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Economic Affairs Interim Committee
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FINAL REPORT TO THE 67TH MONTANA LEGISLATURE

**SORTING OUT FEAR AND FACTS
UNDERLYING MONTANA'S
OCCUPATIONAL LICENSING OF THOSE
WITH CRIMINAL CONVICTIONS**

A STUDY UNDER SENATE JOINT RESOLUTION 18

ECONOMIC AFFAIRS INTERIM COMMITTEE MEMBERS

Before the close of each legislative session, the House and Senate leadership appoint lawmakers to interim committees. The members of the Economic Affairs Interim Committee, like most other interim committees, serve one 20-month term. Members who are reelected to the Legislature, subject to overall term limits and if appointed, may serve again on an interim committee. This information is included in order to comply with 2-15-155, MCA.

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This report is a summary of the work of the Economic Affairs Interim Committee, specific to the Economic Affairs Interim Committee’s 2019-2020 Senate Joint Resolution 18 study of occupational licensing for those with criminal convictions, as outlined in the Economic Affairs Interim Committee’s 2019-2020 work plan and SJR 18 (2019). This report highlights key information presented to the Committee. To review additional study-related information, including audio minutes and exhibits, visit the Committee Topics page under the Economic Affairs Interim Committee website: www.leg.mt.gov/eaic.

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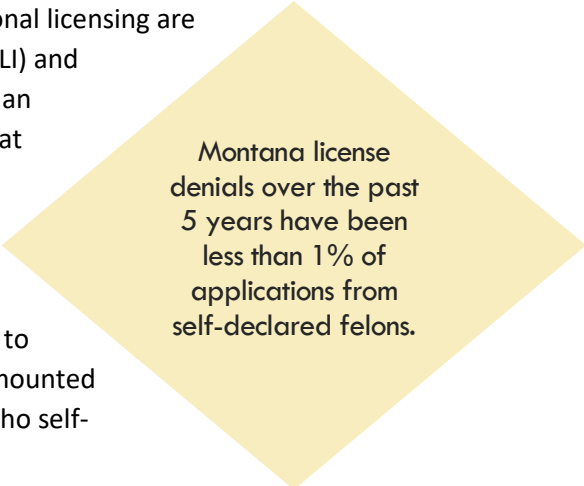
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OVERVIEW

The Senate Joint Resolution No. 18 study of licensing for those with criminal convictions focused on professional and occupational licensing, which enables those with criminal convictions to reenter society with meaningful employment, considered one of the key components that help to avoid recidivism or relapsing. The Economic Affairs Interim Committee chose to keep that focus narrow instead of looking at all the occupations for which a criminal background check might be required, including the issuing of a full-beverage alcohol or beer license or an insurance license.

Montana statutes governing professional and occupational licensing are carried out by the Department of Labor and Industry (DLI) and include 37-2-103, MCA, which states a conviction is not an automatic bar to licensing. The statute further states that after investigation a licensing board may determine--based on considerations of public health, welfare, and safety--that an applicant has not "been sufficiently rehabilitated as to warrant the public trust" for licensure. In fact, over the past five years, according to a [DLI report](#) to the EAIC in early 2020, license denials amounted to less than 1% of the license applications from those who self-declared that they had had criminal convictions.



Montana license denials over the past 5 years have been less than 1% of applications from self-declared felons.

Whether those with criminal convictions do not apply for a license out of fear of rejection or whether actual rejection is happening during the licensing process were two questions posed for the study. The first question was difficult to answer, but for the second question the Economic Affairs Interim Committee determined at its February 2020 meeting that the data from the Department of Labor and Industry (DLI) indicated few licenses had been denied in the past 5 years from someone with a self-admitted criminal conviction and that licenses had been granted to those with criminal convictions, sometimes but not always with provisional attachments.

The Committee also heard what DLI is doing or plans to do to help reassure those with criminal convictions that their applications will not be summarily rejected as the licensing boards seek both to meet the constitutional and statutory requirements regarding applications by those with criminal convictions and to address public health, welfare, and safety, one of the basic rationales for licensing.

Through public comment, the Economic Affairs Interim Committee heard from those who have had concerns about getting licensed. And the Committee also heard from a representative of the Department of Corrections regarding how the prison in Deer Lodge in particular works to help someone become prepared for life outside the prison once paroled or released.

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This study resulted in the following findings:

1. Data from the Department of Labor and Industry's licensing boards indicates the state does not automatically bar those with criminal convictions from obtaining licenses and that, in fact, many have received licenses.

Also resulting from the study were:

- data regarding applications granted and denied by those who stated that they have had criminal convictions;
- information about DLI's current and planned approaches to guidance to licensing boards reviewing applications from those with criminal convictions;
- in response to a committee request for information, an overview of the preapplication process allowed in Ohio and Arizona;
- information about the nuances related to the phrase "full rights are restored" in the Montana constitution; and
- other options, such as legislation previously brought before the Montana legislature regarding ways to help those with criminal convictions be considered for jobs based on their skills, with consideration of their history taken into account later in the process rather than earlier.

