



Policy Perspective

Working with Conviction: Criminal Offenses as Barriers to Entering Licensed Occupations in Texas

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RECOMMENDATIONS

- Institute provisional licenses, particularly for nonviolent ex-offenders.
- Eliminate Class C and other regulatory misdemeanors unrelated to the occupation as grounds for denial or revocation of an occupational license.
- Increase coordination between parole and probation departments and licensing agencies.
- Streamline administrative hearings and make resulting decisions in licensing cases binding on all agencies.
- Create incentive for licensee to voluntarily notify board upon arrest.
- Reform automatic disqualifications for licenses governed by the Private Security Bureau.
- Expand use of declaratory orders so persons with convictions can receive a decision prior to pursuing training for a licensed occupation.
- Avoid licensing additional occupations.
- Limit civil liability of employers who hire ex-offenders.

INTRODUCTION

The National Employment Law Project reports that approximately one in five American adults have a criminal record that will show up in background checks.¹ That would amount to 4.7 million Texas adults, not accounting for the fact that Texas' crime rate is higher than the national average.

Studies have shown that ex-offenders face more difficulty in obtaining employment than illegal immigrants.² Yet, ex-offenders who are employed are three to five times less likely to re-offend, according to the Federal Bureau of Prisons.³ The Texas Workforce Commission (TWC) has identified statutes and administrative rules that exclude some ex-offenders from over 100 different licensed occupations from plumber to electrician to dietitian. TWC Chairwoman Diane Rath notes that as part of Project RIO (Reintegration of Offenders) they provide information to local workforce boards "for them to use in discussing with ex-offenders the opportunities, or lack of opportunities, in specific trades."^{4*}

In April 2006, Florida Governor Jeb Bush issued Executive Order 06-89 directing all state agencies and licensing boards to review and revise their policies relating to the employment and licensure of people with criminal convictions. The order required them to produce data on the number of ex-offenders whose licenses they denied or revoked, and encouraged private employers to reevaluate their criteria for excluding ex-offenders to

make certain that they are narrowly tailored to ensure public safety while promoting rehabilitation.⁴ The report was based on recommendations issued by the Governor's Ex-Offenders Task Force.⁵ Also in 2006, the cities of Boston and Chicago adopted new municipal hiring policies to encourage employment of people with criminal records. Is it time for Texas to step up to the plate?

GENERAL LAW ON LICENSING AND CONVICTIONS

The umbrella statute on convictions that applies to nearly all licensed occupations is Texas Occupations Code Section 53.021, which provides that a licensing authority may suspend or revoke a license or disqualify a person from receiving a license "on the grounds that the person has been convicted of a felony or misdemeanor that directly relates to the occupation." While this portion of the statute is discretionary, Section 53.021 also requires that an occupational license be revoked upon imprisonment following a felony conviction or revocation from probation or parole.

Section 53.022 provides that agencies shall consider the following factors in determining whether a conviction is directly related to the occupation:

1. Nature and seriousness of the crime;
2. Relationship of the crime to the purposes for requiring a license to engage in the occupation;

* Some of the vocations that Project RIO trains inmates in such as welding and carpentry are unlicensed while others such as electrician, truck driver, and cosmetologist are licensed.

3. Extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and
4. Relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.

In assessing the fitness of a person with a conviction to perform, Section 53.023 states that licensing authorities shall consider:

1. Extent and nature of the person's past criminal activity;
2. Age of the person when the crime was committed;
3. Amount of time that has elapsed since the person's last criminal activity;
4. Conduct and work activity of the person before and after the criminal activity;
5. Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and
6. Other evidence of the person's fitness, including letters of recommendation from:
 - (A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;
 - (B) the sheriff or chief of police in the community where the person resides; and
 - (C) any other person in contact with the convicted person.

Section 53.025 also directs each licensing authority to issue guidelines stating the reasons a particular crime is considered to relate to a particular license.

It is worth noting that Chapter 53 does not apply to a person who is licensed by the State Bar, the Texas State Board of Medical Examiners, the Texas State Board of Pharmacy, the State Board of Dental Examiners, or the State Board of Veterinary Medical Examiners, or who is licensed as a peace officer, and who has been convicted of a felony drug offense. Thus, whether individuals with a conviction can obtain or maintain a license in these occupations depends on statutes and/or rules specific to that agency, which may exclude applicants for offenses which are not directly related and regardless of demonstrated fitness. For example, the Board of Law Examiners excludes an individual from applying for a law license if it is within five years of completing a sentence or probation for a felony, including drug possession.⁶

APPLICATION OF CHAPTER 53 IN PRACTICE

While the factors enumerated in Chapter 53 are reasonable to consider for those offenses that truly relate to the occupation, the legislative intent of allowing licensure without a bureaucratic process for unrelated offenses has been undermined. This is because many agencies view nearly all offenses as directly relating to the occupations they regulate.

