licensing for individuals with felony convictions for over 35 professions and occupations. The legislation provides that licenses may only be refused if the applicant has been convicted of crimes that are "substantially related" to the licensed profession or occupation.

Illinois recently enacted a law that provides that the records of most misdemeanors and Class 4 felony violations are to be sealed, provided that certain conditions are met. The sealing of the records means that they cannot be part of an official record that can be used against people. The conditions are that 3 years have elapsed for misdemeanors and 4 years for felonies, and the persons have not committed another offense.

Illinois Commission Guidelines have also been in existence for some time and have the force of law and, similar to Wisconsin law, broadly prohibit discrimination in the absence of some showing of a relationship between the offense and the job:

"Use of such criteria [arrest or conviction information] operates to exclude members of minority groups at a higher rate than others, since minority members are arrested and convicted more frequently than others. Such criteria are therefor unlawfully discriminatory unless the user can demonstrate in each instance that the applicant's record renders him unfit for the particular job in question." An applicant may be disqualified for a job based on a conviction if "(I) state or federal law requires the exclusion or (ii) the nature of the individual's convictions considered together with the surrounding circumstances and the individual's subsequent behavior reveals

the individual as objectively unfit for the job." [emphasis added]

Hawaii prohibits both private and public employers from discriminating because of any court record, unless a criminal conviction record bears a rational relationship to the duties and responsibilities of a particular job.

New York statutes prohibit discrimination by any employer based on the applicant or employee having committed a criminal offense, ***without allowing employers any exception***.

Washington prohibits discrimination by any employer on the basis of conviction records, except for those related to a particular job which are ***less than 7 years old***, under regulations issued by the Washington State Human Rights Commission.

Minnesota provides that consideration of a criminal record by a private employer cannot be an absolute bar to employment and that the job-relatedness of the crime must be considered, under the administrative policies set forth in the Minnesota Department of Human Rights Pre-Employment Inquiry Guide. The guide is not an administrative rule, but the effect is the same, since it would be risky to ignore it, because it is the state agency's interpretation of state law.

Colorado's Civil Rights Commission similarly has issued a pre-employment guide which provides that it may be a discriminatory practice for an employer to even make any inquiry about a conviction or court record that is not substantially related to job. While this is not expressed as a mandate, again, it would be risky to ignore it, since it is an interpretation of state law by the state agency.

Ohio's Civil Rights Commission pre-employment guide similarly advises employers that even any inquiry into convictions of applicants for jobs is unlawful, ***without any reference to "substantial relationship***."

Connecticut statutes prohibit state employers from discriminating based on conviction record, unless the employer considers ***all*** of the following: (1) the relationship of the crime to the job; (2) the rehabilitation of the applicant or employee; and (3) the time that has elapsed since the conviction or release of the applicant from prison or jail.

Florida statutes prohibit a state or municipal employer from discriminating based on a conviction record, unless the crime is (1) either a felony or first degree misdemeanor and (2) is ***directly related*** to the employment position sought. In other words, an applicant may not be discriminated against for having committed a lesser misdemeanor, even if it is directly related to the job.

2. **<u>If SB 207 is Enacted, Employers Will Have to Maintain Three Processes for Hiring and Firing Employees – One for Minorities, Where a Business Necessity or Relationship Test Must be Shown Regarding the Felony Conviction, a Second One for Non Minorities for felonies Under This Bill, Where Felony Status Alone Will Disqualify the Person, and a Third for Misdememants, Where a Relationship Test is Required Under Current Law.</u>**

Current law is a codification of decisions of the U.S. Supreme Court, federal and state courts, the Equal Employment Opportunities Commission (EEOC) and the state Equal Rights Division (ERD), holding that discrimination against minorities on the basis of conviction record, in the absence of "business necessity," constitutes race discrimination – the enactment of AB 286 will not change this law.

Attorneys who represent employers have testified at this hearing and at previous hearings on this legislation that they will continue to advise their clients to comply with the federal requirements under Title VII of the Civil Rights Act of 1964, when considering the employment of minorities. Federal law requires employers to look at business necessity or a relationship test, when addressing the employment of minorities.

Current ***state*** law stems from these federal decisions.

<u>In a way, what current state law does is to extend to non minorities the protections that exist for minorities under federal law</u>. ***<u>One of the considerations in the enactment of this law was the avoidance of reverse discrimination</u>***. It is possible that a ***non minority*** would be able to bring a claim under the Equal Protection Clause, for not having the same protection as does a minority.

In any event, the state legislature cannot do anything to diminish the right that a minority has under federal law. An employer would be foolish to refuse to hire or to fire a minority person solely because the person has a felony record.

As a result, if this bill is enacted, employers will have to maintain two processes for hiring and firing employees: one for minorities that continues to look at a relationship test or a business necessity test, when considering minorities, and one for non minorities, which allows a consideration of felony record alone.

In this regard, this bill actually will do a disservice to employers who rely on it and who look no further than a minority person's felony record. Such an employer will easily expose itself to liability by not conducting some scrutiny regarding business necessity or a relationship test, in its treatment of a minority person.

An employer better served under current law, where it would not be mislead into a false sense of security. And the test under state law -- "substantial relationship" – is arguably not as restrictive as is the "business necessity" or job-relatedness test under federal law.

The U.S. Supreme Court ruled in Griggs v. Power Co., 401 U.S. 424 (1971), that discrimination based on circumstances which have a "disparate effect" on persons because of their race or national origin, ***is in fact*** discrimination based on ***race or national origin*** and is prohibited by Title VII of the Civil Rights Act of 1964, ***in the absence of a showing of "business necessity"*** in a particular case. This decision was followed by a number of federal and state court decisions, and decisions of the EEOC and ERD, in ruling that discrimination based on criminal record for minorities is ***in fact*** discrimination based on ***race or national origin***, in violation of Title VII of the Civil Rights Act of 1964. This is so, because minorities have a greatly disproportionate record of convictions. The federal court decisions include decisions in this circuit for Wisconsin. The logic, then, is that to refuse employment or to take other adverse job treatment of a minority because of a record of conviction, without an adequate business reason, is ***in fact*** an adverse treatment of an employee because of race or national origin. It is racial discrimination in violation of Title VII.

The Equal Employment Opportunities Commission (EEOC) states in its guidelines that an employer may only exclude an applicant because of a criminal conviction if there is a business necessity.

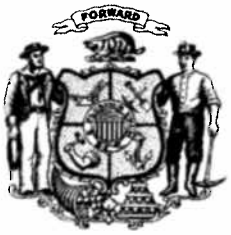
> "To establish business necessity, the employer must show that three factors were taken into consideration in the hiring decision: the nature and gravity of the offense(s); the time that has elapsed since the conviction and/or completion of the sentence; and the nature of the job held or sought," according to the EEOC. "For example, business necessity exists where the applicant has a fairly recent conviction for a serious offense that is job-related."

Even if AB 286 is enacted, minorities will continue to be able to process complaints through either the state Equal Rights Division or through EEOC, as they do now. Where minorities are discriminated against based on felony records, employers will have the burden of showing that their hiring or firing decisions are due to "business necessity" or that there is some job relatedness between the conviction and the job sought – in accordance with federal law requirements, notwithstanding the enactment of AB 286.