RECOMMENDATIONS

With this background, the Economic Affairs Interim Committee may decide to make any of the following recommendations: *[(Italicized language is subject to committee decisionmaking.) The committee may choose from the following presented at the November 2019 EAIC meeting or add new ideas or make a recommendation that the Department of Labor and Industry continue to offer guidance that allows case by case consideration as suggested in the [memo](#) provided to the EAIC at its June 30, 2020, meeting.]*

- *Remove subjective references for an applicant to have "a good moral character" or no "moral turpitude";*
- *Specify the types of criminal histories or background checks that are or are not allowed on a board-by-board basis;*
- *Clarify in statute the types of actions that may not be considered, for example: arrests without convictions, juvenile records, convictions beyond a certain number of years;*
- *Clarify in statute the types of actions that may be considered, for example, reduced pleas, convictions for crimes of a violent or sexual nature or of a nature that a license gives more opportunity to recommit the crime.*
- *Include in statute that youth court adjudications are to be treated similarly whenever statute says criminal convictions are not an automatic bar to being licensed. (This recognizes different terminology for youth, which currently is not recognized under 37-1-203, MCA.)*

CONSTITUTIONAL BASIS FOR RESTORED RIGHTS, BUT...

As with all laws, the founding policy approach arises from the Constitution. The relevant language in the Montana Constitution as relates to this study is that a person who has been convicted has "full rights...

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restored by termination of state supervision for any offense against the state." This language generally has been interpreted to mean that rights as a citizen are restored, but not necessarily full rights in all things. Not all states grant full rights of citizenship after a person is convicted of a felony. But Montana does. However, there are nuances and the following examples describe situations in Montana in which full rights may not be fully restored:

- juvenile records, which are to be sealed but are subject to court petition to be reopened and, for electronic records, perhaps difficult to seal;
- an expungement provision under Montana law, which may be requested for misdemeanors, but which also may be difficult to do for electronic records;
- motor vehicle violations. The Motor Vehicle Division in the Department of Justice retains records of traffic law violations longer than an insured driver's insurance company, which can only use records for a 3-year look-back for purposes of premium determination. Some of the retention is because points related to license/driving violations may accumulate over time.
- someone who is required to register with a sex or violent offender registry. The registration requirement lasts in most cases regardless of whether the person is free of state supervision.

Although this study could have been assigned to the Law and Justice Interim Committee, which would have had familiarity with the nuances related to expungement, state supervision, arrest, and conviction, Legislative Council assigned the study to the Economic Affairs Interim Committee in part because of the focus on occupational and professional licensing. To provide explanations of terms with which the Law and Justice Interim Committee deals routinely, the following table may help licensing boards in making complex determinations related to arrests, convictions, and deferred imposition of sentence.

Terms	Explanation Related to SJR 18 Study
Parole and Probation	<p>Parole is defined in 46-1-202, MCA, as " the release to the community of a prisoner by a decision of the Board of Pardons and Parole prior to the expiration of the prisoner's term subject to conditions imposed by the Board of Pardons and Parole and the supervision of the Department of Corrections.</p> <p>Probation is defined in the same statutes as "release by the court without imprisonment of a defendant found guilty of a crime. The release is subject to the supervision of the Department of Corrections upon direction of the court."</p>
<p>For the purposes of SJ18 - after conviction an offender may have ongoing obligations and limitations according to their probation or parole agreement, the crime they were convicted of and other issues. Any probation or parole obligations expire when the sentence expires. Often during the term of supervision these conditions change depending on how well the offender responds to supervision.</p> <p>DLI has indicated that persons on probation or parole may be considered for a professional or occupational license, although the conditions for probation or parole may be attached to a provisional license.</p>	
Expungement	<p>In 2019 the Legislature passed HB 543, the "Misdemeanor Expungement Clarification Act, which defined expunge or expungement as permanent destruction, deletion, or erasure of "a record of an offense from the criminal history record information system maintained by the Department of Justice in a manner that is appropriate for the record's physical or electronic form." (codified in 46-18-1103, MCA)</p>
<p>Some offenders--depending on their crime--may be eligible for expungement. The person who committed the crime is in a place legally as if it had never happened. However, the Department of Justice may not have the</p>	

