

III. Fair Chance Employment & Occupational Licensing Laws

There is perhaps no more critical aspect of a reintegration agenda than removing the many unjustified and unjustifiable barriers faced by people with a criminal record in the workplace.¹ In an era of near-universal background checking and search engines, the “Mark of Cain” they bear will sooner or later be known to potential employers and licensing boards even if it is not called for on an initial application. Some barriers take the form of laws formally disqualifying people with certain types of convictions from certain types of jobs. More frequently barriers result from informal employer or agency discrimination grounded in an aversion to risk and, too frequently, racial stereotypes. Whether it is securing an entry level job, moving up to management responsibilities, or being certified in a skilled occupation, people with a criminal record are at a disadvantage, if they are even able to compete. As between two individuals with hypothetically equal qualifications, it is easy to justify breaking the tie in favor of the person who has never been arrested.

Individualized record relief mechanisms like expungement or pardon are intended to improve employment opportunities, and they are helpful on a case-by-case basis to those who are eligible and able to access them.² But equally important are systemic fair employment and licensing laws that impose general standards and provide for their enforcement, offering class-wide relief to individuals with a record. States have enacted an impressive number of this sort of “clean slate” law just since 2015, some building on laws enacted in an earlier period of reform in the 1970s, and others breaking new ground in regulating how employers and licensing agencies consider an applicant’s criminal record.³

In employment, one of the most striking legislative trends in the past decade is the embrace of limits on inquiry into criminal history in the early stages of the hiring process, particularly for public employment. The so-called “ban-the-box” campaign that began modestly more than 15 years ago in California has now produced new laws or executive orders in two-thirds of the states and over one hundred cities and counties. More efficient and broadly effective than after-the-fact lawsuits, ban-the-box laws now represent the primary tool for eliminating unwarranted record-based employment discrimination on a system-wide basis. They are premised on an expectation that getting to know applicants before learning about this aspect of their background is likely to lead to a fairer and more defensible hiring decision. This should be particularly true when a records check comes only after a conditional offer is made, so if it is withdrawn there is little doubt about the reason.⁴

Occupational licensing has also seen an acceleration of legislative efforts to limit the arbitrary rejection of qualified workers. Significant procedural and substantive reforms have been enacted in more than half the states in the last five years, making licensing authorities newly accountable for their actions and individuals newly able to obtain and practice a skill with enhanced career prospects. Following suggestions proposed in model laws endorsed by organizations from across the political spectrum, states have substituted objective standards for vague “good moral character” criteria,

prohibited consideration of irrelevant minor offenses unrelated to job performance, required licensing agencies to justify their decisions in terms of public safety, and imposed oversight requirements to hold licensing agencies accountable for their performance.

As shown in the following discussion and in the “Report Card” maps that follow the section, almost every state now has at least some law aimed at limiting record-based discrimination in employment or licensure, or both. Enforcement of these new laws may in many cases depend on education and persuasion rather than on lawsuits and executive orders, but this may make change come sooner and have a more lasting effect. The very exercise of repeatedly having to decide the relevance of an individual’s past conduct through a transparent and accountable process is likely to result in more reliable decision-making, and a better understanding of those relatively few instances when it is legitimate to deny someone an opportunity to work based on their criminal record. We discuss the state of the law in greater detail in the following sections.

Note: Color-coded maps and a side-by-side Report Card for both employment and occupational licensing are at the end of the section.

FAIR CHANCE EMPLOYMENT

Few states have adopted general rules prohibiting employment discrimination based on criminal record, and the only relevant federal law depends upon being able to establish disparate impact based on race or some other protected classification.⁵ In fact, until this century, only three states had incorporated provisions relating to a record of arrest or conviction into their general FEP law: New York (1976), Wisconsin (1981), and Hawaii (1998).⁶ Article 23-A of **New York’s** Corrections Law prohibits “unfair discrimination” against a convicted person by public and private employers and licensing entities. The law imposes a “direct relationship” standard defined by a multifactor test limited only by public safety considerations, which may be enforced through the courts or through the State Human Rights Law. Certificates issued by a court or the parole board may lift mandatory employment or licensing bars and are evidence of rehabilitation in discretionary decisions. Rejected applicants must be given reasons in writing.⁷ **Wisconsin’s** fair employment law also covers arrest or conviction record, and has been broadly interpreted by the administrative agency responsible for its enforcement and the courts to require a conclusion that “a specific job provides an unacceptably high risk of recidivism for a particular employee.”⁸

