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Memorandum

To: Ordinance and License Committee
From: Brian Running
Re: Criteria for Issuance of Operator's Licenses

Over the years, the criteria for issuance of operator's licenses have been applied inconsistently, with many examples of licenses being granted to some but denied to others who had the same background. The purpose of this memo is to boil down the ridiculously-complex rules in Chapters 111 and 125 of the state statutes to an understandable summary, and to propose the creation of standards that will provide consistency in granting operator's licenses.

1. The Basics about Operator's Licenses.

Operator's licenses are frequently referred to as bartender's licenses, but clerks in retail stores (liquor stores, grocery stores, convenience stores, etc.) hold the same license, so "bartender's license" is not completely correct. Just keep in mind when you refer to a "bartender's license," you are also referring to the license that clerks in Class A premises hold.

A Class A or B premises cannot be open for business unless there is a license holder on the premises. That can be either the Class A or B license holder, the agent for the Class A or B license holder, or the holder of an operator's license who is responsible for all persons serving or selling alcohol beverages to customers.¹ Unless the Class A or Class B license holder is on the premises every minute the premises is open for business, that person will usually be an operator's license holder. The operator's license is essential for most retail licensed businesses to be open for business.

Operator's licenses are only valid in the municipality that issued them. A license issued by another city or village is not valid in Waukesha.²

There is no residency requirement, operator's licenses can be issued to out-of-state applicants.

If an applicant meets the statutory requirements for a license, then the license has to be issued. There's no discretion to deny a qualified applicant.³ However, there is discretion allowed in determining what a qualified applicant is, and a license is a privilege that is up to the

¹ Wis. Stat. §§125.32, 125.68.

² Wis. Stat. §125.17(2).

³ Wis. Stat. §125.17(1).

municipality to grant. “[T]here is no right to an alcohol beverage license and ...the ultimate question of whether to issue such a license to a particular applicant is a matter of local concern.”⁴

The Wisconsin Fair Employment Act applies to alcohol licensing, so these discrimination rules apply to license issuance:

- A license cannot be denied on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, military service, use or nonuse of lawful products off the employer’s premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters.⁵
- But there are exceptions to this rule for arrest and conviction records, if the offenses substantially relate to the licensed activity.⁶

2. Statutory Criteria for Issuance of Operator’s Licenses

According to Chapter 125 of the Wisconsin Statutes, operator’s licenses may only be issued to persons who fulfill all of the following criteria:⁷

- At least age 18
- Has completed a responsible server course within last 2 years (unless it’s a renewal, or the applicant has held an operator’s license within the last 2 years)⁸.

i.e., responsible server training is only for first-time applicants

- Has no pending charges for violent crimes against a child or an “exempt offense.”⁹

An “exempt offense” is:

Anything in Chapter 940, violent crimes against life and bodily security

Sex crimes against a child¹⁰

Both must relate substantially to the licensed activity

- Has no conviction record for offenses that substantially relate to licensed activity.¹¹

Only juvenile convictions for “exempt offenses” can be considered. Other juvenile convictions cannot be considered.¹²

⁴ State ex rel. Smith v. City of Oak Creek, 139 Wis. 2d 788, 801, 407 N.W.2d 901, 906 (1987)

⁵ Wis. Stat. §111.321

⁶ Wis. Stat. §111.111.335(2) and (3)

⁷ Wis. Stat. §125.04(5)

⁸ Wis. Stat. §125.17(6)

⁹ Wis. Stat. §111.335(4)(a)

¹⁰ Wis. Stat. §111.335(1m)(b)

¹¹ Wis. Stat. §111.335(2)(b)

¹² Wis. Stat. §111.335(4)(b)

- Is not a habitual law offender for offenses that substantially relate to licensed activity.

This covers more than just arrests and convictions. It allows evidence of any habitual violations of the law to be considered, whether they resulted in an arrest or conviction or not.¹³

- Has not been convicted of a felony substantially related to licensed activity (unless pardoned)¹⁴

Note that there is no time limit on arrest and conviction records, it is just a flat prohibition for any arrest or conviction, no matter how long ago, except for pardons of felonies. This prohibition is subject to the Fair Employment Act, however, as discussed later.

Our City Code adds one more criterion for issuance of a license – the applicant cannot be delinquent in payment of any City taxes or assessments.¹⁵

3. Determining Substantial Relation

The main discretion the City has in issuing a license to an applicant is determining whether an applicant’s past offenses are substantially related to the activities requiring an operator’s license. The requirement for substantial relation to the job comes from the two bases underlying the arrest and conviction record discrimination rules in the Fair Employment Act.

