Arrest Record Discrimination Includes Protections for Records of Civil Forfeitures

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Employers are significantly restricted under the Wisconsin Fair Employment Act (WFEA) in how they may use an individual's "arrest record" to make an employment decision. The WFEA defines "arrest record" expansively as: "information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority."

Recently, in *Oconomowoc Area School District v. Cota*, the Wisconsin Supreme Court ruled that arrest record discrimination covers arrest records related to non-criminal (e.g., civil forfeitures punishable only by fines) as well as criminal offenses. This decision overruled a lower court's ruling which held that an individual only received "arrest record" protections related to criminal activity. Moving forward, employers must comply with the Wisconsin Supreme Court's decision. Thus, an employer could not refuse employment to an individual solely because they were arrested for a non-criminal offense, such as a first-offense OWI, which is a non-criminal offense in Wisconsin (unless the circumstances of the crime or pending charge are substantially related to the circumstances of the job to be performed).

Importantly, even after this decision, employers are still permitted to refuse employment or to terminate an employee who was arrested for an offense if the employer conducted its own independent investigation of the circumstances of the arrest and if the employer is genuinely satisfied as a result of that investigation that the employee committed the act for which they were arrested and that such an act violates the employer's policies or expectations. In this case, the Employer did not conclude that the employees committed the offense at issue and only came to that conclusion following conversations with law enforcement and the district attorney's office. The key factor for this exception to apply is that the investigation must be truly independent and cannot merely rely upon a police report or an arresting officer's assurance that the individual will be found guilty. At a minimum, an employer would need to interview the employee or other witnesses to determine whether the misconduct occurred.

In this case, the employer should have acted right away based on its own investigation, rather than wait for the police to complete their investigation and rely on some of the opinions of the police and DA. The district's instincts in wanting some confirmation of what they already suspected about the theft of the property while normally would seem to be sound reasoning, in this case caused the Court to determine they improperly relied on the "arrest" rather than their own investigation.

Additionally, in the public sector, employers should provide employees with a *Garrity* Warning before interviewing an employee regarding potential criminal matters, which informs employees of their duty to cooperate with their employer's investigation but that the information provided to the employer cannot be shared with law enforcement.

Arrest record discrimination is a complex area of law and contains many nuances. We encourage employers to reach out to a member of the Boardman Clark Labor & Employment Practice Group with questions.

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