Many other states adopted laws in the last years of the 20th century providing that a conviction could not be the “sole” reason for refusing to employ someone, and enjoined employers to consider whether a criminal record was related in some fashion to the job. Some even set out detailed criteria for determining when a “direct relationship” (or, variously, “substantial” or “reasonable” relationship) exists between a person’s criminal record and the position. These standards were sometimes sufficiently precise as to encourage rejected applicants to go to court, but the employer

usually won.⁹ Individuals rejected for employment because of a criminal record had somewhat better luck under federal civil rights law if they could establish a correlation between criminal record and another independently prohibited basis for adverse treatment such as race.¹⁰ But for all intents and purposes until 1998 Wisconsin and New York were the only states that provided administrative remedies for record-based employment discrimination without also requiring a nexus with race or some other illegal ground.

When **Hawaii** extended its Fair Employment Practices law to criminal records in 1998, it was the first state to identify and address a concern about threshold disqualification based on criminal background checks. Its prohibition on inquiries into an applicant’s criminal record until after a conditional offer of employment has been made served as an inspiration for the “ban-the-box” campaign that began several years later in California. In Hawaii, a conditional offer may be withdrawn only if a conviction within the most recent 10 years bears a “rational relationship to the duties and responsibilities of the position.”¹¹ Its four-part enforcement mechanism is a model for other states:

- ❖ To prohibit application-stage inquiries about criminal history
- ❖ After inquiry is made, to prohibit consideration of non-convictions and certain other records that are categorically deemed “unrelated” to qualifications
- ❖ To apply detailed standards to consideration of potentially relevant records, and
- ❖ To enforce these standards and procedures through the general fair employment law.

While the ban-the-box approach pioneered by Hawaii has taken hold across the country, only three additional jurisdictions have built a comprehensive approach to “fair chance employment” around the same four-part mechanism, and of these three only two applied it to private as well as public employment. The District of Columbia was the first in this century to enact what has come to be called a “fair chance” approach to hiring people with a criminal record, regulating public employment in 2010 and a few years later extending similar rules to private organizations employing more than 10 people.¹² California and Nevada followed suit with similar laws in 2017, although Nevada’s extends only to public employment.

California’s Fair Employment and Housing Act (FEHA) is discussed first because it is the most extensive of the three, extending criminal history protections to both public and most private employers, delaying a background check until after an offer of conditional employment is made, and thereafter prohibiting consideration of non-conviction records, as well as convictions that have been dismissed or set aside, pardoned, or been the subject of a judicial Certificate of Rehabilitation. In all cases, employers must conduct individualized assessments to determine whether a conviction has a “direct and adverse relationship with the specific duties of the job,” notify an applicant in the event of denial and of the record relied upon (though no further reasons need be given), and allow the applicant to respond. Violations constitute an “unlawful employment practice” that may lead to

administrative enforcement by the Department of Fair Employment and Housing and ultimately to court.¹³

Nevada and the **District of Columbia** employ essentially the same four-part approach as California and Hawaii before it, including enforcement through their general fair employment or human rights laws. While Nevada prohibits discrimination in public employment only and permits inquiry into criminal record after the first interview, it categorically prohibits consideration not only of non-conviction and sealed records, but also of misdemeanors that did not carry a prison sentence. Nevada law provides that failure to comply with its procedures is an unlawful employment practice and authorizes complaints to be filed with the Nevada Equal Rights Commission. The District’s law prohibits inquiry until after a conditional offer has been made, which may be withdrawn only for a “legitimate business reason” that is “reasonable” under a multifactor test and accompanied by written reasons. The applicant may file a complaint with the D.C. Office of Human Rights (OHR), though the law does not contemplate an appeal from its Human Rights Office to the courts.

Two additional states provide for limited record-related protections through their human rights laws: **Illinois**¹⁴ prohibits inquiries about or consideration of non-conviction records, juvenile records, or expunged or sealed records; and **Massachusetts**¹⁵ prohibits consideration of non-convictions and some misdemeanors.

