

WISCONSIN LEGISLATIVE COUNCIL STAFF

NCJRS

INFORMATION MEMORANDUM 76-20

DEC 22 1976

Room 147 North
State Capitol
Madison, Wisconsin 53702

by Dan Fernbach
Senior Staff Attorney
August 17, 1976

LEGISLATION IN WISCONSIN RELATING TO THE
CONFIDENTIALITY OF CRIMINAL ARREST AND
CONVICTION RECORDS

INTRODUCTION

Over the past decade, the problem of civil disabilities facing citizens with prior criminal arrest or conviction records has received considerable national attention.

Most people assume that an individual who is arrested for committing a misdemeanor or felony is presumed innocent until convicted in a court of law, and that a person convicted of a crime has "paid his debt to society" upon payment of a fine and/or completion of probation, a term of imprisonment and subsequent period of parole.

However, in reality, an individual with a prior record of a criminal arrest or conviction is often stigmatized for life due to his or her past contact with the criminal justice system. Criminal justice researchers estimate that the national recidivism rate among ex-offenders now exceeds the 70% level, and is due in part to various forms of discrimination and public censure faced by the ex-offender after release from prison. Even an ex-offender with a strong desire to "go straight" is likely to be frustrated by discrimination in employment, occupational licensure, housing, the extension of credit and obtaining insurance, to name a few.

The ultimate key to an ex-offender's successful rehabilitation and reintegration into society is his ability to first obtain and then retain a decent job. However, employment discrimination against persons with prior arrest or conviction records is widespread, and in Wisconsin and many other states, there is no law to prohibit an employer from inquiring on a job application form if the applicant has ever been arrested or convicted for committing a misdemeanor or felony.

As a result, the job applicant with a prior arrest or conviction record is confronted with a serious personal dilemma. If the applicant answers truthfully, he knows that it will probably result in his

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elimination from further consideration by the employer, even though he might otherwise be qualified. On the other hand, if the applicant answers falsely and the employer subsequently learns of a prior arrest or conviction from another source, he is likely to be fired for not telling the truth.

In the latter situation, there have been instances where ex-offenders have been discharged after 6 months and more of satisfactory on-the-job performance. In such instances, some employes have been denied unemployment compensation benefits in Wisconsin because an untruthful answer on an application for employment can be deemed intentional "misconduct connected with...employment" under s. 108.04 (5) of the statutes, thereby making the employe ineligible for benefits.

The adverse effects of civil disabilities and various forms of discrimination upon persons with prior arrest and conviction records has prompted a flurry of legislative activity in recent years in Wisconsin and other states. The bulk of this legislation would require some manner of expungement of prior arrest and/or conviction records or would otherwise guarantee the privacy of such records, while other proposals attack the problem from an anti-discrimination standpoint. At this time, at least 25 states have enacted some type of expungement or privacy legislation relating to criminal arrest and/or conviction records. In addition, 15 states have enacted anti-discrimination legislation to insure that a prior arrest or conviction will not per se preclude a qualified individual from consideration for employment and/or occupational licensing.

At present, Wisconsin law does little to insure the confidentiality of individual arrest and conviction records. However, during the 1975 legislative session, 7 separate pieces of legislation relating to individual criminal arrest and/or conviction records were introduced in both houses of the Wisconsin Legislature. Although all of these bills attempt to provide some additional protection for persons with a prior criminal arrest or conviction, they offer various legislative solutions to the same problem. For example, several bills would require the expungement of certain criminal records. Others would insure that a prior criminal arrest and/or conviction will not be a bar to employment or occupational licensure by prohibiting certain employer inquiries of job applicants and establishing anti-discrimination standards and enforcement procedures.

The remainder of this Information Memorandum focuses on a discussion of present Wisconsin law relating to the confidentiality of criminal records and an analysis of the above-mentioned legislation introduced in the 1975 legislative session.

