Addressing Barriers to Licensing for People with Criminal Records

August 9, 2018
Presenters

• **Chidi Umez**, Project Manager, CSG Justice Center

• **Beth Avery**, Staff Attorney, National Employment Law Project

• **Lee McGrath**, Senior Legislative Counsel, Institute for Justice

The presentation was developed by members of the Council of State Governments Justice Center staff. The statements made reflect the views of the authors, and should not be considered the official position of the Justice Center, the members of the Council of State Governments, or the funding agency supporting the work. Citations available for statistics presented in preceding slides available on CSG Justice Center website.
Overview

01 Occupational Licensing and Collateral Consequences

02 Policy Options and Best Practices (NELP)

03 Policy Options and Best Practices cont. (IJ)
Criminal records have a broad impact on the individual and community.

A criminal record reduces the likelihood of a job offer by nearly 50 percent.¹

In 2014, employment barriers associated with a felony (including licensing barriers) produced a loss of about 1.7 million workers.²

The U.S. economy loses about $87 billion in annual GDP when people with records can’t work.²

Criminal records have a greater impact on people and communities of color.

*Rate of Imprisonment per 100,000, by Gender, Race, and Ethnicity, 2015

*Imprisonment is just one point at which a person acquires a criminal record.

Criminal convictions trigger various state and federal “collateral consequences.”

Over 45,000 collateral consequences in state and federal law

https://niccc.csgjusticecenter.org
Employment plays an important role in successful reintegration after incarceration.

- Less likely to reoffend
- Pro-social Activities
- Fewer Risky Activities
- Income for Family
- Improved Mental Health
- Stronger positive relationships
  - Especially when earnings are above minimum wage
  - Especially with stable jobs

A growing number of occupations require a license to practice.

More than 800 occupations are licensed by at least one state, including personal trainers, hair braiders, interior designers, and florists.

Up to 25 percent of the workforce (and growing) requires an occupational/professional license.

Collateral consequences restrict licensing avenues for people with criminal convictions.

Across the 50 states and federal system, there are nearly 15,000 collateral consequences that limit occupational licensing opportunities for individuals with criminal records.

Approximately 6,000 consequences serve as blanket (mandatory) bars for certain licenses, based on certain criminal convictions.

States are adopting different strategies to address the treatment of criminal records in licensing decisions.

**Record Clearance**

- Allow a person to remove criminal record from public viewing (seal, expunge, vacate, dismiss, set aside, shield, annul, or destroy).
- Record clearance may relieve a person from disclosing the existence of a criminal record when seeking employment.*

**Occupational Licensing**

EEOC Title VII: Apply the “Green” factors

- Consider nature/gravity of offense
- Consider time passed since offense
- Consider nature of the job/occupation held or sought

*Varies by state and clearance policies
Fair Chance Licensing

Removing Barriers to Licensed Professions Facing People with Conviction Records

August 9, 2018
Communities of Color Most Impacted

Severe race disparities in justice system

- Incarceration Rate (per 100,000 people)
  - White: 275
  - Black: 1,408
  - Latino: 378

- Arrest Rate (per 100,000 people)
  - White: 2,357
  - Black: 5,262

Holding back our next generation

Nearly half of children have a parent with a record

Employment is the #1 most important factor for decreasing recidivism.

SOURCE: NELP, “Research Summary” (2017),
http://www.nelp.org/publication/research-supports-fair-chance-policies/
Licensing Can Benefit Workers
As long as they aren’t unfairly excluded

- Protects public safety
- Increased wages
- Respect for the occupation

How are the states doing overall?

Room for Improvement

10 Reform Suggestions

- Limit Scope of Inquiry
- Delay Background Checks
- No Blanket Bans
- Case-by-Case Review
- Clear Applicant Guidance
- Data Collection
- No Vague Standards
- Consider Rehabilitation
- Notice & Chance to Respond
- Uniform Standards
Remove Blanket Bans

Kansas Example:

A licensing board “may consider any felony conviction of the applicant, but such a conviction shall not operate as a bar to licensure, certification or registration.”

Licensing authorities may disqualify an applicant only if the conviction “relates adversely to the occupation,” and they must explain how various factors “relate to the license”:

- “Nature and seriousness of the crime”
- “Circumstances under which the crime occurred”
- “Date of the crime”
- “Age of the person when the crime was committed”
- “Whether the crime was an isolated or repeated incident”
- “Social conditions which may have contributed to the crime”
Consider Rehabilitation

**Minnesota Example:**

A person with a conviction “shall not be disqualified from the employment or occupation if the person can show competent evidence of sufficient rehabilitation and present fitness to perform the duties.”

