



HR Heads-up

Update on the Scope of Arrest Record Protections

STORM B. LARSON, DOUGLAS E. WITTE, BRIAN P. GOODMAN | 08.27.25

The law on arrest and conviction record discrimination under the Wisconsin Fair Employment Act (WFEA) can be tricky for employers to navigate. The restrictions on how employers can use an individual's past arrest/conviction history apply regardless of whether the arrest/conviction was for a felony, misdemeanor, or other offense. This is primarily because employers have different restrictions depending on the employee's current stage in the court proceedings. A recent decision from the Labor and Industry Review Commission (LIRC) helps clarify this important area of the law.

BRIEF PRIMER ON ARREST AND CONVICTION RECORD RULES

The WFEA addresses three categories of activity, and each has its own set of rules.

- **Convictions.** For a *conviction*, an employer can terminate, suspend, or refuse to hire an individual *only if* the conviction is *substantially related to the job in question*. Often, this requires employers to consider the nature of the crime, the job description, and how recent the conviction(s) was (among other relevant factors).¹
- **Arrests.** For an *arrest*, employers cannot take any employment action against an employee or applicant *unless* the employer conducts its own investigation and is legitimately satisfied based on that investigation that the individual has engaged in misconduct. An independent investigation requires the employer to do more than just review the police report or consult with law enforcement. At a minimum, an interview of the individual is usually required.

- **Pending Charges.** A pending charge is a specific type of arrest record. If charges are filed following an arrest and those charges are still pending (e.g., have not yet resulted in a conviction), an employer can *only suspend* an existing employee or *refuse to hire* an applicant if the pending charge is *substantially related to the job in question*. An employer *cannot terminate* an existing employee based on a pending charge, even if there is a substantial relationship between the pending charge and the job.

These rules are nuanced and may require consultation with experienced legal counsel where an individual's exact status is unclear. With that primer in mind, we can review the recent LIRC decision, which helps clarify what qualifies as part of an "arrest record."

FACTS OF THE CASE

In *Schultz v. Safelite Fulfillment, Inc.*, Jacob Schultz was hired in December 2018 by Safelite as an auto glass technician. When Schultz was hired, Safelite followed its standard procedure and ran a criminal background check on him. Schultz's check came back clean. In addition to running background checks at the time of hire, Safelite also periodically ran background checks on existing employees to stay updated on their criminal records.

In January 2019, approximately one month after he started working for Safelite, Schultz had a domestic dispute with his girlfriend. As a result, the police arrested him, and he spent the night in jail. From jail, Schultz called a coworker to inform him that he would not be at work the following day. After being released, Schultz informed his supervisor that he had been arrested and that he had hired an attorney. Importantly, Schultz never admitted wrongdoing to anyone at Safelite.

Prosecutors eventually charged Schultz with five crimes: one felony count of strangulation; two counts of misdemeanor disorderly conduct; and two counts of misdemeanor battery. In November 2019, Schultz and the prosecutor reached an agreement on how his charges would proceed. They entered a "Deferred Acceptance of a Guilty Plea Agreement" (DGAP Agreement), which meant that Schultz would plead guilty to some of the crimes in exchange for the court holding off on convicting him for those crimes if he met certain conditions. Those conditions required Schultz to complete community service, complete a domestic abuse program, pay a fine, and not commit any additional crimes. If Schultz violated these conditions, the court would enter a judgment of conviction, and Schultz would be formally convicted of the crimes. Because Schultz was never

convicted of any crime under the terms of his agreement, these charges all remained part of his “arrest record.”

In March 2020, a risk management employee ran a background check on Schultz, which revealed his DGAP Agreement and guilty pleas. Based on this report, Safelite assumed that Schultz had been convicted of violent crimes and based on Safelite’s criteria, he would not have been eligible for hire based on these convictions. Therefore, Safelite decided Schultz could not remain employed, and he was terminated. Safelite’s assumption was wrong because Schultz had not actually been convicted of anything; the court had explicitly held off on entering judgment and sentencing him. Therefore, Safelite should have followed the rules regarding “pending charges” rather than “conviction record.”

THE DECISION & KEY TAKEAWAYS

Schultz sued Safelite for arrest record discrimination, and he won. LIRC decided that Safelite’s assumption that Schultz had been convicted was incorrect. Instead, Safelite should have followed the procedures applicable to an individual’s pending charges since Schultz had never actually been convicted of any crime. LIRC made it clear that employers may only rely upon the substantial relationship test to terminate when a current employee has either actually been convicted of a crime or when there is a pending charge against the individual.

This case is an important reminder for employers to consult early on with legal counsel when there is a concern with an individual’s criminal history. Background checks and online court records can be misleading, and technicalities, which are not always evident in these resources, can make a huge difference in how to proceed with a particular individual. The use of a vendor to conduct a background check also implicates the authorization and notice requirements of the federal Fair Credit Reporting Act.

We encourage employers to reach out to a member of the Boardman Clark [Labor and Employment Practice Group](#) with questions.

[1] School districts can refuse to hire anyone who was convicted of a felony, without needing to apply the substantial relationship test. Other exceptions might also apply for specific employers or for specific job positions.

Disclaimer: This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.

Authors

Storm B. Larson
(608) 286-7207

Douglas E. Witte
(608) 283-7529

Brian P. Goodman
(608) 283-1722