

SJ 18: PAST LEGISLATIVE OPTIONS REGARDING JOB APPLICANTS

SJ 18, a study related to occupational licensing of those with criminal convictions, includes a review of barriers faced by those with criminal convictions when they seek jobs or licensure by an occupational or professional licensing board. Members of the Economic Affairs Interim Committee who served on business and labor committees in the 2019 session heard bills on various ways of eliminating bright flags in the early application process so that the main focus is on an applicant's training and experience.

The topics below explain, from a nonattorney's view, how various past legislation approached an applicant's criminal information in the hiring or licensing process.

BAN THE BOX

A "ban the box" approach on job applications has been used in roughly half the states to give those with criminal convictions a chance at being assessed for job skills rather than being immediately judged as to having truthfully answered the "criminal records" history. New Mexico is among the latest to remove from an initial employment application a question about an applicant's arrest or conviction history. Ban-the-box laws may vary regarding at which point in the application process a potential employer may ask about criminal pasts. The New Mexico legislation allows notification, for example in a job posting, that certain criminal backgrounds may make an applicant ineligible (based on law or firm policy).

In Montana [SB 168](#) (2019 session) would have disallowed use on an initial job application of a question asking whether the applicant had a criminal record or criminal history, with exceptions. Opposition to the bill included concerns among some employers that not being able to ask a question initially might result in time and energy being wasted in the interview process for someone who is not suitable for a job.

Applications for licensure by Montana professional and occupational licensing boards typically include a box asking whether the applicant has a criminal history. Some boards might not need to ask on the application about a criminal history, because those boards have statutory authority to obtain a criminal record background check. While all boards have general authority to obtain confidential criminal justice information for investigative purposes as a criminal

justice agency, under 37-1-307(4), MCA, a board must be “statutorily authorized” to obtain a criminal record background check “as a prerequisite to the issuance of a license.” (See box.)

CRITERIA FOR LICENSING, HIRING

[SB 347](#), introduced in the 2019 session, listed various criteria that a licensing board might use in determining whether an applicant with a criminal history is rehabilitated. Included were:

- Determining whether the crime for which the applicant was convicted had a direct relationship to the profession or occupation for which licensure is sought.
- Whether the profession or occupation would offer opportunities to commit the same type of crime.
- Whether a subsequent, similar crime had been committed.

The bill also listed factors that would remove consideration of the crime:

- an arrest that did not result in a subsequent conviction or a deferred prosecution (see below);
- a conviction that has been dismissed, expunged (see below), or pardoned;
- a juvenile adjudication;
- a nonviolent or nonsexual misdemeanor conviction for which the applicant completed all terms of sentencing more than 2 years before applying for a license; or
- a nonviolent or nonsexual felony conviction for which the applicant completed all terms of sentencing more than 5 years before applying for a license.

Boards with statutory authority to get criminal record backgrounds

- Board of Medical Examiners
- Board of Pharmacy (for wholesale distributors and third-party logistics providers)
- Board of Nursing
- Board of Physical Therapy Examiners
- Board of Psychologists
- Board of Behavioral Health
- Board of Real Estate Appraisers

PRE-EVALUATION OF APPLICANT

[SB 347](#) also included a provision that would have allowed a potential applicant to request a preapplication determination from a licensing board prior to investing in training or schooling or filing a licensure application. The intent is to avoid wasting the applicant’s time and money for training if the ultimate prospect is being denied licensure. The corollary is that a board that is requested to analyze a potential license application would similarly waste time and money for investigation into an applicant’s criminal past if, in fact, the applicant decided on another course of action.

The \$25 fee proposed in SB 347 for the preapplication review was, according to the SB 347 [fiscal note](#), probably not sufficient to cover initial costs or ongoing costs. The fiscal note further suggested that licensing fees for all boards might have to increase to cover the cost of pre-assessment. The unknown in the cost equation is whether one or more potential applicants might use a shotgun approach to inquire of every licensing board what the potential applicant’s chances for licensure might be. Also unknown is whether a predetermination might be made with no follow-through on the part of the requestor.

Some states are using a predetermination approach. At this stage in Montana, preliminary overview information is available at the Department of Corrections [website](#) under reports from the now-defunct Reentry Task Force. The [report](#), written in 2011 by the Department of Labor and Industry’s Research and Analysis Bureau, includes such topics as "Things You Need to Know about Your Criminal Record," "Identifying Your Skills," and "Special Programs for Employers of Ex-Offenders."

The document does not sugarcoat the problems faced by ex-offenders in finding a job, stating: "The most serious barriers to employment are the bias and stigma arising from having a criminal record. Many employers hesitate to hire applicants with conviction histories."

Allowing pre-evaluation of a potential licensing applicant:

Positives	Negatives
<i>For applicant: advance details of licensing prospects</i>	<i>For board: potential waste of time/ money</i>
ALTERNATIVE: Informational flyer	

FUZZY AREAS:

ARRESTS, EXPUNGEMENTS, SEALED RECORDS

ARRESTS

Employers or licensing board members who want to be cautious about not prejudging applicants may want advice about hiring or retaining those under arrest. In a January 2020 Mountain West *Employment Law Letter* article authors Ryan B. Frazier and Kirton McConkie included some general suggestions:

- Review employment agreements or collective bargaining agreements, if any, to see if there is a reference to the situation under consideration; and
- Treat everyone consistently.

