

WASB's Civil Rights Series

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Arrest & Conviction Record Discrimination

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Presentation Overview



Executive Summary



**WFEA Arrest & Conviction
Record Discrimination**



Title VII Implications



Background Checks

Executive Summary

- ▶ Wisconsin Fair Employment Act: The WFEA prohibits employment discrimination on a number of factors, including on the basis of an applicant or employee's arrest or conviction record.
- ▶ Arrest record discrimination: 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 with respect to pending criminal charges.

Executive Summary

- ▶ Arrest record discrimination: It is not arrest record discrimination to refuse to hire an applicant or to suspend an employee on the basis of a pending criminal charge, if the circumstances of the charge(s) substantially relate to the circumstances of the job.
- ▶ Conviction record discrimination: *Generally speaking*, a district may not refuse to hire an applicant or terminate an employee on the basis of his/her conviction record.

Executive Summary

- ▶ Conviction record discrimination: It is not conviction record discrimination if a district refuses to hire an applicant or terminates an employee on the basis of his/her conviction record if the circumstances of the conviction record substantially relate to the circumstances of the job.
- ▶ It is not conviction record discrimination if a district refuses to hire an applicant or terminates an employee if the individual has been convicted of a felony and has not been pardoned for that felony.

Executive Summary

- ▶ Title VII of the Civil Rights Act of 1964: Title VII prohibits school districts from discriminating against individuals in employment on the basis of their race, color, religion, sex and national origin.
- ▶ Although Title VII does not explicitly prohibit arrest and conviction discrimination like the WFEA, a district's use of an applicant or employee's arrest and conviction records could violate Title VII if the district's use of such records results in either disparate treatment of individuals, or has a disparate impact on individuals, who are in a protected class under Title VII (e.g., people of a particular national origin or race).

Executive Summary

- ▶ Background checks: School districts commonly use background checks as a part of their hiring process to verify information submitted by applicants and to potentially screen out applicants for certain positions.
- ▶ Background checks are permitted by state and federal law; however, depending upon the type of background check performed and who performs the background check, districts may have heightened obligations to notify individuals of their rights under the federal Fair Credit Reporting Act (FCRA).



Arrest & Conviction Discrimination Law

Introduction

- ▶ Purpose: To protect the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of arrest or conviction record.
- ▶ What is an “arrest record”?
- ▶ What is a “conviction record”?
- ▶ What are the exceptions to this law?
- ▶ How do districts determine whether an exception applies?

Wisconsin Fair Employment Act

- ▶ The WFEA prohibits employment discrimination on a number of factors, including on the basis of an applicant or employee's arrest or conviction record.
- ▶ Employment discrimination based on one of these factors substantially and adversely affects the general welfare of the state. Employers that deny employment opportunities and discriminate in employment against properly qualified individuals solely because of arrest record or conviction record deprive those individuals of the earnings that are necessary to maintain a just and decent standard of living.

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Wisconsin Fair Employment Act

- ▶ The law is codified in [Wis. Stat. §§ Chapter 111.31 - 111.395](#) and prohibits employers from taking the following actions unless an exception applies:
 - (1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of any basis enumerated in s. 111.321 (including arrest or conviction record).

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Wisconsin Fair Employment Act

- ▶ The law is codified in [Wis. Stat. §§ Chapter 111.31 - 111.395](#) and prohibits employers from taking the following actions unless an exception applies:
 - (2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in s. 111.321.

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Wisconsin Fair Employment Act

- ▶ The law is codified in [Wis. Stat. §§ Chapter 111.31 - 111.395](#) and prohibits employers from taking the following actions unless an exception applies:
 - **(2m)** To discharge or otherwise discriminate against any individual because the individual has exercised certain statutory rights or participated in certain proceedings as defined in the statute.
 - **(3)** To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.

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Wisconsin Fair Employment Act

- ▶ The law is codified in [Wis. Stat. §§ Chapter 111.31 - 111.395](#) and contains the following important definitions:
 - Arrest record: “Arrest record” includes, but is not limited to, information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority.