Minn. Stat. § 364.03(3)
Limit Scope of Inquiry

Pennsylvania Example:

“The following information shall not be used in consideration of an application for a license . . . :

1. Records of arrest if there is no conviction of a crime based on the arrest.

2. Convictions which have been expunged.

3. Convictions of a summary offense.

4. Convictions for which the individual has received a pardon from the Governor.

5. Convictions which do not relate to the applicant’s suitability for the license . . . .”

Remove Vague Standards

Kansas Example:

“[I]n no case shall non-specific terms, such as moral turpitude or good character, . . . be used to disqualify an individual’s application for licensure”

Delay Background Checks

**Colorado Example:**

“[T]he agency shall not perform a background check until the agency determines that the applicant is a finalist”

Require Ongoing Data Collection

Illinois Example:

“[E]ach year, the Department must prepare, publicly announce, and publish a report of summary statistical information relating to new license . . . applications,” showing “at minimum”:

- Number of applicants (and number granted license);
- Number of applicants with a conviction record (and number granted license; denied license; and denied license because of a conviction).

Illinois S.B. 1688 (2017)
Do these reforms work? Are they feasible?
Post-9/11 TSA Credentialing Success Story

- Post-9/11 screening imposed on 1.5 million port workers.
- Case-by-case review of rehabilitation evidence and accuracy of record.
- TSA granted ~90% of waiver applications and appeals

## Sample of Ongoing Efforts

<table>
<thead>
<tr>
<th>State</th>
<th>Bill(s)</th>
<th>Status</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>AB 2138</td>
<td>Cleared Assembly; upcoming Senate vote</td>
<td>Limits lookback period to 7 years; limits rejections to offenses “substantially related” to occupation; bars consideration of arrests and dismissed convictions; no self-reporting by applicant; requires written notice to applicant and data collection.</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>B22-0523</td>
<td>Introduced late 2017</td>
<td>Delays background check; limits rejections to offenses “directly related” to occupation; bars consideration of juvenile/non-conviction/sealed records; requires written notice to applicant, consideration of mitigating factors, and data collection.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>H.8335 S.2995</td>
<td>Recently introduced companion bills</td>
<td>Limits rejections to offenses “directly related” to occupation; bars consideration of juvenile/non-conviction/sealed records; requires consideration of rehabilitation evidence; requires written notice to applicant and data collection.</td>
</tr>
</tbody>
</table>
## Sample of Recent Progress

<table>
<thead>
<tr>
<th>Adopted 2018</th>
<th>Adopted 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Indiana</strong></td>
<td><strong>Louisiana</strong></td>
</tr>
<tr>
<td>HB 1245</td>
<td>HB 519</td>
</tr>
<tr>
<td>“Directly related” standard; must consider rehabilitation; limits lookback period</td>
<td>Limits rejections to offenses “directly related” to occupation</td>
</tr>
<tr>
<td><strong>Tennessee</strong></td>
<td><strong>Kentucky</strong></td>
</tr>
<tr>
<td>HB 2248 &amp; SB 2465</td>
<td>SB 120</td>
</tr>
<tr>
<td>“Directly related” standard; written notice; must consider certain factors</td>
<td>Limits allowable record-based justifications for denying licenses (e.g. no “good moral character” standard)</td>
</tr>
<tr>
<td><strong>Kansas</strong></td>
<td><strong>Illinois</strong></td>
</tr>
<tr>
<td>HB 2386</td>
<td>SB 1688</td>
</tr>
<tr>
<td>“Directly related” standard; no vague standards; limits lookback period; no consideration of arrests</td>
<td>Requires applicant notice, consideration of mitigating factors, and data collection</td>
</tr>
</tbody>
</table>

NELP Resources

- Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records (2016)
  http://nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/


- Fair Chance Licensing Reform Takes Hold in the States (2018)
Thank You

VISIT NELP.ORG/CAMPAIGN/ENSURING-FAIR-CHANCE-TO-WORK
& CONNECT WITH NELP ONLINE:

www.nelp.org
Take Aways

• The best occupational license for a person with a criminal record is a license that does not exist.

• Features of IJ’s model legislation.
Institute for Justice (IJ)

- Advocate for fewer occupational licenses
  - Litigate and lobby
  - Original research *License to Work* (2017)

- Non-profit public-interest law firm
  - Founded 1991
  - 50 attorneys in six offices
    - Clinic at the University of Chicago law school

- Six cases before U.S. Supreme Court
  - *Timbs v. Indiana* (OT 2018)—incorporating 8th Amendment’s excessive fines clause against states.
Background

- Biggest labor market institution
  - Occupational licensing: 25% of workers
  - Union representation: 11% of workers
  - Minimum wage: 3% of hourly paid workers
Background

- Occupational licensing has high costs:

- Increases unemployment: 1% or 3 million jobs
- Increases consumer prices: $200 billion/$1,000 family p.a.
- Reverse Robin Hood: Transfers wealth to higher classes
- Privileges: Formal education over on-the-job training
- Designed to allow: Regulatory capture
- Promotes: Corporate welfare
- Disproportionally: Affects disadvantaged/criminal record
- Increases: Criminal recidivism
Background

- Licensing has few benefits to consumers over reputation:

  - “…most research does not find that licensing improves quality or public health and safety.”

