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# Wisconsin Legislative Council

## INFORMATION MEMORANDUM

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IM-2024-02

### CONSIDERATION OF CONVICTION OR ARREST RECORD IN OCCUPATIONAL LICENSING

This information memorandum provides an overview of the standards used by the Department of Safety and Professional Services (DSPS) and the credentialing boards<sup>1</sup> in reviewing a person's criminal records history when granting, renewing, or reviewing an occupational credential. Current law generally prohibits discrimination based on an arrest or conviction record, but allows consideration of a person's criminal records history under certain guidelines. Current law also prohibits the use of criminal background checks in reviewing a person's criminal records history, except with respect to certain occupations.

#### CONVICTION RECORD

Wisconsin has established a broad standard that prohibits employment discrimination on the basis of a person's conviction record. Under this standard, DSPS and the credentialing boards are generally prohibited from considering a conviction record in granting, renewing, or reviewing an occupational credential for an individual. [ss. [111.321](#) and [111.322 \(1\)](#), Stats.]

As defined under state law, a conviction record includes a felony, misdemeanor, or other offense, juvenile adjudication, less than honorable discharge, or the imposition of probation, a fine, imprisonment, extended supervision, or parole by any law enforcement or military authority.<sup>2</sup> [s. [111.32 \(3\)](#), Stats.]

However, the law allows DSPS or a credentialing board to refuse, bar, or terminate an occupational credential due to a conviction for a felony, misdemeanor, or other offense if the circumstances of the offense are "substantially related" to the circumstances of the licensed activity. [s. [111.335 \(3\) \(a\)](#), Stats.] In addition to that general standard, the statutes also identify particular situations in which a conviction record **must** be considered, as described below.

#### The Substantial Relationship Test

The substantial relationship test allows DSPS and the credentialing boards to examine the circumstances of an offense. The Wisconsin Supreme Court has stated that a review of the

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<sup>1</sup> DSPS administers many occupational credentials issued in Wisconsin, but jointly administers certain credentials with the state's credentialing boards. The credentialing boards are separate legal entities created by statute, and are responsible for granting credentials and creating and administering an occupation's professional standards. DSPS centralizes administrative functions and provides certain uniform procedures. [ss. [15.405](#), [15.406](#), [440.03](#), and [440.035](#), Stats.]

<sup>2</sup> In some cases, a traffic citation may be considered as a conviction record. [See, for example, *Lefever v. Pioneer Hi Bred Int'l.*, Labor and Industry Review Commission (LIRC) (May 14, 2010), and *Gumbert v. Ken Loesch Oldsmobile-Pontiac-Cadillac-Buick*, LIRC (July 9, 1985), as reported in Wisconsin Department of Workforce Development, [2023 Equal Rights Decision Digest](#), #ERD-9048-P (June 2023).] DSPS considers an expunged conviction as a reviewable "conviction." An applicant should provide all documents required and a court document stating that the conviction was expunged.

circumstances of the offense does not focus on the details of what happened, but rather focuses on the circumstances around the criminal activity, such as opportunity for criminal behavior, reaction to responsibility, and the character traits of the person. [*County of Milwaukee v. LIRC*, 139 Wis. 2d 805, at 824 (1987).]

Applying that analysis means that DSPS and the credentialing boards must look beyond “immaterial identity between circumstances,” such as whether there was an intimate relationship with the victim. DSPS and the credentialing boards must instead examine the circumstances material to fostering criminal activity. The material circumstances for review are the circumstances that exist in the workplace (i.e., in the licensed activity) that present opportunities for recidivism given the character traits revealed by the circumstances of the conviction. [*Cree, Inc. v. LIRC*, 2022 WI 15, ¶ 25.]

