



**FY2017 RECOMMENDATION/FY17-RE03 Revise Statutory Guidance on State Licensure and Employment**

**Status:** Implementation Complete

**Actions/Updates**

**2018 FINAL UPDATE**

This recommendation was included as part of House Bill 2018-1418 (The Use of Conviction in Employment; Sponsors: Reps. Weissman & Sens. Coram and Kagan).

With the passage and signing of this bill, work on this recommendation is concluded. No further action is required.

The following were modifications of the bill that altered elements of the original recommendation:

1. The CCJJ recommendation included a section regarding incentivizing opportunity expansion by state contractors. HB 1418 did not include this provision as there was concern that it may bring opposition to an otherwise consensus recommendation.
2. To address concerns raised by DORA, HB 1418 was amended to permit agencies, when evaluating an applicant for licensure or employment, to take into account whether that person will be directly responsible for the care of individuals susceptible to abuse or mistreatment because of circumstances, including age, disability, frailty, mental health disorder, developmental disability, or ill health.
3. Also at the request of DORA, extends the effective date Section 2, which addresses data collection requirements of DORA, to November 1, 2018 so that the requirements go into effect for the next round of Sunsets and not the Sunset reviews currently being done by the Department.
4. Originally, the DORA data collection requirements included an analysis of whether it would be appropriation to change any mandatory collateral sanctions to discretionary disqualifications. This was also taken out of the bill as the request of CDAC.
5. To address concerns raised by DOR, HB 1418 was also amended to exempt DOR from the statute that disallows the fact that an individual has been convicted of a felony may not, in and of itself, prevent the person from applying and obtaining public employment or from applying and receiving a license. DOC and CDPS already have exemptions under this statute.
6. Also at the request of DOR, clarified that, in deciding whether to issue a license to an applicant who has been arrested or charged but never convicted, the conduct underlying the arrest may be considered.

**2017 UPDATE**

This recommendation requires statutory change.

## **Description**

Promote community safety and economic growth by: 1) Preventing consideration of arrests that did not result in a conviction, and convictions that have been pardoned, sealed, or expunged, in state licensure and employment decisions; 2) Empowering the Department of Regulatory Agencies to delist certain conditional licenses; 3) Collecting data; 4) Encouraging the elimination of mandatory collateral consequences; 5) Incentivizing opportunity expansion by state contractors; and 6) Increasing transparency of agency policies.

## **Agencies Responsible**

General Assembly

## **Discussion**

Colorado government regulates the employment of, or directly employs, a substantial portion of the State's population. The Department of Regulatory Agencies (DORA) alone administers over 50 regulatory programs governing professions, occupations, and businesses comprising over 710,000 individual licensees.(1) The State directly employs over 95,000 people,(2) and many more are employed by local governments.

A criminal record can adversely impact an individual's ability to obtain either a license necessary to work or direct employment with state or local governments.(3) This issue is of widespread concern, as it is estimated that nearly one in three Americans of working age have some form of criminal record.(4) In Colorado alone, over 190,000 people were arrested in 2015(5) and an estimated 1.5 million have criminal records.(6)

The inability of large numbers of people to obtain employment adversely affects the public's safety and welfare. On an individual level, gainful employment is a key factor that enables people to avoid future arrests and incarceration.(7) More broadly, the economy as a whole is negatively impacted by the reduction of employment rates for people with a criminal record.(8) Numerous studies have shown that the employment related consequences of a criminal record disparately impact communities of color.(9) It is thus necessary to ensure that Colorado's record-based restrictions on employment and licensing are both fair to individuals and productive to the safety and welfare of society.

When an individual with a criminal record applies for a state job, section 24-5-101, C.R.S. 2016, governs the effect of that record on his or her employment prospects. When an individual with a record applies for a state issued license to engage in most regulated professions, the licensing agency is governed by the same.(10)

The statute purports to "expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society."(11) It provides little guidance, however, for the most frequent circumstances in which state agencies must consider a criminal record.

