
Chapter 4 – FINDINGS, CONVICTIONS AND LIMITATIONS

4.1.0 FINDINGS AND CONVICTIONS**s.50.065(4m)(b)**

Both entities and BQA must closely examine the results of the caregiver background checks for criminal arrests and convictions or findings of misconduct by a governmental agency. Entities must make employment decisions and BQA must make licensing and residency decisions based on the results of the background checks in accordance with the requirements and prohibitions in the law.

A finding by a governmental agency or a conviction record, depending on the nature of the conviction, may result in:

- A bar to employment as a caregiver;
- Denial, revocation or suspension of a license, certificate of approval or registration of a person to operate an entity; or
- Denial of residency of a nonclient resident.

4.1.1 Offenses Affecting Caregiver Eligibility

The offenses listed in the Offenses List (see [Appendix III](#)) prohibit:

- Employment as a caregiver in BQA regulated entities;
 - Licensure, certification, or registration of a person to operate an entity;
 - Residence of a nonclient resident,
- unless the person is approved through the Rehabilitation Review process (see [Chapter 5](#)).

4.1.2 Other Convictions**s.50.065(5m)**

Only those crimes and findings by governmental agencies on the Offenses List (see [Appendix III](#)) and comparable crimes and offenses from other states or other U.S. jurisdictions are bars to employment, regulatory approval and nonclient residency.

Any conviction not on the Offenses List may be determined to be substantially related to the duties or the circumstances of the job. This may result in:

- Refusal to hire a candidate for that reason, although an employer is not required to bar the person from employment;
- Denial, revocation or suspension of a license, certificate or approval or registration; or
- Denial of residency of a nonclient resident.

Chapter 4 – FINDINGS, CONVICTIONS AND LIMITATIONS**4.1.3 Convictions in Other States**

For convictions in other states or U.S. jurisdictions, a determination must be made whether there is a comparable crime listed in the Offenses List and the corresponding consequence or condition must be applied.

Example: Felony abuse of a vulnerable adult in another state is comparable to s.940.285 (2) (b) 1. or 2., Stats., Abuse of Vulnerable Adults in Wisconsin, which is listed on the Offenses List as a crime subject to the Rehabilitation Review process.

Example: An out-of-state reckless driving conviction has no comparable crime on the Wisconsin Offenses List. An entity or BQA may consider whether such a conviction is substantially related to the duties of the job.

4.1.4 Dismissed Charges

A criminal record that indicates “not guilty,” “no prosecution,” “dropped” or “dismissed” means that the person was not convicted of the crime for which they were charged.

Convictions that have been reported to and are on file at the DOJ Crime Information Bureau cannot be expunged from the DOJ Crime Information Bureau (CIB) database, even if they can be expunged from the County Clerk’s office because they are “law enforcement records” rather than “court records”.

4.2.0 ADDITIONAL REQUIRED INFORMATION**s.50.065(2)bb**

Additional information **must** be obtained when:

1. The person reports a conviction for a crime on the Offenses List (see Appendix III) that does not appear on the DOJ report to the criminal history record request;
2. The DOJ report does not provide a conclusive disposition on a criminal charge for a crime on the Offenses List;
3. The BID or DOJ response indicates a conviction of:
 - Misdemeanor battery s.940.19 (1), Stats.
 - Battery to an unborn child s.940.195, Stats.
 - Battery, special circumstances s.940.20, Stats.
 - Reckless endangerment s.941.30, Stats.
 - Invasion of Privacy s.942.08, Stats.
 - Disorderly conduct s.947.01, Stats.

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- Harassment s.947.013, Stats.
where the conviction occurred five years or less from the date on which the information was obtained; or,

4. The military discharge was other than “honorable.”

4.2.1 Obtaining Additional Information

If the person’s circumstances meet the criteria described in 4.2.0, a good faith effort **must** be made to obtain disposition information, including conviction records, from the appropriate jurisdiction such as the county clerk of courts, tribal jurisdiction, armed services branch, etc.