PRESENT WISCONSIN LAW

As indicated earlier, existing Wisconsin law contains few protections relative to the confidentiality of individual criminal arrest and/or

conviction records. In fact, Wisconsin's only statutory protection for the individual is located in s. 165.84 (1) of the statutes. This subsection provides that:

165.84 COOPERATION IN CRIMINAL IDENTIFICATION, RECORDS AND STATISTICS. (1) All persons in charge of law enforcement agencies shall obtain, or cause to be obtained, the fingerprints in duplicate, according to the fingerprint system of identification established by the director of the F.B.I., full face, profile and full length photographs, and other available identifying data, of each person arrested or taken into custody for an offense of a type designated in s. 165.83 (2) (a), of all persons arrested or taken into custody as fugitives from justice, and fingerprints in duplicate and other identifying data of all unidentified human corpses in their jurisdictions, but photographs need not be taken if it is known that photographs of the type listed, taken within the previous year, are on file at the division. Fingerprints and other identifying data of persons arrested or taken into custody for offenses other than those designated in s. 165.83 (2) (a) may be taken at the discretion of the law enforcement agency concerned. Any person arrested or taken into custody and subsequently released without charge, or cleared of the offense through court proceedings, shall have any fingerprint record taken in connection therewith returned upon request. [Emphasis added]

This provision, enacted by the 1969 Legislature, requires all law enforcement agencies in Wisconsin to return a fingerprint record upon request to any person who is arrested or taken into custody and subsequently released without charge or cleared of the offense. While this statute provides only nominal protection for individuals with criminal arrest records, it is evidence of a legislative intent that an individual who is arrested but not actually convicted for committing a crime should be afforded some degree of privacy in the availability or dissemination of at least certain portions of the record relating to the arrest.

BILLS INTRODUCED IN THE 1975 LEGISLATIVE SESSION

Senate Bill 497, Relating to Removing Unrelated Convictions as a Barrier to Licensure and Public Employment

1975 S.B. 497 was introduced by the Senate Committee on Judiciary and Consumer Affairs and, after public hearing, was recommended for passage by that Committee. After adoption of Senate Amendment 1, the

Senate passed the Bill, as amended, on a vote of 30 to 1. After passage by the Senate, the Bill was recommended for concurrence by the Assembly Judiciary Committee, but it never received final action by the Assembly.

Senate Bill 497, as amended and passed by the Senate, would create new s. 103.90 of the statutes and would prohibit a person with a prior criminal conviction from being barred from gaining public employment at the state or local level or from being denied an occupational or professional license at the state or local level unless the conviction is "directly related" to the job or license or the applicant is a "habitual criminal offender."

The Bill creates several statutory standards to be applied in determining whether the conviction "directly relates" to the job or license sought. Apart from this "relationship" test, the Bill would also require the public agency to consider evidence of rehabilitation in making its decision to hire or grant a license, and factors to be considered are also set forth in the Bill.

Under the Bill's provisions, "habitual criminal offender" is equated with a "repeater" under s. 939.62 (2) of the statutes; that is, a person with 3 misdemeanor convictions or 2 convictions, one of which is a felony, during the previous 5-year period.

The Bill would further require a governmental agency to state its reasons in writing whenever a job or license is denied because of a prior conviction, and appeal procedures are provided in accordance with Ch. 227. Finally, the Bill prohibits the use of arrest records where no conviction results from being used to deny public employment or a license.

Assembly Bill 320, Relating to Expunging Arrest Records of Certain Persons, Inquiries About Arrest Records Made an Unfair Labor Practice, Awarding of Public Contracts, Expunging Conviction Records, Penalties for Criminal Repeaters and Providing Penalties

1975 A.B. 320 was introduced by Representative Barbee. The Assembly Labor Committee conducted a public hearing on the measure, but no further action was taken.

Assembly Bill 320 would require that any photographs, fingerprints and other law enforcement records relating to an arrest may not be made available or distributed to any person or local, state or federal agency (other than the arresting agency) until the arrested person is convicted of the crime. If the person is acquitted or released without conviction, the entire record of the matter shall be returned to the person arrested and expunged from the records of the arresting authority. Violators may be subject to a fine and imprisonment.