There are numerous examples of this. For instance, the Texas Department of Licensing and Regulation (TDLR), the state's umbrella licensing agency, considers any drug conviction to be directly related to being a water-well driller. Their guidelines explain, "Due to the safety concerns pertaining to the operation of the equipment, a person with convictions involving illegal use or possession of controlled substances has not demonstrated fitness for the duties performed by a well driller."⁷ The Department uses the exact same language in explaining why any drug conviction is also considered directly related to being a water-well pump installer. Of course, being inebriated on the job in-

TalkingPoint:

Many agencies view nearly all offenses as directly relating to the occupation they regulate.

terferes with performing any occupation, but few if any of the drug convictions that could keep a person from being a water-well driller or pump installer under this overly broad policy are likely to have involved using drugs while at work, or even being under the influence while at work. Individuals with drug convictions may nonetheless be able to obtain or retain a license in these occupations pursuant to TDLR's consideration of their individual circumstances based on the directly related and fitness factors set forth in Chapter 53. But, this process can take months, and even a year or more if the person appeals the agency's decision to the State Office of Administrative Hearings (SOAH). SOAH issues proposals for decisions, which are not binding on an agency, unless an agency's statutes or rules designate that they will be bound by SOAH decisions.

The Texas State Board of Dietitians also takes a sweeping approach in considering nearly all of the most common categories of criminal offenses, except drug possession, as directly related to the occupation and therefore grounds for exclusion. Texas Administrative Code Title 22, Part 31, Rule 711.13 provides that offenses considered directly related to being a dietician include a misdemeanor or felony involving moral turpitude,* offenses against the person, offenses against property, offenses against public order and decency, and offenses against public health, safety, and morals.⁸ The latter category includes DWI. The Rule also specifies that other unspecified offenses may also be considered to be directly related.

Similarly, the Advisory Board of Athletic Trainers, as specified in TAC Title 22, Part 40, Rule 871.15 considers these same categories

of offenses to be directly related to being an athletic trainer, and therefore grounds for denial or revocation of a license.⁹ Like the Dietitians' Rule 711.13, this Rule specifies that the list is not exclusive of those offenses which may be considered directly related to being an athletic trainer. The Funeral Service Commission in TAC Title 22, Part 10, Rule 203.33 casts a similarly wide net in licensing its occupations such as embalmers and morticians, including not only the same categories as dietitians and athletic trainers, but also any drug possession offense.¹⁰

Under a rule promulgated by the Department of Public Safety (TAC Title 37, Part 1, Rule 23.61), vehicle inspectors are automatically ineligible for a license, or will have their license revoked, if they are convicted of any felony.¹¹ Even less than a gram of a controlled substance other than marijuana is a state jail felony.

The Texas Residential Construction Commission considers any misdemeanor involving moral turpitude and any felony or misdemeanor involving deceit to be directly related to being a residential home builder or remodeler,[†] no matter how long ago it was.¹² Applicants and licensees with such convictions are reviewed based on the criteria in Chapter 53.

Electricians and Criminal Convictions

Total Electrician Applicants	154,000	
Electrician Applicants with Conviction(s)	21,560	14%
Denied or Revoked Due to Conviction(s)	634	.33%

Source: Texas Department of Licensing and Regulation

TalkingPoint:

Any drug offense may disqualify a person to be a mortician or embalmer.

* Crimes of moral turpitude have been defined in an opinion by the Texas Attorney General as those involving dishonesty, fraud, deceit, misrepresentation, or deliberate violence. See Opinion No. GA-0299, January 25, 2005, <http://www.oag.state.tx.us/opinions/GA/GA0299.pdf>.

† In 2007, the Legislature lowered the threshold for remodelers to be licensed from \$20,000 to \$10,000 as part of HB 1038.

TalkingPoint:

In 2006, some 10,000 persons were disqualified from security related occupations such as locksmiths due to a criminal record.

TDLR controls the licensing of barbers, cosmetologists, and manicurists, which up until two years ago had been regulated by a separate agency. These occupations, which include everything from shampoo apprentice to hair weaver, are governed by Chapter 53. Although TDLR has not made the guidelines for what offenses are “directly related” available online, they provided them to us. Sex and violent offenses are considered directly related for barbers, cosmetologists, and manicurists, but drug offenses are inexplicably only considered directly related for barbers. Assault is one of the covered violent offenses, which would include domestic violence. The most recent data shows there have been only five revocations or denials of barber licenses based on a criminal conviction. However, that does not necessarily mean the impact is minimal because it cannot be determined in this or other occupations how many ex-offenders do not go through the trouble of training and applying for a license because of the uncertainty involved. Interestingly, cosmetology is one area in which Texas prison inmates are trained and money is saved through having inmates “in training” cut the hair of other inmates. TDLR confirms that no license is needed for that since it is a training program.

BEYOND CHAPTER 53: THE PRIVATE SECURITY BUREAU

The agency with the poorest record of accepting applicants with convictions is the Department of Public Safety’s Private Security Bureau, which is exempted from Chapter 53’s requirement to focus on those offenses directly related to the occupation. The *Austin American–Statesman* reported that the Bureau in 2006 alone “cited an unacceptable criminal history to summarily deny nearly 10,000 applicants the opportunity to work in one of the 16 professions it regulates,” including locksmiths and guard dog trainers.¹³ The word “summarily” connotes the fact

that, unlike at other agencies, applicants and licensees are not entitled to a hearing before the Board, but instead must appeal directly to SOAH. And since the Board is not one of the agencies whose statutes bind them to follow SOAH decisions, the Bureau has refused to reinstate many highly respected lifelong locksmiths whose licenses were revoked for petty crimes decades ago—despite contrary rulings by several administrative law judges. Ironically, some of these locksmiths worked for DPS and local police departments, receiving excellent performance reviews.