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Wisconsin Fair Employment Act

- ▶ The law is codified in [Wis. Stat. §§ Chapter 111.31 - 111.395](#) and contains the following important definitions:
 - Conviction record: “Conviction record” includes, but is not limited to, information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled pursuant to any law enforcement or military authority.

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Wisconsin Fair Employment Act

- ▶ 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.

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Wisconsin Fair Employment Act

▶ Arrest Record Discrimination Exceptions:

- Employers may ask applicants and employees whether there are any pending criminal charges against them;
- Employers may 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;

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Wisconsin Fair Employment Act

▶ Arrest Record Discrimination Exceptions:

- 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

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Wisconsin Fair Employment Act

▶ Criminal charge:

- “Criminal” means conduct prohibited by state law and punishable by fine or imprisonment. Wis. Stat. § 939.12.
- Conduct punishable only by forfeiture is not a crime. *State v. Roggensack*, 15 Wis. 2d 625, 630, 113 N.W. 2d 389, 392 (1962); Wis. Stat. § 939.12.

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Wisconsin Fair Employment Act

- ▶ Conviction record discrimination exceptions:
 - 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 if any of the following applies to the individual:
 - 1. The individual 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.

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Wisconsin Fair Employment Act

- ▶ Conviction record discrimination exceptions:
 - 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 if any of the following applies to the individual:
 - 2. The individual 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.

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Wisconsin Fair Employment Act

- ▶ Conviction record discrimination exceptions:
 - It is not employment discrimination because of conviction record for an educational agency to refuse to employ or to terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony.

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Wisconsin Fair Employment Act

- ▶ How should a district determine whether the circumstances of a pending charge or conviction substantially relate to the circumstances of the particular job?

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Substantial Relationship Test

- ▶ Key questions and considerations:
 - Do the circumstances of the charge or conviction suggest a propensity to commit a similar offense?
 - Does the job provide a particular and significant opportunity for similar criminal behavior?
 - The circumstances that foster criminal activity: the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the individual as revealed by the conviction.

Substantial Relationship Test

- ▶ Key questions and considerations:
 - The inquiry is not whether it is “likely” that the convicted person will re-offend, but whether there is an “unreasonable risk” of this occurring. *Matousek v. Sears Roebuck & Co.*, (LIRC, 02/28/07) (decision on remand from *Sears Roebuck & Co. v. LIRC*, Milw. Co. Cir. Ct., 09/29/06).
 - The mere possibility that a person could re-offend at a particular job does not create a substantial relationship. *Robertson v. Family Dollar Stores* (LIRC, 10/14/05).

Substantial Relationship Test

- ▶ Recent example – *Cree v. LIRC*, 2021 WI APP 4 (December 9, 2020):
 - Prospective employer, Cree, Inc., withdrew a conditional job offer for an Applications Specialist position from an applicant, Palmer, based upon his 2012 convictions for strangulation/suffocation, fourth-degree sexual assault, battery, and criminal damage to property related to a domestic incident with a live-in girlfriend.

Substantial Relationship Test

- ▶ Recent example – *Cree v. LIRC*, 2021 WI APP 4 (December 9, 2020):
 - Cree, Inc. manufactured and sold lighting products. The job posting for the Applications Specialist position at Cree’s Racine facility described the position in the following manner:
 - [P]erforms a mixture of design, presales and post sales customer support responsibilities. In this role you will design and recommend the installation of appropriate lighting equipment and systems, create lighting site plans and 3D models, use local building code requirements to perform energy calculations, and also interact directly with customers. You will be part of a team, while applying project management skills to drive your own projects to completion.

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Substantial Relationship Test

- ▶ Recent example – *Cree v. LIRC*, 2021 WI APP 4 (December 9, 2020):
 - If hired for this position, Palmer would have been working at an over 600,000 square foot facility with more than 1100 employees, including about 500 women, which facility “includes a manufacturing space, storage areas with racks of parts, plus offices, conference rooms, ‘cubicle farms,’ breakrooms, and the like.”
 - Palmer would have been primarily assigned to work “in the ‘cubicle farm’ area, but would have access to the rest of the facility.”
 - While the facility has security cameras, they are primarily located “in areas where people tend to get injured on the job and at the entries and exits to the facility”; “office areas and conference rooms tend not to be covered by cameras.”