Of course, employers will still be required to determine whether there is a substantial relationship between the circumstances of the offense and the circumstances of the offense in misdemeanor cases.

Thank you for your consideration.

WISCONSIN STATE LEGISLATURE



EQUAL JUSTICE UNDER LAW

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TO: Senate Committee on Labor, Public Safety, and Urban Affairs

FROM: Sheila Sullivan, Legal Action of Wisconsin, Road to Opportunity Project

RE: 2011 **Senate Bill 207** permitting private employers to refuse to employ or to terminate from employment unpardoned felons even if the circumstances of the felony do not substantially relate to the circumstances of the job applied for or held and preempting cities, villages, towns, and counties from adopting provisions concerning employment discrimination based on arrest or conviction record that prohibit activity that is allowed under the state fair employment law

DATE: October 24, 2011

Legal Action of Wisconsin, Inc. (LAW) is a nonprofit organization funded by the federal Legal Services Corporation, Inc., to provide civil legal services for low income people in 39 counties in Wisconsin. LAW provides representation for low income people across a territory that extends from the very populous southeastern corner of the state up through Brown County in the east and La Crosse County in the west. LAW operates a project directed at removing legal barriers to employment, the Road to Opportunity Project, which provides direct representation to individuals with criminal records trying to find and keep family-sustaining jobs.

INTRODUCTION

AB 286 is a bad idea legally and as public policy. If AB 286 becomes law, it will create uncertainty and encourage litigation at a substantial cost to Wisconsin businesses. It will increase the racially disproportionate effect of arrest and conviction records, worsen recidivism, and contribute to rising costs in our judicial, public benefits, and corrections systems. It will also hasten the deterioration of the skilled, diverse, and well-educated workforce that is necessary to attract and retain employers in this state.

I. 2011 AB 286 will encourage litigation and increase uncertainty, raising legal costs for businesses operating in Wisconsin.

Assembly Bill 286 does away with the requirement that Wisconsin businesses look at individual conviction records before denying someone a job based on that record. That simple requirement has sent a message to Wisconsin employers that blanket employment bars, based solely on the fact of a conviction, are likely to be unlawful. The passage of this bill will send the

solely on the fact of a conviction, are likely to be unlawful. The passage of this bill will send the opposite message, encouraging employers to adopt such bars to save themselves time and trouble.

The problem is, of course, as Bob Anderson has testified in the past, that a change in state anti-discrimination law will not protect employers who adopt such policies from violating federal law, in particular from violating Title VII of the Federal Civil Rights Act. These violations of federal law will result in increased litigation costs for businesses and our courts.

Title VII makes it unlawful for an employer "to limit . . . applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's [**17] race . . . ." 42 U.S.C. § 2000e-2(a)(2) (emphasis added). Federal courts have interpreted that phrase to prohibit employment practices that have a racially disparate impact on employment opportunity. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 448, 73 L. Ed. 2d 130, 102 S. Ct. 2525 (1982).

In *Griggs v. Power Co.*, 401 U.S. 424 (1971), the United States Supreme Court held that discrimination based on circumstances which have a "disparate effect" on person because of their race or national origin, ***is in fact*** discrimination based on ***race or national origin*** and is prohibited by Title VII of the Civil Rights Act of 1964, ***in the absence of a showing of "business necessity."*** This decision was followed by a number of federal and state court decisions, and decisions of the EEOC, affirming that discrimination based on the criminal records of minority can violate Title VII because minorities have a greatly disproportionate arrest and conviction rate. Racial discrimination in employment, whether through racially disparate treatment or through policies that have a racially disparate impact continues remains prohibited by federal law—whether that discrimination is by a state actor or a private employer.

According to Equal Employment Opportunities Commission (EEOC) guidelines, an employer may only exclude an applicant because of a criminal conviction if there is a business necessity.

> To establish business necessity, the employer must show that three factors were taken into consideration in the hiring decision: the nature and gravity of the offense(s); the time that has elapsed since the conviction and/or completion of the sentence; and the nature of the job held or sought," according to the EEOC. "For example, business necessity exists where the applicant has a fairly recent conviction for a serious offense that is job-related.

It will thus generally be unlawful for private employers to adopt blanket or automatic exclusions based on (for example) the mere fact one was once convicted of a felony. Such policies would, at the very least, provide a basis for a federal law suit or a federal class action based on a disparate impact theory.

If AB 286 is passed, businesses will face new uncertainty. Abolition of state-law prohibitions against non-individualized employment polices invites the creation of new hiring policies, employment applications, and other screening tools. Federal law and existing precedent would suggest that blanket criminal records policies could not be applied to minority candidates. In theory, it would be possible to create a two track employment screening system, where the records of felons of color would be scrutinized individually and non-minority felon applicants would be automatically barred. But such a policy might well constitute racially disparate treatment, which is prohibited by Title VII.

Policies of either sort might subject those who adopt them to suit in federal court or to agency action from the Federal Government which has sent very strong messages that it is interested in enforcing federal antidiscrimination laws in this context. I have included with this comment a recent docket sheet taken from the NELP website identifying a number of federal cases, some of which have recently been settled, which have been allowed to proceed based on a disparate impact theory. The dockets sheet also shows related administrative actions and federal cases involving the Fair Credit Reporting Act and criminal background checks. As the docket sheet suggests, there has been a sharp increase in law suits and enforcement actions focused on the racially discriminatory use of criminal records.

Uncertainty in law always creates cost and encourages litigation. If employers are encouraged by the passage of AB 286 to adopt more blanket exclusionary hiring policies, those employers may find themselves subject to time-consuming and expensive federal litigation—and the bad publicity attendant to claims of racial discrimination. Even those businesses that decide not to change their policies will probably have to reassesses policies, application forms, and other screening metrics that had been tested by practice and which employees could be reasonably certain were lawful under Wisconsin's Fair Employment law. That kind of reassessment also constitutes a cost.

For all these reasons, AB 286 is bad for Wisconsin businesses.

II. *New costs will be imposed on businesses in order to amend a law that has not burdened employers significantly.*

Under the relevant provisions of Wisconsin's current Fair Employment Law, public and private employers may refuse to hire a job applicant, or may terminate an employee, on the basis of ***any conviction record***, if there is a ***substantial relationship*** between the ***circumstances*** of that ***offense*** and the ***circumstances of the particular job***. Employers are thus perfectly free not to hire or to fire otherwise qualified persons based on a criminal record under well understood conditions. The substantial relationship exception to the Fair Employment Law was adopted, and has been retained, because it appears to promote two powerful public policy interests: the interest in promoting rehabilitation and the interest in allowing employers to consider the actual circumstances of an offense in determining whether an applicant for a particular job might present a risk if employed in that job.

Nothing in our current Fair Employment Law requires an employer to hire a person with any kind of conviction, let alone any felony conviction. The law effectively prohibits only one kind of discrimination, the automatic rejection of an applicant or an employee based on a check box or a one word answer to the question: have you ever been convicted of a crime?

The cost to employers of requiring this modicum of individual consideration is very small—in terms of time. And we have ample evidence, from our long experience with the law, the minimal protections of Wisconsin's Fair Employment Law have not created a wave of legal action in costly forums.