The *Statesman* reported that Texas City’s Gary Wilson, 57, had worked as a locksmith most of his life, but when the 2003 law first licensing locksmiths, which applied retroactively, required him to apply for a license, he was rejected because of a decade-old DWI conviction. His attorney Peter Nolan, a partner in the Austin office of Winstead, says Wilson gave up drinking completely after his 1994 arrest. Nolan obtained a SOAH ruling in Wilson’s favor, but the Bureau has disregarded it, leading Nolan to file a suit that is now pending in Travis County district court. The suit alleges that by disqualifying individuals for offenses wholly unrelated to the occupation, the Bureau is violating the constitutionally enumerated right to due process as well as the implied constitutional right to work.

Revocations have even occurred prior to conviction. Tyler locksmith Eric Young had his license revoked a week and a half after being arrested in October 2006 for a domestic dispute, even though he pleaded not guilty and his trial was months away. Young had changed locks for DPS and the Attorney General, and had letters of recommendation from a DPS officer and an Assistant Attorney General. However, according to the Occupations Code Chapter 1702, Section 1702.364 (a), the Private Security Bureau is

Examples of Regulations on Convictions in Selected Texas Occupations

Bingo Operator	A person is ineligible to be a commercial lessor if he/she has been convicted of a felony, a gambling or gambling related offense, or a crime of moral turpitude, if less than 10 years has elapsed since termination of sentence, parole, mandatory supervision, or community supervision served for the offense. Other, less unusual, restrictions apply. (TOC Title 13, 2001.154)
Home Delivery/Repair/Installation (all "in-home" service)	An "in-home service" company is refutably presumed to have not acted negligibly if they hire someone who has not been convicted of (i) an offense against the person of the family; (ii) an offense against property; and (iii) public indecency. -Creates situation of de facto restriction against convicted felons working as deliverymen, repairmen, or "cable guys" due to risk of civil charges being brought against a business for hiring a felon.
Athletic Trainer	Board may revoke or refuse to issue a license for conviction of a felony, or conviction of a misdemeanor involving "moral turpitude."
Auctioneer	May not have been convicted of a felony within 5 years of application date for license.
Bail Bondsman	NOT eligible for license if convicted of a felony, or a misdemeanor involving moral turpitude if conviction occurred after August 27, 1973. (TOC 1704.153)
Combative Sports Occupation (boxing referee and judge)	A referee or judge for a combative sport cannot be a convicted felon in order to receive a license for either of the two positions.
Chemical Dependency Therapist	Graduated limitations on how long a license shall not be renewed based on type and severity of offense, which is divided into 4 categories of offenses. -Categories III and IV pertain to lesser offense. -Category III includes Class A misdemeanor drug and alcohol offenses, felony drug and alcohol offenses, Class A misdemeanors that result in actual or potential harm to others and animals, and all felony offenses that do not involve actual or risked harm towards others and animals. -An applicant cannot have been convicted of a Category III offense 7 years prior to application for license. -Category IV includes Class B misdemeanor alcohol and drug offenses and Class B misdemeanors that result in actual or potential harm towards others and animals. -Category IV offenses cannot have taken place 5 years prior to application.
Dietician	Board given discretion as to whether or not they can deny a license based on the nature of the crime committed. No strict bar created that "shall" result in an applicant being denied a license.
Dog Trainer (licensed guard dog)	Applicant for a license cannot have been convicted of a Class A misdemeanor, and cannot have been convicted of a Class B misdemeanor less than 5 years before date of application. Board has discretion whether to issue a license in regards to Class B misdemeanors even after the 5 year anniversary, unless a pardon has been granted. (T.O.C. 1702.113)
Fire Fighter	Board given discretion along with guidelines as to what offenses are relevant to the job of fire fighter and whether an applicant may or may not be denied a license. (TAC-Title 37, Part 13, Ch. 403.7)
Interior Designer	Board given discretion as whether or not to deny/revoke a license for interior design based on guidelines of what offenses pertain to the job of interior designer. (TAC Title 22, Part 1, Ch. 5h, 5.158)
Interpreter (sign language and oral)	Board may deny application, suspend, or revoke certificate for an interpreter for conviction of a felony involving theft or controlled substances. Other crimes listed that are considered to be directly related and therefore grounds for denial or revocation are homicide, rape, sexual abuse, indecency with a child, injury to a child, aggravated assault, robbery, burglary, theft, forgery, bribery, and perjury. (TAC Title 40, Part 2, Ch. 109, Sub. Ch. B, Division 1, 109.243)
Jailer	A jailer may not be convicted of an offense above a Class B misdemeanor, and must wait 5 years after conviction of a Class B misdemeanor to apply for license. (TAC Title 37, Part 7, Ch. 217, 217.1)
Landscape Architect	License revoked for any felony conviction resulting in incarceration. Discretion given to board, along with guidelines stating which offenses pertain to landscape architecture, to decide whether or not to deny/revoke an applicant/holder's license. (TAC Title 22, Part 1, Ch. 3, Rule 3.149)

TalkingPoint:

An arrest can result in a suspension of a locksmith's license even prior to any determination of guilt.

