Wisconsin Legislative Council

STUDY COMMITTEE MEMO

Memo No. 1

TO: MEMBERS OF THE STUDY COMMITTEE ON INCREASING OFFENDER EMPLOYMENT OPPORTUNITIES

FROM: Katie Bender-Olson, Principal Attorney, and Peggy Hurley, Staff Attorney

RE: Background Information on Topics Raised at First Study Committee Meeting

DATE: September 22, 2022

This memo provides background and additional information regarding topics raised by speakers and committee members during the August 30, 2022 meeting of the Study Committee on Increasing Offender Employment Opportunities. The Department of Workforce Development (DWD) and the Department of Corrections (DOC) raised some of the following topics as part of their recommendations for legislation, while committee members raised other topics during committee discussion.

The following sections address the federal Work Opportunity Tax Credit (WOTC), vocational earned release, work release under 2017 Wisconsin Act 89, employer liability for hiring individuals with prior convictions, "Ban the Box" prohibitions on job applications, anti-fraternization rules, and expungement.

WORK OPPORTUNITY TAX CREDIT

The DWD presentation to the study committee mentioned the federal WOTC, and recommended that the committee consider legislation creating a similar state credit. The WOTC is a federal income tax credit available to employers who hire individuals from targeted groups, including "qualified ex-felons." To be a qualified ex-felon, an individual must have a state or federal felony conviction and must have been hired within one year after being released from prison.[1]

DWD administers the federal WOTC, which includes certifying that a particular employee is a qualified ex-felon or member of another targeted group, promoting the program to employers, and reporting program data to the U.S. Department of Labor. In federal fiscal year 2020, DWD certified 3,848 ex-felons as eligible for the WOTC.[2]

Taxable employers claim the credit as a general business credit against their income taxes, while tax-exempt employers claim the credit against their payroll taxes. The WOTC may equal 40 percent of up to $6,000 of wages paid to an individual during his or her first year of employment, if the individual meets

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[1] The individual can have a felony conviction from any state, and does not have to have been convicted under Wisconsin law. An employer can also receive the tax credit for an individual with a felony conviction who did not serve time in prison, if the individual is hired within one year after the conviction. [26 U.S.C. s. 51 (d) (4).]

[2] Budget Paper #313, *Supplemental State Work Opportunity Tax Credit*, Legislative Fiscal Bureau.

certain requirements. An employer will receive the full credit equaling $2,400 if: (1) the employee is certified by DWD as being part of a targeted group; (2) the employee is in his or her first year of employment; and (3) the employee works at least 400 hours for the employer. If the individual only works between 120 and 400 hours, then the employer will receive a credit of 25 percent of the wages for that employee (equal to $1,500). [26 U.S.C. s. 51.]

Legislation has been introduced in Wisconsin, and in other states, proposing to create a state tax credit to supplement the federal WOTC.[3] This legislation generally creates a credit against state income tax for up to 50 percent of the federal WOTC credit claimed by the employer for employing individuals in any of the targeted groups eligible for the federal credit.

VOCATIONAL EARNED RELEASE

The DOC presentation to the study committee addressed the earned release program, and recommended that the committee consider legislation expanding the program to allow for release based on completion of vocational education or higher education.

Current law creates an Earned Release Program (ERP) that allows eligible inmates to earn early release to extended supervision or parole if they complete a substance abuse program. Only inmates who meet the following conditions are currently eligible for ERP: (1) the inmate is serving time for a nonviolent crime; (2) the sentencing court deems the inmate eligible; and (3) the inmate successfully completes a DOC substance abuse treatment program. [s. 302.05 (3), Stats.]

An inmate who completes ERP will have his or her sentence modified by a court to convert remaining confinement time in prison to supervised time in the community. ERP allows for early release while maintaining the total length of an individual's sentence. The program is only available to inmates with substance abuse needs who complete substance abuse programs, and is not available to those who earn educational credentials or complete vocational training programs.

Legislation has been introduced in Wisconsin proposing to expand ERP to permit early release based on engaging in job training, completing education, or securing employment. [4] Other states also offer "earned time" programs allowing inmates to reduce the length of their confinement time based on completing education or vocational training.[5]

WORK RELEASE UNDER ACT 89

Committee members raised questions about access to work release programs, and whether there are more eligible DOC inmates than available space at DOC minimum security facilities. Members also asked about a program that exists under state law, but is not currently being used, which allows DOC inmates nearing release to be transferred to a county jail in their home counties to participate in employment, education, or job training.