Job applicants or employees who believe they have been discriminated against based on their arrest and conviction records must exhaust their administrative remedies before embarking on legal challenges in court. Administrative hearings are typically significantly less expensive for employers then state—and certainly federal court actions-. Complainants are often unrepresented, costly discovery is limited, the hearings themselves are generally short. In 2010, according to LIRC statistics, there were 122 appeals of initial decisions to LIRC, of those 122 cases—only 13 involved arrest/conviction discrimination claims. No decisions issued in that year found discrimination. In 2009, of the 118 equal rights appeals filed with LIRC, 12 were based on claims of arrest or conviction discrimination: discrimination was found in only 9% of the 118 total cases. The numbers are roughly similar in 2008 and 2007, 96 and 101 cases, 17 and 9 in which the issue was a claim of records discrimination, and only 4 % and 5% of total decisions finding discrimination. I have included copies of these statistical summaries with my comments.

Considering the thousands and thousands of hiring and termination decisions made between 2007 and 2010, those statistics make it clear that the records provisions of Wisconsin's Fair Employment law is **not** creating significant litigation costs for business and that employers **have** created policies, job applications, and screening devices that make it relatively simply to abide by the current law and make independent and well-informed hiring choices.

Equally important, the current law sends a message that ex-offenders with good credentials (and records that do not indicate a risk of reoffending if employed in a particular job) should not automatically be disqualified from consideration for employment.

Passing AB 286 will not only create legal costs and uncertainty for businesses operating in Wisconsin, it will repudiate that message. To make matters worse, the law will create or increase costs for exoffenders, minority communities, and taxpayers.

III. *Encouraging employers to automatically deny jobs to job applicants, or fire existing employees, based solely on the fact of their felony conviction will make it more difficult for felons trying to re-enter their communities, support their families, and become contributing*

members of society increasing costs to them and to taxpayers.

To understand the costs to individual ex-offenders and our state, we must first understand who this bill would directly affect. 65 million Americans, 1 in every four adults, now have a criminal record. *See "65 Million Need not Apply: the Case for reforming Criminal Background Checks for Employment"* (Attached).

While the precise number of felons in the nation, and in our state, is difficult to precisely identify, we know it is large and growing. In 2000, social scientists estimated that there were more than 12 million ex-felons in the United States, constituting more than 8% of the working age population. (Uggen, Thompson, and Manxza 2000). According to Bureau of Justice Statistics, between 1994 and 2004, the number of felony convictions in State courts increased 24%. *See http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=909.* In 2004 alone, 1,078, 920 people were convicted of felonies. 40 % of those convicted of felonies in that year were under 30. We know that rates of felony convictions have continued to increase in the last 5 years. What these statistics tell us is that every year, Wisconsin creates more felons who will leave prison, at a relatively young age, and who will either recidivate or become part of our community with greater or lesser success.

We also know that who is labeled a felon has changed dramatically in the past decades. The category felon was once associated primarily with habitual offenders and/or those who committed violent crimes. Today, the majority of felony convictions are for drug crimes, including possession, and non-violent property offenses.

Wisconsin is fairly typical of how the category of felon has been expanded in the past decades. The number of felonies in Wisconsin has increased in several ways.. Some charges that were once classified as misdemeanors have been reclassified as felonies. Wis. Stat. 939.50 thus now lists nine different classes of felonies—extending the range of "felonious behavior" downward. The following offenses are felonies under WI law: possession of controlled substances (which accounts for the great majority of criminal offenses); $500 or more damage to a coin operated machine; graffiti to a sign of a public utility or common carrier; graffiti damage to any other person's property that exceeds $2500; operating a vehicle without the consent of the driver; removal of a part of a vehicle without the owner's consent; issuance of a check for more than $2,500 with insufficient funds in an account; forgery; property damage to a public utility; stalking with the use of public records or electronic information; threat to accuse another of a crime; theft of property in excess of $2,500; threat to communicate derogatory information; receiving or concealing stolen property of a value in excess of $2,500; distribution of obscene materials; solicitation of prostitution; conducting an unlawful lottery; bribery; bribing a public official; possession of burglary tools with the intent to enter a room or building designed to keep valuables; providing special privileges to a public official in return for favorable treatment; theft of cable or satellite services; theft or fraud against a financial institution of more than $500; cohabitation with another by a married person; failure to pay child support for 120 days; action by a public official to take advantage of office to purchase property at less than full value;

interference with the custody of a child for more than 12 hours; perjury; false swearing; destruction of public documents subject to subpoena; making a communication to influence a juror; fraud on a hotel or restaurant owner in excess of $2,500; transferring real or personal property known to be subject to a security interest; threatening to impede the delivery of an article or commodity of a business; damage to mortgaged property in excess of $2,500; threatening to influence a public official to injure a business; falsification of records by an officer of a corporation; destruction of corporate books by an officer of the corporation; fraudulent use of credit cards; theft of telecommunications services, cellular telephone services, or cable TV services for the purpose of financial gain; modifying or destroying computer data to obtain property; adultery; incest; theft of library materials of a value in excess of $2,500; criminal slander of title of real or personal property; flag desecration; theft of trade secrets; retail theft of a value in excess of $2,500 and a variety of other offenses including the kinds of crimes-murder, rape, armed robbery, drug trafficking, and similar offenses most often associated with the label felon.

Given the expansion of the category of felon, and its increasing application to non-violent offenses, it is unsurprising that more and more Wisconsin citizens will become convicted felons at a relatively young age and will return, to live in our communities, after relatively short periods of incarceration. In their 2001 article, The Labor Consequences of Incarceration," Princeton University Department of Economics Professors Bruce Western, Jeffrey Kling, and David Weiman note that on a given day ***29% of young African American male high school dropouts ages 22-30, were employed, while 41% (up from 26% in 1990) were in prison. Ex-offenders who do get jobs start work making 10-30% less than other African American high school dropouts.*** The same article observed that without adequate jobs, ex-offenders are unable to pay court costs that come out of their convictions, restitution to victims, and child support for their families.

Recidivism or repeated criminality is costly in a variety of ways. Most crime has a direct cost—the value of goods stolen, property destroyed, secondary costs—to maintain prisons and the criminal justice system, and larger social costs—in the form of lost human capital, workers who are not working, children who are not supported by their parents.

AB 286 will increase those costs by making it more difficult for felons who have completed their sentences to get work when they are released from jail or prison and more difficult over time to maintain the kind of steady employment necessary to escape poverty.

Bureau of Justice Statistics indicate that roughly two-thirds of released felons will be charged with new crimes and over 40% will return to prison (either because of probation violations or new convictions) within three years. While these statistics may seem frightening, we need to pay attention to their causes. In addition to mental health and substance abuse issues, experience with the criminal justice system in and of itself has adverse consequences, limiting employment opportunities and earnings potential—the strongest predictors of recidivism. See 939 AJS Volume 108 Number 5 (March 2003) 937-75, Devah Pager, *The Mark of a Criminal*

Record (Attached).

According to many scholars, criminal records act as a form of "negative credentialing" certifying certain individuals for discrimination or social exclusion. This negative credentialing includes legal bars to employment or licensure, felon disenfranchisement, and less direct forms of stigma creation such as the wide-spread and permanent availability of criminal background information and the exclusion of felons from anti-discrimination protections. *See* Pager at 942.

To the extent the passage of AB 286 would encourage greater exclusion of felons from the work force, not just initially, but perpetually it will strengthen the effect of negative credentialing.

