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CAUTION ESSENTIAL WHEN HIRING SOMEONE WITH AN ARREST RECORD

John Carlson Jr.

Employees and applicants with arrest and conviction records pose unique concerns for Wisconsin employers.

Seemingly conflicting legal obligations flank the employer's pathway for hiring and firing individuals with criminal records.

To walk that path with a sure foot, employers must be familiar with Wisconsin law and implement strategies for compliance.

On the one hand, employers must avoid employing persons whose backgrounds pose an unreasonable risk of harm to others or their property. Neglecting this duty may expose employers to negligent hiring, training and supervision claims.

On the other hand, employers must avoid unlawfully discriminating against employees and applicants based on their arrest or conviction records for felonies, misdemeanors, or other offenses. Failing to do so may expose employers to discrimination claims under the Wisconsin Fair Employment Act (WFEA).

The crux of negligent hiring, supervision and training cases in which an employee injures a third party or damages her property is whether the employer exercised reasonable care in checking the background of the candidate and in deciding whether the candidate was suitable for the particular job.

The required depth of background research depends on the nature of the job to be filled. Jobs that entail particular risks or unsupervised contact with fellow employees or the public require a commensurately careful investigation into the candidate or employee's background. Examples of such employment include delivery jobs, door-to-door sales and other positions affording access to private residences.

Compare conviction with job

Investigations should include checking criminal records and references, contacting previous employers, inquiring into gaps in employment and verifying all application materials for accuracy.

When evaluating criminal records, employers should compare the nature of any criminal convictions or pending charges to the responsibilities and character traits the job requires and the opportunities the position affords to commit similar crimes.

An applicant with theft or burglary convictions, for example, might not be suitable for a job as a bank teller. Crimes suggesting violent tendencies must be evaluated with particular scrutiny if the job would create opportunities for violent crime against co-employees or members of the public.

In theory, categorically refusing to hire applicants or retain employees convicted of, or arrested for, any crime would be the best safeguard against negligent hiring, training and supervision claims. But the WFEA prohibits such blanket discrimination to encourage the employment of all properly qualified individuals, to discourage recidivism and to reintegrate persons with the stigma of past convictions into society.

Employment applications requesting information about past convictions should clarify that convictions are not an absolute bar to employment.

Employers, however, can lawfully consider arrest or conviction records when the circumstances of a pending charge or a past conviction substantially relate to the circumstances of the particular job.

Assessing behavior

Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test.

Past cases are illustrative:

* A conviction for delivering cocaine was substantially related to employment as a youth counselor for emotionally disturbed juveniles, many of whom had problems related to chemical dependency.

* Convictions for forgery and being party to a crime were substantially related to the prospective duties of a direct mail specialist, who would have access to her employer's mail and thus opportunities to commit fraud.

* Convictions for first-degree sexual assault and exposing a child to harmful material were substantially related to the job of fitness center director, where the director managed an employee under the age of 18 and had contact with members under the age of 16.

Consult legal counsel

Where the substantiality of the relationship between offenses and job duties is less obvious than these examples, careful consideration should be given, and, if possible, legal counsel consulted.

Fortunately, the seemingly conflicting legal duties imposed by Wisconsin negligence law and the WFEA are, in fact, consistent.

Situations involving a substantial relationship where an employer can lawfully consider arrest and conviction record are the very situations in which an employer should do so to prevent employees from committing crimes on the job and third parties from filing negligent hiring, training and supervision claims.

Through an awareness of Wisconsin law and the use of strategies for compliance, employers can minimize their liability exposure related to the hiring and firing of individuals with arrest and conviction records.

----- INDEX REFERENCES -----

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