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technical capability yet to easily accomplish the erasure due to all of the places the data resides and software limitations. Achieving that capability is expensive and time consuming.	
Registry	Persons convicted as a sexual or violent offender are required to register under 46-23-504, MCA. The obligation to register is separate from restoration of rights.
For the purposes of SJ 18, a person who must register as a sexual or violent offender is most likely going to have to report that registration on a licensing application. Some states tie being on the registry to an automatic bar to licensing, but the list of offenses that may land a person on the registry may include streaking at a college football game or an offense against public decency but not necessarily against an individual.	
Deferred Imposition of Sentence	When an offender receives a "deferred imposition of sentence," which many first-time felons who are convicted of nonviolent crimes receive, it technically means the sentence is held in abeyance so long as the offender abides by the conditions of the deferred imposition. Conditions may include jail time, community service, alcohol restrictions, among others. After the term of the deferred expires, the sentence goes away. What it actually means is there is still an electronic record of the conviction. While it seemingly technically means that the conviction never occurred, thus a young offender gets a second chance, in reality it is still searchable in various databases unless the offender is able to have it removed, which is difficult if not impossible from a technical standpoint. It is a question as to how an offender who has successfully completed a deferred sentence should answer the question on a job application of whether he or she was ever convicted of a felony.
Information sent in an email and memo from Julianne Burkhardt, Montana Legislative Services. The memo is in Appendix 1.	

Further, dealing with juvenile offenders raises additional questions with terminology different than that for adults. Legislative Services attorney Joe Carroll points out that youth are not convicted (unless they are tried as adults). Instead, they are adjudicated as delinquent youth. Mr. Carroll further says, "The first thing to note is that action in youth court is civil, not criminal." He added, "Likewise, a youth isn't incarcerated but can be placed in a state youth correctional facility. See [41-5-106](#), MCA. Other aspects that may require recognition of differences between youth and adult offenses is that, while youth court records start out as public records that are open to public inspection, there are provisions to seal them (at the youth's 18th birthday if not before under certain conditions) and eventually to destroy the records. See [41-5-215](#) and [41-5-216](#), MCA.

As provided in the DLI [memo](#) for guidelines to the licensing boards regarding applicants by those with criminal convictions, the goal will be to not require applicants to list arrests or adjudications as a minor.

THE APPLICATION PROCESS

Montana's licensing boards number 33, handling more than 50 professions and occupations. These include health-related boards like the Board of Medical Examiners, which licenses physicians, podiatrists, physician assistants, nutritionists, acupuncturists, and emergency responders. Other boards license plumbers, electricians, land surveyors, and other professions. See Appendix 2 for data on the licensing boards and the outcome of applications for applicants who self-declared that they had had a criminal conviction.

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This section will further review how the Department of Labor and Industry handles criminal background data and which boards specifically may request criminal background information.

The DLI guidance to licensing boards may not address the concerns of those who either do not apply or do not appear to follow through with applications out of fear of being rejected because of criminal convictions,

DLI Proposals for Licensing Board Guidance in Reviewing Applications from Those with Criminal Convictions

- **Review Relevancy of the Crime in terms of the Requested License**
 - the nature and circumstances of the offense
 - the time lapse between the offense and the application
- **Review Rehabilitation Information**
 - information on training, subsequent conduct

although the Economic Affairs Committee may recommend that DLI draft an FAQ for general posting. DLI's proposed new guidance is primarily intended for licensing boards.

OPTIONS USED IN OTHER STATES

Among the requests made by the Committee was one to see what other states had done in terms of previewing an application by someone with a criminal conviction. This suggestion was included in a bill proposed in the 2019 session.

Pre-Review

The states of Indiana, Ohio, and Arizona have adopted a preapplication review. Ohio's came in Senate Bill 255 in 2019 (see <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA132-SB-255>); Arizona's in 2018. Arizona implementation <https://www.azleg.gov/legtext/53leg/2r/bills/sb1436p.pdf>

A staffer for Arizona's board that licenses technical professions, like engineers, said that he has seen few requests for pre-reviews, although one had recently come in. He noted that a "clearance card" that is issued by the Arizona Department of Public Safety, has resolved some questions that boards may have had when requested to license a convicted burglar who might be applying to for a license to install alarms. Once vetted for the clearance card, that resolves further questions, he said.

Indiana - H.B. 1245 in 2018 —Allows applicants to seek a determination, before going through the application process, as to whether the individual's prior conviction will disqualify the individual from receiving the license or certification.

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Listing of Specified Crimes That Disqualify Applicants

Indiana's Legislature required licensing boards to address what convictions can be considered in licensure. Here's what the Indiana Board of Barbers and Cosmetologists provide in their regulations:

(d) Not later than November 1, 2018, a board, commission, or committee shall revise its licensing or certification requirements to the extent necessary to explicitly list the crimes that may disqualify an individual from receiving a license or certificate under this title. The board, commission, or committee may not:

(1) use nonspecific terms, such as moral turpitude or good character, as a licensing or certification requirement; or

(2) consider an arrest that does not result in a conviction.

<https://www.in.gov/pla/files/2019%20SBCBE%20Statutes%20and%20Rules.pdf>

Other Options

A summary of other legislation that has been considered that relates to SJ 18.