

# EMPLOYMENT LAW SUMMARY

## Wisconsin Fair Employment Laws - Overview



*Because You're Different*

Most employees are protected from workplace discrimination under federal laws, such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). In Wisconsin, state law provides similar (though not identical) protections for employees in the state. Wisconsin's fair employment standards are governed by the **Wisconsin Fair Employment Act (WFEA)**. Virtually all Wisconsin employers are subject to this law.

### WFEA OVERVIEW

The purposes of the WFEA are to stop unfair discrimination in employment and to encourage employers to evaluate employees and applicants based on individual qualifications, rather than on membership in a particular class.

The WFEA prohibits employers from discriminating against individuals based on specific categories. These categories are outlined in the table below.

WFEA Protected Categories			
Age	Disability	Ancestry	Use or nonuse of lawful products off the employer's premises during nonworking hours
Race	Marital Status	Sexual Orientation	Declining to attend a meeting or participate in any communication about religious or political matters
Creed	Sex	Arrest or Conviction Record	
Color	National Origin	Military Service	

### PROHIBITED PRACTICES

Employer actions that are prohibited if based on any of the above categories include:

- Refusing to hire an applicant;
- Terminating an employee; and
- Taking any action that affects an individual's promotion opportunities, compensation, or terms, conditions or privileges of employment.

The WFEA also prohibits employers from:

- Requiring employees or applicants to submit to lie detector tests;
- Printing or circulating any statement, advertisement or publication, or using an employment application that implies or expresses any limitation or specification regarding any of the WFEA's protected categories; and
- Retaliating against an employee or applicant for opposing a WFEA-prohibited practice, filing a complaint under the WFEA, or otherwise participating in the enforcement of the WFEA.

## AGE DISCRIMINATION

Employers may not discriminate against employees who are age 40 years or older based on their age. However, this does not necessarily mean that age can never be a factor in an employer's decisions affecting an individual who is age 40 or older. Specifically, the law allows employers to:

- Terminate an employee who is physically or otherwise unable to perform his or her duties;
- Implement a retirement plan or system, as long as it is not a maneuver to evade the WFEA;
- Apply varying insurance coverage according to employees' ages;
- Use an age distinction when hiring an individual to a position where the knowledge and experience to be gained is required for future advancement to a managerial or executive position; or
- Use an age distinction with respect to employment involving physical danger or hazard, including certain employment in law enforcement or firefighting.

Employers should be especially careful about following the WFEA's age provisions when they are creating a job posting. As an example, advertisements that call for a "young college graduate" would be considered unlawful under the WFEA. Seeking an employee with a particular level of experience (for example, "0-3 years of experience"), on the other hand, is permitted.

## ARREST / CONVICTION RECORD DISCRIMINATION

With certain exceptions, the WFEA generally prohibits employers from firing an employee or refusing to hire an applicant based on the individual's arrest or conviction records.

### ARREST RECORDS

An arrest record is broadly defined to include any information indicating that an individual has been:

- Questioned;
- Apprehended;
- Taken into custody or detention;
- Held for investigation;
- Arrested; or
- Charged with, indicted, or tried for any felony, misdemeanor, or other offense.

Asking for or about arrest records of employees or applicants is almost always prohibited. However, asking for information about any pending criminal charges is usually permitted.

When an employer obtains information about charges that are pending against an existing employee, the employer may use it to suspend (but not terminate) the employee until the charges are settled, but only if the circumstances of the pending charges are substantially related to the circumstances of the employee's job. Similarly, an employer that obtains information about an applicant's pending charges may not refuse to hire the applicant based on the charges unless the circumstances of the charges substantially relate to the job the applicant seeks.

### CONVICTION RECORDS

A conviction record includes any information indicating that an individual has been:

- Convicted of any felony, misdemeanor or other offense;
- Adjudicated delinquent by any law enforcement or military authority;
- Less than honorably discharged from the military; or
- Placed on probation or extended supervision, fined, imprisoned or paroled.

The WFEA does not restrict employers' ability to obtain applicants or employees' conviction records. However, employers may not terminate an employee nor refuse to hire an applicant based on a conviction record unless the circumstances of the conviction substantially relate to the circumstances of the job.

## SUBSTANTIAL RELATION

Because the WFEA does not specifically define the term “substantially related,” employers may have difficulty determining whether pending charges or conviction records are substantially related to a particular job. The law indicates that the circumstances of a pending charge or conviction must have an actual relationship to the duties of the job that are being performed or sought to be performed. For example, it would be unlawful to refuse to hire an applicant for a garbage collection position based solely on the fact that the individual has a conviction record for failing to pay child support.

## CREED DISCRIMINATION

The WFEA defines “creed” as a system of religious beliefs, including moral or ethical beliefs about right and wrong, which are sincerely held with the strength of traditional religious views. In general, employers must reasonably accommodate an employee or applicant’s religious observance or practice. An employer may qualify for an exception to this requirement if it can demonstrate that an accommodation would pose an undue hardship on its program, enterprise or business.

The WFEA also provides a narrow exception that applies only for private religious organizations. These employers are allowed to give preference to an applicant or employee who is a member of the same or a similar religious denomination. Similarly, a fraternal organization may give preference to an employee or applicant who is a member of the fraternal organization.

## DISABILITY DISCRIMINATION

The WFEA defines an individual with a disability as a person who:

- Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- Has a record of such impairment; or
- Is perceived as having such an impairment.