In 2003, Professor Devah Pager studied the effects of criminal records on job applicants through a Wisconsin based study using an audit methodology. The study used two black and two white subjects to test the effects of a hypothetical criminal conviction in the initial stage of a job application. Id. at 948-9. (Studies have shown that the effect of a record is most significant at the first stage of the employment process). Id. at 948' see Devah Pager, Bruce Western, and Naomi Sugie, 623 Annals 195 (May 2009), "Sequencing Disadvantage: Barriers to Employment facing Young Black and White Men with Criminal Records." They were all 23 year old Milwaukee College students of the same physical appearance, Pager, *Mark*, at 947. In test applications, one of the black pair and one of the white pair would be assigned a criminal record, the other member of the pair would have no record. *Id.* The work experience, educational levels, and other personal characteristics of the testers were the same: the crime was felony possession with intent to distribute. *Id.*

The effects were profound for both white and black test subjects. The audit study showed that having a criminal record reduced the likelihood of a callback for the white subjects 50%--a large and significant effect. Id. at 955. Despite the fact that the white applicant with a record was equally qualified as the white applicant without a record.

The effect for the "identical" black applicant pairs was even more striking. The black applicant with a criminal record was 40% more disadvantaged, in this test, then the white subject with a criminal record. *Id.* 959. (The white applicant with a criminal record received more callbacks (17%) than the black applicant without a criminal record (14%)). *Id.*at 958.

Pager's study is important because it provides empirical evidence of how persistently a criminal record disadvantages job applicants and how much more powerful that disadvantage is for non-white offenders. Later studies using the audit methodology have confirmed similar patterns in other cities and states. The studies indicate that the effect of a criminal record is dissipated to some extent by personal contact and information beyond the mere fact of conviction.

Because AB 286 encourages blanket bars and exclusions, and diminishes the legal

Hawaii prohibits both private and public employers from discriminating because of any court record, unless a criminal conviction record bears a rational relationship to the duties and responsibilities of a particular job.

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Colorado's Civil Rights Commission has issued a pre-employment guide which provides that it may be a discriminatory practice for an employer to even make any inquiry about a conviction or court record that is not substantially related to job. While this is not expressed as a mandate, again, it would be risky to ignore it, since it is an interpretation of state law by the state agency.

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Florida statutes prohibit a state or municipal employer from discriminating based on a conviction record, unless the crime is (1) either a felony or first degree misdemeanor and (2) is ***directly related*** to the employment position sought. In other words, an applicant may not be discriminated against for having committed a lesser misdemeanor, even if it is directly related to the job.

Municipalities and individual cities have joined the movement, enacting "ban the box" ordinances, requiring that criminal record checks not be done until after candidates for

responsibility to make individual determination it will therefore certainly increase the negative credentialing associated even with old criminal convictions, decreasing employment and increasing social isolation. Those effects will encourage recidivism at the front end-with its attendant costs—and even for those who do not reoffend will tend to make employment hard to find, irregular, and low-paying. A recipe for keeping ex-offenders and their families below the poverty line and dependant on government services.

IV. *Across the country, states, counties, and cities are recognizing and seeking to respond to the problem of negative credentialing.*

Other states are increasingly recognizing the effects of negative credentialing, and the disparate racial effects of criminal record histories.

Some state employment agencies and courts have recognized the significance of "disparate effect" in their administrative rules or statutes, e.g. Iowa. Several states have created special laws -- either by statute or by administrative action of Human Rights Commissions -- prohibiting discrimination based on conviction:

> ***Delaware*** *enacted a law last year lifting the ban on licensing for individuals with felony convictions for over 35 professions and occupations. The legislation provides that licenses may only be refused if the applicant has been convicted of crimes that are "substantially related" to the licensed profession or occupation.*
>
> ***Illinois*** *enacted a law this year that provides that the records of most misdemeanors and Class 4 felony violations are to be sealed, provided that certain conditions are met. The sealing of the records means that they cannot be part of an official record that can be used against people. The conditions are that 3 years have elapsed for misdemeanors and 4 years for felonies, and the persons have not committed another offense.*
>
> ***Illinois Commission Guidelines*** also have been existence for some time and have the force of law and similarly applies to all employers:
>
> > "Use of such criteria [arrest or conviction information] operates to exclude members of minority groups at a higher rate than others, since minority members are arrested and convicted more frequently than others. Such criteria are therefore unlawfully discriminatory unless the user can demonstrate in each instance that the applicant's record renders him unfit for the particular job in question." An applicant may be disqualified for a job based on a conviction if "(I) state or federal law requires the exclusion or (ii) the nature of the individual's convictions considered together with the surrounding circumstances and the individual's subsequent behavior reveals the individual as objectively unfit for the job." [emphasis added]

employment have been through initial screenings—the point would be to identify desirable candidates before deciding how to weigh the significance of a possible criminal record. I should not that the proposed law you are considering would also prohibit what may counties and cities have insisted they need—the ability to respond locally to the problems of exoffenders in particular communities.

V. *AB 286 represents a movement in the wrong direction.*

AB 286 represents a movement against the grain—both with respect to other states and the federal government. It will increase front end discrimination against felons, and increase the negative credentialing that is so costly to individuals, communities, employers, and taxpayers. To the extent AB 286 encourages employers to ignore the factors the EEOC identifies as critical to business necessity—the nature and gravity of the offense(s); the time that has elapsed since the conviction and/or completion of the sentence; and the nature of the job held or sought"—, it encourages hiring and employment models based on irrational fears, prejudices, and assumptions about risk that are not factually based. In the past five years, a number of scholars have used longitudinal studies to assess the relationship between criminal arrests and convictions and probabilities of reoffending. I have included a sample study from 2008 by Kiminori Nakamura whose later work with Dr. Alfred Blumstein has been central in this area. What all of those studies show is that after a certain period of non-offending, which depends on a variety of factors including the nature of the offense and the age of the offender, a convicted person's likelihood of reoffending falls to a level statistically indistinguishable from that of an individual who has never offended.

This scientific work, while still being developed, provides further, powerful evidence that blanket and non-individualized hiring policies which make convictions for a generic category of offense-such as a felony—an absolute bar to employment are not just costly but ineffective as a method of employer risk control.

CONCLUSION

There are legitimate arguments about where we should focus the state's limited resources to best deal with the social and economic consequences of the flow of exoffenders back into our communities. But there is no reasonable argument that we need a law that will change the status quo in a way that increases costs to the state, to private employers, to minority communities, to ex-offenders, and to taxpayers without producing any tangible benefits to anyone. I therefore urge you to vote against AB 286.

- Ohio House Bill 86 (enacted 2011)

(5) **Securing Identification Documents (birth certificates, drivers license, other ID)**

- Colorado Senate Bill 6
- Virginia House Bill 1161
- Kentucky House Bill 428 (enacted 2010)
- New York Assembly Bill 9706 (enacted 2010)
- Nevada Senate Bill 159 (enacted 2011)

(6) **Reducing Child Support Arrearages**

- New York Assembly Bill 8178 (enacted 2009)

(7) **Training and Job Placement for Affected Populations**

- Arkansas Senate Bill 806 (enacted 2011)
- Colorado House Bill 1112 (enacted 2010)
- Iowa House Bill 2522 (enacted 2010)
- Idaho Senate Bill 1030 (enacted 2011)
- North Carolina House Bill 233 (eligible for 2012 session)

(8) **Employer Negligent Hiring Protections**

- Colorado House Bill 10-1023 (enacted 2010)
- Massachusetts Senate Bill 2583 (enacted 2010)
- North Carolina House Bill 641 (enacted 2011)
- Arkansas Senate Bill 806 (enacted 2011)

(9) **Anti-discrimination laws**

- Arkansas Senate Bill 806 (enacted 2011)("The Arkansas Restorative Justice Responsibility Act").

