

**WRITTEN COMMENTS SUBMITTED BY  
TIMOTHY G. COSTELLO OF  
KRUKOWSKI & COSTELLO, S.C. TO  
SPECIAL COMMITTEE ON REVIEW OF RECORDS  
ACCESS OF CIRCUIT COURT DOCUMENTS  
NOVEMBER 4, 2010**

**INTRODUCTION**

Good morning. My name is Tim Costello of the law firm of Krukowski & Costello, S.C. located in Milwaukee, Wisconsin. I would like to thank the Committee for extending its invitation for me to provide the employer's perspective with regard to any changes to the access of civil or criminal records under the Wisconsin Circuit Court Automated Programs (CCAP).

By way of background, I have practiced labor and employment law for thirty years in Wisconsin. My practice is limited exclusively to representing (usually defending) employers with regard to labor and employment matters. With regard to the arrest and conviction record anti-discrimination statute in Wisconsin, my practice usually involves defending employers who have utilized arrest or conviction records when taking an employment action.

**THE CURRENT EMPLOYMENT LAW**

Section 111.335 of the Wisconsin Fair Employment Law was first enacted in 1981. It has gone through several amendments dating back to 1991, and as recently as 2005.

The current law *prohibits* discrimination:

- Based on an individual's past arrest record.
- Requesting an employee to disclose past arrest records (except when there is a bondability requirement).
- Based on a pending arrest that "does not substantially relate to the circumstances of the particular job."
- Based on a conviction record that "does not substantially relate to the circumstances of the particular job."

To summarize, the current employment law allows an employer to use a pending arrest record or a criminal conviction record to refuse employment or make an employment decision if that offense "substantially relates to the circumstances of a particular job."

If an employer violates the law, it is liable for reinstatement or reinstatement of the applicant or employee, back pay, costs, interest, attorneys' fees as well as compensatory and punitive damages up to \$300,000.00.

I have attached the full text of the law to my comments so that each member of the Committee has it as a ready reference.

The law provides for a fact-intensive analysis as to when a pending arrest or conviction “substantially relates to the circumstances of a particular job.”

The substantially related test is objective (not based on an employer’s own subjective thoughts or beliefs) looking first and foremost at the elements of the crime involved in determining the character traits that are revealed by the violation of that criminal statute. Then an assessment is made as to whether the tendencies and inclinations to behave in a certain way are likely to reappear later in the employment setting based on those traits revealed by the elements of the crime. *County of Milwaukee v. LIRC*, 139 Wis.2d 805, 407 N.W.2d 908 (1987).

When assessing whether or not the substantially related test is met, it is irrelevant that the job applicant or employee argues that he or she was innocent of the crimes that they were convicted of, or that there were mitigating circumstances. This would allow the applicant or employee to try to re-litigate the crimes that they have already been convicted of. These arguments should be raised in the criminal courts, not in the employment application process or employment setting.

#### **WHY IS THE SUBSTANTIALLY RELATED TEST IMPORTANT?**

On one hand, society has an interest in rehabilitating individuals who have been charged with a crime or convicted of a crime and protecting them from discrimination in employment. On the other hand, society also has an interest in protecting its citizens. Employers also have a legitimate concern that they and the community at large not bear an unreasonable risk to the employer’s assets, employees and customers that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which they were convicted, will commit similar crimes.

Added to these balanced interests that are set forth in the Wisconsin Fair Employment Act is the fact that Wisconsin employers can be sued under the Wisconsin Safe Place Act, Wis. Stat. §101.111, or for “negligent hiring” pursuant to the Wisconsin Supreme Court decision in *Miller v. Wal-Mart Stores, Inc.*, 219 Wis.2d 250, 580 N.W.2d 233 (1998), if they do not carefully screen applicants for prior convictions and perform criminal background checks on potential new employees and face tremendous liability for damages caused by an employee with a past conviction record who may harm the employer’s other employees or customers in the workplace. The U.S. Department of Occupational Safety and Health Administration (OSHA) may also issue severe fines and penalties against Wisconsin employers for the same issues under the General Duty Clause, 29 U.S.C. § 1654(a), of the Federal Occupational Safety & Health Act.

#### **APPLICATIONS OF THESE DOCTRINES**

1. What information does the employer need from CCAP?

Most employers ask whether an applicant is subject to a pending arrest or has been convicted of a crime and provide a statement that a pending arrest or conviction does not automatically disqualify the individual from being considered for employment.