Land Surveyor	License revoked for any felony conviction resulting in incarceration. Discretion given to board, along with guidelines stating which offenses pertain to land surveying, to decide whether or not to deny/ revoke an applicant/ holder's license. (TAC Title 22, Part 29, Ch. 663, Rule 663.20)
Locksmith	Applicant for a license cannot have been convicted of a Class A misdemeanor, and cannot have been convicted of a Class B misdemeanor less than 5 years before date of application. Board has discretion whether to issue a license in regards to Class B misdemeanors even after the 5 year anniversary, unless a pardon has been granted. (T.O.C. 1702.113)
Lottery Agent	Board has discretion for a number of factors, but shall deny a license to persons convicted of felony, criminal fraud, gambling or a gambling-related offense, or a misdemeanor involving moral turpitude, if less than 10 years has elapsed since the termination of the sentence, parole, mandatory supervision, or probation served for the offense. Or if applicant has been a professional gambler. A "professional gambler" is a person whose profession is, or whose major source of income derives from, playing games of chance for profit. (TAC Title 16, part 9, Ch. 401, 401.153)
Maritime Occupations	A maritime worker can't be a murderer, smuggler, or ever been convicted of a crime involving explosives, etc. Only controversial issue is that a person cannot have been convicted for "distribution of, possession with intent to distribute, or importation of a controlled substance." (Title 49 CFR, 1572.103)
Midwife	May have license denied or revoked for number of reasons, including conviction of a felony or a misdemeanor involving moral turpitude; intemperate use of alcohol or drugs while engaged in the practice of midwifery; disciplinary action taken by another jurisdiction affecting the applicant's legal authority to practice midwifery. (TAC Title 22, Part 38, Ch. 831, 831.20)
Pesticide Applicator	The commissioner may revoke, suspend, annul, or amend an existing valid license, disqualify a person from receiving or renewing a license, or deny a person the opportunity to be examined for a license because of a person's conviction of a felony or a misdemeanor, if the crime directly relates to the performance of the occupation or activity for which the license is issued and the prior criminal conviction directly affects such person's present fitness to perform such occupation or activity. Offenses considered to be directly related include crimes involving "moral turpitude" and any felony or misdemeanor in the Penal Code involving deceit. (TAC Title 4, Part 1, Ch.2, 2.1)

authorized to summarily suspend a license or summarily deny an application on receiving written notice from DPS or another law enforcement official that an individual has been arrested for, or charged with, a Class B misdemeanor or above. Young retained Austin attorney and former Travis County Judge Bill Aleshire, who successfully reached a settlement with the Board to restore Young's license until, and unless, he is convicted.

Then there is alarm device installer Nathan Crabtree. At the age of 19, he was convicted of a misdemeanor assault in 2001 for hitting his girlfriend's child in a fit of anger. Although he had been licensed and successfully performing his duties as an installer for four years, the Bureau revoked his license in November 2006. Crabtree, who represented himself before SOAH, won a favorable decision from the administrative law judge, who ruled that Chapter 53 applied and that

the conviction was directly related to being an alarm installer simply because installers interact with the public (a questionable rationale because it could apply in almost all circumstances), but that Crabtree had been rehabilitated and that, therefore, his license should be restored.¹⁴ However, the Bureau chose not to implement the SOAH decision, so Crabtree remains suspended.¹⁵ The Bureau has taken this position even though Crabtree's supervisor at Hilton Technologies testified that he had been an exemplary employee with no incidents.

HB 2833, enacted in the 80th Legislature and effective as of September 1, 2007, modified existing law regarding convictions. First, it clarified conflicting rulings by administrative law judges by expressly stating that Chapter 53 does not apply to the Bureau's licenses. This means that individuals will no longer be able to seek relief from a denial or

revocation by arguing that the offense was totally unrelated to the occupation. However, HB 2833 slightly improved the law on old convictions. Under this legislation, a license must be denied or revoked for any occupation regulated by the Board if the person has been convicted of a felony within the past 20 years or a Class A misdemeanor within the past 10 years.¹⁶ Prior to this change, Class A misdemeanors were automatically disqualifying unless more than 20 years old, although for certain types of older offenses, a person could request a hearing before the Board. However, there were no criteria in statute or rule governing such a hearing.

This statutory change came in handy for a branch manager at a private security company that Aleshire represented. Branch managers and salespeople at security companies must obtain individual licenses from the Bureau, in addition to the license maintained by the security company itself. On August 31, 2007, Aleshire's client received a notice from the Bureau that her license was to be revoked for a 25-year-old Class A misdemeanor conviction in Oklahoma for serving alcohol to an undercover cop at a bring-your-own-beer establishment. Thanks to the revision in HB 2833 and Aleshire's intervention, the Bureau retracted the notice on September 1 when the new law became effective.

