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# Fair Employment Law Basics

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# Wisconsin Working

- I. The Legal Framework
- II. Who is protected?
- III. What actions are illegal?
- IV. What actions are not illegal, but seem like they should be?

- V. Specific anti-discrimination rules
- VI. How does the investigation process work?



### **Government Agencies**

Equal Employment Opportunity Commission (EEOC)

State Fair Employment Practice Agencies (FEPAs)

Local Agencies (e.g. Madison Equal Opportunity Commission)



### Legal Framework

- Sec. 111.31 111.395, Wisconsin Statutes
- Ch. DWD 218, Wis. Administrative Code
- Companion federal laws
  - Title VII, Civil Rights Act of 1964
  - Americans with Disabilities Act (ADA)
  - Age Discrimination in Employment Act (ADEA)
  - Equal Pay Act (EPA)



### Legislative Intent





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### Legislative Intent

• Unlawful discrimination causes grave injury because it denies a person's right to a just and decent living standard.

• Employers should evaluate people based on their individual qualifications.

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• The law must be broadly construed to ensure fair employment practices.



### **Protected Classes**

f State & Federal Laws s State Law

f Race	1945	f Disability	1965
f Color	1945	s Arrest	1977
f Creed	1945	s Conviction	1977
f Ancestry	1945	s Sex'l Orientation	1982
f Nat'l Origin	1945	s Marital Status	1982
f Age	1959	s Military Service	1987
f Sex	1961	s Lawful Product	1992



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### **Actions Prohibited**

*s. 111.322* 





### **Actions Prohibited**

### s. 111.322

- To refuse to hire or promote, to terminate, to discipline or compensate differently, or permit different terms, conditions or privileges based on a person's protected class.
- To print or circulate an ad, publication or application or make any inquiry that **implies or expresses** unlawful discrimination.
- To **retaliate** against a person who opposes discrimination, complains or assists in a complaint.



### "Disparate Impact" Claims

- Facially neutral policies that have a **disparate impact** on a protected class.
  - Facially neutral means that a neutral observer can look at the policy and it seems fair because it doesn't mention race, sex, etc.
  - BUT such policies affect a protected class much more than other classes.

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• These cases proved by statistics.



### Fair & Legal Hiring

• Law applies in all hiring decisions:

RecruitingApplication FormsAdvertisingInterviews

- *Method* used in the above is up to employer, but the process must not be discriminatory.
- Legal focus is on *results does it tend to eliminate* protected categories without legal basis?





### Are you at <u>least</u> 18 years old?

Avoid questions that reveal age, such as:

- Date of birth
- Date of high school graduation





**Disability** 

### Have you ever filed a workers compensation claim?



**National Origin** 

### Are you a U.S. citizen?



### Sex

- Any question that elicits an applicant 's gender
- Bona fide Occupational Qualification (BFOQ)
- Gender specific questions (i.e. childcare)



### **Arrest & Conviction Record**

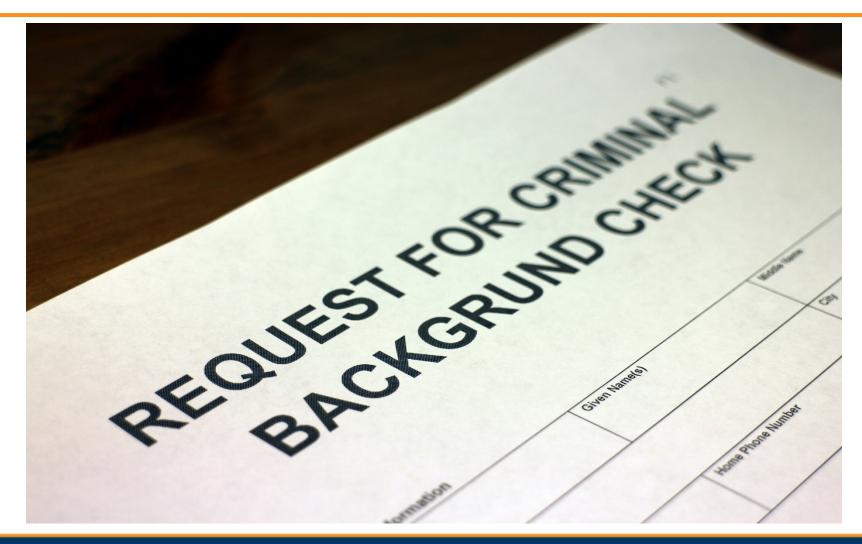
It is acceptable to ask:

- Do you currently have any pending charges?
- Have you ever been convicted of a crime?





