Occupational License Reform and Criminal Records

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Contact info

Date
Highlights of Act 53 (SB 637)

- Affects only licensees of Bureau of Professional and Occupational Affairs (BPOA) boards
- New analysis by which state boards can consider criminal records, including:
  - Published list of offenses establishing “direct relationship”
  - Nature of offense poses “substantial risk”
  - 11 individual assessment factors to be considered
- Restricted licenses for people who trained while incarcerated (esp. barbers/cosmetologists)
- Limited preliminary determinations possible
Why Occupational Licensing Reform was Needed in PA

• **Overbroad**: the law eliminated people who did not present substantial risk

• **Inconsistent**: too much discretion was invested in the State Boards, who often were laypeople without expertise in criminal record matters

• **Unpredictable**: people could be forced to go through extensive and expensive training without knowing whether they would be excluded; many completely gave up on their dream occupations

• **Racially disparate results**: Blacks and Hispanics are more likely than whites to have criminal records
Occupational Licensing in PA

• 20% of PA workforce has occupational licenses
• BPOA boards license about a million Pennsylvanians (1 in 12 residents)
Scope of Act 53: Only BPOA Boards

• New law does not apply to workers licensed outside BPOA (teachers, lawyers, security guards, etc.)

• Does not apply to certified nursing assistants, who have certifications instead of licenses through the Board of Nursing

• Does not apply to the schools that train people in the professions licensed by BPOA
Top BPOA Boards (# of Licensees)

- Nursing (312k)
- Medicine (135k)
- Cosmetology (128k)
- Real estate (65k)
- Engineers/surveyors/geologists (53k)
- Pharmacy (43k)
Other Notable Covered Occupations

- Architects
- Accountants
- Barbers
- Dentists
- Massage therapists
- Occupational therapists
- Physical therapists
- Psychologists
- Social workers
- Vehicle dealers and salespersons
- Veterinarians
New Rules Apply to All BPOA Actions (18 Pa CSA § 9124(A.1))

- Refusals to issue or renew a license, certificate, registration, or permit
- Suspensions
- Revocations
- Limitations
Consideration of Criminal Records: Out with the Old (§§ 3113(A),(A.1))

• No longer permits lifetime disqualifications for all felonies -- 18 P.S. § 9124(c) no longer applies to BPOA boards.

• Overrules practice acts for each profession on consideration of criminal records.

• Eliminates concepts of “good moral character, "crimes of moral turpitude,” and “ethical or honest practice” as related to criminal records.
BPOA Must Publish List of Disqualifying Criminal Offenses (§ 3117)

• By BPOA Commissioner, in consultation with boards and business
• Offenses must be “directly related” to the occupation
• List to be published in the PA Bulletin by 12/28/2020
• Proposed regulations within 2 years after publication of list
• List to be provided to each applicant/on websites
• Used by boards for discipline, licensure, preliminary determinations
What is “Directly Related”? (§3102)

“The nature of the criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform one or more of the duties or responsibilities necessarily related to the profession, trade or occupation for which the individual seeks licensure.”
New Method of Considering Criminal Records
(§ 3113(B))

STAGE 1: See if the offense is on the published list as “directly related.”
- If yes, determine whether the person would pose a “substantial risk” to health and safety of clients or of future offending by conducting an “individualized assessment.”
- Rebuttable presumption that it would pose a substantial risk, but person can rebut with evidence of rehabilitation.

STAGE 2: If the offense is not directly related (i.e., is not on the list), the Board shall determine whether the conviction, due to its nature, poses a substantial risk.
- If so, the Board shall conduct the individualized assessment.
- Again, the person can provide evidence of rehabilitation.
11 Factors in Individualized Assessment (§3113(C))

1) Criminal conduct involved act or threat of harm, incl property/reputation
2) Facts and circumstances around the conviction
3) Number of convictions
4) Increase in age/maturity since date of conviction
5) Criminal history, if any, after conviction
6) Completion of education/training, including in incarceration
7) References from employers or others (including from incarceration)
8) Personal rehabilitation
9) Meets other licensing requirements
10) Criminal history while engaged in occupation
11) Any other factor deemed relevant to fitness
Carve-outs

- **Sexual offenses/health care practitioners** – lifetime ban (§3113(D)).
- **Crimes of violence** as defined in 42 Pa. CSA §9714 (listing convictions carrying mandatory minimums – such as some agg assaults, sex crimes, kidnapping, burglary, robbery, drug delivery resulting in death, etc.) UNLESS all of these:
  - Crime-free at least 3 years since release from incarceration (tolled by parole violation) or imposition of sentence;
  - Person demonstrates significant rehabilitation;
  - Board finds person does not pose substantial risk (§3113(E))
- **Drug trafficking** (NOT ordinary drug felony) – depends on amt/weight of drugs involved; burden on Board to prove trafficking (§3113(F)).
- Many of these terms are defined in §3113(I).
Restricted Licenses for Barber/Cosmetologist
(§3112)

• Meant to help people trained for these professions while incarcerated
  (§3112.1 allows restricted licenses for other training occurring during
  incarceration)
• Licenses last 1-2 years
• Establishes criteria for fitness
• Permits conditions by the Board, including reasonable supervision by a
  licensee
• Provides for revocation
• At end, supervisor tells Board whether person complied. If so and
  otherwise qualified, the person will then receive a regular license.
Preliminary Determination (§3115)

• Meant to enhance certainty about possibility of license before training is entered.

• Can file a petition for preliminary determination. Fee of not more than $45 (can be in forma pauperis).

• Board will determine whether the person’s record is on “the list” and thus is “directly related.” Decision in 45 days.

• If record is determined to be directly related, determination is not final. Person can present evidence on the 11 factors in a formal application.
Other Provisions

- Expunged or sealing cases – No! (18 Pa CSA § 9124(b)(2))
- Juvenile adjudications – No! (§3114)
- Best practice guide for applicants – prepared by Dept. of State to summarize the law (§3116)
Enforcement

- Licensing hearings
- Appeals to Commonwealth Court
QUESTIONS?

CONTACT