Also, HB 2833 modified existing law to give the Board discretion to consider which Class B misdemeanors within the last five years would be disqualifying. A pending administrative rule¹⁷ designates those Class B offenses that are disqualifying for five years,

including, for example, theft of \$50 to \$500, but excluding marijuana possession of less than two ounces.*

RELEVANT EMPIRICAL RESEARCH

Studies have found that individuals whose last offense occurred many years ago are very unlikely to re-offend. Researchers at the University of South Carolina and University of Maryland concluded in a 2006 longitudinal study of ex-offenders, "Our findings suggest that after approximately seven years there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those without a criminal record."¹⁸

Furthermore, this risk must be balanced with the findings that gainful employment significantly reduces criminal behavior. Some 83 percent of New York offenders who violate the terms of their probation or parole are unemployed at the time of the violation.¹⁹ A study by the federal court system of sex offenders on probation found that nearly 88 percent of the 624 offenders who were employed both at the start and at the end of their supervision successfully complied with the conditions of their supervision while less than 37 percent of those unemployed at both stages completed their supervision term.²⁰ A Massachusetts study of parolees found that those who were employed within the first three months of leaving prison were more than seven times less likely to return to prison than those who were not.²¹ Other studies have concluded that: 1) unemployment correlates positively to increased arrests; 2) probability of conviction for property crimes

Talking Point:

Parolees employed within the first three months of leaving prison were more than seven times less likely to recidivate.

* The disqualifying Class B misdemeanors are: Penal Code 20.02 Unlawful restraint; 22.01 Assault (by threat or offensive contact with sports participant); 21.08 Indecent exposure; 22.07 Terroristic threat; 25.04 Enticing a child from lawful custody; 28.03 Criminal mischief (\$50 to \$500); 30.05 Criminal trespass (not habitation); 31.03 Theft (\$50 to \$500); 31.12 Theft of or tampering with multichannel video or information services (and conviction); 32.41 Issuance of bad check (for child support); 32.45 Misapplication of fiduciary property; 32.46 Securing execution of a document by deception; 32.52 Fraudulent, substandard or fictitious degree; 33.02 Breach of computer security; 33.A.02 Unauthorized use of telecommunications service (less than \$500); 33.A.04 Theft of telecommunications service (less than \$500); 37.08 False report to police officer; 37.12 False identification as peace officer; 38.02 Failure to identify (if a fugitive); 38.04 Evading arrest or detention; 39.02 Abuse of official capacity; 39.05 Failure to report death of prisoner; 42.01 Disorderly conduct (firearm in public place); 42.02 Riot; 42.07 Harassment; 42.061 Silent or abuse calls to 911 service.

increases when individuals are unemployed; 3) crime and wages are negatively related; and 4) as a person earns more legally, their proceeds from illegal activity decline.²²

The latter finding is particularly relevant to occupational licensing barriers, since the skilled professions that are licensed tend to pay more. Evidence indicates that the quality of the job, both in terms of pay and satisfaction, is also correlated with an ex-offender's recidivism rate. Specifically, a University of Minnesota study of ex-offenders found that a shift from food service work (with a job quality score of .57) to skilled craft work (with a job quality score of 1.08) decreases the probability of criminal behavior by approximately 11 percent.²³

By reducing wages earned by ex-offenders, occupational barriers likely result in less restitution paid to crime victims. A Pennsylvania study found that ex-offenders who are employed are much more likely to fulfill their restitution obligation.²⁴ Similarly, child support, which may be garnished from wages under Texas law, is almost certainly more likely to be paid if the offender is employed, particularly in a well paying job. Ex-offenders are significantly more likely to owe child support than others and Texas prisoners owe \$2.3 billion in child support.²⁵

There is also some empirical evidence from several occupational boards in Texas. The Plumbing Board reports that they allow 85 percent of applicants with a criminal record to obtain a license but that they observe no increased level of occupational violations or criminal offenses by these plumbers relative to their peers. The Nursing Board indicates that in 2006 they had only a 9.64 percent violation rate among nurses who received a license despite a conviction. Of these violations, most were not crimes, but rather failure to comply with an occupational rule or stipulation, such as practicing as a home nurse without supervision.

RECOMMENDATIONS

Provisional Licenses for Nonviolent Ex-Offenders

SB 1750 by Sen. John Whitmire, chairman of the Senate Criminal Justice Committee, would have limited disqualification for licensure to offenses less than five years old and required most occupational licensing agencies to issue provisional licenses to otherwise qualified applicants for offenses not directly related to the occupation. However, SB 1750 would have excluded those convicted for offenses under Code of Criminal Procedure, Article 42.12, Section 3g (serious violent crimes such as murder and aggravated robbery) or sexually violent offenses from the five-year limitation and the provisional licensing provisions, and it would not have covered peace officers, public security officers, jailers, psychologists, nurses, accountants, doctors, attorneys, pharmacists, dentists, nurses, and mortgage brokers. The bill unanimously passed the Senate but was left pending on the last day's House calendar.

A major limitation of SB 1750 was that it would only have required that a provisional license be issued if the offense was not directly related to the occupation under Section 53.021(a) of the Occupations Code.

However, because "directly related" has been so broadly defined by many licensing entities, it often includes virtually all offenses. Thus, policymakers should consider modifying SB 1750 to require issuance of at least a provisional license for less serious offenses, whether or not they are deemed by the agency to be related to the occupation. Individuals with only drug possession felonies, up to two drunk driving misdemeanors, or a single property offense that is a Class A misdemeanor or below should be guaranteed at least a provisional license in those occupations covered by the final version of SB 1750, so long as the offense was not committed in the course of performing the duties of either that occupation or another job. An offender

TalkingPoint:

The Plumbing Board observes no increased level of occupational violations or criminal offenses among licensed ex-offenders.

guilty of a property offense could, as a stipulation of that provisional license, be unable to provide in-home service unless accompanied by a licensed individual without a criminal record. It is important to note that home burglary is a third degree felony so it would not be covered at all under this modification of SB 1750. It would be within the agency's discretion whether to issue a provisional license when there is a more serious offense that directly relates to the occupation, as it is broadly defined by most agencies, or multiple property misdemeanors.

