

CONCURRENCE IN SENATE AMENDMENTS

AB 2138 (Chiu and Low)

As Amended August 24, 2018

Majority vote

ASSEMBLY: 45-29 (May 31, 2018)

SENATE: 24-13 (August 28, 2018)

Original Committee Reference: **B. & P.**

SUMMARY: Reduces barriers to licensure for individuals with prior criminal convictions by limiting a regulatory board's discretion to deny a new license application to cases where the applicant was formally convicted of a substantially related crime or subjected to formal discipline by a licensing board, with offenses older than seven years no longer eligible for license denial, with several enumerated exemptions.

The Senate amendments significantly narrowed the bill's applicability and scope through changes to the bill that do the following:

- 1) Extend the timeframe during which all substantially related criminal convictions may be considered from five years to seven years.
- 2) Replace the exemption from the seven-year washout period for "violent felony" convictions with a broader exemption for "serious felony" convictions.
- 3) Exempt convictions for crimes requiring registration as a Tier 1 or Tier 2 sex offender.
- 4) Exempt, for applicants seeking licenses that regularly involve a financially sensitive relationship with members of the public, financial crimes determined by the relevant board through rulemaking to be directly and adversely related to the licensed profession.
- 5) Restore current law allowing boards to deny an application for licensure where an applicant has a prior criminal conviction that is "substantially related" to the licensed profession.
- 6) Clarify that the seven-year washout period is tolled from date that the applicant was released from incarceration, when applicable.
- 7) Expressly authorize a board to deny an applicant for licensure who has been subject to discipline by a board either within or outside of California.
- 8) Strike all provisions in the bill modifying the authority of a board to suspend a license, revoke a license, or place a new or current license on probation.
- 9) Restore the ability of a board that does not conduct a fingerprint background check of its license applicants to require applicants to self-disclose their criminal histories.
- 10) Permit all other boards to request an applicant voluntarily provide details about his or her criminal history, provided that the applicant is informed that the applicant's decision not to disclose any information is not be a factor in a board's decision to grant the application.

- 11) Strike all provisions of the bill requiring boards to respond to petitions for changes to probation within 90 days.
- 12) Revise portions of the bill related to applicants who make a showing of rehabilitation to a board to simply require that a board consider that an applicant is rehabilitated if he or she has completed a criminal sentence without a violation of parole or probation, or has satisfied criteria for rehabilitation developed by the board.
- 13) Exempt from all changes made by the bill the State Athletic Commission, the Bureau for Private Postsecondary Education, and the Horse Racing Board.
- 14) Delay implementation of the entire bill until July 1, 2020.

EXISTING LAW:

- 1) Establishes the Department of Consumer Affairs (DCA) within the Business, Consumer Services, and Housing Agency. (Business and Professions Code (BPC) 100)
- 2) Enumerates various regulatory boards, bureaus, committees, and commissions under the DCA's jurisdiction. (BPC 101)
- 3) Authorizes a board to deny a professional license issued under its jurisdiction if the applicant has any of the following:
 - a) Been convicted of a crime.
 - b) Done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another.
 - c) Done any act that if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license. (BPC 480)
- 4) Limits a board's authority to deny a license to instances where the applicant's crime or act is substantially related to the qualifications, functions, or duties of the profession for which application is made. (*Id.*)
- 5) States that a person shall not be denied a license solely on the basis that he or she has been convicted of a felony if he or she has obtained a certificate of rehabilitation. (*Id.*)
- 6) Permits a board to deny an application for a license on the ground that the applicant knowingly made a false statement of fact that is required to be revealed in the application for the license. (*Id.*)
- 7) Prohibits a board from denying an application for a license solely based on a criminal conviction that has been dismissed. (*Id.*)
- 8) States that a person shall not be denied a license solely based on prior convictions for a misdemeanor if he or she has met all applicable requirements of the criteria of rehabilitation developed by the board to evaluate the rehabilitation of a person when considering the denial of a license. (*Id.*)

- 9) Requires each board to develop criteria to aid it, when considering the denial, suspension or revocation of a license, to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates. (BPC Section 481)
- 10) Requires each board to develop criteria to evaluate the rehabilitation of a person for purposes of considering the denial of a license application or considering suspension or revocation of a current license. (BPC 482)
- 11) States that successful completion of any diversion program or successful completion of an alcohol and drug problem assessment program shall not prohibit a board from denying a license for professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a record pertaining to an arrest. (BPC 492)
- 12) Establishes that the record of conviction of a crime shall be conclusive evidence of the fact that the conviction occurred for purposes of a board's decision to deny an application for a license or suspend or revoke a current license, except a board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question. (BPC 493)

FISCAL EFFECT: According to the Senate Committee on Appropriations, varying fiscal impacts for each board under the DCA ranging from minor and absorbable to significant.