Wisconsin’s laws regarding employment discrimination based on conviction record serve two important, and sometimes competing, interests – **rehabilitating those convicted of crimes and protecting the public from the risk of criminal recidivism**. ... As such, Wisconsin law generally prohibits an employer from discriminating against prospective employees on the basis of their conviction record. ... But it is not employment discrimination because of conviction record ... if the individual has been convicted of any felony, misdemeanor, or other offense the circumstances of which substantially relate to the circumstances of the particular job. ... This is known as the “substantial relationship test.” As an exception to the general rule against discrimination, the employer bears the burden of showing that the circumstances of the convicted offense substantially relate to the circumstances of the job.¹⁶

Note that the two competing factors are rehabilitation and protecting the public from criminal recidivism. Therefore, in our licensing decisions, we are concerned about the welfare of the public, and not the employer or the applicant.

There not many reported cases in Wisconsin on the substantial-relation test. The most recent case tries to distill the test to a few factors and give some guidance in applying them.¹⁷

¹³ State ex rel. Smith v. City of Oak Creek, 139 Wis. 2d 788, 407 N.W.2d 901 (1987)

¹⁴ Wis. Stat. §111.335(2)(b)

¹⁵ Waukesha Mun. Code §8.26

¹⁶ Cree, Inc. v. LIRC, 2022 WI 15, ¶14, 400 Wis. 2d 827, 838, 970 N.W.2d 837, 843 (emphasis added)

¹⁷ Cree, Inc. v. LIRC, 2022 WI 15, 400 Wis. 2d 827, 970 N.W.2d 837

- Identify the character traits revealed by the offense.

Not just that the person is capable of doing the act, but what aspects of the person’s character allowed him or her to do it – for example, dishonesty, lack of concern for others, propensity for violence, lack of respect for the law, etc.

- Determine whether those character traits relate to job duties and responsibilities.

Not just job skills, look at the underlying character traits that the job requires – for example, honesty, patience, empathy, calmness, good judgment, etc.

- Determine whether the workplace is an environment that would be conducive to the applicant offending again.

- Decide whether the length of time since the offense indicates a likeliness or unlikeliness of re-offending.

“The recentness of the offenses and any pattern of conviction are additional readily ascertainable considerations. If significant time has passed since a potential employee’s last conviction, then that tends to indicate rehabilitation and reduces the likelihood of recidivism. But the existence of convictions with similar elements that predate the most recent conviction undermine an inference of rehabilitation, increasing the recidivism risk.”¹⁸

“Whether the circumstances of the offense substantially relate to the circumstances of the job requires ‘[a]ssessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed.’”¹⁹

Looking at previous cases to see how these factors have been applied, for example:

- The Supreme Court found that 26 counts of misconduct in public office for falsifying traffic citations as a deputy sheriff had a substantial relationship to the job of chief of police. The court treated that one as essentially a no-brainer.²⁰
- The Court of Appeals found that a drug-dealing conviction substantially related to the job of securities broker, because the position involved a significant amount of unsupervised time, and a fiduciary responsibility to customers, including handling money. The court did not elaborate, the implication being that a drug-dealing conviction reveals traits of untrustworthiness.²¹
- The Supreme Court found that an armed robbery conviction was substantially related to the job of school bus driver, because it revealed the character traits of “disregard for both the personal and property rights of other persons and a propensity to use force or the

¹⁸ Cree, Inc. v. LIRC, 2022 WI 15, ¶33, 400 Wis. 2d 827, 851, 970 N.W.2d 837, 849

¹⁹ 79 Op. Att’y Gen. 89, 92-3 (1990); quoting Milwaukee County v. LIRC, 139 Wis. 2d 805, 824, 407 N.W.2d 908 (1987).

