

Wisconsin Law Enforcement Agencies Have New Recordkeeping and Sharing Obligations

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Posted By: Ryan P. Heiden

Practice Area: County and Municipal Governance & Government Law

On November 7, 2021, 2021 Wisconsin Act 82 (the “Act”) went into effect and established new statutory requirements that immediately apply to Wisconsin law enforcement agencies. This *Legal Update* summarizes the key obligations of Wisconsin local law enforcement agencies arising out of the Act, including the requirement to create, collect and share employment information as part of their recruitment and hiring processes. The Act applies to all law enforcement agencies in Wisconsin, defined as state “governmental unit[s] or political subdivision[s] that employ one or more law enforcement officers.”

The Act’s Key Requirements

Recordkeeping and Creating an Employment File. A law enforcement agency’s most immediate obligation under the Act is to ensure that it has or creates and retains an “employment file,” as defined by the Act, for every person the agency employs. This recordkeeping requirement is not limited solely to sworn law enforcement officers—it includes all law enforcement agency employees. The Act defines an “employment file” to include “all files relating to a person’s employment, including performance reviews, files related to job performance, internal affairs investigative files, administrative files, previous personnel applications, personnel-related claims, disciplinary actions, and all substantiated complaints and commendations.” The Act’s definition of “employment file” excludes information relating to pay and benefits and medical records; however, medical records that pertain to an employee’s “mental competency” to be able to perform their job are included (*i.e.*, records related to an employee’s mental fitness for duty).

Sharing an Employment File. In addition to the Act's recordkeeping requirements, the Act provides new obligations pertaining to sharing of an "employment file" with other law enforcement agencies during their recruitment process for "law enforcement positions." Under the Act, "law enforcement positions" are defined as any law enforcement, tribal law enforcement, jail, or juvenile detention position." Specifically, when a law enforcement agency recruits a *current or former* employee of another law enforcement agency for a law enforcement position, the interviewing agency *must* receive a written waiver from the candidate that gives every law enforcement agency for which the candidate works, or has previously worked, permission to share their "employment file" with the interviewing agency. The interviewing agency may not consider any candidate who fails to provide a waiver that meets the Act's requirements. Specifically, the waiver must include language that releases both the interviewing agency and the law enforcement agencies the candidate works for, or has previously worked for, from liability pertaining to the use and disclosure of their employment file. Once disclosure of the employment file is ready to occur, the Act indicates an agency can share copies with the interviewing agency or allow the interviewing agency to review the file at the agency that previously employed the candidate. The interviewing agency may also choose to orally interview people from the agency that previously employed the candidate. The Act states law enforcement agencies shall not be liable for complying with its provisions or for participating in an official oral interview with an investigator from the interviewing agency.

It is important to note the record sharing dictated by the Act must meet specified deadlines. First, the interviewing agency must provide the executed waiver to the current and former employing agencies *at least 30 days before* making its decision on whether to hire the candidate. Second, once the current or former employing agency receives the waiver from the interviewing agency, the current or former employing agency *has 21 days* to provide the requested information. An exception to this requirement is if there is a nondisclosure agreement between the current or former employing agency and the candidate that precludes the employment file being shared with the interviewing agency. However, the Act limits this exception to nondisclosure agreements entered into on or before November 7, 2021 and it prohibits law enforcement agencies from entering into nondisclosure agreements as of November 8, 2021 that prevent an interviewing law enforcement agency from viewing an "employment file" in a current or former employing agency's possession.

Decertification. The Act empowers the LESB to decertify a jail, juvenile detention, or sworn law enforcement officer¹ who: (1) resigned in lieu of termination or is terminated for just cause; (2) violated a rule, policy, or order of the LESB relating to curriculum, training, or recruitment; (3) lied about information that would affect their certified status; (4) are certified due to an administrative error; (5) have been convicted of a felony (or of a crime that would be a felony if committed in Wisconsin); (6) have been convicted of a misdemeanor of domestic violence, convicted of domestic abuse as defined in Wis. Stat. § 968.075(1), or subject to the imposition of the domestic abuse surcharge regardless of whether any part of the surcharge is waived by the court; or (7) have failed to pay court-ordered child or family support. The Act requires any officer who is convicted of domestic violence or a misdemeanor of domestic violence report the conviction to the LESB within 30 days of his or her conviction. The LESB must implement a system for decertifying law enforcement officers under the Act, and this system must include a process for reviewing and determining if decertification is necessary.

LESB Admission and Recruitment Standards. Finally, the Act authorizes the LESB to require that law enforcement agencies submit reports and other information that relate to the administration of the rules that this Act imposes. It also authorizes the LESB to create standards for "admission to preparatory law enforcement." These qualifications must relate to the person's ability to perform the responsibilities that come with being a law enforcement officer. The LESB may also "establish minimum educational, training, and recruitment standards" that must be met in order to be hired as a law enforcement officer. These standards must also relate to the person's ability to perform the responsibilities that come with being a law enforcement officer. The LESB will be responsible for providing a way in which law enforcement agencies can show compliance with these standards.

What Should Law Enforcement Agencies and Human Resources Professionals Do?