The Bill further reduces from 5 years to 3 years the time during which an ex-offender is liable for increased penalties under s. 939.62 of the statutes, Wisconsin's Repeater Law. In addition, the Bill would require the expungement of the criminal records of any person who has not been arrested for or convicted of a crime (other than a motor vehicle offense) during the previous 3 years if such person is not serving a sentence of imprisonment, probation or parole and is not a party to a pending criminal appeal.

Assembly Bill 320 would also establish a new "unfair labor practice" under Ch. 111 of the statutes if an employer inquires about the prior arrests of any applicant for employment. Finally, the state and municipalities would be prohibited from awarding public contracts to any employer in violation of Chapters 101 to 106, Chapter 108 and Chapter 111 of the statutes (statutes regulated by the Department of Industry, Labor and Human Relations and the Wisconsin Employment Relations Commission). Violators are punishable by a \$5 penalty for each day the violation persists and, in addition, the contract may be voided at the option of the state or local unit of government.

Assembly Bill 323, Relating to Disposition of Arrest Records Where There is No Conviction

1975 A.B. 323 was introduced by Representatives Ferrall, Sicula, Barbee and Czerwinski. The Assembly Judiciary Committee conducted a public hearing on the measure, but no further action was taken.

Assembly Bill 323 would require the "criminal arrest record" (fingerprints, photographs, summation of the charge, etc.) of any person arrested but not subsequently convicted to be returned to such person upon recording the disposition of the arrest, and records so returned may not be used in any subsequent criminal proceeding. In addition, the arresting officer would be required to secure the return of arrest records pertaining to the case from any other agency receiving them.

The Bill further restricts the dissemination of criminal arrest records for valid law enforcement purposes only, and dissemination control records must also be kept. Such arrest records may be disseminated for not more than one year after the arrest or until official disposition of the charge, whichever occurs first. However, the subject of the arrest record shall have access to the record upon demand.

The Bill also limits access to official court records pertaining to offenses not resulting in a conviction, and persons aggrieved due to the misuse of criminal arrest records are entitled to sue for civil damages.

Finally, A.B. 323 would create a new discriminatory employment practice under Ch. 111 of the statutes for any employer who inquires whether a job applicant has ever been arrested. However, questions relating to a prior criminal conviction or pending criminal prosecution would be permitted.

Assembly Bill 863, Relating to Employment Application Conviction Information and Providing a Penalty

1975 A.B. 863 was introduced by Representative Thompson and co-sponsored by 47 other representatives and 8 senators. The Assembly Labor Committee conducted a public hearing on the Bill, but no further action was taken.

Assembly Bill 863 would prohibit any employer from making inquiries, either orally or on an application form, into any prior felony convictions of a job applicant for which such applicant has been granted a full, complete and unconditional pardon. Similarly, no employer may discharge or otherwise discriminate against an employe who has been granted a full pardon for a prior felony conviction.

The Bill further authorizes the Department of Industry, Labor and Human Relations [DILHR] to enforce the above prohibitions, and employers who violate the law are subject to a civil forfeiture of \$10 to \$100.

Assembly Bill 928, Relating to Discrimination in Employment on the Basis of Arrest and Conviction Records

1975 A.B. 928 was introduced by Representatives Tropman, Flintrop, Metz, Barbee and Clarenbach. After a public hearing on the measure, the Assembly Labor Committee introduced Assembly Substitute Amendment 1, to A.B. 928, and recommended the Substitute Amendment for passage on a vote of 6 to 1. Although the measure was scheduled for action on the Assembly floor, no further action was taken due to the lateness of the legislative session.

Assembly Bill 928, as amended by Assembly Substitute Amendment 1, would amend Wisconsin's Fair Employment Law (ss. 111.31 to 111.37, Wis. Stats.), as well as a number of occupational and professional licensing statutes, to prohibit discrimination on the basis of a prior arrest or conviction record by any employer, labor organization, licensing agency or employment agency. The prohibition would not apply to convictions which are "substantially related" to an individual's ability to perform the duties of a particular job or licensed activity.