An entity may also wish to obtain additional information for other offenses than those on the Offenses List when:

1. The person reports a conviction for a crime that does not appear on the DOJ report to the criminal history record request;
2. The DOJ report does not provide a conclusive disposition on a criminal charge.

4.2.1.1 County Clerk of Courts/Tribal Courts/Military Courts

When a person has a conviction record listed in 4.2.0, the **criminal complaint and judgment of conviction** must be obtained from the County Clerk of Courts or Tribal Courts Office in the county where the person was convicted.

See www.wicourts.gov/contact/docs/clerks.pdf for a list of Clerks of Court by County.

When a person has a discharge status other than honorable, additional information regarding the nature and circumstances of the discharge must be obtained from the armed forces branch.

See the National Personnel Records Center, Military Records Request at www.archives.gov/facilities/mo/st_louis/military_personnel_records/standard_form_180.html for contact information.

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4.2.1.2 *Circuit Court Automation Program (CCAP)*

Arrest and conviction information is also available at the Wisconsin Circuit Court Automation Program web site at

<http://wcca.wicourts.gov/index.xsl>.

This web site provides Criminal Summary Reports for most Wisconsin counties. It is an easy-to-use system that allows access with the individual's first and last name. These records include the individual's date of birth, address, charge description, associated statute, severity (felony or misdemeanor), disposition, disposition date, case status and more. It does not contain details about the case the entity may need to make a substantially related determination (see **4.3.0**).

A search on CCAP that fails to find a criminal record does not mean that the person does not have a record. Information obtained via the Circuit Court Automation Program cannot be used in lieu of the caregiver background checks, which are required by law.

4.2.2 **Juveniles**

Adults are "convicted of crimes" and have criminal records. Juveniles under age 17 are "adjudicated delinquent" and have juvenile records. Juvenile records may be released with a parent or guardian's authorization. Juvenile records are not otherwise available and entities and BQA are not required to obtain them.

However, conviction records of juveniles who are waived into and convicted in adult court are public records and may be accessed through the means described in **4.2.1.1**.

4.2.3 **Fingerprint Cards**

s.50.065(2)(bm)

Entities and BQA are authorized to require, at their discretion, the person whose background is being checked to be fingerprinted on two fingerprint cards, each bearing a complete set of the person's fingerprints. The Department of Justice (DOJ) may submit the fingerprint cards to the Federal Bureau of Investigation (FBI) for the purposes of verifying the identity of the person fingerprinted and obtaining records of his or her criminal arrest or convictions. This procedure allows for conviction information to be obtained from closed record states and provides for a more comprehensive criminal history check.

The FBI has a database of over 32 million criminals, maintained at its facility in Clarksburg, WV. Like the Crime Information Bureau (CIB) criminal repository, the FBI database is based on fingerprint arrest records and court dispositions, but contains records from all U.S. states

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and territories. The FBI's criminal index system provides a single source of inquiry for criminal records, nationwide.

CIB provides access to the FBI system for law enforcement agencies in Wisconsin. Law enforcement agencies are authorized to use the FBI's information for criminal justice purposes. For the most part, the general public is not authorized to have access to the FBI data. Exceptions include public housing agencies for screening tenant applications, and caregivers who submit applicant fingerprint cards to CIB.

Contact the DOJ Crime Information Bureau at (608) 267-5764 to request the application materials to receive FBI information.

4.3.0**SUBSTANTIALLY RELATED CRIMES****s.50.065(5m)**

An entity may refuse to hire and BQA may revoke or refuse regulatory approval or permission to reside at a facility if the person has been convicted of an offense that is not on the Offenses List, but is, in the estimation of the entity or BQA, substantially related to the duties or circumstances of the job or residency.

Example: John A. applies for a job at a home health agency. His Background Information Disclosure (BID) lists a charge of theft. The home health agency obtains the criminal conviction and judgement of conviction from the county clerk of courts and reviews the facts of the incident which indicate that John stole cash while working as a private pay caregiver.

The home health agency decides the circumstances of John's offense substantially relate to the duties of the job for which John has applied and declines to hire him.