Employers need to verify whether a pending arrest or a conviction meets the substantially related test. Therefore, an employer needs to have the most current information from CCAP with regard to any applicant's or employee's pending arrests or convictions to begin that process.

2. Why do employers need certain information that is found on CCAP?

Employers need this information to evaluate whether an employee's pending arrest or conviction demonstrates character traits that are likely to reappear in the employment setting based on the elements of the crimes at issue. This information is necessary in order to make sure that its assets, employees and customers are not put at unreasonable risk by the applicant or an existing employee.

3. How do employers use CCAP and the information on it.

Generally, an employer will verify an employee's answers on an application with regard to any pending arrest or conviction record. The employer first needs to determine whether the answer is truthful, accurate and complete. If the applicant or employee has provided a truthful, accurate and complete answer, the employer will then evaluate whether any pending arrest or conviction record substantially relates to the job at issue based on case law.

Also, the State of Wisconsin requires an employer to gather certain conviction information for purposes of verifying eligibility for Wisconsin Development Zone Jobs Tax Credit. I have attached the questionnaire required be provided by the applicant. CCAP allows an employer to verify an applicant's answer so the tax credit is properly requested.

4. What law governs the use of information on CCAP.

As discussed above, Section 111.335 of the Wisconsin Fair Employment Act, which is attached to this submission, governs and regulates an employer's use of pending arrest and criminal conviction information. There is a cautionary warning that appears on CCAP in this regard.

5. What would employers do if the information they needed was not found on CCAP?

First, it could encourage applicants or employees to provide false information on their applications if he/she knows that the employer has no easy and immediate reference to verify the accuracy of such information. Second, it would slow down the hiring process because an employer would have to go to untraditional resources for this information. For example, the Court House, hiring an outside service to do background checks, or doing a "manual" background check by themselves. Third, if this information is not readily accessible, it would increase the employer's cost of hiring with regard to either buying the information from a private vendor or hiring a background check firm to perform a search.

## CONCLUDING REMARKS

The employer's use of the information on CCAP is governed by an existing law from employment law. The employment issue is not a matter of whether this information is available by looking online or going to the clerk's office in the Court House or a private background check firm, but rather, whether the substantially related test is a workable standard under the Wisconsin Fair Employment Act. It is fact-intensive analysis, and it has provided employers a basic measurement tool when determining whether a pending arrest or a conviction disqualifies an applicant or employee from employment. Although it is not perfect, it does provide the employer with guidance and allows the employer to protect its assets, employees, customers and the public at large from an unreasonable risk to safety. The employability or lack of employability of individuals that are convicted of crimes is not really addressed by attempting to limit access to this already public information. The Wisconsin Fair Employment Act would have to be amended to do so.

Thank you and I would welcome any questions.

remains silent in the face of the *prima facie* case, the complainant continues to bear the burden of proof on the ultimate issue of discrimination. *Currie v. DILHR*, 210 Wis. 2d 380, 565 N.W.2d 253 (Ct. App. 1997), 96-1720.

A *prima facie* case for a violation of this section requires that the complainant: 1) was a member of a protected class; 2) was discharged; 3) was qualified for the position; and 4) was either replaced by someone not in the protected class or that others not in the protected class were treated more favorably. *Knight v. LIRC*, 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998), 97-1606.

Discrimination in advertising. *Abramson, WBB March*, 1985.

**111.325 Unlawful to discriminate.** It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employee or any applicant for employment or licensing.

**111.33 Age; exceptions and special cases.** (1) The prohibition against employment discrimination on the basis of age applies only to discrimination against an individual who is age 40 or over.

(2) Notwithstanding sub. (1) and s. 111.322, it is not employment discrimination because of age to do any of the following:

(a) To terminate the employment of any employee physically or otherwise unable to perform his or her duties.

(b) To implement the provisions of any retirement plan or system of any employer if the retirement plan or system is not a subterfuge to evade the purposes of this subchapter. No plan or system may excuse the failure to hire, or require or permit the involuntary retirement of, any individual under sub. (1) because of that individual's age.

(d) To apply varying insurance coverage according to an employee's age.

(e) To exercise an age distinction with respect to hiring an individual to a position in which the knowledge and experience to be gained is required for future advancement to a managerial or executive position.

(f) To exercise an age distinction with respect to employment in which the employee

is exposed to physical danger or hazard, including, without limitation because of enumeration, certain employment in law enforcement or fire fighting.

(g) To exercise an age distinction under s. 343.12 (2) (a) and (3).

