



Montana Department of
LABOR & INDUSTRY
Business Standards Division

TO: Economic Affairs Interim Committee
FROM: Todd Younkin, Division Administrator
Colleen White, Legal Counsel, Professional Licensing Bureau
RE: SJ18, L. 2019
DATE: January 30, 2020

We respectfully submit this memo for the Committee's consideration.

Very Few Applicants Are Denied License Because of Criminal Convictions

During the five years between November of 2014 to November of 2019, the Business Standards Division, Professional Licensing Bureau (BSD) received 59,738 license applications. Among these, 5,807 applicants answered "yes" to criminal convictions. Of these, 20 applicants were denied licenses. This constitutes a less than one percent denial rate ($20/5807 = \%0.34$) based on prior criminal convictions.

This rate reflects that Montana's licensing boards properly apply an effective criminal justice policy. In this memo, BSD will suggest ways that this policy can be built upon further to ensure that applicants who disclose criminal convictions, but do not warrant denial, are not unnecessarily delayed receiving a license by waiting for a board meeting, assuming they otherwise meet the qualifications for licensure.

Montana Currently Has a Progressive & Rehabilitative Criminal Justice Policy for Professional Licensure

Montana's laws governing licensure of criminal offenders were enacted after the 1972 adoption of Mont. Const. Art. II, § 28 Criminal Justice Policy – Rights of the Convicted, which provides for "full" restoration of rights upon termination of state supervision and features elements widely considered to be necessary to reduce barriers to licensing:

- Prohibits denial of a license based solely on an applicant's criminal record unless the conviction relates to the occupation, § 37-1-203, MCA;
- Requires boards to consider evidence of rehabilitation, § 37-1-203, MCA; and
- Requires an explanation of denial of the license and an opportunity for hearing. § 37-1-307, MCA.

As stated in § 37-1-203, MCA, when an applicant discloses a criminal conviction, the licensing agency must determine whether the conviction “*relates to the public health, welfare, and safety as it applies to the occupation*” and if so, whether there is evidence that the applicant “*is not sufficiently rehabilitated to warrant the public trust.*” Mont. Code Ann. §37-1-203. This statute can be described, under certain circumstances, as affording a *rebuttable presumption of rehabilitation* to an applicant with a relevant criminal conviction, even if that person is on probation or parole. § 37-1-201, MCA, et seq.

Legislative proposals from other states may need to be examined with caution to determine whether they are appropriate for Montana’s population and BSD’s “umbrella” administrative agency. Unlike Montana, other states’ criminal justice policies may lack provisions requiring consideration of post-conviction rehabilitation and required modernization. The BSD position is that solutions that meet Montana-specific needs are the best solutions. Proposals initiated by other states addressing these issues should be carefully scrutinized in comparison to Montana’s approach.

BSD Performs Background Checks to Carry Out its Mission

The opportunity for applicants with criminal convictions to become licensed must be provided “with prudence to protect the interests of the public.” § 37-1-201, MCA. In exercising “prudence,” boards and programs ask standardized questions at initial application and renewal to elicit information about “legal and disciplinary” actions which relate to the profession, see § 37-1-105, MCA, and exclude as best can be predicted, unprofessional conduct or impairment that presents a future risk to consumers and requires correction. §§ 37-1-101, -307, -312, -316, MCA. The criminal history related portion of the questions are:

A criminal conviction alone may not automatically bar you from receiving a license. For more information about how a criminal conviction may impact your application, consult the board or program website.

(1) Have you ever been convicted, entered a plea of guilty, no contest, or a similar plea, or had prosecution or sentence deferred or suspended as an adult or “juvenile convicted as an adult” in any state, federal, tribal, or foreign jurisdiction?

(2) Are you now subject to criminal prosecution or pending criminal charges?

For six of the thirty-three boards,¹ BSD cross-references the answer to these questions with the results of an FBI fingerprint criminal background check authorized by the U.S. Department of Justice. In the remaining boards, BSD relies on the applicant’s voluntary disclosures, which if found later to be misleading or untruthful, may subject the license to revocation.

¹Nurses, physicians, physical therapists, real estate appraisers, and behavioral health and private security providers.

BSD may, if warranted in rare cases, pay for and run a name-based check with the Montana Department of Justice or try to obtain confidential criminal justice information (CCJI), § 37-1-307, MCA, from local criminal justice agencies. Running each application through this process would significantly increase costs and substantially slow down application processing times.

