
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 2138 **Hearing Date:** June 26, 2018
Author: Chiu
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Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Licensing Boards: Denial of Application: Revocation or Suspension of Licensure:
Criminal Conviction*

HISTORY

Source: Alliance for Boys and Men of Color; East Bay Community Law Center; Root & Rebound

Prior Legislation: None

Support: A New Way of Life Reentry Project; Alameda County Public Defender's Office; All of us or None; American Civil Liberties Union of California; Anchor of Hope; Anti Recidivism Coalition; Bay Area Legal Aid; Bayview Hunters Point Foundation for Community Improvement, Inc.; California Immigrant Policy Center; California Labor Federation; California Landscape Contractors Association; California Landscape Contractors Association; California Pan-Ethnic Health Network; California Public Defenders Association; Center for Employment Opportunities; Center on Juvenile and Criminal Justice; City and County of San Francisco; Checkr, Inc.; Courage Campaign; Downtown Women's Center; Ella Baker Center for Human Rights; Hunters Point Family; Lawyers' Committee for Civil Rights of San Francisco Bay Area; Leadership for Urban Renewal Network; Los Angeles Regional Reentry Partnership; National Association of Social Workers, California Chapter; National Employment Law Project; Oakland Private Industry Council, Inc.; Planting Justice; PolicyLink; REDF; Rise Together; Roots Community Health Center; Rubicon; San Francisco Conservation Corps; San Francisco Public Defender's Office; Young Women's Freedom Center

Opposition: Board for Professional Engineers, Land Surveyors and Geologists; Board of Behavioral Sciences; California Board of Accountancy; California Board of Psychology; California State Board of Pharmacy; Contractors State License Board; Medical Board of California; Physician Assistant Board

Assembly Floor Vote:

45 - 29

PURPOSE

This bill limits the current discretion provided to regulatory entities within the Department of Consumer Affairs (DCA) to apply criminal history background, as it relates to denial of an application for licensure and suspension or revocation of an existing license, by specifying that these actions can be taken if the applicant or licensee was formally convicted of a crime substantially related to the qualifications, functions or duties for which the individual is seeking licensure or is licensed.

Existing law establishes the Department of Consumer Affairs (DCA) within the Business, Consumer Services, and Housing Agency with various regulatory boards, bureaus, committees, and commissions under the DCA's jurisdiction. (Business and Professions Code (BPC) §§ 100-101)

Existing law specifies that "board" as used in BPC also includes "bureau," "commission," "committee," "department," "division," "examining committee," "program," and "agency." (BPC § 22)

Existing law provides that all boards within the DCA are established for the purpose of ensuring that those private businesses and professions deemed to engage in activities which have potential impact upon the public health, safety, and welfare are adequately regulated in order to protect the people of California. (BPC § 101.6)

Existing law 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)

Existing law 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.*)

Existing law 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.*)

Existing law 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.*)

Existing law prohibits a board from denying an application for a license solely based on a criminal conviction that has been dismissed. (*Id.*)

Existing law states that a person shall not be denied a license solely based on prior conviction of 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.*)

Existing law 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 § 481)

Existing law 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)

Existing law authorizes a board to revoke or suspend a current license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. (BPC § 490)

Existing law permits a board to suspend a license in the event that an applicant is not in compliance with a child support order or judgment. (BPC § 490.5)

Existing law 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)

Existing law 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)

This bill specifies that "conviction" for purposes of board actions means a judgment following a plea or verdict of guilty or a plea of nolo contendere or finding of guilt.

This bill narrows a board's discretion to deny a professional license to the following cases:

- a) The applicant has been convicted of a crime; limits denials based on a criminal conviction to convictions for which the applicant is presently incarcerated or that occurred within the preceding seven years, except for convictions of a serious felony.
- b) The applicant has been subjected to formal discipline by a licensing board within the preceding seven years based on professional misconduct that would have been cause for discipline before the board for which the present application is made.

This bill requires that any criminal conviction or formal discipline be substantially related to the qualifications, functions, or duties of the business or profession for which the present application is made in order to be the cause for denial of an application.

This bill removes the authority for a board to deny an application for licensure based on "acts" for which there has been no due process in a criminal or disciplinary proceeding.

This bill specifies that a person shall not be denied a license on the basis of any conviction, or on the basis of the acts underlying the conviction, that has been dismissed.

This bill prohibits a board from denying a license on the basis of an arrest that resulted in a disposition other than a conviction.

This bill states that a board shall not deny a license based solely on an applicant's failure to disclose a fact that would not have been cause for denial of the license had it been disclosed.

This bill requires that a board follow the following procedures in requesting or acting on an applicant's criminal history information:

- a) A board shall not require an applicant for licensure to disclose any information or documentation regarding the applicant's criminal history.
- b) If a board decides to deny an application based solely or in part on the applicant's conviction history, the board shall notify the applicant in writing of the denial of the application as well as the applicant's right to challenge or appeal the board's decision, as well as the process by which the applicant may secure a copy of their own rap sheet.