2017 Wisconsin Act 89 created a program to allow DOC inmates held in county jails, county houses of correction, or tribal jails to leave the facilities to work, seek employment, engage in job training, perform community service, or attend an educational institution. The program is voluntary for counties

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[3] See e.g., 2021 Assembly Bill 68 (Governor's budget bill) and Maryland House Bill 2.

[4] See, 2021 Assembly Bill 68 (Governor's budget bill) and 2019 Assembly Bill 830.

[5] *Cutting Corrections Costs: Earned Time Policies for State Prisoners,* National Conference of State Legislatures (NCSL), July 2009 (table beginning on page 9).

and tribes, and operates pursuant to a contract between DOC and the county or tribe. DOC then pays the county or tribe a daily rate for each participating DOC inmate. The sheriff, superintendent, or tribal chief of police and DOC together determine inmate eligibility for the allowable activities, and either party may terminate an inmate's participation at any time. [s. 302.27 (2), Stats.]

The legislative history of the act indicates it was intended to reduce recidivism by allowing inmates to find employment in the communities where they would be living following release. DOC and the bill authors envisioned that individual counties and DOC would negotiate the details of the program within a memorandum of understanding (MOU), which would allow inmates to transition back to their local communities under the supervision of both the county jail and a DOC probation and parole agent.[6] The program was intended to allow inmates to find work that they could continue after release, rather than participating in work release jobs far away from their home counties and having to leave that successful employment when released.

As noted, state law allows counties and tribes to contract with DOC for housing DOC inmates and supervising their release for employment-related purposes, but does not require them to do so. DOC reports that no such contracts currently exist, so no DOC inmates are currently being transferred to county facilities and released for work under the program.

EMPLOYER LIABILITY RELATED TO EMPLOYEES WITH CONVICTIONS

Committee members raised questions regarding potential liability for employers who hire individuals with criminal convictions. This issue arose during discussion regarding fidelity bonding or other employer-targeted incentives for hiring individuals with prior justice system involvement.

Wisconsin courts recognize a "negligent hiring" tort claim, which allows a person injured by a company's employee to sue the employer, if the employer knew the employee posed a foreseeable risk of harm to others. This claim asserts that the employer's careless hiring procedures exposed members of the public to a potentially dangerous employee. Liability arises from the employer's failure to exercise reasonable care when hiring the employee, not from the employee's harmful conduct itself. To establish negligent hiring, or the related claims of negligent training and negligent supervision, a person must show that: (1) the employer has a duty of care; (2) the employer breached that duty of care; and (3) the employer's failure to properly hire, train, or supervise its employee caused the plaintiff's injury. [*Miller v. Wal-Mart Stores*, Inc., 219 Wis. 2d 250, 267-68 (1998).]

Generally, only a customer or other third party can bring a negligent hiring claim against an employer. An employee who is injured by a coworker cannot file such a claim because the Wisconsin Worker's Compensation Act (WCA) provides the exclusive remedy for a work-related injury. [*Peterson v. Arlington Hosp. Staffing, Inc.*, 2004 WI App 199, 276 Wis. 2d 746.]

Though employers are potentially subject to negligent hiring claims for hiring employees with prior convictions, such claims are difficult for plaintiffs to win.[7] First, the claim is only available to customers or others who do not work with the employee, since injury to a coworker is typically preempted by the

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[6] 2017 Wisconsin Assembly Bill 345 was the legislation eventually enacted as Act 89. Testimony given by Representative Schraa and Senator Feyen, the authors of the legislation, and by DOC and other stakeholders during public hearings on the bill, can be found within the "LC Bill History Materials," which are accessible here.

[7] An employer who hires an individual holding a Certificate of Qualification of Employment (CQE) is immune from liability for any claim of negligent hiring, retention, training, or supervision, unless the employer acted maliciously or with intentional disregard for an individual's rights when hiring the CQE holder. [s. 895.492, Stats.] However, only two CQEs have been issued as of July 27, 2022, so this civil immunity is not widely available to employers.

WCA. Second, a plaintiff must establish that the employer should have known that the individual posed a danger to the plaintiff based on his or her criminal record. This likely requires a connection between the prior conviction and the risk the individual posed. For example, an employee with a forgery conviction likely does not pose a foreseeable risk of committing assault.

"Ban the Box" Prohibitions

DWD recommended to the committee that it consider legislation prohibiting employers from asking about conviction record before an applicant has been selected for an interview. This prohibition is referred to as a "Ban the Box" law because employer application forms often include a "yes/no" check box to inquire about criminal history.