For example, in a recent Wisconsin Supreme Court decision analyzing the circumstances of a prior domestic violence conviction, the Court first asked whether the person would have opportunities to recidivate, such as opportunities to isolate victims. The Court next identified the character traits revealed by the elements of a crime of domestic violence, such as a willingness to use violence against others. The Court found that the elements of domestic violence offenses may exhibit multiple character traits, including a willingness to use acts of violence when power and control are threatened, a disregard for the health and safety of others, a lack of respect for bodily autonomy or property of others, and an unwillingness or inability to control anger or other emotions. The Court held that those circumstances substantially related to employment circumstances in that case, where the person would be working both at customer sites and in the employer’s manufacturing and office facility, in situations where power and authority could be threatened and there is a lack of supervision. [*Id.* ¶¶ 26-27, 30, and 37-40.]

In a prior example, the Court found that an armed robbery conviction indicates “personal qualities” that are contradictory to the patience, levelheadedness, and avoidance of the use of force that are essential for employment as a school bus driver. [*Gibson v. Transp. Comm’n*, 106 Wis. 2d 22, 28 (1982).]

As described above, DSPS and the credentialing boards may not refuse to credential a person who has a conviction record, unless the circumstances of the offense substantially relate to the circumstances of the licensed activity. To determine whether the circumstances are substantially related, DSPS or a credentialing board must engage in an individual analysis of the circumstances of the offense.<sup>3</sup>

## **Mandatory Consideration**

In addition to the general standard for consideration of circumstances that may be substantially related to the circumstances of a licensed activity, DSPS and the credentialing boards are required to analyze the circumstances of certain offenses in relation to certain professions.<sup>4</sup>

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<sup>3</sup> When submitting a credentialing application to DSPS, an individual is required to self-report any convictions and pending charges. Applicants for cosmetology and barbering professions may report a conviction history using [DSPS form #2253](#). Applicants for nursing professions, licensed midwives, third-party logistics providers, wholesale distributors, and private security and private detective professions may report a conviction history using [DSPS form #2254](#). Applicants for other health and business professions may report a conviction history using [DSPS form #2252](#).

<sup>4</sup> Under DSPS’s centralized administrative functions, the statutes specify that DSPS is authorized to investigate whether an applicant has been charged with or convicted of a crime. This is part of DSPS’s duties in determining whether an applicant satisfies eligibility requirements for a credential administered by it or a credentialing board. The statutes provide a list of the occupations for which DSPS is authorized to conduct the

When applicable, a profession's governing provisions identify those requirements. These are typically structured as specifying that, subject to the statutory nondiscrimination standards, a person must submit evidence that the person does not have an arrest or conviction record. An analysis under these provisions would utilize the substantial relationship test.

In some lines of work, DSPS and the credentialing boards are further required to refuse, bar, or terminate a credential for certain types of convictions, regardless of the nondiscrimination standards and the substantial relationship test.<sup>5</sup> For example, DSPS may not credential a person to provide private security services if the person has had a felony conviction. [s. [440.26 \(2\) \(c\) 2.](#), Stats.]

## Exception for Certain Juvenile Offenses

The authorization to consider whether the circumstances of an offense substantially relate to the circumstances of a licensed activity does not extend to all types of offenses.

Specifically, DSPS and the credentialing boards are prohibited from considering a juvenile offense, unless the juvenile offense was particularly serious. The statutes identify the specific, serious juvenile offenses that may be considered. These generally include crimes against life or bodily security and sexual crimes involving a child.<sup>6</sup> [s. [111.335 \(1m\) \(b\)](#) and [\(4\) \(b\)](#), Stats.]

For a summary table of professions regulated by DSPS and the credentialing boards that require an offense to be considered, see Legislative Council, [Specific Conviction or Arrest Records Considered in Occupational Licensing](#), IM-2024-03 (April 2024).

## ARREST RECORD AND PENDING CHARGES

State law generally prohibits consideration of an arrest record and prohibits DSPS or a credentialing board from asking a person about an arrest record.<sup>7</sup> [ss. [111.32 \(1\)](#), [111.321](#), [111.322 \(1\)](#), and [111.335 \(2\) \(a\)](#), Stats.]

