



Jim Doyle  
Governor

Kevin R. Hayden  
Secretary

**State of Wisconsin**

**Department of Health and Family Services**

**DIVISION OF PUBLIC HEALTH**

1 WEST WILSON STREET  
P O BOX 2659  
MADISON WI 53701-2659

608-266-1251  
FAX: 608-267-2832  
TTY: 888-701-1253  
dhfs.wisconsin.gov

July 23, 2007

Ernesto Quinones  
U. S. Nuclear Regulatory Commission  
11545 Rockville Pike, T8E24  
Rockville, MD 20852-2738

Dear Mr. Quinones:

This letter responds to NRC letter RCPD-07-004 dated June 21, 2007. It conveys Wisconsin Department of Health and Family Services (DHFS) legal counsel opinion on possible impediments to implementing the fingerprinting requirements of Section 652 of the Energy Policy Act of 2005. Please be aware that this is not a state Attorney General legal opinion.

The DHFS legal counsel opinion is as follows:

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NRC asks for citations to state "statutes, regulations, or other laws that might affect a State's ability to collect fingerprints or the use of information obtained as a result of the required FBI identification and criminal history records check. Wisconsin statute s. 111.335, which prohibits employment discrimination based on arrest or conviction record might have such an effect. The statute not only prohibits denial of licensure and employment and other adverse employment actions based on arrest or conviction record, it prohibits requesting such information. There is an exception for taking adverse employment actions when the pending charge or conviction is "substantially related" to the employment.

I have copied the statute below:

"111.335 Arrest or conviction record; exceptions and special cases.

(1)(a)Employment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employee, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge, except that it is not employment discrimination to request such information when employment depends on the bondability of the individual under a standard fidelity bond or when an equivalent bond is required by state or federal law, administrative regulation or established business practice of the employer and the individual may not be bondable due to an arrest record.

(b) Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual who:

1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity; or
2. Is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation or established business practice of the employer.

(cg) 1. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to deny or refuse to renew a license or permit under s. 440.26 to a person who has been convicted of a felony and has not been pardoned for that felony.

2. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke a license or permit under s. 440.26 (6) (b) if the person holding the license or permit has been convicted of a felony and has not been pardoned for that felony.

3. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ a person in a business licensed under s. 440.26 or as an employee specified in s. 440.26 (5) (b) if the person has been convicted of a felony and has not been pardoned for that felony.

(cm) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ as an installer of burglar alarms a person who has been convicted of a felony and has not been pardoned.

(cs) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke, suspend or refuse to renew a license or permit under ch. 125 if the person holding or applying for the license or permit has been convicted of one or more of the following:

1. Manufacturing, distributing or delivering a controlled substance or controlled substance analog under s. 961.41 (1).
2. Possessing, with intent to manufacture, distribute or deliver, a controlled substance or controlled substance analog under s. 961.41 (1m).
3. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under a federal law that is substantially similar to s. 961.41 (1) or (1m).
4. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under the law of another state that is substantially similar to s. 961.41 (1) or (1m).
5. Possessing any of the materials listed in s. 961.65 with intent to manufacture methamphetamine under that section or under a federal law or a law of another state that is substantially similar to s. 961.65.

(cv) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ in a position in the classified service or in a position described in s. 230.08 (2) (k) a person who has been convicted under 50 USC, Appendix, section 462 for refusing to register with the selective service system and who has not been pardoned.”


Nonetheless, there are a number of statutes that permit criminal background checks and the use of fingerprints for certain types of licenses or permits issued by state agencies. Such checks are expressly permitted for licensed caregivers for children and adults in need of nursing home or CBRF care, teacher certificates and licenses, school bus endorsements on driver's licenses, the administrator of DOA's (Note: Dept. of Administration) division of gaming, private investigators, and EMT's (Note: Emergency Medical Technician). A number of these statutes explicitly indicate that they are an exception to Wis. Stat. s. 111.335 and/or define or characterize the kind of criminal convictions that would disqualify a person from employment or licensure.

This all suggests to me that it may be advisable to amend the statutes to expressly allow for criminal background checks and the use of certain types of criminal history to disqualify persons from working with higher activity sources of radioactive material. On the other hand, I think a decent argument can be made that the department has authority to request such information without explicit statutory authority, under its agreement with the federal government to regulate radiation in the stead of the NRC in a manner consistent with federal law, under the priority of federal law over conflicting state law, under the department's broad powers to protect public health, and based on the argument that certain criminal activity is substantially related to activities associated with radioactive materials.

I guess my bottom line at this time is: (1) We can probably commence obtaining the criminal history information now without statutory change, if necessary, and have a decent defense if challenged. (2) It probably would be a good idea to get explicit statutory (or perhaps rule) recognition of the right to obtain and use this information, notwithstanding s. 111.335, Stats. Specifying what types of criminal acts would be substantially related to activities involving radiation would protect individuals subject to such checks. (3) The question merits a more thorough review.

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I hope this legal opinion proves useful to the fingerprinting working group. Please contact me with any questions.

Sincerely,



Paul Schmidt, Chief  
Radiation Protection Section