

**Relief from the Collateral Consequences of Conviction:
State Laws Limiting Consideration of Conviction in Employment and Licensure**

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Editor's Note: This is the first in a series of four articles describing the results of the author's recent study of how U.S. jurisdictions deal with the question of relief from the collateral consequences of conviction. In coming months, articles address executive pardon, judicial expungement, and deferred adjudication.

I recently completed a study of state law mechanisms for avoiding or mitigating the collateral consequences of conviction. The happiest surprise was that well over half the states have laws that prohibit the arbitrary denial of public employment and/or occupational licensure based solely on a criminal conviction. When I began the study last year, I expected to find that very few states have general provisions for judicial expungement, and that pardon has become unavailable for all practical purposes in all but a handful of jurisdictions. But I did not expect to find that most states agree, at least in principle, that a criminal conviction should not be disqualifying unless it indicates that an individual is unfit to engage in the particular occupation or profession at issue.

Thirty-three states have laws on the books that prohibit denial of a job or license "solely" on grounds of a criminal conviction. Rather, a conviction must be "reasonably related" (or "directly" or "substantially" related) to the particular occupation or profession before termination or refusal to hire is permitted. Some states define "reasonable relationship" in terms of the circumstances of the offense, the amount of time since conviction, and the individual's demonstrated rehabilitation. A few states presume rehabilitation after a specified number of years. Even states that do not have a generally applicable "nondiscrimination" law recognize that a "reasonable relationship" test is appropriate for at least some occupations.

The intended effect of these laws is to cut back on categorical disqualifications because of conviction, and substitute a system of case-by-case discretionary decision-making based upon individual circumstances. Many of them date from the 1970's, though a few have been enacted more recently in response to concerns about offender reentry.

It is not clear how helpful these nondiscrimination laws have been as a practical matter in allowing people with convictions to get their foot in the door in the workplace. While the laws look good on paper, only a few states have any mechanism for their enforcement, and they have been narrowly interpreted by the courts. In a few states they have been enacted as a part of the state's fair employment practices scheme, and a few laws make reference to the state administrative procedure act. But in most states the laws are free-standing with no mechanism for administrative enforcement.

Moreover, every state separately regulates numerous employments and occupations, and in this connection may permit (or require) consideration of conviction without regard to their general nondiscrimination laws. In addition to such obvious areas as law enforcement and banking institutions, jobs in education and health care are often closed to people with convictions without regard to what they actually did and how long ago they did it. Any ambiguity in coverage is usually resolved against the convicted person.

Yet in spite of exceptions and lax enforcement, general nondiscrimination laws are an important expression of a state's public policy that can be built upon by law reformers.

A chart describing each state's nondiscrimination law can be found on the Sentencing Project's website, along with profiles of each state's law and practice. See www.sentencingproject.org/rights-restoration.cfm. It shows that four states (Hawaii, New York, Pennsylvania and Wisconsin) regulate consideration of a conviction in public and private employment and occupational licensure.

Twelve states (Arizona, California, Colorado, Connecticut, Florida, Kentucky, Louisiana, Minnesota, Missouri, New Jersey, New Mexico, and Washington) prohibit disqualification from public employment and occupational licensure solely on grounds of conviction, but do not regulate private employment. One state (Kansas) prohibits disqualification from public and private employment but does not regulate occupational licensing decisions. Eleven states (Arkansas, Delaware, Indiana, Maine, Michigan, Montana, North Dakota, Oregon, South Carolina, Texas, and Virginia) limit consideration of conviction in connection with occupational licensing but not employment. Six states (Illinois, New Hampshire, Ohio, Oklahoma, Massachusetts, and West Virginia) limit consideration of a felony conviction in licensing and/or employment only when rights have otherwise been restored by a pardon or the conviction vacated or expunged by a court. Of the 17 states that do not have a general nondiscrimination law, many nevertheless apply the "direct" or "rational" relation test in the context of at least one regulatory or licensing scheme, often in the context of disciplinary actions.

As a general matter, federal law prohibits discrimination in employment on the basis of conviction only insofar as it involves discrimination on some basis that is otherwise forbidden under federal civil rights laws. In addition, federal law requires criminal history checks and limits the employment of people with criminal records in a number of occupational areas, including banking, education, healthcare, and transportation. In some cases, however, notably in the transportation industry, federal law requires disqualification only for certain offenses, and only for a limited period of time. Transportation regulations give effect to state pardons and expungements, and also permit administrative waivers.

The thirty-three general non-discrimination laws range all the way from simple one-sentence declarations, to complex regulatory schemes covering many pages in the statute book. Arkansas, Michigan, and Washington all state the public policy sought to be served by the law as intended to "encourage and contribute to the rehabilitation of offenders" and "to assist them in the assumption of the responsibilities of citizenship." New York and New Jersey focus on employment and training as an aid to rehabilitation. Connecticut and New Mexico both link nondiscrimination with public safety ("the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens"). Colorado's statute appears to be aimed at rewarding offenders who have already achieved rehabilitation ("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").

States take very different approaches to establishing an offender's rehabilitation. Minnesota requires consideration of rehabilitation as part of the test for determining the relationship of the conviction to employment; Virginia and New Jersey incorporate the extent of rehabilitation into the relationship test; Michigan makes rehabilitation the basis for rebuttal of an administrative determination that an applicant lacks good moral character. Arkansas, Minnesota, and New Mexico presume that an offender is rehabilitated if the sentence has been served and a specified number of years have passed without further adverse encounters with the law. A number of states require an employer or licensing agency to give specific reasons, in writing, for denial or termination of employment or licensure on

grounds related to conviction. Some states prohibit employer inquiries about pardoned or expunged offenses, or arrests not leading to conviction. In New Jersey, a person may overcome an adverse decision by a licensing board by obtaining a “certificate of rehabilitation” from the Parole Board. Colorado, Delaware, New Mexico and North Dakota incorporate their general nondiscrimination test verbatim into dozens of individual licensing statutes, while other states exempt many of the same professions. Kansas appears to be the only state that addresses employer concerns about liability for negligent hiring, and Hawaii uniquely permits an employer to inquire about an applicant’s criminal record only after an offer of employment has been made.

The wide variety of these nondiscrimination laws has surely earned the states their spurs as “laboratories of democracy.” But variety is not unique to this particular method of neutralizing the effect of a conviction. As will be seen in later issues of this newsletter, it is just as much in evidence when it comes to judicial remedies like expungement and sealing, and executive pardoning arrangements.