However, the law allows consideration of certain, specific types of charges that a person may have pending. A “pending” charge means a charge that has already been filed but has not yet been fully resolved. An arrest that has not yet led to a charge may not be considered. [s. [111.335 \(2\) \(b\)](#), Stats.; and see, for example, [Marcin v. Charter Communications LLC](#), LIRC ERD Case No. CR201201053 (July 14, 2015).]

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investigation. For a credential that is granted by a credentialing board, DSPS must forward the results of an investigation and a recommendation on the applicant's credentialing eligibility to the board. If a credentialing board has delegated authority to DSPS, DSPS may grant or deny an application, or approve an application with limitations. [s. [440.03 \(13\) \(a\)](#) and [\(b\)](#), Stats.]

<sup>5</sup> As required by statute, DSPS has a [webpage that lists the specific offenses](#) that may cause it to deny licensure. [s. [111.335 \(4\) \(e\)](#), Stats.]

<sup>6</sup> The serious offenses are: all crimes in ch. 940, Stats., against life and bodily security; sexual assault of a child; repeated sexual assault of the same child; physical abuse of a child; sexual exploitation of a child; trafficking of a child; causing a child to view or listen to sexual activity; incest with a child; child enticement; use of a computer to facilitate a child sex crime; soliciting a child for prostitution; sexual assault of a child placed in substitute care; and sexual assault of a child by a school staff person or person who works or volunteers with children. [s. [111.335 \(1m\) \(b\)](#), Stats.]

<sup>7</sup> A deferred prosecution agreement is an arrest record, rather than a conviction record, as it occurs before any finding of guilt or culpability. [*Vega v. LIRC*, 2022 WI App 21.] A civil, municipal charge is not an arrest and accordingly may be considered without violating the statutory protections for an arrest record. [*Oconomowoc Area Sch. Dist. v. Cota*, Appeal No. 2022AP1158 (Wis. Ct. App. January 10, 2024).]

Specifically, DSPS or a credentialing board may ask for information regarding any pending charges and may review a pending charge for an offense that is particularly serious. The specific, serious offenses that may be considered generally include crimes against life or bodily security and sexual crimes involving a child.<sup>8</sup> DSPS or a credentialing board may also consider a pending charge for certain additional violent crimes against a child. [s. [111.335 \(1m\) \(b\)](#) and [\(d\)](#), [\(2\) \(a\)](#), and [\(4\) \(a\)](#), Stats.]

If a person has a pending charge that is of a type that may be considered, DSPS or a credentialing board may consider whether the circumstances of the pending charge substantially relate to the circumstances of the licensed activity, using the substantial relationship test described above. [s. [111.335 \(4\) \(a\)](#), Stats.]

## **PREDETERMINATION**

Current law allows a person to apply for a “predetermination” regarding a conviction record before submitting an application for a credential.<sup>9</sup> The process allows DSPS or a credentialing board to determine whether a conviction would disqualify the person from being credentialed in the particular field. [s. [111.335 \(4\) \(f\)](#), Stats.]

DSPS or a credentialing board must issue its determination in writing within 30 days after receiving a predetermination application. A determination is binding if the person subsequently applies for the credential, unless relevant information is available that was not available at the time of the predetermination. [s. [111.335 \(4\) \(f\) 2.](#) and [3.](#), Stats.]

## **REHABILITATION**

If DSPS or a credentialing board denies or terminates a credential based on a prior conviction, the agency must state in writing the reasons for denying or terminating the credential. DSPS or the credentialing board must allow the individual an opportunity to show competent evidence of rehabilitation and fitness to engage in the licensed activity.<sup>10</sup> [s. [111.335 \(4\) \(c\)](#) and [\(d\)](#), Stats.]

For evidence of rehabilitation, a person may submit a copy of the person’s release document, proof of completion of probation or extended supervision, or any other evidence to show that one year has passed since incarceration without any subsequent convictions. An applicant may submit additional evidence such as letters of reference from people the person has been in contact with since release. An applicant may also submit a personal statement that provides details such as age at time of offense, length of time since the offense, and mitigating circumstances surrounding the commission of the offense. [s. [111.335 \(4\) \(d\)](#), Stats.]

