



WISCONSIN



DWD

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





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





Protected Classes

f State & Federal Laws
s State Law

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





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.
 - These cases proved by statistics.



Fair Hiring

Fair & Legal Hiring

- Law applies in all hiring decisions:

Recruiting

Application Forms

Advertising

Interviews

- **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?*



Fair Hiring

Age

Are you at least 18 years old?

Avoid questions that reveal age, such as:

- Date of birth
- Date of high school graduation



Fair Hiring

Disability

Have you ever filed a workers compensation claim?



Fair Hiring

National Origin

Are you a U.S. citizen?



Fair Hiring

Sex

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



Fair Hiring

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.
- 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. ”
- 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

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





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 not in the same class , or*
 - *Others were treated more favorably*
- Employer must show **legitimate** , non-discriminatory reason for its action.
- If done, complainant must show **pretext.**



Remedies for Complainants

Wisconsin

“Make Whole ”

- ❑ Reinstatement
- ❑ Remedial Orders
- ❑ Back Pay + Interest
- ❑ Attorney Fees

Federal : additional remedies include compensatory and punitive damages.



Questions?

Equal Rights Division

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