4.3.1**Guidelines for Substantially Related Crimes****HFS 12.06**

To determine whether a crime is substantially related to the care of a client, some of the factors that may be considered are those:

- In relation to the job,
- In relation to the offense, and
- In relation to the person.

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4.3.1.1 *In Relation to the Job***HFS 12.06(1)**

The following factors may be considered in relation to the job:

- The nature and scope of the job's client contact.
- The nature and scope of the job's discretionary authority and degree of independence in judgment relating to decisions or actions that affect the care of clients.
- The opportunity the job presents for the commission of similar offenses.
- The extent to which acceptable job performance requires the trust and confidence of clients or their parent or guardian.
- The amount and type of supervision received in the job.

4.3.1.2 *In Relation to the Offense***HFS 12.06(2)**

The following factors may be considered in relation to the offense:

- Whether intent is an element of the offense.
- Whether the elements or circumstances of the offense are substantially related to the job duties.
- Any pattern of offenses.
- The extent to which the offense relates to vulnerable clients.
- Whether the crime involves violence or threat or harm.
- Whether the crime is of a sexual nature.

4.3.1.3 *In Relation to the Person***HFS 12.06(3)**

The following factors may be considered in relation to the person:

- The number and type of offenses for which the person has been convicted.
- The length of time between the conviction or convictions and the employment decision.
- The person's employment history, including references, if available.
- The person's participation in or completion of pertinent rehabilitation programs.
- The person's probation or parole status.
- The person's ability to perform or to continue to perform the job consistent with the safe and efficient operation of the program and the confidence of the clients served including, as applicable, their parents or guardians.
- The age of the person on the date of conviction or dates of conviction.

Written documentation should be maintained regarding the determination of whether or not a person's crime is substantially related to the care of a client in the employment, regulatory approval or residency decisions.

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A person who is refused employment or terminated from employment and believes discrimination may have occurred may file a complaint with the Department of Workforce Development, Division of Equal Rights (see [4.4.0](#)).

4.3.2 Municipal or County Ordinance Violations

Municipal and county ordinance violations are not “criminal” convictions and the Offenses List does not include municipal or county ordinance violations. However, ordinance violations may appear on the Department of Justice criminal background report if local officials reported the original arrest to DOJ; or a person may have disclosed such a violation or corresponding forfeiture on the Background Information Disclosure form. The criminal record may indicate “non-criminal” after the charge, or list ordinance numbers that do not correspond to statutory crime numbers.

4.3.3 Actual Conviction vs. Original Charge

It is the actual conviction that determines whether someone must apply for and receive DHFS approval through the Rehabilitation Review process (see [Chapter 5](#)). However, in determining whether such a conviction is substantially related to the duties of the job, the circumstances behind the conviction may be considered.

For example, in the case of an originally charged serious crime that was plea-bargained down, the nature of the person’s behavior as well as the circumstances of the arrest and conviction may be considered in making a decision.

4.3.4 Pending Charges

The Caregiver Law does not cover pending criminal charges, which are covered under the Fair Employment Law. An entity can consider pending charges substantially related (see [4.3.1](#)) when making a hiring decision.

However, it is not permissible under the Fair Employment Law to terminate an existing employee because of a pending criminal charge. An employee who is charged with a crime that is substantially related to the duties of the job may be suspended or removed from a caregiving position, or other employment action as determined by the employer or BQA.

If the employee is eventually convicted of a crime that is substantially related to the duties of the job, the employer may dismiss the employee at that time.

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4.4.0**FILING A COMPLAINT****HFS 12.06-Annot.**

A person who has been refused employment or terminated from employment and believes discrimination has occurred, may file a complaint under s. 111.335, Stats., by calling (608) 266-6860 or writing the:

Division of Equal Rights
Department of Workforce Development (DWD)
P.O. Box 8928
Madison, WI 53708-8928

A person, who has been refused regulatory approval or who has had their regulatory approval revoked and believes discrimination has occurred, may contact their licensing agency.

For more information regarding arrest and conviction records under the law, please see the Equal Rights Publication ERD-7609-P from DWD at www.dwd.state.wi.us/er/discrimination_civil_rights/publication_erd_7609_p.htm.