Under current law, it is generally considered unlawful employment discrimination to refuse to hire a person on the basis of the person's criminal record. However, an employer may lawfully refuse to a hire a person whose criminal conviction or pending charge "substantially relates" to the position for hire. Additionally, under current law, a licensing board may refuse to grant a license or certification if a person has been convicted of certain crimes. [ss. 111.321 to 111.325, Stats.]

"Ban the Box" legislation has been introduced in Wisconsin, and introduced or adopted in other states, which would prohibit employers from asking a prospective employee whether he or she has been arrested for or convicted of a crime during the early stages of the application process. These laws are intended to encourage employers to assess each applicant, particularly at the early stages of the application process, without regard to whether he or she has a criminal history.

According to a NCSL report, 27 states and the District of Columbia have enacted some form of "Ban the Box" legislation, but the laws vary in scope and applicability. For example, in Hawaii, the first state to enact "Ban the Box" legislation, an employer may inquire into conviction records for prospective employees only after a conditional offer of employment. After that, employers generally may only withdraw an offer if the crime of which the person was convicted bears a rational relationship to the duties and responsibilities of the position. Recent amendments to Hawaii's law have limited the number of crimes that would meet the "rational relationship" standard.

Several state "Ban the Box" laws apply only to public employers. A similar federal law went into effect in December 2021, and generally prohibits federal agencies and contracts from inquiring into an applicant's criminal history until after a conditional offer of employment has been made. Other proposals or laws, including legislation introduced in Wisconsin, would allow an employer to inquire about an applicant's criminal history at the interview stage.

Additionally, several states allow an employer to inform prospective applicants that certain criminal convictions would lawfully preclude a person from being hired. If certain convictions are "substantially related" to the position or if a specific conviction or class of convictions (such as a felony relating to a controlled substance) is exempted under current law from discrimination on the basis of a criminal record, "Ban the Box" legislation would allow the employer to state that fact at the time a person applies for employment.

According to research reviewed and summarized by NCSL, "Ban the Box" legislation has generally had a neutral or negative impact on employment for women and for persons of color who do not have criminal convictions, and a neutral or positive impact on employment for persons who do have criminal convictions. In response, advocates are looking to enact or to amend legislation that may mitigate the mixed or negative effects of existing "Ban the Box" efforts.

ANTI-FRATERNIZATION RULES

Committee members raised questions about anti-fraternization rules and whether these rules negatively impact individuals who are incarcerated or recently released into the community. Anti-fraternization rules and policies (also referred to as "fraternization" policies) prohibit specific contact or relationships between correctional staff, contractors, or volunteers and individuals who are incarcerated or on supervision. These rules may prevent volunteers who work with individuals inside correctional institutions from having contact with those individuals when they are released.

Anti-fraternization rules are largely created by DOC policy, rather than state law. While there are statutes and administrative rules restricting delivery of contraband and regulating visits with inmates, state law does not otherwise prohibit contact between individuals under DOC care and volunteers.[8]

The Division of Adult Institutions (DAI), a division within DOC, has policies prohibiting relationships and contacts between volunteers and offenders. DAI Policy#: 309.06.03 prohibits volunteers from "associating with, accompanying, corresponding with, consorting with" or exchanging personal contact information, goods, services, or funds with any of the following: (1) inmates incarcerated in a DOC facility; (2) offenders under DOC supervision; (3) family, friends, or associates of an inmate or offender under DOC supervision; or (4) an inmate or offender who has been discharged from incarceration or supervision within the prior two years.

The policy also prohibits a volunteer from interceding on an offender's behalf regarding facility discipline, classification or programming, rules of supervision, employment, and petitions for parole, pardon, commutation, or judicial matters. Additionally, the policy requires a volunteer to report to DOC any relationship or contact with the individuals enumerated above, even if contact was accidental. For instance, the policy requires a volunteer to notify the DOC institution where he or she volunteers about any unplanned or inadvertent contact with an offender in the community by the next business day. [DAI Policy #: 309.06.03, sec. VII A and B.]