²⁰ Law Enforcement Standards Board v. Village of Lyndon Station, 101 Wis. 2d 472, 305 N.W.2d 89 (1981)

²¹ Knight v. LIRC, 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998)

threat of force to accomplish one’s purposes,” which is the opposite of the patience and level-headedness required to drive a bus full of school kids.²²

- The Supreme Court found that a conviction for misdemeanor patient neglect was substantially related to being a crisis-intervention specialist. The offense revealed the character trait of an indifference to the well-being of others, and the crisis-intervention job required an attention to the well-being of others.²³
- The Supreme Court found that a domestic-violence conviction substantially related to the job of “applications specialist” for a lighting manufacturer, because it revealed the character traits of willingness to use violence to achieve power and control over others and an inability to control anger, and those traits were dangerous in a person who would be designing and recommending lighting systems to customers, often in one-on-one situations in isolated areas without supervision.²⁴

As you can see, some of these are not a superficially-obvious connection to the job. You have to look a little deeper to see how the character traits could affect the job. That means that we are not limited to just alcohol-related offenses when judging substantial relation to holding an operator’s license, we can look deeper and evaluate factors like dishonesty, tendency to violence, etc.

The legislature “declared that the purpose of the substantial relationship test is to ‘assess whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed.’ ...[W]e interpreted ‘circumstances’ to mean those circumstances material to ‘fostering criminal activity,’ for example, ‘the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.’ ...But immaterial details such as ‘the hour of the day the offense was committed, the clothes worn during the crime, whether a knife or gun was used, whether there was one victim or a dozen, or whether the robber wanted money to buy drugs or to raise bail money for a friend’ fall beyond the scope of relevant circumstances.”²⁵

Finally, there are notification requirements to applicants that are rejected on the basis of a conviction record. The applicant must be provided with a written explanation of how the offense substantially relates to the licensed activity (except that no explanation is needed for exempt offenses), and the applicant must be given an opportunity to show competent evidence of rehabilitation and fitness to perform the licensed activity.²⁶

4. Application of these Rules and Determining Substantial Relation to Operator’s Licenses

First, analyze the workplace environment for operator’s license holders:

- Continual contact with the public, some will be belligerent

²² Gibson v. Transportation Comm’n, 106 Wis. 2d 22, 27-8, 315 N.W.2d 346 (1982)

²³ Milwaukee County v. LIRC, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

²⁴ Cree, Inc. v. LIRC, 2022 WI 15, 400 Wis. 2d 827, 970 N.W.2d 837

²⁵ Cree, Inc. v. LIRC, 2022 WI 15 at ¶¶ 20-21, 400 Wis. 2d at 842–43, 970 N.W.2d at 845

²⁶ Wis. Stat. §111.335(4)(c) and (d)

- Bartenders will be in contact with intoxicated people
- Bartenders will be in contact with aggressive customers, confrontations and fights not uncommon
- Frequently unsupervised, and in a supervisory position over others
- Handling customer money and making change
- Responsible for enforcing alcohol laws
- In general, it's a very forward-facing position with respect to the public, with lots of opportunities for contact with difficult or drunk people, being in high-conflict situations, with a lot of responsibility

Second, look at character traits ideally required for the workplace environment, for example:

- Patient, even-tempered, not easily provoked, no tendency towards violent behavior
- Level-headed judgment
- Honesty, trustworthiness
- Responsible, able to follow and enforce rules, respect for the law
- In general, a person that can take conflict without overreacting and becoming angry and violent, can be trusted with people's money, and can be trusted to take alcohol laws seriously

Third, identify offenses that tend to indicate a lack of these qualities, for example:

- Violent crimes against persons and children – chapters 940 and 948
- Theft, robbery, embezzlement, fraud
- Possession, manufacture, delivery of controlled substances
- Illegal gambling, chapter 945 violations

Finally, identify offenses that are clearly related to alcohol, for example:

- OWI
- PAC
- Selling to underage person
- Selling to intoxicated person
- Sober server violation

- Violations of Wisconsin Statutes Chapter 125 or Waukesha Municipal Code Chapter 9

5. Suggested Criteria for Issuance of Operator’s Licenses

Finally, putting all of this together, here are suggested criteria for evaluating applications for operator’s licenses.

Note that the “Operator License Application Review Criteria” are required by law. It is not recommended to vary these. The “Substantially-Related Offenses” are where we have discretion to tailor the criteria and create policy for Waukesha. This can be done in two main ways – one, to add or remove offenses to or from the list; and two, to lengthen or shorten the time period after which offenses will not be counted. The period should be a length that shows it is unlikely that the applicant will repeat the offense again.