LAWS LIMITING EMPLOYMENT

(1) Employment Bans

- Florida House Bill 7069 (enacted 2010) (caregiver focused; specified offenses are barring; agencies can grant waiver after period of time)
- Pennsylvania House Bill 1352 (enacted 2011)(5 and 10 year bars, enumerated offenses, educational institutions)

(2) Sex Offenses

- Pennsylvania House Bill 123 (pending 2011)
- New York Assembly Bill 4151 (pending 2011)

(enacted 2011)

- Ohio House Bill 86 (enacted 2011)

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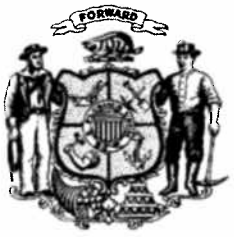
FORWARD

Epping, Christopher

From: Colleen Lehmann [clehmann@ehlkelaw.com]
Sent: Tuesday, October 25, 2011 2:18 PM
To: Sen.Wanggaard; Sen.Grothman; Sen.Darling
Cc: Sen.Wirch; Sen.Vinehout; Sen.Taylor; Sen.Shilling; Sen.Risser; Sen.Miller; Sen.Lassa; Sen.Larson; Sen.King; Sen.Jauch; Sen.Holperin; Sen.Hansen; Sen.Erpenbach; Sen.Cullen; Sen.Coggs; Sen.Carpenter
Subject: [Possible SPAM]
Importance: Low
Follow Up Flag: Follow up
Flag Status: Completed
Attachments: Testify.doc

Dear Senator Wangaard,

Thank you for allowing me the opportunity to speak before the Senate Committee yesterday. It was probably clear that it was a subject I felt passionate about. I do hope that you and your fellow law makers will listen to what I have to say and realize that the proposed legislation (to repeal the protections of the WFEA for felony convictions), would overall do harm to our State while at the same time failing to provide employers with any real protection or savings.

After I testified before the Assembly Committee on the companion bill I received a letter from an angry man who was upset that I would love criminals more than hard working Americans. But I don't. First because many of these ex-cons are now hardworking Americans themselves. But also, because I believe that our society cannot function, safely, efficiently, economically and fairly, if a section of our society becomes disenfranchised from legal means of financial support.

You had asked me to provide a written copy of my testimony and you will find it attached. Thank you again for your time.

Colleen Bero-Lehmann

Colleen Bero-Lehmann
EHLKE, BERO-LEHMANN
& LOUNSBURY, S.C.
608-827-9750 Ph.
608-827-5460 Fax
clehmann@ehlkelaw.com

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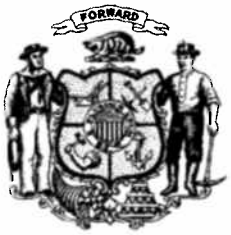


FELMERS O. CHANEY
CORRECTIONAL CENTER
COMMUNITY ADVISORY BOARD
2825 N. 30th Street
Milwaukee, WI 53210
December 5, 2011

Senator Van Wanggaard, Chairman
Committee on Labor, Public Safety, and Urban Affairs
Wisconsin State Senate
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Wanggaard,

Please find the succeeding two-page statement that is being submitted in opposition to SB 207 and AB 286. Please also be advised that, in addition to the names appearing in the membership column to your left, the accompanying statement has been endorsed by the following organizations and individuals:

Atty. James Hall	NAACP, Milwaukee Branch
Christine Neumann Ortiz	Voces de la Frontera Action
Lo Neng Kiataukaysy	Hmong American Friendship Association
Al Holmes	Center for Veterans' Issues
Angela M. Turner	Center for Self Sufficiency
Dr. Pat McManus	Black Health Coalition of Wisconsin
Al Holmes	My Father's House, Inc. *(Formerly the Milw. Fatherhood Collaborative)*
Barry Givens	Sherman Park Community Association
Dr. Kenneth Harris, Jr.	100 Black Men of Greater Milwaukee
Clarence Johnson	Wisconsin Community Services, Inc.
Maria Monreal-Cameron	Hispanic Chamber of Commerce of Wisconsin (HCCW)
Ruben Hopkins	Wisconsin Black Chamber of Commerce, Inc.
Earl Buford	Wisconsin Regional Training Partnership/Big-Step
Rev. Willie Briscoe	Milwaukee Inner-City Congregations Allied for Hope
Guadalupe Rendon	Hispanic Business and Professionals Association
Lupe Martinez	United Migrant Opportunity Services, Inc. (UMOS)

Selected Signatories

Milwaukee Alderman Joe Davis, Sr.
State Senator Spencer Coggs
State Senator Lena Taylor
State Representative Beth Coggs
State Representative Jason Fields
State Representative Sandy Pasch
State Representative Christine Sinicki
State Representative Robert Turner
State Representative Leon Young

Peter T. Blewett
Reuben Harpole
Atty. Jackie Boynton
Atty. Peter G. Earle
Atty. Israel Ramon
Michael Rosen
Jesus Salas
Salvador Sanchez
Primitivo Torrez
Eric Von
Earl Ingram
Dr. Cheryl Ajirotutu

Respectfully,
R.L. McNeely
R.L. McNeely, Chair
Chaney Community Advisory Board
Tel: (262) 255-4015; Fax: (262) 255-4019
Email: rlmatty@wi.rr.com

C: Members, Committee on Labor, Public Safety, and Urban Affairs

FCAB Website: http://www.fcabmke.org/

STATEMENT OF R.L. MCNEELY ON BEHALF OF THE FELMERS O. CHANEY CORRECTIONAL CENTER COMMUNITY ADVISORY BOARD (FCAB)

Position Statement and Call to Action Against Senate Bill 207

Submitted to the Committee on Labor, Public Safety, and Urban Affairs, namely,
Sen. Jessica King (D-Oshkosh); Sen. Robert Wirch (D-Pleasant Prairie); Sen. Mary Lazich (R-New Berlin); Sen. Glenn Grothman, (R-West Bend); and the Committee Chairman, Sen. Van Wanggaard (R-Racine)

The Felmers O. Chaney Correctional Center (FCCC) is a minimum security prison located in Milwaukee that commenced full operations during June of 2000. The Felmers O. Chaney Correctional Center Community Advisory Board (FCAB), in turn, commenced operations during October of 2000. The mission of FCAB may be succinctly stated as follows:

> The purpose of the Board is to support effective re-integration of offenders back into the communities from which they came. The Board works in collaboration with the correctional center to address the interests and concerns of the community and facility. It further serves as a contact point between the facility and the community at large to share information and respond to issues that are brought to the board's attention.

