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60-Second Memo

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Warren E. Buliox, Esq.

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When Your Star Employee Is a Criminal: A Look at Wisconsin's Arrest and Conviction Record Discrimination Law^[1]

By Warren E. Buliox, Esq.

After months of searching and sifting through dozens of applicants, you have finally identified the one person who, by no far stretch of the imagination, is the Michael Jordan of marketing. This guy comes with it all -- a wealth of experience, a proven track record and his very own client base. There's just one small problem . . . you absolutely need him to start this week, but his background check (which given your legitimately high standards) will not come back for another month or so. Faced with the urgency of now, you hire him, Mr. Simpson, as your new Marketing Director.

Several weeks go by and things are going great. Prospects are looking good as you reach markets you never dreamed you would, all because of your new star employee. Then, when you least want it, the background check comes back. Mr. Simpson's educational background, work history and references check out but the company you use to conduct your background checks tells you not to proceed with the hiring in light of his substantial criminal record, which includes a felony for possession of a controlled substance, a few random misdemeanors (namely

traffic related offenses) and a pending arrest for mail fraud.

Given Mr. Simpson's record, especially his pending mail fraud charge, you strongly believe that he is a risk to your business operations and no longer a good fit for your company. Under Wisconsin law, to what extent, if any, can you consider Mr. Simpson's criminal record in making employment-related decisions about him? Where do you go from here?

For starters, never jump on the recommendation of a background check company. While many of these companies are very good in what they do, they likely process hundreds if not thousands of background investigations at any given time and do on occasion make mistakes. Further, some companies do not apply Wisconsin-specific law in their analysis on whether an individual is suitable for a particular position in light of his/her criminal record.

The Wisconsin Fair Employment Act ("WFEA") prohibits discrimination in employment against individuals with arrest and/or conviction records. The law, however, carves out several statutory exceptions to this general prohibition. One that is used often is the "substantial relationship" affirmative defense which provides that an employer may take certain action against an individual who has been arrested or convicted of crime if the circumstances of the crime substantially relate to the circumstances of the individual's position. Depending on whether an arrest or conviction is at issue, the actions an employer can take vary. For arrests, an employer can refuse to hire the person or suspend him/her from employment without pay. For convictions, an employer can refuse to hire or terminate the individual's employment. Again, the crime for both arrests and convictions must be substantially related to the position before the employer can take any action.

In evaluating the "substantially related" question, it is necessary to compare the elements of the offense against the circumstances of the job (working conditions, job responsibilities, etc) and "asses[s] whether the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear in a related context, based on the traits revealed. It is the circumstances which foster criminal activity that are important, e.g. the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person." Goerl v. Appleton Papers, (LIRC 10/05/92). The ultimate question often comes down to whether the position at issue will present the employee/applicant with a greater than usual opportunity, and thus the potential temptation, to re-offend.

For instance, a criminal conviction or arrest for theft will be substantially related to a cashier or teller position in many situations when the work performed is done with little to no supervision. Similarly, sex crimes involving children will typically be substantially related to positions which require individual and isolated contact with minors. On the other hand, a conviction for operating a vehicle while intoxicated has been held to not be substantially related to a caretaker position which required

travel to various housing units when there was no requirement that the employee drive himself between housing units.

At the end of the day, whether a crime is substantially related to a given position requires a case-by-case analysis. Over the last few years, the Wisconsin Equal Rights Division has taken a rather strong position on this and has required the relationship to be quite substantial. In Mr. Simpson's case, there is simply no connection between his convictions (felony drug possession and misdemeanor traffic offenses) and his position as the Marketing Director. Accordingly, no action should be taken against Mr. Simpson in light of the same. His mail fraud arrest, however, may be substantially related to his position if a major responsibility of his position is to solicit and market business through U.S. Mail systems. If it is substantially related, you may suspend him without pay but not terminate his employment. If he is ultimately convicted, you may at that time terminate his employment.

Let's assume, for the sake of conversation, that nothing in Mr. Simpson's criminal background is substantially related to the Marketing Director position. Are you out of options? Not necessarily.

Check to see whether Mr. Simpson conveniently neglected to mention any of his convictions on his employment application (assuming, of course, he was asked to list convictions on his application in the first place). If he has, you can terminate his employment for falsifying his application if you have (or would) discharged others (who do not have criminal records) for the same.

Also, for pending charges, an employer can take action against an employee at anytime if it honestly believes, based upon its own independent investigation, that the individual had in fact engaged in misconduct unbecoming of an employee. Under this approach, the typical legal analysis for arrest record discrimination is completely bypassed since the adverse employment action is taken in response to the underlining misconduct rather than the actual arrest. Please note here that the investigation must truly be independent and cannot be based solely on police reports, criminal complaints, or media reports based on information from the police or prosecutors. Please also note that this approach does not apply to conviction record discrimination cases.

The point in all of this is that you should never make a quick decision when it comes to taking action against someone because of a criminal record, as there are many factors to consider. The scenario and issues discussed above are just the tip of the iceberg. One misstep in this arena can lead to substantial legal liability.

[1]The majority of states have laws in effect placing limits on an employer's consideration of an applicant's or employee's criminal history when making important job-related decisions. Wisconsin

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