At the same time, SB 1750 should be narrowed in a few other areas. As filed last session, a person who lost their license for committing an offense while performing the duties of the occupation could have re-applied after five years and been entitled to a license. The legislation should be modified so someone who, for example, commits insurance fraud while using their license, has no right to be licensed again, but could receive a license should the agency—under Chapter 53—decide at some point that they have been rehabilitated. Second, SB 1750 should also be clarified to expressly allow stipulations on a license to continue after the six month probationary period. Although no language in SB 1750 explicitly precluded conditions on a license beyond the provisional period, some agencies were uncertain about this. The Nursing Board applies stipulations, such as requiring the nurse to work in a supervised environment, for up to two years. The Plumbing Board only rarely uses stipulations, although they could require a plumber with a prior conviction to work only in a commercial setting. While the license could be revoked for any violation of probation, parole, or occupational rules during the provisional license period without due process procedures such as the SOAH hearing, such due process would apply after the provisional period even while the stipulations remain in effect.

Another option that could instill greater confidence among elected officials and the public in a provisional license system is allowing agencies to require that a refundable deposit or bond be posted. This would provide the agency with even more leverage over the licensee during the provisional period, after which time the bond would be refunded provided the person has not had their license revoked. For minor violations of stipulations such as performing a task without a supervisor, the bond would also provide a means for the agency, at its discretion, to deduct a fine from the amount posted in lieu of revocation. The bond amount should be capped at a reasonable level so it does not exclude those of modest means.

How would occupational licensing agencies react to provisional licensing? Both the Plumbing and Nursing Boards indicated they would like more bright lines in the law. One reason for that is the volume of individual files to review and the time and work involved for the agency in an SOAH hearing. Due to an increase in these hearings, the Nursing Board is planning to ask the Legislature for an additional appropriation for legal staff—even though the Board more than pays for itself, it must still seek such authority.

Eliminate Class C and Regulatory Misdemeanors, not Performed on the Job, as Grounds for Denial or Revocation Under Chapter 53

Chapter 53 should be modified so that Class C misdemeanors are not grounds for the revocation or denial of a license, unless committed in the course of performing duties regulated as part of the occupation. There are approximately 500 Class C misdemeanors in state law, most of which are regulatory in nature, such as shipping citrus fruit from out-of-state without submitting paperwork to the Comptroller, maintaining an unauthorized off-premise sign, or failing to register or vaccinate a dog or cat. A person

TalkingPoint:

Class C misdemeanors not committed in the course of the occupation should not be grounds for revocation.

TalkingPoint:

Probation officers can use the threat of reporting repeated technical violations of probation to the licensing agency as leverage to gain compliance and, if necessary, as an intermediate sanction prior to revocation to prison.

cannot be jailed as punishment for a Class C misdemeanor unless they fail to resolve the citation. If the offense is not serious enough to warrant jail time and is not committed while performing the occupation, it should not be of concern to licensing agencies. Additionally, most Class A and B misdemeanors not in the Penal Code and Controlled Substances Act (the traditional crimes and illegal drug offenses) and not committed in the course of performing occupational duties should not be grounds for revocation. The hundreds of Class A and B misdemeanors not in those statutes are regulatory offenses, such as hunting the wrong animal at the wrong time under the Parks & Wildlife Code.

Increase Coordination between Probation and Parole Departments and Licensing Entities

A provision in SB 1750 would have required a person receiving a provisional license who is on probation or parole to provide the name and contact information for their probation or parole officer. The fact that the provisional license could be summarily revoked, upon revocation for violating the terms of the probation or parole, provides a strong positive incentive to the licensee to comply with the terms. Also, probation officers can use the threat of reporting repeated technical violations of probation to the licensing agency as leverage to gain compliance and, if necessary, as an intermediate sanction prior to revocation to prison.

Streamline SOAH Hearings and Make Decisions Binding on All Agencies in Licensing Cases

While Chapter 53 indicates that one factor in evaluating an applicant's fitness is letters of recommendation, attorney Susan Henricks with Austin's Hull, Henricks & McRae, who represents many ex-offenders

before occupational boards, notes that some SOAH judges have ruled that they are inadmissible hearsay if the letter writer is unavailable to testify, even if an affidavit has been executed. Similarly, agencies complain that the hearsay rule often precludes the admission of testimonials from police, victims, and others with information about the nature and impact of the offense. Over the years, SOAH hearings have become increasingly formalized to resemble trials in district court. This is problematic, particularly in this context when applicants sometimes represent themselves at SOAH because they cannot afford an attorney. All sides would be better served by all relevant information being before the administrative law judge, particularly since unlike a civil or criminal trial, neither incarceration nor monetary damages is at stake.