This bill requires boards to retain application forms and other documents submitted by an applicant, any notice provided to an applicant, all other communications received from and provided to an applicant, and criminal history reports of an applicant for a minimum of three years.

This bill requires boards to retain the following statistical information:

- a) The number of applicants with a criminal record who received notice of denial or disqualification of licensure.
- b) The number of applicants with a criminal record who provided evidence of mitigation or rehabilitation.
- c) The number of applicants with a criminal record who appealed any denial or disqualification of licensure.
- d) The final disposition and demographic information, including, but not limited to, voluntarily provided information on race or gender, of any applicant.

This bill requires boards to annually make available to the public through the board's website and through a report submitted to the Legislature deidentified information collected that ensures confidentiality of the individual applicants.

This bill requires each board to develop criteria for determining whether a crime is directly and adversely related to the qualifications, functions, or duties of the business or profession a board regulates, including the following:

- a) The nature and gravity of the offense.
- b) The number of years elapsed since the date of the offense.
- c) The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.

This bill requires each board to post on its website a summary of the criteria used to consider whether a crime is considered to be substantially related to the qualifications, functions, or duties of the business or profession it regulates.

This bill requires a board to consider that an applicant or licensee has made a showing of rehabilitation if any of the following are met:

- a) The applicant or licensee has completed the criminal sentence at issue without a violation of parole or probation.
- b) The applicant or licensee documents that he or she has worked in a related field continuously for at least one year prior to licensure or successfully completed a course of training in a related field, unless the board finds a public record of an official finding that the applicant committed professional misconduct in the course of that work, including work performed without compensation and work performed while incarcerated.
- c) The applicant or licensee has satisfied criteria for rehabilitation developed by the board.

COMMENTS

1. Need for This Bill

According to the author:

In California, nearly 8 million people – approximately 1 in 3 adults – have arrest or conviction records. California has 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 huge role in the prison and jail overcrowding crisis that the Legislature spent the past decade attempting to address.

One of the reasons for high rates of recidivism is an inability of prior offenders to secure gainful employment upon reentry. Like all Californians, access to secure employment is critical for these 8 million individuals with a prior conviction to support their families and communities.

California has already adopted robust policies that break down barriers for previously incarcerated individuals to access jobs in the private sector, including “ban the box” policies. Nevertheless, there continue to be barriers to employment for Californians with prior convictions.

Nearly 30 percent of California jobs require licensing, certification or clearance by an oversight board or agency for approximately 1,773 different occupations.

All too often, qualified people can be denied licensure 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.

Even ex-offenders who received job-specific training while incarcerated can be kept out of those very occupations by licensing barriers. For example, the CA Dept of Corrections offers over 20 career & technical education programs to prisoners, but ironically, most of these programs relate to professions that require a license - like construction, cosmetology or automotive repair.

Currently, a licensing board may deny a license based on prior misconduct and each board individually determines what offenses are “substantially related” to the license sought. Many reports on California’s occupational regulation have pointed out that this licensing process lacks transparency, consistency, and due process for applicants.

Additionally, AB 2138’s sponsors have seen a chilling effect with prior nonviolent offenders who do not apply for licenses because there is a presumption they will be denied. This bill codifies a policy that we’ve seen in other criminal justice reforms in California that nonviolent offenders who have not reoffended within a number of years should be considered rehabilitated.

AB 2138 proposes to establish a transparent licensing process that gives these Californians a fair chance, as is the case in a number of other states, by prohibiting the denial of a license on the basis of a non-violent conviction older than 7 years (or a dismissed conviction or a non-conviction act) unless it is substantially related to the duties of the profession for which the application is made - for all licenses under the Department of Consumer Affairs, which regulates over 40 major professions.

It is in the interest of public safety to assist in the rehabilitation of criminal offenders by removing impediments and restrictions upon their ability to obtain employment.

2. DCA Entities and Licensure

The DCA notes in its *Who We Are and What We Do* booklet that California’s commitment to protecting consumers began with the passage of the Medical Practice Act of 1876, which was designed to regulate the state’s medical professionals who had operated virtually unchecked. Additional professions and vocations were brought under state authority over the following 30 years so that by the late 1920s, the Department of Vocational and Professional Standards was responsible for licensing or certifying accountants, architects, barbers, cosmetologists, dentists, embalmers, optometrists, pharmacists, physicians, and veterinarians. The Consumer Affairs Act was passed in 1970, giving the DCA its current name. Today, DCA issues almost 3 million licenses, certificates, and approvals to individuals and businesses in over 250 categories. This involves setting the qualifications and levels of competency for the professionals regulated by the Department’s boards and bureaus which license, register, or certify practitioners; investigate complaints; and discipline violators.