If a conviction was for an offense that is particularly serious, DSPS and the credentialing boards are not required to provide a written statement of the reasons for denying, barring, or terminating a credential, or provide an opportunity to show evidence of rehabilitation. The specific, serious offenses that do not require a written statement or an opportunity to show

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<sup>8</sup> See footnote 6 for a list of the serious offenses.

<sup>9</sup> Applicants for cosmetology and barbering professions may apply for a predetermination using [DSPS form #3253](#). Applicants for nursing professions, licensed midwives, third-party logistics providers, wholesale distributors, and private security and private detective professions may apply for a predetermination using [DSPS form #3086](#). Applicants for other health and business professions may apply for a predetermination using [DSPS form #3085](#).

<sup>10</sup> Evidence of rehabilitation may also be provided in an applicant’s initial disclosure of a conviction record or pending charge. See footnote 3 for the applicable forms.

rehabilitation generally include crimes against life or bodily security and sexual crimes involving a child.<sup>11</sup> [s. [111.335 \(1m\) \(b\)](#) and [\(4\) \(c\) 2.](#), Stats.]

In practice, DSPS asks applicants to provide evidence of rehabilitation in an initial application.

## BACKGROUND CHECKS

In limited situations, DSPS may obtain a criminal background check from the Wisconsin Department of Justice (DOJ) as part of its analysis.

However, current law prohibits fingerprint background checks unless explicitly authorized.<sup>12</sup>

Under the specific authorizations, DSPS may require a fingerprint background check in only two situations: (1) for certain occupations that are listed in the statutes; or (2) when there is reason to believe that an applicant has failed to accurately describe a conviction record. [ss. [440.03 \(13\) \(c\)](#) and [440.15](#), Stats.; and s. [SPS 4.08](#), Wis. Adm. Code.]

DSPS is prohibited from obtaining a fingerprint background check, except for certain identified occupations.

The statutes authorize DSPS to use a fingerprint background check for the following occupations: audiologist; dentist or dental hygienist; juvenile martial arts instructor; multistate license for registered nurse or practical nurse; compact privilege for occupational therapist or occupational therapy assistant; physical therapist or physical therapist assistant; physician assistant; compact license for physician; private detective or private security personnel; professional counselor; psychologist; real estate appraiser; and speech-language pathologist.<sup>13</sup> [ss. [440.03 \(13\) \(c\)](#) and [440.15](#), Stats.]

A background check report provides a list of arrests and convictions, but does not include supporting documentation for the entries in the report.<sup>14</sup> Accordingly, even in cases in which DSPS is authorized to obtain a fingerprint background check, a person must submit the record's underlying documentation for DSPS or a credentialing board to conduct an analysis as to whether the circumstances of an offense are substantially related to the circumstances of the licensed activity. Examples of underlying documentation that may provide narrative information include copies of police reports, charging documents, and court findings.

This information memorandum was prepared by Margit Kelley, Principal Attorney, on April 5, 2024.

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<sup>11</sup> See footnote 6 for a list of the serious offenses.

<sup>12</sup> DOJ processes two types of background checks: (a) a name-based criminal history search; and (b) a fingerprint-based search. A name-based criminal history search is limited to Wisconsin records, and incurs a \$7 fee per search. A fingerprint-based criminal history search uses national records from the Federal Bureau of Investigation (FBI), and incurs a \$15 fee per search by a governmental agency or nonprofit organization. [s. [165.82 \(1\)](#), Stats.]

<sup>13</sup> Applicants who are required to submit fingerprints must submit an authorization for release of FBI information using [DSPS form #2687](#).

<sup>14</sup> Ordinance violations are included in a person's background check report only if reported by a municipal court. Juvenile adjudication records are not included in a background check report. [s. [938.396 \(2g\)](#), Stats.]