Once the SOAH process is improved, all agencies' statutes should provide that SOAH decisions regarding occupational license denials and revocations are binding until reversed by a court. Agencies would still be able to appeal to district court, but during that time if the administrative judge ordered that the license be issued or reinstated, that decision should be honored while the parties await the district court's decision.

Create an Incentive for Licensee to Notify Board of Arrest or Conviction Immediately Instead of Discovery Upon Renewal

Many agencies do not require a licensee to notify them upon being convicted of a crime that could be grounds for suspension or revocation of their license.* Instead, the agency will learn about the offense on a renewal form or when they run a criminal background check as part of the renewal process.

* One exception is the Board of Professional Land Surveying, which has an administrative rule requiring licensees to notify the Board within 90 days of a conviction. See [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=22&pt=29&ch=663&rl=20](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=22&pt=29&ch=663&rl=20).

While the Nursing Board does not require disclosure upon conviction, they say that they informally hear about the conviction in most cases because the vast majority of licensed nurses work in hospitals. If the conviction results from a substance abuse problem, this enables them to immediately refer the nurse to the peer assistance program (TPAPN). In their experience, the earlier a nurse is referred to the program, the more likely they will successfully complete it, stay clean, and be able to retain their license.

To the extent rules on criminal convictions are justified because they protect consumers, agency actions that are more rapid but less punitive may well produce better outcomes for all stakeholders. Consequently, agency rules should provide greater leniency if the licensee voluntarily discloses the incident, particularly upon arrest, even before a possible conviction. While agencies other than the Private Security Bureau generally do not and should not revoke a license simply based on an arrest until a person's guilt is established, notification opens up various options. For example, an agency and licensee might agree to stipulations such as monitoring and treatment to take effect immediately after the arrest in exchange for avoiding revocation even if the licensee is ultimately convicted of the offense.

Expand Use of Declaratory Orders to Provide Greater Certainty Earlier in the Process

Other licensing agencies that license occupations for which considerable training is required should follow the Nursing Board in creating a declaratory order procedure, thereby enabling prospective applicants to avoid wasting time obtaining training in an occupation for which they will be unable to obtain a license. Even though prisoners may not be licensed while behind bars, they should be permitted to seek declaratory orders so that they can participate in vocational programs in occupations they are actually

going to be able to enter upon their release. Given that agencies would presumably follow the Nursing Board in charging a fee for requesting a declaratory order, cash-strapped inmates are unlikely to submit frivolous paperwork. Agencies should be required to act on declaratory order requests within a reasonable amount of time, such as 90 days.

Reform Law Governing Occupations Licensed by the Private Security Bureau and/or Move Some of These Occupations to the TDLR

While the occupations that the Bureau regulates are uniquely related to property crimes, their statutes need to be substantially revised to, at the least, give the Bureau more leeway on drug possession and DWI, particularly for occupations other than security guards. The provision in HB 2833 exempting the Bureau from the Chapter 53 “directly relating” requirement should be reversed. Introduced in the 80th session, HB 3203 by Rep. Elliott Naishtat would have limited the Bureau's authority to deny and revoke licenses to offenses that directly relate to the occupation, thereby applying the Chapter 53 standard.²⁶ This standard recognizes that, while professional thieves are not suited to be locksmiths, someone convicted of a minor alcohol or drug possession offense years ago, and has been a law abiding locksmith for years, should not have their livelihood destroyed by state regulators.

Old convictions remain a problem as well. Even with the improvements made in HB 2833 in the last session, it remains remarkable that a nine year-old conviction for possessing three ounces of marijuana would be disqualifying to be an alarm salesperson or a guard dog trainer. Indeed, for all offenses, it may not make sense to subject guard dog trainers, alarm salespeople, and electronic access control device installers to the same standard as security guards. Accordingly, fields such as dog training and alarm sales might be more appropriately regulated by

TalkingPoint:

In the 80th session, the Legislature considered and rejected legislation that would have licensed new occupations such as mechanics, lactation consultants, sheetmetal workers and journeymen, and swimming pool and spa installers.

the TDLR. Given that the Private Security Board and DPS are now under sunset review, it is an ideal time to address the structural question of what agency should regulate these occupations, if in fact they must be regulated.

Avoid Licensing Additional Occupations

In the 80th session, the Legislature considered and rejected legislation that would have licensed new occupations such as mechanics, lactation consultants, sheetmetal workers and journeymen, and swimming pool and spa installers. For years, one group of more established roofers has hired lobbyists to support licensing while another group of more hardscrabble roofers has opposed it. The pro-licensing roofers unsuccessfully sought a licensing amendment to HB 1038, the Texas Residential Construction Commission clean-up bill. Similarly, the legislation to license mechanics was drafted by one group of mechanics to put lower-priced competitors out of business, partly through a requirement that every shop maintain an expensive insurance policy.

At the hearing on HB 2211 to license mechanics, auto body shops, and auto repair estimators, Rep. Delwin Jones asked the witness from the Houston association of auto repair shops, who had the bill filed, whether he would be okay with it just being bracketed to Harris County to see how it works. This witness responded: “The first thing that comes to mind would be that all the good technicians in Harris County would flee to go to someplace where they weren’t government regulated.”²⁷ Chairman Kino Flores responded to this startling admission by saying “that’s why we need to leave well enough alone” and noted that his unlicensed mechanic manages to keep his 1995 Impala running at 145 mph all day long.