Under the provisions of the Bill, there would be a basic distinction between "arrest records" and "conviction records." Arrest records would include information indicating that a person has been arrested,

taken into custody, charged, indicted or tried for an alleged offense, but has not been convicted. The Bill would prohibit any employment or licensing discrimination based on arrest records, including inquiries of job applicants or others regarding prior arrests.

On the other hand, the Bill's provisions regarding conviction records do not per se prohibit the use of information indicating that a person has been convicted of a crime, placed on probation, fined, imprisoned or paroled. Employers and licensing agencies would be permitted to request such information from applicants or other sources, and would be allowed to deny or terminate employment or licensing on the basis of a criminal conviction. However, such action would be permitted only when the offense for which the applicant was convicted is substantially related to the person's ability to adequately perform the duties of the particular job or licensed activity.

Assembly Bill 1145, Relating to Creating a Criminal Records Information Control Commission and a Security and Privacy Council, Granting Rulemaking Authority and Providing Penalties

1975 A.B. 1145 was introduced by Representative Barbee. The Bill was referred to the Assembly Judiciary Committee, but no further action was taken on the proposal.

Assembly Bill 1145 would create within the Department of Administration a 3-member Criminal Offender Records Control Commission to control throughout the state the collection, storage, dissemination and usage of criminal offender record information. Such information would include all records and data compiled by criminal justice agencies to identify criminal offenders, as well as summaries of arrests, disposition of charges, sentences, rehabilitation and release information on each offender.

The 3 members of the Commission would be nominated by the Governor and appointed with the advice and consent of the Senate, and would serve for staggered 6-year terms.

The Bill also creates a 7-member Security and Privacy Council to conduct a continuing study of individual privacy and system security in connection with the collection, storage, dissemination and use of criminal offender record information and to make recommendations to the Commission. Council members would serve staggered 3-year terms.

The Criminal Offender Records Control Commission, as part of its regulatory functions, may promulgate rules and conduct inquiries and investigations. The Commission may compel any agency which receives or maintains criminal offender records to produce such data for inspection.

Specifically, the Commission would be responsible for determining which persons or agencies will be entitled to have access to, receive, collect or utilize criminal offender records for law enforcement, research or any other purpose. In addition, the Commission would have responsibility for developing a continuing program of data auditing and verification to assure the accuracy and completeness of criminal offender records, and shall promulgate rules regarding the purging of records when appropriate and to assure the security of criminal offender records information from unauthorized disclosures.

Assembly Bill 1145 guarantees an individual the right to inspect criminal offender information located in the state which pertains to him, and such persons may request any agency to purge, modify or supplement any incomplete or inaccurate information. In this regard, the individual may have an adverse decision of the agency reviewed by the Commission. In addition, agencies maintaining individual records must prescribe reasonable hours and conditions for the inspection of such records.

Finally, the Bill creates criminal penalties for violations of its provisions or administrative rules promulgated thereunder. Intentional violations are punishable by a fine of not more than \$5,000, imprisonment up to 2 years or both. Other violations are punishable by a fine not exceeding \$100, a maximum of 10 days in jail or both. In addition, aggrieved parties may seek civil damages or other equitable relief, and costs, reasonable attorneys' fees and exemplary damages not exceeding \$1,000 may be awarded for intentional violations.

Assembly Bill 1383, Relating to Employment Application Arrest and Conviction Information and Providing a Penalty

1975 A.B. 1383 was introduced by the Assembly Labor Committee which recommended the Bill for passage on a vote of 7 to 3. No further action was taken on the measure.

Assembly Bill 1383 is nearly identical to 1975 A.B. 863, described above. Assembly Bill 863 would prohibit employer inquiries into prior felony convictions of job applicants after a full pardon is granted and further prohibits an employer from discharging or otherwise discriminating against ex-felons who have been pardoned.

Assembly Bill 1383 contains identical provisions but, in addition, would also prohibit an employer from inquiring about prior criminal arrests not resulting in a conviction and further prohibits other forms of discrimination against employees who have been arrested for committing a crime but not convicted.