First, the only clear statutory guidance on how a criminal record should be considered does not apply to licensure decisions.(12) It applies only to actual employment by the State. The statutory provisions applicable to licensure decisions indicate that a prior conviction should be considered, but do not indicate how.(13)

Second, the guidance provided for state employment decisions mandates that the same criteria for evaluating convictions which have been pardoned, expunged, or sealed applies to those that have not.(14) This defeats the express goal of a pardon,(15) and the implicit goals underlying the statutory scheme for expunging, sealing, or dismissing conviction records.(16) It also makes no mention of orders of collateral relief, which can be issued by courts to relieve eligible individuals of state imposed collateral consequences.(17)

Third, the scant existing guidance for licensure decisions applies only when a state or local agency is required to make a finding that the applicant “is a person of good moral character as a condition to the issuance thereof . . .”(18) Most of the statutes governing state licensure decisions do not require an evaluation of whether a person is of “good moral character.” They simply allow adverse licensure action to be taken on the basis of a prior offense.

Finally, the guidance for both employment and licensure applies only to discretionary agency decisions. It does not apply if there is a specific statutory prohibition that prevents an individual from obtaining employment or licensure.(19)

Information obtained from DORA indicates that its various regulatory programs do not have a widespread practice of denying licensure based on a past criminal history. Those programs will, however, regularly issue licenses on a conditional or probationary status based on such a history. This results in a record of the individual’s criminal history being publicly accessible through DORA’s website. DORA does not have the power to ever remove public access to that information.

This recommendation includes one non-statutory element:

1. Increase transparency of agency policies.

State employment and licensing decisions are made by hundreds of people who serve on various regulatory boards. To achieve consistent, fair, and productive results, they should have guidance on how to evaluate the impact of applicants’ criminal history.

CCJJ recommends that DORA develop a written policy on how state agencies should implement section 24-5-101 and section 24-32-102(8.7). The policy should provide clear guidance on how an applicant’s criminal record may impact state employment and licensure decisions, and should be available to the public on DORA’s website.

This recommendation includes five statutory elements:

1. Amend section 24-5-101.
2. Empower DORA to delist certain conditional licenses.
3. Collect data.
4. Encourage the elimination of unnecessary mandatory collateral consequences.

5. Incentivize opportunity expansion by state contractors.

[The Proposed Statutory Language may be found in the related "Recommendation Text."]

### Footnotes

(1) DORA (2016, Oct. 1), *2017-2018 Department Performance Plan*, (see p. 6 at [colorado.gov/dora/dora-executive-directors-office](http://colorado.gov/dora/dora-executive-directors-office)).

(2) Colo. Div. of Human Res. (2015), *FY 2014-15 Workforce Report*, (see p. 3 at [colorado.gov/dhr/fy2014-15workforcereport](http://colorado.gov/dhr/fy2014-15workforcereport)).

(3) Mark Evans, Colo. State Public Defender's Office, *The Consequences of Conviction: Sanctions Beyond the Sentence Under Colorado Law* 14-15, 51-94 (2014 ed.) (available at <http://www.coloradodefenders.us/consequences-of-conviction-2/consequences-of-conviction-2/>).

(4) J.C. McGinty (2015, Aug. 7), How Many Americans Have a Police Record?, *The Wall Street Journal* (at <https://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802>).

(5) Colo. Bureau of Investigation, *Crime in Colorado 2015*, [http://crimeinco.cbi.state.co.us/cic2k15/state\\_totals/statewide\\_adult\\_arrests.php](http://crimeinco.cbi.state.co.us/cic2k15/state_totals/statewide_adult_arrests.php) (last visited Feb. 2, 2017).

(6) Bureau of Justice Statistics (2014, January), *Survey of State Criminal History Information Systems*, U.S. Dept. of Justice (see Table 1 on p. 14 at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>).

(7) Letter from United States Attorney General Eric Holder, Jr., to Colorado Attorney General John Suthers (April 18, 2011); see also J.H. Laub & R.J. Sampson (2001). Understanding desistance from crime, *Crime and Justice*, 28(1), 1-69 (doi: 10.1086/652208); National Research Council (2008), *Parole, Desistance from Crime, and Community Integration*, Committee on Community Supervision and Desistance from Crime, (see pp. 23-24 at [cdpsdocs.state.co.us/ccjj/Resources/Ref/NCR2007.pdf](http://cdpsdocs.state.co.us/ccjj/Resources/Ref/NCR2007.pdf)); and J. Radice (2012), Administering justice: Removing statutory barriers to reentry, *University of Colorado Law Review*, 83(3), 715-779 (see p. 719 at [colorado.edu/law/sites/default/files/Vol.83.3.pdf](http://colorado.edu/law/sites/default/files/Vol.83.3.pdf)).