So, finally, here is the table of suggested criteria – next page:

Operator License Application Review Criteria

The applicant must meet all of these requirements:

1. Age 18 or older.
2. Not delinquent in payment of any City taxes or assessments.
3. No false or incomplete statements on application, no failure to disclose any material information on application.
4. Completed responsible server course within last 2 years (unless applicant has held an operator's license or Class A, B, or C retail license in last 2 years, then no server course required).
5. No outstanding arrest warrants.
6. No **pending charges** for violent crime against a child, sex crime against a child, or crime against life or bodily security. This includes offenses described in Wisconsin Statutes Chapter 940 and sex crimes described in Wisconsin Statutes Chapter 948. See the attached Schedule of Violent Crimes.
7. No **conviction record** for offense that substantially relates to the licensed activity.
 - Only juvenile convictions for violent crime against a child, sex crime against a child, or crime against life or bodily security count. Other juvenile convictions do not count.
8. Is not a habitual offender for offenses that substantially relate to licensed activity. This includes violations of law that do not lead to arrest or conviction.

Substantially-Related Offenses

1. OWI within the last 10 years.
2. PAC within the last 10 years.
3. Serving underage persons, two times within any one-year period, within the last 10 years.
4. Serving intoxicated persons – within the last 10 years.
5. Sober server violation – within the last 10 years.
6. Any other violations of Wisconsin Statutes Chapter 125 – within the last 10 years.
7. Any other violations of Mun Code Chapter 9 – within the last 10 years.
8. Possession, manufacture, delivery, or use of controlled substance – within the last 10 years.
9. Concealed carry of a firearm without a permit – within the last 10 years.
10. Embezzlement – within the last 10 years.
11. Fraud – within the last 10 years.
12. Theft – within the last 10 years.
13. Robbery – within the last 10 years.
14. Credit card fraud – within the last 10 years.
15. Wire fraud – within the last 10 years.
16. Gambling, violations of Wisconsin Statutes Chapter 945 – within the last 10 years.
17. Other crimes of dishonesty – within the last 10 years.
18. Homicide or injury by intoxicated use of a motor vehicle – no time limit.
19. Violent crimes described in Wisconsin Statutes Chapter 940 – no time limit. **See the following Schedule of Violent Crimes.**
20. Violent crimes against a child described in Wisconsin Statutes Chapter 948 – no time limit. **See the following Schedule of Violent Crimes.**

Schedule of Violent Crimes

- 940.01 First-degree intentional homicide.
- 940.02 First-degree reckless homicide.
- 940.03 Felony murder.
- 940.05 Second-degree intentional homicide.
- 940.06 Second-degree reckless homicide.
- 940.08 Homicide by negligent handling of dangerous weapon, explosives or fire.
- 940.09 Homicide by intoxicated use of vehicle or firearm.
- 940.10 Homicide by negligent operation of vehicle.
- 940.19 Battery; substantial battery; aggravated battery.
- 940.195 Battery to an unborn child; substantial battery to an unborn child; aggravated battery to an unborn child.
- 940.20 Battery: special circumstances.
- 940.201 Battery or threat to witnesses.
- 940.203 Battery or threat to an officer of the court or law enforcement officer.
- 940.205 Battery or threat to department of revenue employee.
- 940.207 Battery or threat to department of safety and professional services or department of workforce development employee.
- 940.208 Battery to certain employees of counties, cities, villages, or towns.
- 940.21 Mayhem.
- 940.225 Sexual assault.
- 940.23 Reckless injury.
- 940.235 Strangulation and suffocation.
- 940.24 Injury by negligent handling of dangerous weapon, explosives or fire.
- 940.25 Injury by intoxicated use of a vehicle.
- 940.285 Abuse of individuals at risk.

- 940.29 Abuse of residents of penal facilities.
- 940.30 False imprisonment.
- 940.302 Human trafficking.
- 940.305 Taking hostages.
- 940.31 Kidnapping.
- 940.32 Stalking.
- 940.42 Intimidation of witnesses; misdemeanor.
- 940.43 Intimidation of witnesses; felony.
- 940.44 Intimidation of victims; misdemeanor.
- 940.45 Intimidation of victims; felony.
- 948.02, .025 Sexual assault of a child.
- 948.03 Physical abuse of a child.
- 948.05 Sexual exploitation of a child.
- 948.051 Trafficking of a child.
- 948.055 Causing a child to view sexual activity.
- 948.06 Incest with a child.
- 948.07 Child enticement.
- 948.075 Use of a computer to facilitate a child sex crime.
- 948.08 Soliciting a child for prostitution.
- 948.085 Sexual assault of a child placed in substitute care.
- 948.095 Sexual assault of a child by a school staff person or a person who works or volunteers with children.
- 948.30(2) Abduction of another's child.