Substantial Relationship Test

- ▶ Recent example – *Cree v. LIRC*, 2021 WI APP 4 (December 9, 2020):
 - Part of the [Applications Specialist] job is to help customers determine where lighting products should go. The position interacts with engineering teams to understand the technical aspects of products, and interacts with clients to create drawings and deliver them to the clients. There is regular customer interaction, typically by telephone or email, although local clients might travel to the facility because the respondent has demonstration rooms. The job also entails occasional travel to a client location in order to do design work. In addition, the job includes some trade show travel, which involves car rental, staying at a hotel, and interacting with clients on the trade show floor. There is no supervision when traveling.

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Substantial Relationship Test

- ▶ Recent example – *Cree v. LIRC*, 2021 WI APP 4 (December 9, 2020):
 - Cree argued that its Racine facility where Palmer would have worked was very large, having many unobserved nooks and crannies, locations that are very loud, and approximately 1100 employees about 500 of whom are women, and the employees have access to almost all areas of the facility, creating significant opportunity with which Palmer could commit additional crimes against persons and property.
 - Cree also claimed that Palmer would have regularly worked with female coworkers whom he could later harm outside of work.

Substantial Relationship Test

- ▶ Recent example – *Cree v. LIRC*, 2021 WI APP 4 (December 9, 2020):
 - Holding:
 - Cree did not meet its burden to establish a substantial relationship between Palmer’s convictions and the circumstances of the job.
 - Palmer’s criminal record demonstrated a “tendenc[y] and inclination[] to behave a certain way in a particular context” — to be physically abusive toward women in a live-in boyfriend/girlfriend relationship.

Substantial Relationship Test

- ▶ Recent example – *Cree v. LIRC*, 2021 WI APP 4 (December 9, 2020):
 - Holding:
 - In light of Palmer’s criminal history, if the question before the court was whether Palmer was likely to again be violent toward another woman with whom he was in a live-in boyfriend/girlfriend relationship, the answer would almost certainly be “yes.”

Substantial Relationship Test

- ▶ Recent example – *Cree v. LIRC*, 2021 WI APP 4 (December 9, 2020):
 - Holding:
 - But that was not the question before the court. The question was whether Cree met its burden to show that Palmer’s past domestic abuse was substantially related to the circumstances of the Applications Specialist job for which he applied.

Substantial Relationship Test

- ▶ Recent example – *Cree v. LIRC*, 2021 WI APP 4 (December 9, 2020):
 - Holding:
 - Cree presented no evidence suggesting Palmer had ever been violent in a circumstance other than a live-in boyfriend/girlfriend relationship or even suggesting he has ever had such a relationship that in any way stemmed from or was related to his employment.
 - Cree presented no evidence suggesting Palmer would be supervising, mentoring or even working closely with female employees.
 - It would require a high degree of speculation and conjecture to conclude that Palmer would develop a live-in boyfriend/girlfriend relationship through the Applications Specialist job, and Palmer’s mere contact with others at the facility and on the job is not substantially related to his domestic violence.

Commonly Asked Questions

- ▶ Can a district discharge a current employee because of a pending criminal charge?
 - No. A district may suspend an employee if the pending criminal charge is substantially related to the circumstances of the particular job or licensed activity.
 - Districts must ensure that the charge is a *criminal* charge. *Gustafson v. C.J.W. Inc.*, ERD Case No. 8650341 (LIRC Mar.21, 1989) (holding that the affirmative defense was not applicable because the pending charge was first offense DUI, which is not a criminal offense).

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Commonly Asked Questions

- ▶ What if an employee has a pending criminal charge, the district conducts its own investigation, and concludes on the basis of that investigation that the employee's conduct warrants discipline or termination?
 - Under these circumstances, it would not be arrest record discrimination to discipline or terminate the employee.
 - This is known as the *Onalaska* defense and requires that knowledge of the employee's arrest not be the sole or primary basis upon which the district forms its belief that the employee engaged in the conduct underlying the arrest.