Prohibited employment discrimination based on disability includes, but is not limited to:

- Contributing a lesser amount to an employee’s fringe benefits (including life or disability insurance coverage) because of his or her disability; or
- Refusing to reasonably accommodate an employee or applicant’s disability, unless the employer can demonstrate that the accommodation would pose a hardship on the employer’s program, enterprise or business.

It is **not** unlawful to base employment decisions on an individual’s disability if the disability is reasonably related to the individual’s ability to adequately undertake the job-related responsibilities of the employment. When evaluating whether an individual with a disability can adequately undertake the job-related responsibilities of a particular job, an employer may consider certain factors, such as the present and future safety of the individual, other employees or the general public. However, this evaluation must always be made on an individualized, case-by-case basis. Employers are prohibited from establishing general rules against employing individuals with disabilities or against employing any particular class of individuals with disabilities.

## MARITAL STATUS DISCRIMINATION

Employers may not discriminate against an applicant or employee based on whether the individual is married. However, employers may prohibit an individual from directly supervising or being directly supervised by his or her spouse.

## MILITARY SERVICE DISCRIMINATION

Employers may not discriminate against employees or applicants based on their membership in or their obligation to perform service for:

- The U.S. armed forces;
- The state defense force;
- The national guard of any state; or
- Any reserve component of the U.S. armed forces.

It is **not** unlawful for an employer to terminate or refuse to hire an individual based on the fact that the individual has been discharged from military service, as long as the following conditions are met:

- The individual’s discharge was for bad conduct, dishonorable, anything other than honorable or under an entry-level separation; and
- The circumstances of the discharge or separation are substantially related to the circumstances of the particular job.

## SEX DISCRIMINATION

The WFEA's prohibition against discrimination based on sex includes several types of employer actions or decisions. These include:

- Paying or treating one individual differently from how another individual of the opposite sex is paid or treated, where both individuals perform equal or substantially similar work and sex is not a bona fide occupational qualification;
- Engaging in or allowing sexual harassment;
- Making any employment decisions affecting a woman based on her pregnancy, childbirth or related medical condition;
- Making any employment decisions affecting an individual based on his or her sexual orientation.

## **GENDER-BASED DISCRIMINATION**

Employers must provide equal compensation and other privileges of employment to employees of opposite genders who perform substantially equal or similar work. However, employers may base certain employment decisions on an individual's gender if sex is a bona fide occupational qualification. To qualify for this exception, an employer must prove that:

- Members of one sex are physically incapable of performing the essential duties required by a job; or
- The essence of the employer's business operation would be undermined if employees were not hired exclusively from one sex.

## **SEXUAL HARASSMENT**

Under the WFEA, prohibited sexual harassment includes:

- Unwelcome verbal or physical conduct directed at another individual because of that individual's gender;
- Implicitly or explicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment;
- Making or permitting acquiescence in, submission to or rejection of sexual harassment any part of the basis for any employment decision affecting an employee (except where the employment decision is a disciplinary action against an employee for engaging in sexual harassment in violation of the WFEA);
- Permitting sexual harassment to substantially interfere with an employee's work performance; and
- Permitting sexual harassment to create an intimidating, hostile or offensive work environment.

An employer may be held liable for any act of unlawful sexual harassment, whether committed by the employer itself or by one of its employees, if:

- The act occurs while the complaining employee is at his or her place of employment or is performing duties relating to his or her employment;
- The complaining employee informs the employer of the act; and
- The employer fails to take appropriate action within a reasonable time.

## **PREGNANCY / CHILDBIRTH-RELATED DISCRIMINATION**

Employers may not discriminate against women based on pregnancy, childbirth, maternity leave or any related medical conditions. Pregnancy discrimination includes asking an applicant whether she is pregnant and refusing to hire an applicant because she is pregnant.

## **SEXUAL ORIENTATION DISCRIMINATION**

Employers may not base any employment decisions on the basis of an individual's sexual orientation. The WFEA defines "sexual orientation" as:

- Having a preference for heterosexuality, homosexuality or bisexuality;
- Having a history of such a preference; or
- Being identified with such a preference.

## **POLITICAL OR RELIGIOUS OPINION DISCRIMINATION**

WFEA prohibits employers from forcing their employees to engage in political or religious communication or activities. Specifically, an employer may not require its employees to:

- Attend any employer-sponsored meeting that has a primary purpose of communicating the employer's opinion on political or religious matters; or

- Engage in any communication about political or religious matters with the employer or its agents.

An exception to this may apply if an employer is required by law to communicate information about religious matters or political matters. In these cases, employers may not communicate any political or religious information beyond what is required under the applicable law.

In addition, certain types of employers may be partially exempt from these prohibitions. These include:

- Non-profit religious associations;
- Organizations or corporations that are primarily owned or controlled by a non-profit religious association; and
- Political organizations, such as political parties or any other organizations that engage, in substantial part, in political activities.

## **OTHER PROHIBITIONS**

The WFEA protects individuals from discrimination based on their use of lawful products (such as cigarettes) outside of the workplace. It also protects employees against an employer's improper use of genetic testing or polygraph testing. For more information on these and other fair employment topics, visit the DWD website or contact Heffernan Insurance Brokers.

## **MORE INFORMATION**

Contact Heffernan Insurance Brokers for more information on fair employment laws in Wisconsin.

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