### **Arrest & Conviction Record**





# Arrest & Conviction Record

- There are about 2.2 million people in state or federal jails and prisons.
- One out of nine people in prison is serving a life sentence.
- Over half of prisoners in state prisons are serving time for nonviolent offenses.
- Immigration offenses account for over 40 percent of federal criminal prosecutions and 30 percent of new prisoners.

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• People of color are disproportionately represented in correctional systems.



# Arrest & Conviction Record

- Law balances needs of society & employer by creating "substantial relationship" test.
- May inquire about pending arrest and past convictions but not past arrests.
- May reject (or suspend) if job provides context in which person would have "significant opportunity to re -offend."

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• Actions motivated by "underlying conduct".



# Who is a person with a disability?

Person with a physical or mental impairment that

ADA: substantially limits one or more major life activities

WIS: makes achievement unusually difficult or limits the capacity to work

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ADA: covers disability by "association"



### **Reasonable Accommodation**

Changes to a job, the environment or how things are done that enables a person with a disability to enjoy work opportunities equal to similarly situated employees.



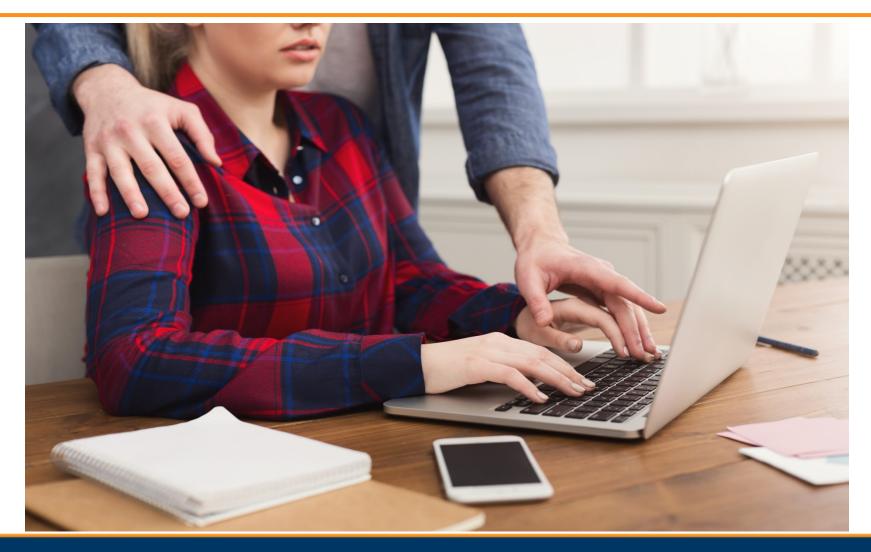
### **Pregnancy Accommodations**

- There is no requirement that pregnancies be accommodated.
- However, pregnant employees must receive the same treatment as other employees with temporary medical conditions.





### Sexual Harassment





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### **Sexual Harassment**

"Unwelcome ".....

- Sexual advances
- Requests for sexual favors
- Sexual physical contact
- Sexual verbal or physical conduct



### Harassment "because of"

• Severe or pervasive conduct that creates a hostile work environment because of protected characteristic.

• The occasional use of slurs may not rise to a violation of law.

• Still must be a basis for employer liability.





### **Religion or Creed**

- Defined as a system of sincerely held religious or ethical beliefs, but not political beliefs.
- Be careful judging the sincerity of religious belief.
- Religious employers (like churches, religious charities) may prefer members of own faith.



### Retaliation

- In 2018, Retaliation claims under WFEL were almost 20% of the cases filed.
- You can be liable for retaliation even if there was no underlying discrimination.
- Three elements of a retaliation complaint:
  - Protected Activity
  - Adverse Action
  - Causal Connection





# What's not protected?

• General bullying or harassment by coworkers or supervisors.

• Changes to schedule without reason or notice.

• Unequal treatment due to family, personal, romantic, or other relationship.

• Termination for any reason that is not explicitly unlawful.



# **ERD Complaint Process**

- Filed within 300 days
- Investigator assigned
- Early settlement explored
- Finding: Probable or No Probable cause
- If PC, case set for hearing
- If NPC, case is dismissed



# **Burden of Proof and Production**

- Complainant must show prima facie case
  - Is protected and qualified
  - Adverse employment action occurred
  - Person hired is <u>not</u> in the same class, or
  - Others were treated more favorably
- Employer must show legitimate , non-discriminatory reason for its action.

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• If done, complainant must show **pretext**.



### Remedies for Complainants

### <u>Wisconsin</u>

"Make Whole"

- □ Reinstatement
- □ Remedial Orders
- $\Box$  Back Pay + Interest
- □ Attorney Fees

<u>Federal</u>: additional remedies include compensatory and punitive damages.



# Questions?

Equal Rights Division (608) 266-6860 <u>erinfo@dwd.wi.gov</u> <u>dwd.wisconsin.gov/ er</u>