**History:** 1981 c. 334; 1983 a. 391, 538.

Sub. (2) (f) exempts the hiring of fire fighters from being the subject of age discrimination suits. A fire department need not show that it openly and consistently discriminated on the basis of age to be exempt under sub. (2) (f). *Johnson v. LIRC*, 200 Wis. 2d 715, 547 N.W.2d 783 (Ct. App. 1996), 95-2346.

An employee is physically unable to perform a job under sub. (2) if that employee is performing the job with a physical accommodation. *Harrison v. LIRC*, 211 Wis. 2d 681, 565 N.W.2d 572 (Ct. App. 1997), 96-1795.

A city charged under the federal Age Discrimination in Employment Act had the burden of establishing that a mandatory retirement age of 55 for law enforcement personnel was a bona fide occupational qualification. *Equal Employment Opportunity Commission v. City of Janesville*, 630 F.2d 1254 (1980).

The federal Employment Retirement Income Security Act preempts sub. (2) (b) to the extent that it applies to employee benefit plans covered by it. *Waukesha Engine Division v. DILHR*, 619 F. Supp. 1310 (1985).

**111.335 Arrest or conviction record; exceptions and special cases.** (1) (a) Employment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employee, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge, except that it is not employment discrimination to request such information when employment depends on the bondability of the individual under a standard fidelity bond or when an equivalent bond is required by state or federal law, administrative regulation or established business practice of the employer and the individual may not be bondable due to an arrest record.

(b) Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any

individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

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

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

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

(cg) 1. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to deny or refuse to renew a license or permit under s. 440.26 to a person who has been convicted of a felony and has not been pardoned for that felony.

2. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke a license or permit under s. 440.26 (6) (b) if the person holding the license or permit has been convicted of a felony and has not been pardoned for that felony.

3. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ a person in a business licensed under s. 440.26 or as an employee specified in s. 440.26 (5) (b) if the person has been convicted of a felony and has not been pardoned for that felony.

(cm) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ as an installer of burglar alarms a person who has been convicted of a felony and has not been pardoned.

(cs) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke, suspend or refuse to renew a license or permit under ch. 125 if the person holding or applying for the license or permit has been convicted of one or more of the following:

1. Manufacturing, distributing or delivering a controlled substance or controlled substance analog under s. 961.41 (1).

2. Possessing, with intent to manufacture, distribute or deliver, a controlled substance or controlled substance analog under s. 961.41 (1m).

3. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under a federal law that is substantially similar to s. 961.41 (1) or (1m).

4. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under the law of another state that is substantially similar to s. 961.41 (1) or (1m).

5. Possessing any of the materials listed in s. 961.65 with intent to manufacture methamphetamine under that section or under a federal law or a law of another state that is substantially similar to s. 961.65.

(cv) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ in a position in the classified service or in a position described in s. 230.08 (2) (k) a person who has been convicted under 50 USC, Appendix, section 462 for refusing to register with the selective service system and who has not been pardoned.

**History:** 1981 c. 334; 1991 a. 216; 1993 a. 98; 1995 a. 448, 461; 1997 a. 112; 2001 a. 16; 2003 a. 33; 2005 a. 14.

A rule adopted under s. 165.85 properly barred a nonpardoned felon from holding a police job. *Law Enforcement Standards Board v. Lyndon Station*, 101 Wis. 2d 472, 305 N.W.2d 89 (1981).

# WISCONSIN DEVELOPMENT ZONE JOBS TAX CREDIT SCREENING QUESTIONNAIRE

The employer with which you are applying for employment with is in the Development Zone Program, and **may be eligible to take a tax credit for hiring individuals from certain groups of applicants.** This form will assist the employer in identifying these individuals. The information you provide will be **used solely to determine eligibility status for the tax credit and will be held in strict confidence.**

