

PROPOSED REGS THREATEN TO UNDERMINE OCCUPATIONAL LICENSING REFORM EFFORTS

On November 19, 2022, the PA Department of State published for public comment proposed regulations to implement the occupational licensing reform law, Act 53 of 2020. Unfortunately, these regulations fail badly in effectuating the goal of the law, which was to open the licensed occupations to people with old and unrelated criminal convictions.

We ask the public to weigh in and urge revision of the proposed regulations.

THE PROPOSED REGULATIONS FRUSTRATE THE PURPOSE OF ACT 53

The proposed regulations must be revised because **they erect lifelong, unreasonable barriers** that will keep people with criminal records from becoming licensed and discourage people with criminal records from pursuing licensed fields. Act 53 of 2020 was supported by a bipartisan group of legislators and advocates who aimed to help people with criminal records access the licensed professions. The proposed regulations do not aim to accomplish this goal. According to the Department of State, the purpose of the Act 53 is “to provide transparency and clarity” to people with criminal records about the barriers they face. This is simply not true. Making obstacles to licensing clearer and more transparent, while failing to reduce those obstacles, does not accomplish the reform intended by the law. It will do the opposite.

Overbroad and Unreasonable Lists of “Directly Related” Crimes

Act 53 of 2020 required Occupational Licensing Boards to identify crimes that are “directly related” to the professions they regulate, and the Boards’ lists are in the proposed regulations. **The lists are overbroad and unreasonable, creating unwarranted barriers to licensure.**

Why This Matters: If an applicant has a conviction for a crime on the list, there is a presumption that they should not be licensed because they pose a “substantial risk”, creating a significant hurdle for the applicant.

The Problem: The proposed lists are overbroad. The Boards failed to use an evidence-based, systematic approach to develop their lists, resulting in lists that are overbroad and unreasonable. Overbroad lists would violate Act 53: Under the law, a crime is “directly related” only if it bears on the ability to perform a duty that is “necessarily related” to the professions regulated. Crimes that relate to *possible* but not *necessary* duties should not make the list.

The proposed regulations’ lists include many crimes that are not related to the regulated professions. For example:

- The Board of Nursing’s list includes 92 separate crimes. Those are added to the lists of sexual crimes, crimes of violence and drug trafficking that already apply to Nursing Board professions.
- The Barber Board’s list includes possession of a drug with intent to deliver and felony DUI.
- The Cosmetology Board’s list includes receiving deposits in a failing financial institution and forgery.

Lifelong Barriers to Licensing

Old convictions are stale and do not predict future behavior, but under the proposed regulations, a conviction for a listed crime creates a presumption against licensure **no matter how old that conviction is**. This creates lifelong barriers that will discourage people with old records from pursuing licensed fields.

Why This Matters: The proposed regulations include lifelong barriers to licensure, which will create a daunting obstacle, even if Boards promise to consider the age of the conviction at a later stage of the application process. Few people can risk devoting years and thousands of dollars to professional training with the hope that they can overcome the presumption that they are unfit to be licensed.

The Problem: Under the proposed regulations, old convictions create a presumption that a person should not be licensed. But old, stale convictions do not predict future behavior and consequently do not make someone unfit for a profession. Under Act 53, a crime is directly related if it “has a direct bearing on the fitness or ability to perform” the duties

of the profession. Desistance research shows that the risk presented by a person decreases as years pass without another conviction. After just 4 to 7 years, people with convictions are no more likely to commit a crime than anyone else, so the convictions do not bear on their fitness to do a job. Relatedness of an offense is therefore tied to its recency, and time since conviction is a primary factor determining whether a conviction is “directly related” to a job.

Because relatedness is tied to recency, time parameters must be part of the initial determination of whether a conviction is “directly related” to a profession. These parameters should be added to the lists of “directly related” crimes. For example, felony theft may be directly related to the Board of Nursing professions for 4 years after conviction.

A Faulty Process Led to Unreasonable Regulations

The proposed regulations were created using a faulty process. The lists of “directly related” crimes were drafted without input from stakeholders, experts, and without reviewing relevant research or law. Despite receiving pushback from interested parties and experts, the regulations barreled forward.

Occupational Licensing Boards drafted their “directly related” crimes lists behind closed doors, without seeking input or sharing their process. The drafted lists received pushback from interested groups, but that input was largely ignored.

The Boards and State Department failed to seek out or consider any input from outside experts, including criminal law experts (prosecutors or defense attorneys), criminologists, Industrial/Organization psychologists, or experts in their own field. They also did not consider relevant research, such as desistance research.

Reports from two nationally known experts were provided to the State Department in response to the draft lists. The reports are described below and are available for public review at <https://clsphila.org/national-record-clearing-project>:

- [Desistance Researcher Report](#): Kiminori Nakamura, Ph.D., criminologist expert, explains how a person with a criminal conviction is no more likely than anyone else to commit a crime after only 4 to 7 years;
- [Industrial/Organization Psychologist Report](#): Toni Locklear, Ph.D., explains how experts determine whether a crime is related to a profession, and proposes a systemic, evidence-based methodology that should be used by the Boards to make their lists. In her paper, Dr. Locklear explains that the amount of time that has passed since a conviction is a key factor in determining relatedness. Dr. Locklear also conducted a demonstration exercise with a group of nursing experts to show her methodology in action.

SUBMIT A COMMENT

The proposed regulations were published in the Pennsylvania Bulletin on November 19, 2022 and are open for public comment until December 19, 2022. **Please write to Cynthia Montgomery, counsel to the Department of State, at RA-STRegulatoryCounsel@pa.gov, and Michelle Elliott, Regulatory Analyst, at melliott@irrc.state.pa.us, or submit comments by mail to P.O. Box 69523, Harrisburg, PA 17106-9523, to object to the proposed regulations and to ask that the lists of offenses that are “directly related” be more narrowly drawn and time limited. Include in the subject line "16A-66 (Consideration of Criminal Convictions)" when submitting comments by e-mail.**

Please contact Brendan Lynch, blynch@clsphila.org, Katie Svoboda-Kindle, kkindle@clsphila.org, or Sharon Dietrich, sdietrich@clsphila.org of Community Legal Services (CLS) for more information.