Within the DCA are 38 entities, including 26 boards, eight bureaus, two committees, one program, and one commission (hereafter “boards” unless otherwise noted). Collectively, these boards regulate more than 100 types of businesses and 200 different industries and professions. As regulators, these boards perform two primary functions: Licensing—which entails ensuring only those who meet minimum standards are issued a license to practice, and Enforcement—which entails investigation of alleged violations of laws and/or regulations and taking disciplinary action, when appropriate.

DCA entities are semiautonomous regulatory bodies with the authority to set their own priorities and policies and take disciplinary action on their licensees. 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, licensure. Boards adhere to general BPC provisions outlining discretion in determining how prior criminal history may be grounds for licensure denial. 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:

- 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.
- Done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another.
- Done any act that if done by a licensee of the business or profession in question, would be grounds for suspension or revocation of license.

This section of law also 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.”

3. Limits on Denial of License for Convictions

This bill would limit the authority of a Board to deny, suspend or revoke a license on the grounds that an applicant is currently incarcerated or has been convicted of an offense within the last seven years, except for serious felonies. The bill would require that the crime be substantially related to the qualifications, functions or duties of the job.

Seven years since conviction could mean that the person was incarcerated for a significant period of that time. Is that what it is intended? If not, the Committee may wish to consider whether the requirement should instead read seven years from conviction, incarceration or release from probation or parole.

The seven year limit will not apply to crimes that are serious felonies. Are there other offenses that a person licensed by a Board under the Department of Consumer Affairs should be considered beyond the seven years? For example should the Board of Accountancy be permitted to consider a conviction for embezzlement that is over 7 years old? Should the Board of Pharmacy be permitted to look at a drug conviction or insurance fraud conviction that is over 7 years old? Are there other convictions that are unique to specific boards that should they should be able to consider beyond the 7 year deadline?

4. Prohibits a Board from Requesting Information Regarding a Criminal History

This bill prohibits a board from requesting information from the applicant regarding his or her criminal history. If the Board is going to grant a license even with a criminal conviction, wouldn't the Board need information on the conviction? Wouldn't it be better for the applicant to submit the court information with an explanation about any of the circumstances instead of having the Board get the information itself? Would failure to have easy access to this information result in more denials of licenses based on the criminal conviction without further research?

5. Argument in Support

The Alliance for Boys and Men of Color support the bill stating:

The Alliance for Boys and Men of Color is a coalition of youth, community, public system leaders, and policy researchers and advocates that are working to ensure our most vulnerable youth and young adults get the tools and supports needed to develop into healthy, successful adults who can contribute to California's social and economic vitality. Working at the state and local level, the Alliance is actively pursuing reforms that will increase access to health services, improve academic success, support neighborhood safety, reduce justice system involvement, and support employment opportunities for this vulnerable population.

California has nearly 8 million people who have been impacted by the justice system and have had previous convictions, many of whom, are disproportionately young men of color. Most formerly incarcerated people struggle to find permanent and stable employment after contact with the justice system. Data has shown that employment is the single most important factor to reducing recidivism. Across the nation, almost 30 percent of jobs require occupational licensing. In California, applicants who seek an occupational license that is governed under the umbrella of the Department of Consumer Affairs must be cleared by an oversight board.

Currently, the Department of Consumer Affairs has overly restrictive policies that deny qualified people occupational licenses and allow for revocation or suspension of licenses because of prior arrests or convictions that are not directly and adversely related to the job. Further, many individuals are denied occupational licenses on the bases of judicially dismissed convictions. Even applicants who gained job-specific training while incarcerated are still barred from working in their occupational field due to licensing barriers.

6. Argument in Opposition

According to the Board for Professional, Engineers, Land Surveyors, and Geologists opposes this bill stating:

The Board [Board for Profession Engineers, Land Surveyors and Geologists] is mandated by Business and Professions Code Sections ... to give the highest priority in all decisions to the protection of the public; these laws state "...whenever protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." The provisions of AB 2138 that would prohibit the Board from considering all criminal convictions of applicants and licensees in determining whether to deny the issuance of a license or to seek disciplinary action against a licensee and from inquiring of the applicants and licensees directly regarding any convictions places the interests of the applicants and licensees ahead of those to the public, in direct contradiction to the clear intent of the Legislature when it enacted these sections. Furthermore, the removal of the Board's ability to consider acts by applicants that do not lead to convictions also places the interests of the individual applicants above the protection of the public as a whole.

Prohibiting the Board from requiring that the applicant provide information, such as court documents, regarding the conviction, would cause the Board to have to expend additional resources, including court fees and staff time, to obtain the documents directly. In addition to increasing the Board's workload and costs, it would also delay the processing of applications and the issuing of licenses. Additionally, prohibiting the Board from considering convictions relating to non-violent crimes that are over five years old would exclude many crimes that are not only substantially related but also "directly and adversely" related, to professions the Board regulates such as fraud, embezzlement, diversion of public funds and submittal of false or forged documents to public agencies.

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