BSD Has a Duty to Review the Criminal History of All Applicants

To ask if the person has been convicted or is currently subject to pending criminal charges provides the level of due diligence² expected by the public, including patients, clients, customers, as well as other licensed professionals and employers. BSD must continue to ask all applicants the criminal history question and not just those license types the legislature has granted authority to conduct FBI fingerprint background checks. The same criteria of § 37-1-201 et seq. are applied whether the criminal history is voluntarily disclosed or discovered through an FBI fingerprint background check.

It is Unnecessary to Define “arrests,” “juvenile convictions,” “expungements,” “dismissals, and “pardons”

BSD does not ask applicants to disclose arrests or juvenile convictions unless the juvenile was tried as an adult. § 41-5-216, MCA (youth court records to be sealed at age 18).

If a conviction has been dismissed, expunged, or pardoned, there is legally no “conviction.” The same is true in deferred prosecutions or imposition of sentence, once the deferment period ends and the case is dismissed.

Staff Apply Criteria to Determine if the Application Must be Reviewed by the Board

In processing applications of persons with criminal convictions, attorneys and executive officer staff first determine whether the conviction is “related” to the profession, considering for example, if:

- a. the occupation would offer the opportunity for the commission of the offense or similar offense,
- b. the population served by the occupation are vulnerable to become victims of the offense or similar offense,
- c. one or more facts and circumstances of the conduct surrounding the offense relate to the profession or happened during the practice of the profession, or

² BSD “shall require that all boards and department programs require each applicant for licensure or renewal to report any legal or disciplinary action against the applicant that relates to the propriety of the applicant’s practice of or fitness to practice the profession or occupation for which the applicant seeks licensure.” § 37-1-105, MCA.

- d. other reasonable demonstration of connection between the criminal conduct and the occupation exists.

If the conviction is related to the occupation, attorneys and executive officers then review the application for evidence of “insufficient rehabilitation,” which may be indicated by one or more of the following:

- a. multiple or subsequent criminal offenses or unprofessional conduct;
- b. failure to comply with court-ordered conditions, e.g., conditions of supervision, treatment, or payment of fines;
- c. lack of candor, misrepresentation, or omission in disclosing the offense or circumstances of the offense;
- d. statements that demonstrate lack of remorse or accountability for the conduct;
- e. unless good cause exists, failure to maintain education, training, or employment on at least a part time basis; or
- f. other credible evidence of insufficient rehabilitation.

Relatedness (Relevancy) and Rehabilitation Criteria

These criteria are applied by attorneys advising boards reviewing applications. To ensure that these criteria are applied clearly and consistently, BSD could seek legislative authority for BSD to promulgate rules to define “related” and “rehabilitative” criteria applicable to all boards and programs and, importantly, delegate authority to staff to apply the criteria to determine whether board review is necessary. Coupled with the time limitation discussed below, a significant number of applications could be processed more quickly, without increased risk of harm to the public, with this legislative change.

A Time Limitation on Convictions Would Reduce the Number of Applications that Require Board Review

Even if there is no evidence of insufficient rehabilitation (a through f above), the next and final step is one that presently, only the licensing board can make because of the broad discretion necessary to exercise in answering the question: *whether enough time has passed given the nature and severity of the offense for the person to demonstrate rehabilitation.*

A few boards have enacted rules that impose time or type limits to guide staff in considering whether a conviction requires board review. Inconsistent exercise of discretionary authority among the various boards results in inconsistent application of the principle underlying Montanan’s progressive licensing statutes. To reduce delays in issuing licenses, BSD could seek a legislative change to include the following convictions within the rebuttable presumption of rehabilitation:

- felony convictions involving non-sexual and non-violent conduct older than N years
- misdemeanor convictions involving non-sexual and non-violent conduct older than N years

BSD suggests that the number of years be based on recidivism data and that the time limit be counted either from the date of conclusion of any prison term of a sentence, or the beginning of a probationary sentence without a prison term. More study may be warranted in this regard.