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Commonly Asked Questions

- ▶ Can a district refuse to hire a person because of a record of arrest that did not lead to conviction?
 - No. A district is not allowed to ask about arrests, other than pending charges.
- ▶ What can a district ask regarding arrest and conviction records?
 - A district may ask whether an applicant has any pending criminal charges or convictions, provided the district makes it clear that these will only be given consideration if the offenses are substantially related to the particular job.
 - A district cannot legally make a rule that it will not employ individuals with a conviction record. Each job and record must be considered individually.

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Commonly Asked Questions

- ▶ Can a district refuse to hire an applicant because of a lengthy record of convictions or conviction for a crime the employer finds upsetting?
 - A district may only refuse to hire a qualified applicant because of a conviction record for an offense that is substantially related to the circumstances of a particular job.
 - Whether the crime is an upsetting one may have nothing to do with whether it is substantially related to a particular job.

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Commonly Asked Questions

- ▶ Can a district refuse to hire or discharge a person with a pending criminal charge or a conviction because other employees or parents don't want the person with a pending charge or conviction to be employed with the district?
 - No. The law makes no provision for this type of problem. The district must establish that the pending charge or conviction record is substantially related to the particular job. Co-worker or parent preference is not, by itself, a valid consideration.

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Commonly Asked Questions

- ▶ How should an applicant answer questions on an application regarding pending charges/conviction record?
 - The district should make it clear that:
 - (1) a conviction record (or pending criminal charge) will not automatically disqualify the applicant from being considered for the position, and
 - (2) failure to completely and accurately respond to the question(s) (i.e., dishonesty) may be grounds for the district to refuse to hire the applicant (and to terminate the applicant/employee if hired).

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Commonly Asked Questions

- ▶ Should a district ask about the circumstances of a conviction during an interview?
 - A district must obtain enough information to determine if the conviction record is substantially related to the job. A district may also ask applicants to provide relevant details concerning a prior conviction on the application.
 - If the district decides there is a substantial relationship, employment may be refused, but the district must be prepared to defend the decision if the applicant believes there is not a substantial relationship and files a complaint.

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Commonly Asked Questions

- ▶ What if a district believes a pending charge or conviction is substantially related, but the employee or applicant believes it is not?
 - In this situation, the employee or applicant may file a complaint, and the Equal Rights Division will determine whether there is a substantial relationship.

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Commonly Asked Questions

- ▶ Would a district violate the law if it refused to hire an applicant and the applicant's conviction record was only a part of the reason for not hiring him or her?
 - Possibly. A conviction record that is not substantially related to that particular job should be given no consideration in the hiring process, unless . . .
 - It was an unpardoned, felony conviction. In that case, the district may consider and rely upon that conviction record in making its determination without violating ***the WFEA***.

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Other Concerns Regarding Conviction Record Inquiries/Use

- ▶ A district's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.
- ▶ Title VII prohibits employment discrimination on the basis of race, color, religion, sex and national origin.

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Other Concerns Regarding Conviction Record Inquiries/Use

- ▶ A Title VII violation may occur if a district treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability).
- ▶ A district's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability).

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Other Concerns Regarding Conviction Record Inquiries/Use

- ▶ Disparate treatment:
 - A district is liable for violating Title VII when the plaintiff demonstrates that it treated him differently because of his race, national origin, or another protected basis.
 - For example, there is Title VII disparate treatment liability where the evidence shows that a district rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record.

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Other Concerns Regarding Conviction Record Inquiries/Use

- ▶ Evidence of disparate treatment may include, for example:
 - Biased statements. Comments by the employer or decisionmaker that are derogatory with respect to the charging party's protected group, or that express group-related stereotypes about criminality, might be evidence that such biases affected the evaluation of the applicant's or employee's criminal record.
 - Inconsistencies in the hiring process. Evidence that the employer requested criminal history information more often for individuals with certain racial or ethnic backgrounds, or gave Whites but not racial minorities the opportunity to explain their criminal history, would support a showing of disparate treatment.

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Other Concerns Regarding Conviction Record Inquiries/Use

- ▶ Disparate impact:
 - A district is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group, and the district fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.
 - With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a district's criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the district does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.