Other suggestions include the same type of considerations board members may make regarding whether the crime is related to job-related activities. Given that Montana is not an employment “at-will” state, meaning employers must have “cause” to terminate an employee who no longer is in a newly hired probationary period, employers

faced with the arrest of an employee or board members considering licensing or relicensing someone under arrest may want to review Montana definitions of “gross misconduct” and “misconduct” in 39-51-201, MCA. These terms impact unemployment insurance under 39-51-2303, MCA, and may be useful as well in hiring or relicensing cases.

EXPUNGEMENT/SEALED RECORDS

Not all crimes can be expunged. In addition, expungement takes a court action except for certain youth court records upon the youth turning 18. (See 41-5-216, MCA.) Under 46-23-510, MCA, a sentencing court “shall,” in the case of a final reversal of a conviction for a sexual or violent offense, “order the expungement of any records kept by a court, law enforcement agency, or other state or local government agency” under Title 46, chapter 23, part 5, MCA, which requires registration of sexual or violent offenders.

For run-of-the-mill cases, however, the question of expungement or sealing of records may be murky. What is even less clear is whether expungement—if not specified on a job or license application—may leave a job or licensure applicant in a quandary as to how to respond to a question of having been arrested or convicted if the record has been expunged and there is legitimately no longer a record linking that person to a crime. If the person answers “yes” and no record is found, then what? If a person answers “no” and contrary evidence turns up, then what?

In some cases, the application question encompasses expungement. The Montana Mortgage Act, for example, indicates that expungement is not a master key for a person seeking licensure as a mortgage broker or any related licensure because 32-9-120, MCA, still allows consideration of underlying circumstances of both pardoned and expunged felony convictions. The Montana Mortgage Act is based on federal legislation.

A new section of Montana law, introduced as [HB 543](#) in 2019, provides a process for requesting a sealing of records or expungement of certain misdemeanors. These criteria also may be helpful for employers or board members to review in determining employment, licensure, or relicensure. The “Misdemeanor Expungement Clarification Act” is codified in 46-18-1102 through 46-18-1111, MCA.

OTHER LEGISLATIVE OPTIONS

LEGAL PROTECTIONS FOR EMPLOYERS

Another approach taken under [SB 325](#) (2017 session) was to provide an employer with legal protection if the employer hired a person with a criminal record and had done due diligence prior to hiring. This would have included reviewing the arrest record or further information on the person’s record, including whether the conviction was for a misdemeanor offense that was unrelated to the employment. The protection also was extended if the employee with a criminal record was under the supervision of probation and parole and had received approval to apply for the job. Codified under 39-2-710, MCA, the measure was intended to remove one of the barriers that

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prevents those with criminal convictions from being hired by employers concerned with negligent hiring accusations.

Similar efforts in 2019 were aimed at providing protections to landlords who lease or rent to those with criminal convictions ([SB 293](#)) and to private educational institutions that admitted those with criminal convictions ([SB 229](#)).

CERTIFICATES OF REHABILITATION

Yet another option would have created a certificate of rehabilitation that job applicants could use to indicate they had achieved successful rehabilitated status ([SB 238](#)). All the bills were intended to remove barriers typically faced by those whose most recent history included incarceration. Unlike the employer protection bill, however, SB 293, SB 238, and SB 229 did not pass. According to the nonprofit organization [Legal Action Center](#), six states offer rehabilitation certificates: Arizona, California, Illinois, Nevada, New Jersey, and New York.

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Among the considerations the Economic Affairs Interim Committee may want to discuss are:

- RULE OR STATUTE?
 - If by rule, the choice would be whether to provide to the Department of Labor and Industry, or possibly to each specific board, the authority to set rules regarding:
 - what categories of crimes may require board-specific approval (for example, violent or sex-related felonies);
 - what look-back terms might require board-specific approval of an application as compared with a routine application review that allows department personnel to fast-track determination for licensure; or
 - whether to require specificity in asking for conviction information but not arrest, unless the arrest specificity in asking for conviction information but not arrest, unless the arrest is pending, or variations on that theme.
 - If by statute, the legislature could list broad considerations, the initial approach of SB 347 in 2019.

	FY2015	FY2016	FY2017	FY2018	FY2019
Total Applications	11,233	11,855	22,431	12,386	12,833
Applications with criminal history listed	1,139	1,157	1,077	1,164	1,270
Applications: Denied	6	5	3	2	4
Issued with Probation	5	12	10	12	21
Issued without strings	1,000	1,027	945	976	1,049

Applications not approved or denied may have timed out or may be still pending before the board, withdrawn, voided, or otherwise in process. Full data may be requested from the Department of Labor and Industry, Business Standards Division.