

# Wisconsin Arrest and Conviction Record Discrimination Protection – Part 2

## Labor & Employment Law Update

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A prior article reviewed a decision of the Wisconsin Supreme Court which dealt with the relationship between the workplace and an applicant's prior domestic violence convictions (*Cree, Inc., v. LIRC*). This article will discuss a case which followed later in 2022, a decision of the Wisconsin Court of Appeals in *Vega v. LIRC, et al.*, 2021 AP 24, Petition for Review Denied, which dealt with whether an employee's admission to his employer of the facts underlying two felony deferred prosecution agreements for sexual assault could serve as an independent basis to terminate the employment of the employee.

This issue experienced a seesaw of conflicting results at the various administrative and lower court levels, again revealing the difficulty agencies and courts have in striking the appropriate balance between the law's public policy goal of offering opportunities to individuals with criminal backgrounds while protecting employers, their workers and customers from potentially harmful individuals.

In *Vega*, the Court of Appeals first needed to determine whether deferred prosecution agreements are part of a person's "arrest record" or "conviction record." The significance of that determination is the ability to squarely apply the decades-old holding of a Court of Appeals decision, *City of Onalaska v. LIRC*, 120 Wis. 2d 363 (Ct. App. 1984) which held an employer does not unlawfully discharge based on an arrest record if it concludes from its own investigation that the employee had, in fact, committed an offense.

After a detailed analysis, the court ultimately concluded that a deferred prosecution agreement constituted an arrest record, not a conviction record, and thus applied the *Onalaska* exception to conclude Vega's employer was allowed to rely on the information derived from its own questioning of Vega which included his admissions to the sexual assault.

The Court of Appeals declined the opportunity to clarify whether the longstanding *Onalaska* rationale applied to discrimination claims based on a conviction record, but noted that the Labor and Industry Review Commission

(LIRC) “has now expressly refused to make that extension” despite prior LIRC decisions that cited *Onalaska* as being applicable to conviction cases. As a result, employers will need to await a future appellate decision to determine that issue. As to arrest records, Vega’s petition to the Wisconsin Supreme Court to review this decision was denied in October, 2022, leaving settled the issue of *Onalaska*’s application to deferred prosecution agreements.

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