FCAB, given its mission, is horrified at prospects for the passage of SB 207 and AB 286. We regard that passage as being tantamount to a de jure decimation of Milwaukee's African American community. That is because SB 207 and AB 286 will surely diminish possibilities for the formation of stable African American families, exacerbate the ongoing disruption of those families and, thereby, promote the destabilization of that community. Simply put, the legislation, as proposed, will remove extant protections offered to ex-offenders against blanket discrimination because, presently, ex-offenders cannot legally be denied employment based on having committed a felony unless that felony relates substantially to the nature of the work for which the felon is being considered. Removing this protection undoubtedly will make it more difficult for ex-offenders to secure the kind of gainful employment that can afford ex-felons opportunities to re-integrate into their communities, successfully, and to establish and maintain stable families. As research focused on Wisconsin has shown, it is already difficult enough for African American males with criminal records to receive a call back in reference to a job search. Such males have only a 5 percent chance of getting a call back compared to a 17 percent chance afforded to European American males with a criminal record. Indeed, European American males with a criminal record fare even better than African American males without a criminal record as African American males without a criminal record only have a 14 percent chance of receiving an employment-related call back in the State of Wisconsin. [1]

But it is the relationship of one's prospects to secure sustainable wage employment to one's likelihood to form stable families that is the critical connection. While, for example, the numbers of African American males who are incarcerated has steadily increased in Wisconsin to the point where Wisconsin incarcerates, proportionately, more African American males than any state in the union, except South Dakota,[2] the percentage of Milwaukee's African American families that are two-parent families has steadily declined, from 64.2 percent of all such families in 1970, to 44.3 percent of all

---

[1] D. Pager, "The Mark of a Criminal Record," American Journal of Sociology, V. 108, (5) March 2003: 937-975.

[2] Marc Mauer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* (monograph), The Sentencing Project: Research and Advocacy for Reform, Wash. D.C., July, 2007: 23 pp.; P. 8.
For pertinent information, Cf: Commission on Reducing Racial Disparities in the Wisconsin Justice System, *Final Report* (monograph), Office of Justice Assistance, Madison, Wisconsin, (February) 2008: 98 pp.

African American families in 1980, to only 28.2 percent in 2000.[3] This is not surprising as ample evidence exists to show that African American males (as well as other males) are far more likely to marry when they have sustainable wage employment.[4] What is not so well known is the effect on communities of high percentages of single-parent households.

Children from single-parent homes, for example, are more likely to engage in juvenile delinquency,[5] twice as likely to drop out of high school, twice as likely to have a child before age 20, 1½ times more likely to be out of school and out of work in their late teens and early twenties, two to three times more likely than children in two-parent families to have emotional and behavioral problems, and they are at a dramatically greater risk to suffer from drug and alcohol abuse.[6] Although some studies report attenuated or limited effects of fatherless homes, other studies have found that fatherless boys are more likely than others to engage in violence, that father absence is more significant than poverty in predicting criminal involvement, and that Black family disruption has the strongest effect on Black juvenile criminality and substantially increases the rates of Black murder and robbery.[7] These conditions wreak havoc in lower-class and working class neighborhoods and, hence, destabilize Black communities.

CALL TO ACTION

As SB 207 and AB 286 undoubtedly will make it more difficult for ex-offenders to secure and maintain sustainable wage and other employment which, in turn, will increase the numbers of single-parent families in Milwaukee's African American community, with all of the attendant adverse neighborhood de-stabilizing consequences, we vigorously beseech you to oppose passage of this legislation. Additionally, please recall that an unemployed ex-offender is four times more likely to return to prison than an ex-offender who is employed.[8]

---

[3] R.L. McNeely, D. Pate and L. Johnson, *Milwaukee Today: An Occasional Report of the NAACP* (monograph), NAACP, Milwaukee Branch, June, 2011: 40 pp. See: p. 16; R.L. McNeely and Melvin R. Kinlow, *Milwaukee Today: A Racial Gap Study* (monograph), a research publication of the Milwaukee Urban League, October, 1987, 72 pp: See p. 56.

[4] Andrew R. Gatewood, *The Social and Economic Status of Young Black Males and the Impact on the Formation of Detroit Area Black Families* (monograph), United Community Services of Metropolitan Detroit, August, 1989: 34 pp.

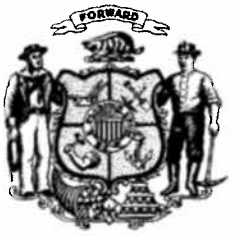
[5] K.W. Griffin, G.J.. Botvin, L.M. Scheier, T. Diaz, and N. L. Miller., Parenting Practices as Predictors of Substance Use, Delinquency, and Aggression Among Urban Minority Youth: Moderating Effects of Family Structure and Gender," Psychology of Addictive Behaviors, V. 14 (2) 2000: 174-184.

[6] Warren R. Stanton, et al., "National Health Interview Survey," U.S. Department of Health and Human Services, National Center for Health Statistics, Hyattsville, MD, 1988; U.S. Department of Health and Human Services, National Center for Health Statistics, "Survey on Child Health," Washington, D.C: 1993; D.R. Hollist and W.H. McBroom, "Family Structure, Family Tension, and Self-Reported Marijuana Use: A Research Finding of Risky Behavior Among Youths," Journal of Drug Issues, Fall, 2006: 976-998; Jason DeParle, "To Have and to Hold," The New York Times Magazine, 8/22/04: Pp: 27-31, 48-49, 52-54; Cf: Fathers.com (The Consequences of Fatherless).

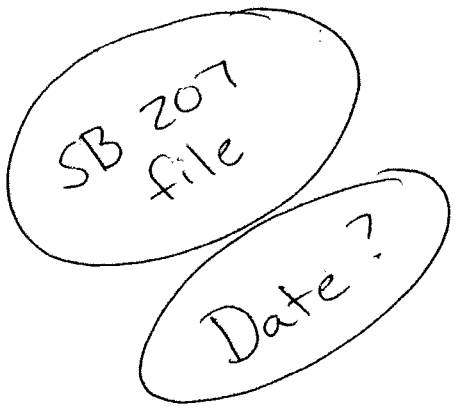
[7] Robert J. Sampson, "Urban Black Violence: The Effect of Male Joblessness and Family Disruption," American Journal of Sociology, V. 93, No. 3 (September, 1987): 348-382; W. Mackey, and B. Mackey, "The Presence of Fathers in Attenuating Young Male Violence: Dad as a Social Palliative," Marriage and Family Review, V. 35, 2003: 63–75; Jennifer Morse, "Parents or Prisons," Policy Review, V. 120, 2003: 49-60.

[8] United States Probation Office, Eastern District of Wisconsin, *Employer Guide to Hiring Ex-Offenders* (undated brochure). For additional information contact: Janice Stricker, United States Probation Officer, 517 E. Wisconsin Ave., Room 001, Milwaukee, Wisconsin, 53202

WISCONSIN STATE LEGISLATURE



Good afternoon america...**Senate bill 286**...is the personification of opressionin in 2012...its a bill that has reached the table...of the wisconsin senate...without the permission of the people...that permits...employers the right...the right to discrimate...against felons...depriving them of the opportunity...to be an american...not only does it allow employers the right...to refuse consideration...for employments...it gives them the right...to terminate employment of current employees...it doesn't matter if you're a janitor or a doctor...it doesn't matter if you've been working diligently for 1 or 20 years...our law makers wanna give employers the right...to take jobs.....&opportunities to provide for their familes from americans...these people have repaid their debts to society..based on our judicial system &lost their right bare arms...&in most cases...vote...but...what..about human rights?? We the people will not allow the powers that be..to continue to disenfranchise &oppress those attempting to redeem themselves..as americans...this great country is tired...of our politicians...dressing up capitalism &calling it democracy...we demand transparency &equality from the officials we elect &the companies we support...america has walked onthe back of the lower &middle class for far too long...we tired...of corruption...oppression...&war...we want justice..we are tired...of fighting one another for jobs...while the 1% lounge on yachts parlaying in comfort...I say we...cuz this doesn't just affect me...you all...whether you realize or not...are the 99%...cuz after the felons...they're coming for you next...your jobs...your stability...your rights...so you can either wait...for your feet to fall from beneath you...or speak...&stand..&fight..for yourselves...for your children...for the people...thank you...