    *Occupational Licensing: A Framework for Policymakers (2015)*
    
    *Council of Economic Advisors to President Barack Obama.*

- 19 studies assessing effect of occupational licensure on quality.
  - Common finding: neutral, mixed or unclear.
  - 3 studies: positive effect on quality.
  - 4 studies: negative effect on quality.

  *State of Occupational Licensure in Wisconsin* [https://tinyurl.com/Mercatus-WI](https://tinyurl.com/Mercatus-WI)
Conclusion

- Licensing is a High-Cost/Low-Benefit public policy
Alternative: Inverted Pyramid of Least Restrictive Regulation

- Market Competition
- Consumer-created Ratings and Review
- Private Certification
- Voluntary Bonding and Insurance
- Private Civil Action
- Deceptive Trade Practice Act
- Mandatory Disclosures
- Regulation of Process
- Inspections
- Mandatory Bonding & Insurance
- Registration
- Government Certification
- License
Protect Consumers by Using Least Restrictive Regulation.

**Consumer Concern**
- Fraud
- Health & safety, cleanliness
- Damages to buyer or 3rd-parties (externalities)
- Fly-by-night providers
- Knowledge gap (Asymmetrical information)
- Government reimbursement for new medical niche services

**Response**
- Deceptive Trade Practice/Mandatory Disclosures
- Inspections
- Bonding/insurance
- Registration
- Certification
- Specialty license
Slivinski’s Research

- *Turning Shackles into Bootstraps* (2016)
  Study period: 1997-2007

- States with heaviest occupational licensing burdens:
  Increase in the 3-year, new-crime recidivism rate of over 9%.

- Conversely, states with lowest burdens:
  Decline in that recidivism rate of nearly 2.5%.
I J’s Model Collateral Consequences in Occupational Licensing Act.

- Petition at any time, including before obtaining training.

- No automatic/mandatory/permanent/blanket ban.

- Shifts burden to board to prove:
  - Past felony or violent misdemeanor “is directly, substantially and adversely related to the state's interest in protecting public safety;” and
  - Approval “will put individual in a position where he is more likely than not to reoffend and cause harm.”
IJ’s Model Collateral Consequences in Occupational Licensing Act.

- Requires boards to consider 10 factors reflecting rehabilitation.

- Excludes boards from considering:
  
  - Non-conviction information—deferred adjudication, diversion programs or arrests not followed by convictions;
  
  - Sealed, dismissed, expunged or pardoned conviction;
  
  - Juvenile adjudication;
  
  - Non-violent misdemeanor; or
  
  - Conviction older than 3 years.*
• July 2, 2018, New Hampshire Governor Chris Sununu signed into law SB 589.

• 10th state in 2018 to approve comprehensive limits on consideration of criminal record in occupational licensing. (6 states enacted reforms in 2015-2017)

• Similar to Indiana, Kansas, Tennessee and Wisconsin.

• Process ensures people with requisite qualifications will not be unfairly denied licenses based on their records of arrests or convictions.

• Reflects the provisions of IJ’s model act.
Resources

- IJ’s Model Act:  www.tinyurl.com/IJ-ccola
- State enactments:  www.tinyurl.com/IJ-ccola-Enactments
- Shackles:  www.tinyurl.com/shackles-bootstraps
Potential Litigation

• IJ is looking for initial case to litigate
  • Challenge an automatic ban
    • Including facing retroactive ban.

• Sympathetic client:
  • Good example: California firefighter
  • Bad example: Convicted of white-collar crime.
  • Invested in taking case to appellate courts.

• IJ does not charge its clients to represent them.
Contact information

Lee McGrath
Senior Legislative Counsel
Institute for Justice
520 Nicollet Mall-Suite 550
Minneapolis MN 55402
o:(612) 435-3451
c: (612) 963-0296
Lmcgrath@ij.org

www.ij.org/legislation
Questions?

- **Chidi Umez**, CSG Justice Center, [cumez@csg.org](mailto:cumez@csg.org)
- **Beth Avery**, NELP, [bavery@nelp.org](mailto:bavery@nelp.org)
- **Lee McGrath**, IJ, [lmcgrath@ij.org](mailto:lmcgrath@ij.org)
Resources


• National Inventory of Collateral Consequences of Criminal Conviction; https://niccc.csgjusticecenter.org/

• Clean Slate Clearinghouse; https://cleanslateclearinghouse.org/
THANK YOU!

Join our distribution lists to receive updates

www.csgjusticecenter.org/subscribe

https://cleanslateclearinghouse.org/