1. **Work Collaboratively Internally.** This law creates several new hurdles involving many different departments of local government. The Chief or Sheriff should work closely with human resources and administration to develop plans of action to: (1) update local policies and ordinances; (2) establish parameters for transferring files or ensuring good duplicate files exist; (3) ensuring confidentiality of protected information; and (4) developing good preemployment background screening waivers.
2. **Create a Law Enforcement Agency Employment File.** If not implemented already, immediately establish a system for creating an "employment file" for: (1) every person your law enforcement agency currently employs; and (2) every person your agency previously employed, and for whom your agency still maintains records that fall under the Act's definition of "employment file." This system should also include a process for keeping each "employment file" up-to-date, secure in location and access, and compliant with recordkeeping laws. The system should ensure files maintained by the law enforcement agency and human resources are cohesive. Records protected by the FMLA, GINA, and ADA should continue to be kept confidential and separate from the other records in the employment file.
3. **Retention.** Agencies should refer to their record retention policies or ordinances or, if none, to applicable Wisconsin Statutes, litigation defense principles, and guidance from the Wisconsin Public Records Board when determining how long "employment files" of former employees must be kept.
4. **Know Nondisclosure Agreements.** While nondisclosure agreements at the local law enforcement agency level are unlikely, review nondisclosure agreements effective prior to November 8, 2021 carefully to determine the extent to which each agreement truly prohibits the sharing of records with an interviewing agency that now fall under an "employment file." Certain agreements that merely require the creation of a separate "investigation folder" generally should not preclude records in that separate folder from being shared or treated as a nondisclosure provision and such records may fall under the Act's broad definition of "employment file."
5. **Revisit and Rewrite Separation Agreement Templates.** Many agencies use separation agreements. Now is a good time to review your template to make certain it conforms with the new requirements of the Act for use in the future.
6. **Confidentiality.** Although the Act requires medical records related to an employee's mental fitness for duty be maintained in their "employment file," the ADA, FMLA and GINA require that such records be maintained separately. Thus, we suggest that the "employment file" itself should simply include a brief note if there are medical records to be pulled from the employee's medical records folder and included in any production of the "employment file" to an interviewing agency. The relevant medical record should also have a notation on it for purposes of identifying it. This procedural safeguard is recommended given records related to an employee's mental or physical fitness for duty may be covered by a number of state and federal medical confidentiality provisions that require all medical records be maintained in a separate medical file outside of an employee's personnel file.
7. **Use Protective Waivers, Releases and Indemnity Agreements.** If your agency already uses a waiver as part of its hiring process, have the waiver reviewed by legal counsel to confirm the waiver covers both your agency and any current or former employing agencies and other persons providing information during the hiring process. A robust waiver should also include broad language related to the records and information to be exchanged, language waiving the candidate's right to inspect or otherwise access the information exchanged, and language holding harmless and indemnifying all agencies and related parties providing information. If your agency does not already use a waiver as part of its hiring process, work with legal counsel to draft a comprehensive waiver that contains the aforementioned provisions, in addition to any other unique provisions that might benefit your agency. The waiver must also comply with the Fair Credit Reporting Act (FCRA), and we recommend separate waivers be used for specific requests for information under the FCRA. Additionally, if the "employment file" might contain protected health information, then it is advised that the waiver include language regarding the provision of protected health information. However, and despite this Wisconsin statute, it is unclear whether an agency can require disclosure of a disabling or medical condition.

8. **Check, Read and Understand the Waivers Your Agency Receives.** When

- o. **Closely Read and Understand the waivers Your Agency Receives.** When receiving a waiver from another agency, inspect it carefully to verify it applies to your agency with regard to its disclosure and use of the candidate's "employment file." Determine whether it explicitly authorizes your agency to disclose the candidate's "employment file" to the interviewing agency. If the waiver is deficient and does not provide adequate protections, then immediately notify the interviewing agency of the deficiency and request better protections. If the waiver is sufficient, then provide the "employment file" to the interviewing agency within 21 days of initial receipt of the waiver. Consider having the agency come to your department to inspect the file to avoid loose copies of the "employment file" existing in the possession of others. Keep internal records to verify that you fulfilled the interviewing agency's request so you can show compliance with the Act. Keep copies of all waivers received from interviewing agencies for this same reason.
- 9. **Signed Waivers are a Must.** When hiring a candidate for a law enforcement position who is currently employed or was formerly employed by another law enforcement agency, if the candidate refuses to execute a waiver as required by the Act, your agency must refuse to further consider that candidate. Notify candidates of this at the time you present the waiver to them, either separately or by including express language in the waiver. If you reject the candidate on this basis, provide the reason for the rejection in writing.
- 10. **Due Dilligence.** When considering hiring a jail, juvenile detention, or sworn law enforcement officer for a law enforcement position ensure you are asking questions and confirming that you know whether that officer may have resigned in lieu of termination, been terminated for cause, or otherwise falls under the Act's designations for purposes of potential LESB decertification. If a concern about a candidate exists, then coordinate with receiving information from the LESB before hiring that officer to determine if decertification is a possibility. Failure to do so may result in your agency hiring an officer who is later decertified. While you may be able to remove that officer via a non-disciplinary separation following decertification, you will have wasted valuable time and resources hiring and training that officer in the interim.

¹ It is important to note the Act redefined the term "law enforcement officer" under Wis. Stat. § 940.203(1)(c), which has the practical effect of permitting the LESB to decertify both current and former law enforcement officers for the specific aforementioned reasons.

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