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Other Concerns Regarding Conviction Record Inquiries/Use

- ▶ Two circumstances in which the EEOC believes employers will consistently meet the "job related and consistent with business necessity" defense are as follows:
 - The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); or
 - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

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Other Concerns Regarding Conviction Record Inquiries/Use

- ▶ EEOC's recommended practice:
 - As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.

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Criminal Background Checks

- ▶ School districts are not required by law to perform criminal background checks on prospective or current school district employees. *But see* [§120.13\(14\)](#) and [§48.686](#), Wis. Stats. for childcare law coverage.
- ▶ The Department of Public Instruction (DPI) performs criminal background checks on individuals who seek to be licensed as teachers in the State of Wisconsin and once every 5 years thereafter. [Wisconsin Administrative Code PI 34.041\(6\)](#).

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Criminal Background Checks

- ▶ If an employer conducts its own background check, there is no legal requirement that the employer notify individuals of the fact that it may review and take action based upon an individual's background profile.
- ▶ However, if an employer hires a third-party, consumer reporting agency to provide a consumer report or an investigative consumer report in order to evaluate an applicant for employment or an employee for promotion, reassignment, or retention, the employer must then comply with a federal law known as the Fair Credit Reporting Act ("FCRA").

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Fair Credit Reporting Act

- ▶ The FCRA imposes specific notice and authorization obligations on employers that order background checks from third-party vendors (known as consumer reporting agencies).
 - FCRA regulations apply to all “consumer reports,” a broad term that includes a wide variety of reports such as driving records, criminal records, credit reports, and many other reports procured from a third-party company.
 - Employers who hire third parties to conduct background checks or obtain credit reports regarding job applicants or employees must be aware of the FCRA’s requirements and make sure that, if they hire a company to conduct background checks, the third-party vendor is complying with the FCRA.

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Fair Credit Reporting Act

- ▶ FCRA Requirements Before the Background Check:
 - Districts must provide job applicants with a clear and conspicuous disclosure to the applicant before requesting the credit report. The disclosure must be written in clear, easy to understand terms, and it must be a stand-alone document. The disclosure must include that:
 - A consumer report may be obtained for employment purposes;
 - That the consumer has authorized in writing the procurement of the report by the employer; and,
 - That before an adverse action is taken, the applicant or employee will be provided with a copy of the report, the address and phone number of the credit bureau, and a copy of “A Summary of Consumers Rights” under the FCRA.

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Fair Credit Reporting Act

- ▶ FCRA Requirements Before the Background Check:
 - Before obtaining a credit report from a credit reporting agency, the employer must certify to the credit reporting agency that:
 - The consumer has been informed that a credit report may be obtained for employment purposes;
 - The consumer has authorized the procurement of a credit report;
 - The consumer has been informed about the procedures to be taken in case an adverse action is to be taken based in whole or in part on the credit report; and,
 - The information being obtained will not be used in violation of any federal or state equal opportunity law or regulation.

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Fair Credit Reporting Act

- ▶ FCRA Requirements Before Taking an Adverse Action:
 - Before rejecting a job applicant or taking an adverse action against an employee based on information contained in a background check, the district must provide the applicant/employee:
 - A notice that includes a copy of the consumer report the district relied on to make its decision; and
 - A copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.”

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Fair Credit Reporting Act

- ▶ FCRA Requirements After Taking Adverse Action:
 - When the adverse action is taken, the employer must issue a notice to the applicant/employee that includes:
 - The name, address, and telephone number of the agency/individual that supplied the report;
 - A statement that the agency/individual was not responsible for taking the adverse action and therefore, cannot explain it; and,
 - A notice that the applicant or employee may dispute the accuracy or completeness of any information furnished by the agency/individual, and that the applicant or employee has the right to an additional free credit report if requested within 60 days of receipt of the Adverse Action Notice.

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Additional Resources

- ▶ [WI DWD, Arrest & Conviction Record Discrimination](#)
- ▶ [EEOC Enforcement Guidance, Title VII and Arrest & Conviction Records](#)
- ▶ *WASB Legal Comments:*
 - [Discrimination standards involving arrests and convictions of school district employees](#) (March 2016)
 - [Background checks of school district employees and volunteers](#) (May 2012)



Presenter Bio

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