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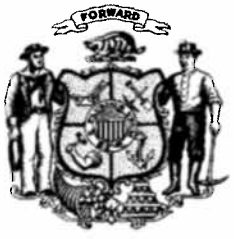


Date?

I am Colleen Bero-Lehmann. I am a shareholder of Ehlke, Bero-Lehmann & Lounsbury, S.C. I have been representing individuals who have been discriminated against in their employment since 1998. I am here to testify today against proposed Assembly Bill 286 **Senate Bill 207** which repeals the protections afforded in the Wisconsin Fair Employment Act and makes it legal to terminate or refuse to hire an individual based solely on his or felony conviction. The reason for my protest is as follows:

1) The WFEA as it stands works. It works for the employees it was designed to protect and it works for employers.
2) There has not been sufficient research into the social/racial costs or the real economic cost.

   A. The repeal of this act will have a larger impact on African American males as they, as a group, have a higher conviction rate. Please refer to "The Crisis of the Young African American Male and the Criminal Justice System" Prepared for the U.S. Commission on Civil Rights by Marc Mauer, April15, 1999;
   B. There appears to have been no research into the financial and societal repercussions of having these people unemployed. For example what about child support payments, rent assistance, Medicaid? Will County expenses increase? Further, there are many studies which indicate that recidivism rate is much higher among those who have no hope of employment. Prosecutors have complained that this law will hamper their ability to plead cases. There will be more trials;
3) Passing this bill will accomplish nothing that its sponsors have intended. It will not save employers money and it will not create one single job.

THE LAW AS IT IS WORKS TO HELP THE PEOPLE IT WAS DESIGNED TO HELP:

The protections afforded by the WFEA create real protections for people who need them. When I heard of the proposal to repeal the protections afforded for people who had committed felonies the stories of many individuals that I or others in my firm have represented leapt to mind. Stories of individuals with families who have turned their lives around after a sorted past or a one time mistake. But the story most poignant is that of a man I will refer to here as Russell Green and African American male.

Russell Green was arrested for possession of cocaine and heroine with intent to deliver on January 19, 2004. Mr. Green was jarred by his arrest. He decided he needed to change his life. Shortly after his arrest, Mr. Green, moved to Wisconsin and applied for a position in Wal-Mart's distribution center. The application asked if he had ever been convicted of a felony and Mr. Green truthfully answered no. He was hired by Wal-Mart Distribution center on March 8, 2004. Mr. Green excelled at his job and was given a recognition certificate for outstanding performance on July 24, 2004. He also received all outstanding and exceeds expectation marks on his first formal evaluation on September 7, 2004.

On December 21, 2004, Mr. Green was formally convicted of possession with intent to deliver, a felony. Knowing that Wal-Mart had a rule that an employee had to report any convictions within three days, Mr. Green immediately reported the conviction to his supervisors. His supervisor told Mr. Green that he thought he was a wonderful employee but that Wal-Mart had a blanket policy against employing anyone with a felony conviction. Mr. Green was fired.

Mr. Green pursued his claim through the Equal Rights Division under the WFEA. Mr. Green won his case. Wal-Mart was ordered to re-employ him. Mr. Green is still employed at Wal-Mart to this day. In fact, I believe, he has even received a promotion. His story has a happy ending because of the law that you are trying to repeal. Without the conviction record protection, Russell Green would have been out of a job and his family and he would have had to rely on State and county assistance.

My thoughts don't just stop with Russell Green but goes to several clients, some of whom I have represented for issues other than workplace discrimination for felony convictions, who have felony drug charges or battery in their distant past but still desire and need to work. Many of the people I meet are now in their 40's and were convicted of these crimes in their early twenties. Many of these people I have known have child support payments to make or families to support. Just what are these people supposed to do for work?

THE LAW WORKS FOR EMPLOYERS: SUBSTANTIALLY RELATED TEST PLUS TIERD ADMINISTRATIVE SYSTEM KEEPS COSTS LOW FOR EMPLOYERS.

The law as it is protects employers because of the multi-tiered system of the ERD. Before a claim even sees an Administrative Law Judge, it must first pass "probable cause." Probable cause is an analysis performed by an ERD investigator which determines whether, if what the complainant says is true, would it violate the law. Alternatively, the probable cause analysis requires the complainant to have some verifiable evidence to support his or her claim. Most claims do not make it past probable cause and never see a judge. The probable cause stage consists of a one page written complaint and a response from the employer. It is inexpensive and not onerous. It is usually prepared by the H.R. Director. For the time period of July 2009 through June 2010 there were about 3,300 claims of discrimination in the work place filed with the ERD. Of those 316 were for a combination of criminal record and arrest record discrimination. There has no analysis as to how many of the above that were filed because of criminal record were because of a felony criminal record. Of the 316 only 20% had a finding of probable cause and were allowed to go onto Hearing on the merits before an ALJ. Therefore, 80% of claims filed are dismissed without the employer paying anything more than the salary of the H.R. Director. Clearly this is not an onerous burden. Even cases that go the hearing are not comparatively expensive because discovery is limited and there is no use for expert witness testimony in criminal conviction cases. The cost is comparatively compared to discrimination cases that go to Federal Court.

The law, as it currently is, balances the needs of the employer and the needs of the individual to find employment by employing the "substantially related" test. Under the current law, it is not unlawful for an employer to refuse to hire or terminate a person whose felony conviction is related to the job in

issue. For example, a person who was convicted of bank robbery could be refused employment in a bank. A person convicted of drug possession and distribution would not be hired as a pharmacist's assistant. A person convicted of sexual assault would not be employed in a position which he worked around women. If this proposed bill becomes law many companies will pass rules like Wal-Mart prohibiting employment of those with felony convictions under any circumstances. No company will take the time to think about whether the crime is related to the position if it doesn't have to.

THIS LAW WILL HAVE A GREATER EFFECT ON THE AFRICAN AMERICAN COMMUNITY

Repealing this law will unfairly affect African American males who have a higher felony conviction rate. There have been many studies which demonstrate that African American males have a higher felony conviction rate than there white counter-part. Marc Mauer's report prepared for the U.S. Commission on Civil Rights in 1999 revealed a shocking disparity between the black white conviction rate as well as recidivism rate. Quote Bruce Dixon in an article he wrote for the Black Commentator: "A felony conviction in America is a stunningly accurate predictor of a life of insecure employment at poverty-level wages and no health care, of fragile family ties, of low educational attainment and limited or no civic participation, and a strong likelihood of re-imprisonment. " In Wisconsin we have admirably tried to lesson this burden. We should be proud of what we have done not try to destroy it.