(8) A. Christman & M.N. Rodriguez (2016, August), *Fact Sheet: Research Supports Fair-Chance Policies*, The Nat'l Emp't Law Project (at [nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf](http://nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf)); J. Roberts (2011), Why misdemeanors matter: Defining effective advocacy in the lower criminal courts, *U.C. Davis Law Review*, 45(2), 277-372 (see pp. 300-301 at [lawreview.law.ucdavis.edu/issues/45/2/Articles/45-2\\_Jenny\\_Roberts.pdf](http://lawreview.law.ucdavis.edu/issues/45/2/Articles/45-2_Jenny_Roberts.pdf)); J. Schmitt & K. Warner (2010), *Ex-Offenders and the Labor Market*, Center for Econ. & Policy Research (at [cepr.net/documents/publications/ex-offenders-2010-11.pdf](http://cepr.net/documents/publications/ex-offenders-2010-11.pdf)).

(9) E. A. Carson (2015, September), *Prisoners in 2014*, Bureau of Justice Statistics, U.S. Dept. of Justice (reporting on p. 15 that as of December 31, 2014, black men are imprisoned in state and federal facilities at a rate of 2,724 per 100,000, Hispanic men are imprisoned at a rate of 1,091 per 100,000, and white men are imprisoned at a rate of 465 per 100,000; similar disparities exist for women), (at [bjs.gov/content/pub/pdf/p14.pdf](http://bjs.gov/content/pub/pdf/p14.pdf)); and U. S. Equal Opportunity Commission (2012, April 25), *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (see “I. Summary” at [eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://eeoc.gov/laws/guidance/arrest_conviction.cfm)).

(10) “[I]f a licensing entity in title 10 or 12, C.R.S., determines that an applicant for licensure has a criminal record, the licensing entity is governed by section 24-5-101 for purposes of granting or denying licensure or placing any conditions on licensure.” § 24-34-102(8.7), C.R.S. 2016.

(11) § 24-5-101(2), C.R.S. 2016.

(12) § 24-5-101(3), -101(4), C.R.S. 2016.

(13) § 24-5-101(1), -101(2), C.R.S. 2016.

(14) § 24-5-101(3)(d), -101(4), C.R.S. 2016.

(15) “A pardon issued by the governor shall waive all collateral consequences associated with each conviction for which the person received a pardon unless the pardon limits the scope of the pardon regarding collateral consequences.” § 16-17-103, C.R.S. 2016.

(16) State and local government agencies are generally forbidden from asking applicants to disclose information in records that were sealed due to non-prosecution, dismissal, or acquittal. § 24-72-702(1)(a), -702(1)(f), C.R.S. 2016. State and local government agencies are also generally forbidden from asking applicants to disclose information in sealed records relating to certain controlled substance, petty offense, and municipal offense convictions. § 24-72-703(4)(d)(I), C.R.S. 2016. With the exception of certain controlled substance and human trafficking related offenses, the sealing of a record reflects that a judge has already determined that the harm to the individual’s privacy outweighs the public’s interest in the availability of the record. §§ 24-72-702(1)(b)(II)(B), -704(1)(c), -705, -706, -708(3), C.R.S. 2016.

(17) See §§ 18-1.3-107, 18-1.3-213, 18-1.3-303, C.R.S. 2016. The State of New York has long issued certificates similar to Colorado’s orders of collateral relief. There, however, public agencies and private employers are required to give consideration to such certificates. N.Y. Correct. Law § 753(2). Other states have similar mechanisms. See Conn. Gen. Stat. § 54-130e(b); 730 Ill. Comp. Stat. Ann. 5/5-5.5-15; N.C. Gen. Stat. § 15A-173.2; Ohio. Rev. Code Ann. § 2953.25.

(18) § 24-5-101(2), C.R.S. 2016.

(19) §§ 24-5-101(3)(a), 24-34-102(8.7), C.R.S. 2016.