COMMENTS:

Purpose. This bill is sponsored by a coalition of criminal justice advocacy groups including the East Bay Community Law Center, Anti-Recidivism Coalition, Legal Services for Prisoners with Children, and Root & Rebound. According to the author:

California has among the highest recidivism rates in the nation, with many low-level criminal offenders committing new crimes within a year of release. These factors play a significant role in the prison and jail overcrowding crisis that the Legislature has spent the past decade attempting to address. One of the root causes of high recidivism rates is the inability of prior offenders to secure gainful employment upon reentry. Nearly 30% of California jobs require licensure, certification, or clearance by an oversight board or agency for approximately 1,773 different occupations. All too often, qualified people are denied occupational licenses or have licenses revoked or suspended on the basis of prior arrests or convictions, many of which are old, unrelated to the job, or have been judicially dismissed. Alleviating barriers to occupational licensing is just one way California can reduce recidivism and provide economic opportunity to all its residents.

Background. *Board Discretion to Deny Applications for Licensure.* Due to the unique nature of each individual profession licensed and regulated by entities under the DCA, the various professional practice acts contain their own standards and enforcement criteria for individuals applying for or in receipt of special occupational privileges from the state. There are some umbrella statutes that govern the discretion of these regulatory bodies generally. For example, BPC 480 governs the authority of regulatory boards to deny applicants for licensure.

Under BPC 480, a board *may* deny a license within the purview of the DCA on the grounds that the applicant has one of the following:

- 1) Been convicted of a crime; boards may disqualify based on criminal history if the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence.
- 2) Done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another.
- 3) Done any act that if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

BPC 480 specifies that a license may only be denied for prior misconduct if the disqualifying crime or act is substantially related to the qualifications, functions, or duties of the business or profession for which application is made. The statute also states that a person may not be denied a license solely based on a conviction if he or she possesses a certificate of rehabilitation. Statute further clarifies that a dismissed conviction may not be grounds for disqualification for licensure.

These provisions are echoed in BPC 490, which deals with the discretion of a board to take disciplinary action against a current licensee for subsequent criminal activity. This code section makes specific reference to *Petropoulos v. Department of Real Estate* (2006) 142 Cal.App.4th 554, a court decision dealing with licensees convicted of criminal misconduct. The Legislature has found and declared the holding in that case has "placed a significant number of statutes and regulations in question, resulting in potential harm to the consumers of California from licensees who have been convicted of crimes." The Legislature therefore further found and declared that "this section establishes an independent basis for a board to impose discipline upon a licensee."

Criticism has been made over statute's allowance for boards and bureaus to deny a license to an individual who has "done any act involving honesty, fraud, or deceit" for self-benefit or harm to others. This broad discretion goes beyond criminal convictions, as well as non-criminal activity that is nevertheless afforded an element of due process, such as regulatory discipline. This authority has opened the door for many licensure applications to be denied based purely on alleged misconduct that has not been determined to have occurred through standard due process.

The discretion for boards and bureaus to deny licensure to applicants with criminal histories has also been criticized, despite the guarantee of due process afforded to these applicants prior to a crime being reflected on their record. In its report *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records*, the National Employment Law Project (NELP) discusses the arguably draconian nature of barriers to occupational entry based on criminal history. NELP's report refers to "a lack of transparency and predictability in the licensure decision-making process and confusion caused by a labyrinth of different restrictions" in regulatory schemes across the country.

California is specifically graded as "Needs Improvement," with recommendations including:

- 1) Expand blanket ban prohibition to all occupations with one overarching law.
- 2) Expand occupation-relatedness requirement to all.

- 3) Require consideration of the time elapsed since conviction.
- 4) Prohibit consideration of certain record information (arrests, lesser offenses, older offenses).
- 5) Require consideration of the applicant's rehabilitation.