DOC Executive Directive #16 provides further fraternization prohibitions. Executive Directive #16 was originally issued in 2004, and reapproved by the current DOC Secretary in 2019. The policy prohibits "employees," including volunteers, from having certain relationships with offenders under the legal custody or supervision of DOC. Specifically, volunteers cannot have personal contacts or be in a "social or physical relationship" with an offender, including dating, forming close friendships, visiting that is not job related, or corresponding or communicating in person, in writing, by phone, or through social media that is not job related, unless an exception has been granted.[9]

The directive also explicitly prohibits the following contacts and relationships: (1) a volunteer living with an offender; (2) a volunteer employing an offender; (3) an offender employing a volunteer; (4) a volunteer extending, promising, or offering any special consideration or treatment to an offender; (5) a volunteer giving goods or services to an offender (e.g., gifts, loans); (6) an offender giving goods or services to a volunteer; or (7) a volunteer engaging in sexual conduct with an offender. Further, the directive requires volunteers to report certain relationships and any unanticipated, nonemployer

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[8] DOC administrative rules provide a list of considerations for a warden to use in determining whether an individual may be approved to visit an inmate or removed from an approved visiting list. One of the 10 considerations is whether the proposed visitor is a current or former employee or volunteer within the past 12 months. [s. DOC 309.08 (4) (j), Wis. Adm. Code.]

[9] Executive Directive #16 contemplates that DOC may grant exceptions allowing certain relationships or contact that is otherwise prohibited. An exception request requires submission of a form "DOC 2270-Fraternization Policy Exception Request," followed by initial review by a supervisor and final determination by a division administrator or designee.

directed contacts they have with offenders. [Executive Directive #16, *Fraternization Policy*, secs. IV to VIII.]

Expungement

The DOC presentation to the committee recommended updating expungement laws, and members also questioned whether revising the current expungement laws could assist offenders in finding employment. Expungement is the means by which information relating to an individual's conviction is sealed, destroyed, or otherwise removed from view. No record of the case, other than the case number, will be available on the court system's public-facing database, commonly referred to as "CCAP." [s. 973.015, Stats., and SCR 72.05 (2) (L) and 72.06.]

Expungement does not vacate or set aside a conviction, so it does not restore eligibility for licensing or employment for which an individual is otherwise ineligible. Additionally, expungement seals access to court records, but not to information or records held by the Department of Justice's Crime Information Bureau, DOC, law enforcement agencies, or the Department of Transportation. A person conducting a background check or other investigation on an individual can still obtain information about an expunged conviction from these other sources.[10]

According to NCSL, state laws on expungement vary significantly, with variance in the types of crimes eligible for expungement, limits on the age of the offender at the time of the offense, and differences as to whether an offender must take certain post-conviction measures in order to have his or her criminal court record expunged.

Wisconsin law limits expungement to certain low-level felonies, while certain other states apply different categories of crime to determine eligibility for expungement. In Wisconsin, only misdemeanors and Class H and I felonies are eligible for expungement. However, a court cannot expunge a Class H or I felony if the individual has a prior felony conviction or the offense falls into certain categories.[11] In other states, eligibility for expungement varies among several categories of offenses: serious felonies, lesser felonies, misdemeanors, controlled substance offenses, and sex-related offenses. States impose different requirements for expungement between the categories, but in general, serious felonies and sex-related offenses are not eligible for expungement, particularly if an offender is required to register on a state list of sex offenders.

Wisconsin law imposes age limits for expungement, while many other states do not. In Wisconsin, expungement is available only if the offender was under the age of 25 at the time of the offense. The majority of states that offer some form of expungement do not impose an age limit for the offender, but do limit the types of offenses that are eligible for expungement.

Wisconsin law limits expungement to those deemed eligible at sentencing, while other states do not. Under current Wisconsin law, a judge must order expungement at the time a person is sentenced. If a person did not receive an order of expungement that takes effect when the person completes his or her sentence, the person may not go back to the court later and request expungement.[12] In other states that

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[10] See *State v. Leitner*, 2002 WI 77, 253 Wis. 2d 449, and *State v. Braunschweig*, 2018 WI 113, 384 Wis. 2d 742.

[11] A Class H felony cannot be expunged if the offense is stalking, intentional or reckless physical abuse of a child, sexual assault by a school staff member or volunteer, or is defined as a violent offense. A Class I felony cannot be expunged if the offense is concealing the death of a child or is defined as a violent offense. [s. 973.015 (1m) (a) 3., Stats.]

[12] A victim of human trafficking for the purpose of a commercial sex act may request expungement of a court record for prostitution at any time after conviction. [s. 973.015 (2m), Stats.]

offer expungement, an offender may typically petition the court for expungement if he or she has successfully completed the sentence for a crime eligible for expungement and has not reoffended. Statutes vary,[13] but most require the offender to complete his or her sentence, impose a waiting period before the offender may apply, and impose a limit on the number of times an offender may petition for expungement. [s. 973.015, Stats.]

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[13] In Wisconsin, legislation has been proposed that would allow the court to retain the option of ordering expungement at the time of sentencing, but would allow an offender to petition for expungement after completing his or her sentence if the court declined to do so.