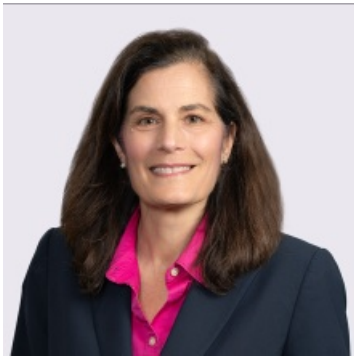


# Municipal Violation Is Not ‘Arrest Record’ Covered by Wisconsin Fair Employment Act, Court Holds

By Susan M. Corcoran, Michaela A. Utrup & John T. Woodson

March 29, 2024

## Meet the Authors



**Susan M. Corcoran**

(She/Her)

Principal

(914) 872-6871

[Susan.Corcoran@jacksonlewis.com](mailto:Susan.Corcoran@jacksonlewis.com)



**Michaela A. Utrup**

Associate

(608) 807-5286

[Michaela.Utrup@jacksonlewis.com](mailto:Michaela.Utrup@jacksonlewis.com)



**John T. Woodson**

The Wisconsin Fair Employment Act’s (WFEA’s) prohibition against discrimination based on employees’ arrest and conviction record has always been considered broad, and its standard of allowing employers to make employment decisions only based on “substantially related” offenses is equally nuanced. The Wisconsin Court of Appeals has narrowed the scope of the prohibition on considering employees’ arrest and conviction records by holding the WFEA does not prohibit employers from terminating employees based on noncriminal, municipal citations.

In *Oconomowoc Area School District v. Cota*, 2024 WI App 8 (2024), the School District terminated two employees’ employment based on its belief that they stole and sold the School District’s scrap metal and kept the proceeds for themselves. The School District based its termination decision, in part, on the employees’ municipal citations for theft and a municipal attorney’s representations that he believed the employees were guilty of theft.

The plaintiffs challenged their terminations by filing a complaint with the Wisconsin Department of Workforce Development, Equal Rights Division alleging the School District’s actions constituted unlawful arrest record discrimination under the WFEA. An agency administrative law judge, the Labor and Industry Review Commission, and the county circuit court all agreed with the employees and found the School District violated the WFEA because municipal citations fell within the WFEA’s definition of “arrest record.”

The Wisconsin Court of Appeals disagreed and reversed the prior decisions, finding that municipal citations are not an “arrest record” under the WFEA. The appellate court’s analysis focused on the legislature’s intention when it used the phrase “or other offense” in Wis. Stat. § 111.32(1). The court concluded that because the legislature used the phrase “any felony, misdemeanor or other offense,” it intended only to protect criminal violations, not civil, noncriminal offenses such as municipal citations. Thus, because the *Cota* employees received only noncriminal, municipal citations, the appellate court said the WFEA did not prohibit the School District from terminating their employment based on those citations.

The *Cota* decision further defines the scope of arrest and conviction record protections under the WFEA. Employers, however, should be cautious in relying on it to make employment decisions. The Labor and Industry Review Commission has petitioned the Wisconsin Supreme Court for review, and *Cota* could be overturned, likely with immediate effect.

Jackson Lewis attorneys monitor developments of Wisconsin’s ever-changing employment laws. If you have questions about Wisconsin’s arrest and conviction record discrimination laws, or any other employment laws, please contact a Jackson Lewis

Associate  
608-807-5281  
John.Woodson@jacksonlewis.com

attorney.

## Related Services

Background Checks

National Compliance and Multi-

State Solutions

©2024 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.