In 2017, the Assembly Business and Professions Committee discussed barriers to licensure generally in its sunset background paper for the DCA. Specifically, the committee considered how criminal convictions eligible for license disqualification in California are limited in the sense that they must be "substantially related" to the profession into which the license allows entry. Concern was expressed that there is a "serious lack of clarity for applicants as to what 'substantially related' means and this determination is often left to the discretion of individual boards." The committee staff recommendation was for the DCA to take steps to improve transparency and consistency in the use of applicants' criminal histories by boards and bureaus.

Recidivism Reduction Policies. California has among the highest recidivism rates in the country. At the height of the state's prison overcrowding crisis, the percentage of incarcerated individuals becoming convicted of new crimes and returned to prison was close to 70%. This troubling statistic and its detrimental effects on society, the economy, and public safety – in addition to a court decision in *Brown v. Plata* regarding the inhumanity of overcrowded prisons – led to a variety of anti-recidivism policies in localities and statewide. Many of these policies focused on expanding economic opportunity for those with criminal conviction histories, seeking to "close the revolving door" of prisons.

In 2012, the White House under President Obama called for expanded policies encouraging successful reentry through postrelease employment. This included "ban the box" policies, referring to the deferment of disclosure of criminal history on initial applications for employment. These policies allow an applicant to proceed through a hiring process up until the final offer stage without their prior conviction being disclosed. The intent of this and other post-conviction reentry policies is to provide those convicted of crimes with economic opportunity following release, which in turn reduces criminal recidivism, improves public safety, and curbs over-incarceration. In 2013, AB 218 (Dickinson), Chapter 699 was signed into law as California's first "ban the box" legislation. The bill prohibited a state or local agency from asking an applicant to disclose information regarding a criminal conviction until the agency has determined the applicant meets the minimum employment qualifications for the position. This legislation was followed in 2017 by AB 1008 (McCarty), which extended the law to include private employers.

This bill would similarly improve economic opportunity for those with criminal convictions by increasing access to professional licensure. This bill does not broaden the state's "ban the box" laws to professional licensure, and it does not replicate those laws enacted for employment by a public or private entity. Applicants for licensure are not competitively evaluated and chosen based on professional strengths. Applicants are presumed eligible if they meet certain qualifications and if there is nothing to disqualify them. An applicant's criminal history is disclosed at the time of the application and this bill would not exclude or delay its consideration.

However, because current law enables boards to disqualify based on crimes that are "substantially related" to the profession, applicants are often unaware of what misconduct will render them ineligible for licensure. Further, many applications for licensure require self-disclosure of prior misconduct from applicants; in instances where applicants underestimate the

inclusivity of what crimes or acts will disqualify them, they may fail to voluntarily disclose that information. This lack of disclosure is in and of itself grounds to deny the application for licensure. The practice of requiring self-disclosure by applicants and then denying an application based on an applicant's inadequate self-incrimination is frequently regarded as the "candor trap."

Criminal Offenses Eligible for Consideration. This bill does not change the authority of an individual board to determine what crimes may be considered when denying a licensure application. The bill currently retains the discretion for each board to establish its own criteria to decide whether a crime is substantially related. The bill does mandate data collection and public reporting in regards to how criminal convictions are used to deny licenses. This information will guide policymakers in the event that more prescriptive reforms to what crimes are eligible for consideration are contemplated.

The bill institutes a seven-year "washout period" for convictions. Under these provisions, crimes older than seven years may no longer be considered for purposes of denying a licensure application. However, this washout period does not apply to serious felonies or crimes requiring registration as a Tier 1 or Tier 2 sex offender. The bill also allows the following licenses under the following boards whose licensees are frequently placed in a financially sensitive relationship with the public to add additional financial crimes to the washout period exemption through rulemaking:

- 1) Board of Accountancy
- 2) Fiduciaries Bureau
- 3) Department of Real Estate
- 4) Bureau of Security and Investigative Services
- 5) Contractors State License Board
- 6) Board of Real Estate Appraisers
- 7) Cemetery and Funeral Bureau

The bill's current seven-year washout period aligns with the standard for private employment, where background checks only go back seven years. It also roughly aligns with the point at which research suggests a nonviolent prior offender is no more likely to reoffend. Individuals convicted of crimes longer than seven years ago that are nonserious, nonviolent, nonsexual, and—for applicable boards—non-financial may still be placed on probation upon licensure, and may be subject to restrictions on practice included in conditions for probation or parole. Finally, the bill clarifies that the seven-year clock does not start until after an incarcerated inmate has been released from jail or prison.