**PLEASE PRINT**

Name and Address of Applicant (include zip code) _____  	Telephone Number: _____  Social Security Number: _____  County: _____
<p><b>Dislocated Workers</b></p> <p>During the last five years, have you been unemployed due to a plant closing or layoff?.... <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If Yes, date of layoff (month/year)._____ Years employed on job? _____</p> <p>Name of company? _____</p> <p>Have you worked for this company before?..... <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	
<p><b>Vocational Rehabilitation Referrals</b></p> <p>Do you have a disability that is a barrier to employment?..... <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If yes, what is your counselor's name? _____</p> <p>Agency _____ Phone # _____</p>	
<p><b>W2/SSI/General Assistance/Food Stamps</b></p> <p>Is your family eligible for the Wisconsin Works (W-2) program (includes payments, food stamps, medical assistance, childcare services)?..... <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Did you receive Supplemental Security Income benefits during the last 60 days?..... <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Did you receive General Assistance benefits during the last 60 days?..... <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Did your family receive food stamps during the last six months?..... <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Name of caseworker or agency? _____ Phone # _____</p>	
<p><b>Economic Revitalization Area</b></p> <p>Do you live on the Menominee, Mole Lake or Lac du Flambeau Indian reservations? ..... <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Did you live in the City of Milwaukee? ..... <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Address _____</p> <p><i>Verify eligibility using Address Locator link at <a href="http://egis.hud.gov/egis/cpd/rcezec/ezec_open.htm">http://egis.hud.gov/egis/cpd/rcezec/ezec_open.htm</a></i></p>	

**(Continue on reverse side.)**

## Economically Disadvantaged Veterans/Ex-Felons/Youth

Are you an U.S. Armed Forces veteran?..... ☐ Yes ☐ No

Name of Job Service Veteran's representative? \_\_\_\_\_

Phone # \_\_\_\_\_

Were you convicted of a felony and released from prison during the last 5 years?..... ☐ Yes ☐ No

Name of parole/probation officer? \_\_\_\_\_

Phone # \_\_\_\_\_

Are you at least 18 years old but under 23?..... ☐ Yes ☐ No

If so, date of birth \_\_\_\_\_ (Include proof of age documentation.)

***If you answered "YES" to any of the above three questions, please complete the following section. The form cannot be processed without this information.***

### Family Size

Enter the number of family members now living in your household, including yourself.... \_\_\_\_\_

- **Note:** All persons related by blood, marriage or adoption are considered members of a family. Do not include an individual 18 years of age or older who receives less than 50% of their support from the family.

If you are under 18 years old, are you living in a family (household) that received Wisconsin Works (W2) benefits, General Assistance or Supplemental Security Income (SSI)?..... ☐ Yes ☐ No

### Family Income (Read and follow instructions on the next page)

List total income received by all members of the family (household) for the **LAST SIX MONTHS**.

1. Gross wages or salary. Include total money earnings, before deductions, for work performed as an employee..... \_\_\_\_\_
2. Self-employment income. Include net money income (gross receipts minus expenses). \_\_\_\_\_
3. If applicant or members of family reside on an operating farm, include net income received from the sale of farm products..... \_\_\_\_\_
4. Other income. Include money received from rent, social security benefits, OASI (Old Age Survivor's Insurance) and Federal Disability Insurance, pensions, interest, and periodic income from insurance policy annuities..... \_\_\_\_\_

**Total Family (Household) Income...** \_\_\_\_\_

### AFFIDAVIT

I understand that by providing this information I may be assisting an employer in receiving a State Tax Credit. I certify that the information provided above is true to the best of my knowledge and that I have no fraudulent intent. I am also aware that the information I have provided is subject to verification. I allow release of this information for verification purposes and understand that it will be used to determine eligibility. Falsification may constitute fraud.

Applicant Signature	Date Signed	Parent or Guardian Counter Signature if applicant is under 18 years of age.	Date Signed



**Include the Following in Determining Family Income for the Past 6 Months:**

If a family's only source on income was from wages and salary payments, family income would be equal to gross wages or salary received.

- **Gross Wages or Salary:** The total money earnings received for work performed as an employee. It represents the amount paid **before deductions** for income taxes, social security, bond purchases, union dues, etc. Wages and salaries received by individuals through public service employment and on-the-job training under Workforce Investment Act (W.I.A.) and the Emergency Employment Act of 1971 and Title X of the Public Works and Economic Development Act are **included** in the income computations.

Income earned while on Nation Guard/Army Reserve duty is included because this is not considered active duty.

- **Self-Employment Income:** Net money income (gross receipts minus operating expenses) from a business firm, farm, or other enterprise in which a person is engaged on his/her own account.
- **Other Income:** Money income received from such sources as net rents, interests, social security benefits (OASI), pensions, alimony and periodic income from insurance policy annuities, contests and lotteries, governmental retirement payments and armed forces retirement payments.