Limit Liability of Employers Who Hire Ex-Offenders

Even if an ex-offender obtains a license, state statutes and judge-made common law create a civil liability risk that discourages employers from hiring them. In *Sibley v. Kaiser Foundation Health Plan of Texas*, 998 S.W.2d. 399 (Tex. App.-Texarkana 1999), the court ruled that under the tort of negligent hiring and supervision, an employer who negligently hires an incompetent or unfit individual may be directly liable to a third party whose injury was caused by the employee’s negligent or intentional act. In 2003, the Legislature passed HB 706 which, as now codified in Chapter 154 of the Civil Practices & Remedies Code, creates a rebuttable presumption that an employer offering in-home service is not liable for negligent hiring if they conduct a background check showing that in the last 20 years the individual has not been convicted of: (1) an offense against the person or the family; (2) an offense against property; or (3) public indecency. While it may have been intended to offer a safe harbor, this statute has been interpreted by attorneys in the field as creating a presumption that an employer is liable if the background check indicates one of these offenses and the employer nonetheless hires the person.²⁸

One unfair aspect of the law is that an employer can potentially be held liable for negligent hiring if an ex-offender commits a tort, such as dropping a piece of equipment that injures the customer. There is no requirement in Chapter 154 that the injurious act or omission by the ex-offender employee bear any relationship to the offense. This defect in the law should be remedied and the safe harbor’s timeframe for past convictions pared down, at least for misdemeanors and/or nonviolent offenses, consistent with research indicating offenses more than seven years old do not predict future criminal activity.

TalkingPoint:

State statutes and judge-made common law create a civil liability risk that discourages employers from hiring ex-offenders.

Also, HB 2537 introduced in the 80th Legislature by Rep. Nathan Macias would have eliminated negligent hiring liability imposed on all employers solely on the basis that the person hired was a nonviolent ex-offender.²⁹ In addition to violent offenders, sex-offenders, even those who had committed a nonviolent sex crime, were also excluded. HB 2537 would have also precluded introducing the offense into evidence in a negligent supervision suit unless the employer: (1) knew of the conviction or was grossly negligent in not knowing of the conviction; and (2) the conviction was directly related to the nature of the employee's or independent contractor's work and the conduct that gave rise to the alleged injury that is the basis of the suit.

Finally, an additional or alternative approach would be to eliminate punitive damages in negligent hiring suits. It makes little sense for the state to spend \$16 million every biennium on Project RIO, which trains ex-offenders and encourages employers to hire them, while operating a civil justice system that provides a disincentive to do so. Even without punitive damages, those injured could collect compensatory damages and attorney's fees in a negligent hiring suit based on the employee's prior conviction. Moreover, neither this proposal nor the others outlined here would limit the liability of the ex-offender.

CONCLUSION

The justification for licensing barriers applicable to ex-offenders is often unclear. Is it to punish the offender, protect the consumer and public, safeguard the image of the occupation, or limit competition? The criminal justice system already punished the offender and the U.S. and Texas Constitutions preclude double jeopardy for the same offense. States can legally regulate occupations to protect the consumer, but as a matter of policy, shouldn't we at least demand evidence that ex-offenders with certain offenses within a given timeframe are more likely to violate the rules of the occupation or commit an offense while engaging in the licensed activity?

Given that some percentage of ex-offenders will inevitably re-offend, the critical question is whether the impact of their recidivism will be magnified by virtue of being licensed and, if so, whether this negative effect exceeds the significant positive benefits, including lower overall recidivism, associated with expanded employment opportuni-

ties for ex-offenders. In most occupations and for most convictions, particularly those that occurred many years ago, the evidence suggests the balance should be in favor of more opportunities for ex-offenders than Texas law currently provides. The fact that electricians and nurses may come into your home is cited as a basis for excluding many ex-offenders, particularly property offenders, from those occupations, but housekeepers, drywall contractors, and upholsterers all come into people's homes as well and are entirely unregulated. If an ex-offender is licensed, they will be under some supervision, including possible stipulations on the license, and may have more to lose by committing another offense.

Moreover, occupational licensing in general comes at a steep cost to consumers, who pay more for services when the supply is artificially constricted. A University of Minnesota study found that "occupational licensing reduces employment growth in states that are licensed relative to those that are not regulated." States that licensed dietitians and nutritionists, respiratory therapists, and librarians experienced 20 percent lower employment growth in these fields from 1990 to 2000.³⁰ UT-Austin Economics Professor Dan Hammermesh estimated that the "deadweight loss" to society from occupational licensing is between \$34.8 and \$41.7 billion per year.³¹

Thus, in evaluating Texas' current statutes and rules governing convictions and licensing, policymakers should demand evidence indicating that allowing those types of ex-offenders who are currently excluded into certain occupations will expose the public to significantly more risk of being harmed and therefore outweigh the benefits associated with greater employment of ex-offenders and more competition in licensed occupations. Neither punishment, the image of an occupation, and certainly not eliminating potential competitors should be grounds for excluding ex-offenders from licensed occupations.

Ultimately, barriers that are not narrowly tailored are counterproductive from both a crime control and economic growth perspective. In short, when our government doesn't let ex-offenders get back on their feet, we shoot ourselves in the foot. ✨

ENDNOTES

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