Rather than a “safe harbor,” where the passage of time alone would be considered rehabilitation (as was attempted in 2019 SB 347), BSD proposes that these time frames only be the basis for staff to issue a license in cases where there is no evidence of a lack of rehabilitation. All other cases exceeding these time limits and offense types (i.e., sexual and violent no matter how long ago committed) would necessarily require board review. The concern of any legislative approach in this area must be unintended consequences to consumer safety, such as a “safe harbor” or loophole where an applicant with a high-risk criminal history, coupled with recent behavior contrary to rehabilitation is automatically qualified for licensure as a matter of law.

SB 347 - Listing Possibly Disqualifying Convictions is Costly, Ineffective, and Unpredictable

Bills in the 2019 session attempted to address employment of individuals with criminal histories. SB 347 was the only bill that proposed to amend Title 37 professional and occupational licensing statutes and, as discussed below, was opposed by BSD.

In its draft form, SB 347 (LC 3070) required each board to define by citation to the criminal code those convictions which “may” disqualify an individual from licensure before applying basically the same rehabilitation analysis. Not only would this approach be costly in terms of research, development, and implementation, it would give poor guidance to persons with convictions outside of Montana. Of greatest concern would be the failure to include a significant conviction and the legal and public risk ramifications an ill-suited omission may have.

The current statute adequately and properly lists general types of crimes, not specific offenses. § 37-1-316(1), MCA (a crime relating to or committed during the practice or involving violence, use or sale of drugs, fraud, deceit, or theft). These general descriptions of the offenses allow, as trending best practices dictate, a review of the underlying conduct. A review of the underlying conduct rather than the crime for which a person is convicted is critically important to consider given the reliance on plea agreements to lesser offenses utilized by the criminal justice system.

SB 347 - Defining “Qualifying” Convictions Should Not Create a “Safe Harbor”

After collaborating with BSD on the bill draft, instead of the approach described above, SB 347 proposed to define a set of convictions by type and age that licensing officials could not consider. These “safe harbors” protected “nonviolent” and “nonsexual” convictions for which an individual had completed all terms of sentencing before license application for a period of 2 years for misdemeanors and 5 years for felonies. BSD’s position is that a better approach now is to require that the time limits on these types of convictions be included within the previously discussed rebuttable presumption of rehabilitation.

SB 347 – A Predetermination Process is Inefficient and Legally Flawed

SB 347 would have authorized a person with a conviction to petition the board to determine --before completion of training, education, experience, and examination--if the conviction disqualified the individual from being licensed.

BSD opposes the idea because of additional costs (paid by licensing fees) to build infrastructure (forms, database programming, training, etc.), even before a single potential applicant paid the predetermination fee and filed a petition. The petition would consume staff, legal, and board resources for a hypothetical question: a petitioner may never pursue or gain the required qualifications, inserting ambiguity on how long to retain records related to the petition.

The deficiency of a predetermination process for occupational licensure is perhaps best demonstrated by the lack of an appeal process. SB 347 was silent in this regard. While it may seem unfair that a petitioner denied by the board would have no appeal rights, a legal challenge of a petition denial must allege a violation of a duty or deprivation of a right. When a person is not qualified to be licensed, there is no property interest protected by state or federal due process, demonstrating the absence of a “case in controversy,” the jurisdictional threshold that prevents judicial bodies from entertaining hypothetical questions.

Conclusion

BSD *SUPPORTS* pursuing the following legislation:

1. Amend 37-1-201 to include convictions of a certain age and type be included in the rebuttable presumption of rehabilitation.
2. Give rulemaking authority to the department to define “related” and “rehabilitative” criteria applicable to all boards and programs and delegate authority to staff to apply the criteria to determine whether board review is necessary.

There may be many reasons outside of the control and mission of the licensing boards and programs why convicted persons do not enroll in education or training opportunities leading to licensure and employment.

Rather than encourage the licensure of any population of potential licensees, the role of the professional license regulatory agency is to set and enforce standards of conduct, to clearly communicate the license standards and processes, and to apply them in a manner that protects the public³ without unnecessarily impacting employment opportunities.

The Legislative grant of discretion and quasi-judicial immunity, §§ 2-15-102, 2-15-121, MCA, to licensing boards recognizes that these are difficult and highly fact-specific decisions.

³ i.e., vulnerable consumers or patients such as children, elderly, disabled, bereaved, under anesthesia, unconscious, suffering from mental health disorders, and those having intimate bodily or physical contact, including entering or safeguarding private homes and property or handling personal and business finances.