**Do Not Include the Following in Annual Family Income:**

- Non-cash income, such as food stamps or wages received in the form of food or housing.
- Cash value of owner-occupied property.
- Cash welfare payments: Federal, State, or local welfare payments, such as AFDC, SSI, and Foster Care. (Any member of a family receiving welfare payments as a family or through an individual member, is economically disadvantaged. Wards of the state, including foster children, who receive aid from the state or local government shall automatically be considered economically disadvantaged.)
- Payments made to participants of employment and training programs, such as payments for training, work experience, transportation, and dependency allowances, including college or vocational school work study programs.
- Capital gains and losses.
- One-time unearned income, such as the following examples (not intended to be a complete list, but designed to show examples of one-time unearned income.):
  1. Payments received for a limited fixed term under income maintenance programs and supplemental unemployment benefit plans.
  2. One-time (or fixed term) scholarship and fellowship grants.
  3. Accident, health, and casualty insurance proceeds.
  4. Disability and death payments, including fixed-term (but not lifetime) life insurance annuities and death benefits.
  5. One-time awards and gifts.
  6. Inheritances, including fixed-term annuities.
  7. Fixed-term worker's compensation awards.
  8. Terminal leave pay.
  9. Soil bank payments.
  10. Agriculture crop stabilization payments.
  11. Alaska oil trust fund disbursements for economic development
- Social Security Disability Insurance.
- Payments for child support.
- Payments received under the Trade Readjustment Act of 1974 as amended.
- Federal, State, or local unemployment benefits.

**Veterans Only – In addition, Do Not Include the Following in Annual Family Income:**

The effect of Section 2013, Chapter 42, of Title 38, U.S. Code (P.L. 92-540) Vietnam Era Veteran's Readjustment Assistance Act of 1972 on the definition of economically disadvantaged in calculating family income is to exclude the following:

- Amounts received as pay and allowances by any person while serving on active duty in the armed forces.
- Educational assistance and compensation payments under Chapters 11, 13, 31, 34, 35, and 36 of Title 38, United States Code.

**NOTE:** Title 38 U.S.C. Chapter references are as follows:

11. Compensation for Services Connected Disability or Death
13. Dependency and Indemnity Compensation for Service-Connected Death
31. Vocational Rehabilitation
34. Veterans' Educational Assistance
35. War Orphans' and Widows' Educational Assistance
36. Administration of Educational Assistance

**WIA INCOME GUIDELINES  
FOR DETERMINING ECONOMICALLY DISADVANTAGED INDIVIDUALS**

Poverty Guidelines Effective 01/23/08  
70% LLSIL Guidelines Effective 04/25/08

NUMBER IN FAMILY, INCLUDING APPLICANT	POVERTY GUIDELINES	70% OF THE LOWER LIVING STANDARD INCOME LEVEL (LLSIL)*		
		A. Metro	B. Non-Metro	C. Mil. SMSA
1	\$10,400	\$8,392	\$8,040	\$8,149
2	\$14,000	\$13,756	\$13,171	\$13,357
3	\$17,600	\$18,880	\$18,080	\$18,338
4	\$21,200	\$23,309	\$22,317	\$22,637
5	\$24,800	\$27,504	\$26,340	\$26,715
6	\$28,400	\$32,172	\$30,804	\$31,241
7	\$32,000	\$36,840	\$35,268	\$35,767
8	\$35,600	\$41,508	\$39,732	\$40,293
9	\$39,200	\$46,178	\$44,196	\$44,819
10	\$42,800	\$50,844	\$48,660	\$49,345
11	\$46,400	\$55,512	\$53,124	\$53,871
12	\$50,000	\$60,180	\$57,588	\$58,397
For each additional family member, add		\$3,600	\$4,668	\$4,464
			\$4,464	\$4,526

\*The LLSIL may vary according to location in the state:

**COLUMN A** is for all of the metropolitan areas of the state, **except the Milwaukee Standard Metropolitan Statistical Area.**  
*This includes Douglas, Chippewa, Eau Claire, Marathon, La Crosse, Brown, Sheboygan, Outagamie, Winnebago, Calumet, Rock, Dane, \*Racine, and Kenosha Counties.*

**COLUMN B** is for all of the non-metropolitan areas of the state.

**COLUMN C** is for the Milwaukee-Racine Metropolitan Statistical Area which includes Ozaukee, Washington, Waukesha, and Milwaukee Counties.

Please notice that for some WDAs with both metropolitan and non-metropolitan areas, you will have to use one of two columns, depending on whether the applicant lives in a metropolitan or non-metropolitan area, unless the Workforce Development Board has chosen to use only one, in which case, you must use the lower (non-metro) column.