PEOPLE OF ALL RACES AND SOCIOECONMIC LEVEL CAN BENFIT FROM THIS LAW.

However, we should not turn a blind eye to others who may be affected. Kids of all races and socio-economic backgrounds do stupid things in their late teens and early twenties. Should these kids be doomed to a life with no hope of employment because they made a mistake? I am reminded of a man who threw a bottle at a Badger game when he was 20 years old at U.W. Madison. The police officer on duty thought that the bottle was intended for him. The man was arrested and convicted of dangerous conduct regardless of life; a felony. If this law were to pass, no employer would be required to question whether this crime, committed 30 years ago, would be substantially related to his employment. It would be perfectly legal to refuse him employment or terminate him.

THERE HAS BEEN NO ANALYSIS OF THE ECONOMIC IMPACT OF THIS BILL

What will the fiscal impact be of having individuals with felony convictions bared from employment? Have there been any studies to determine the effect on child support payments, rental assistance, food stamps, medical assistance, or increased unemployment benefits (the last time I checked an old felony conviction did not constitute misconduct for the purpose of denying unemployment benefits). Prosecutors will have more trouble pleading cases out because of the impact and stigma of having a felony. More cases will go to trial straining the already strained county resources.

There are numerous large corporate employers that have a blanket ban on hiring felons or those with criminal convictions. Wal-Mart, Best Buy, Sears, Amazon.com just to name a few.

THE PROPOSED BILL WILL NOT SAVE EMPLOYER'S MONEY NOR WILL IT CREATE A SINGLE JOB.

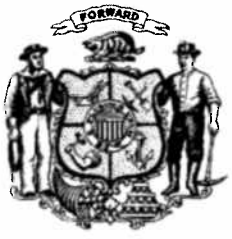
Finally, I believe that the proposed bill would not serve any real purpose should it be passed.

A. Because the number of claims are small and very few cases make it past the probable cause stage employers are not generally spending money on these claims.

D. I have not seen one piece of evidence that repealing this protection would create one single job.

For all these reasons and more, I ask that the Senate not pass the amendments to the Wisconsin Fair Employment Act as they relate to the criminal conviction protections.


WISCONSIN STATE LEGISLATURE


FORWARD

WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

Date ?

"Fair Employment Act" Protects Convicted Felons, Costs Employers

Wisconsin is one of only ~~four~~ five states that expressly include convicted felons as a protected class of citizens under its Fair Employment Act. This affords a criminal conviction the same protection as age, race and creed under the law.[i]

For employers looking to hire workers, this special status can lead to costly lawsuits and a no-win liability trap. Hire the convicted felon and be responsible for their actions, or refuse to hire and be subject to a costly lawsuit.

Assembly Bill 286/Senate Bill 207 protects businesses by reducing unjustified litigation threats while aligning Wisconsin law with the vast majority of other states.

The bill also preempts cities, villages, towns, and counties from adopting provisions concerning employment discrimination based on arrest or conviction record.

Background of Wisconsin Fair Employment Act
The current Wisconsin Fair Employment ~~Act (WFE~~A) prohibits employment discrimination based on age, ancestry, arrest record, *conviction record*, creed, color, disability, marital status, military service, national origin, race, sex, or use or nonuse of legal products during nonwork hours off the employer's premises.

The WFEA does provide an exception to the conviction record prohibition where the "felony, misdemeanor or other offense...substantially relates to the circumstances of the particular job."[ii] However, the "substantially relates" exception is not well defined in the statutes. Courts and administrative agencies have broad discretion when applying this standard and therefore it is not at all clear to businesses how the exception will be applied when hiring or terminating an individual.

Law has been a Deterrent to Businesses while Protecting Violent Criminals
Although current law provides an exception allowing employers to refuse to hire or terminate a person based on their conviction record if it "substantially relates" to the job the exception is broadly written and fails to provide employers the necessary guidance they need to run their businesses. As a result of the law, employers may face costly and dubious lawsuits from individuals who were either terminated from their position or not hired, simply because the person may have had a conviction record.

A convicted felon who is not hired or terminated merely has to file a claim under the WFEA and seek damages, likely forcing the employer to settle the case or incur unnecessary expenses fighting the lawsuit.

More troubling, the law protects violent criminals over employers.

The "Halloween Killer," Gerald Turner: Known as the "Halloween Killer," Gerald Turner was convicted of raping and murdering a 9-year-old girl who disappeared while trick-or-treating in Fond du Lac. After his release from prison Turner applied for a job sorting recyclables at Waste Management, Inc. in Madison. After Waste Management refused to hire him, Turner filed a lawsuit under the WFEA. An administrative law judge found probable cause that unlawful discrimination based on conviction records had occurred.[iii] As a result, Waste Management settled out of court with Turner for an undisclosed amount of money.

(over)

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Milwaukee Public Schools Case: Another example is a case involving Mark Moore who was convicted of throwing hot grease from a pan at his girlfriend, which instead hit a 20-month-old child, causing severe burns to the child. After serving time in jail, Moore was hired as a maintenance person with the Milwaukee Public Schools (MPS) system. After learning of his conviction, MPS terminated Moore for intentionally falsifying his employment application by failing to include his conviction.

Moore reapplied for a similar job but was not hired by MPS. Moore then filed a discrimination lawsuit under the WFEA against MPS with the Department of Workforce Development. The Court of Appeals concluded that MPS unlawfully discriminated against Moore based on his conviction record. Applying the nebulous "substantially related" test, the court ruled that the circumstances of Moore's conviction were not substantially related to the job of Boiler Attendant Trainee.

Wisconsin Should Remove Convicted Felons as a Protected Class under the WFEA
It is time for Wisconsin to remove the conviction record as a basis for discrimination under the WFEA for the following reasons:

- The current law is undesirable because it expressly grants individuals with conviction records the same status of a protected class. A person's conviction record should not be placed in the same category as other bases of discrimination, such race, sex, religion, and other commonly protected classes.
- The current law is undesirable because it expressly grants individuals with conviction records the same status of a protected class. For example, under Title VII of the Civil Rights Act of 1964, if an employer's hiring policy has a "disparate impact" on minorities and is not justified by a business necessity, it is unlawful.
- WFEA's convicted records prohibition denies employers the ability to truly assess job applicants. An applicant's character and his or her propensity to commit crimes are highly relevant to businesses when making hiring decisions. A strict application of the law against employers' use of conviction records denies employers an important element in their hiring decisions.
- Like many other states, Wisconsin recognizes negligent hiring as a tort action. Therefore, a Wisconsin business could potentially be negligent for hiring a person with a conviction record if the employer knew, or should have known, the person was prone to commit a crime against a third party while performing the employee's job duties.

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[i] Thomas M. Hruz, Comment: *The Unwisdom of the Wisconsin Fair Employment Act's Ban on Employment Discrimination on the Basis of Conviction Records*, 85 Marq. L. Rev. 779, 781 (Spring 2002).

[ii] Wis. Stat. § 111.335(1)(c)(1).

[iii] Thomas M. Hruz, *Criminals Escaping Affliction: Gerald Turner and Wisconsin's Fair Employment Law*, WI: Wisconsin Interest, Winter 2000, at 7.