Some advocates have looked to federal civil rights law for reinforcement, but many are wary of relying on a vehicle for challenging record-based employment bars that is necessarily tethered to otherwise-prohibited discrimination based, *inter alia*, on race or ethnicity.¹⁶

A large number of states have now adopted the first step of Hawaii’s comprehensive approach to hiring by adopting “ban-the-box” laws, and rely primarily on limiting the amount of information employers have about an applicant’s criminal record until the later stages of the hiring process. These laws are premised on a hopeful expectation that if applicants are given a chance to demonstrate their job-related qualifications before their past record is revealed, employers will be willing to take a more considered look at them. By the beginning of 2020, laws or ordinances prohibiting application-stage inquiries applied to public employment in 36 states, the District of Columbia, and over 150 cities and counties, and in many cases limited record checks until after a conditional offer of employment.¹⁷ In 14 states and D.C., and 18 cities and counties, private sector employment was also affected.¹⁸

Even Congress acted in late 2019 to postpone inquiries into criminal record, until after a conditional offer is made, for **federal** agency employment in all three branches of government and private contractor hiring.¹⁹ Effective January 2021, the federal Fair Chance Act also prohibits agency procurement officials from asking persons seeking federal contracts and grants about their criminal history, until an “apparent award” has been made.²⁰

Many of these states also enjoin employers to base hiring decisions involving a person with a criminal record on criteria related in some fashion to the job, and in some cases set out detailed criteria for determining when a “direct relationship” (or, variously, “substantial” or “reasonable” relationship) exists between a person’s criminal record and the position.²¹ Some also prohibit employer consideration of non-conviction records and convictions that have been expunged or sealed, or ask employers to consider “certificates of relief” issued by courts or parole boards. **Colorado** has built an extensive set of standards around a “ban-the-box” core, requiring justification for withdrawing a conditional offer, prohibiting consideration of non-convictions or sealed or pardoned convictions, and giving effect to judicial or administrative certificates of relief.²²

The limited information available to date on the practical effect of ban-the-box schemes suggests that they do improve job opportunities for people with a criminal record.²³ However, their effectiveness depends to some extent upon a willingness on the part of decision-makers to forego, at least temporarily, information about a candidate for employment that might be highly relevant to a hiring decision. In this regard, there has been some concern that limiting inquiry into criminal history may lead to employer reliance on racial or other stereotypes about who may have a criminal record.²⁴

Some states protect employers from negligent hiring liability, the primary reason cited by employers for not hiring someone with a criminal record.²⁵ Frequently such protections are triggered when an employee or applicant for employment receives some form of individualized restoration of rights, such as a pardon or judicial sealing. But some states, like Colorado, Minnesota, and New York, absolutely prohibit the use of conviction evidence in a negligent hiring civil suit. Texas prohibits negligent hiring suits except when the employer knew or should have known that an employee committed certain high-risk offenses.²⁶ Massachusetts protects employers so long as they relied on information from the state’s Criminal Offender Record Information System (CORI) and reached a decision within 90 days of receiving that information.

While ban-the-box laws generally exclude specific types of employment, including employment where a background check is required by law, and are essentially toothless without standards and an enforcement mechanism, collectively they represent the single most significant advance for people with a record in the workplace in thirty years. In requiring potential employers to evaluate each applicant’s circumstances as opposed to reflexively rejecting anyone who reports a record, and in some cases potentially making it expensive to withdraw an offer conditionally extended, these laws are to a considerable extent self-enforcing. In this sense, they depend for their effectiveness not so much on the threat of lawsuits to compel compliance as on marketplace efficiency.

As we will see in the following discussion, comprehensive occupational licensing reforms enacted by more than a dozen states since 2018, and partial reforms enacted by another dozen, are an equally encouraging development.

OCCUPATIONAL LICENSING

Recent studies have shown that close to 20% of all jobs in the United States are available only to people who have been approved to compete for them by a government licensing agency.²⁷ It is therefore of obvious importance to the reintegration agenda to remove record-based barriers that unfairly and inefficiently restrict access to the licenses and certificates that people need to work in regulated occupations and professions.

In addition to the burdens imposed in time and money by engaging in the licensing process, applicants face regulatory agencies that may be inhospitable to people with a criminal record even if they are fully qualified by skill and training. Sometimes this is because the law mandates a heightened standard for those who have been convicted of a crime (if they are not excluded entirely). More frequently it is because of vague “good moral character” standards arbitrarily enforced by those with a guild mentality or moral scruples untethered to public safety or actual occupational requirements.²⁸

In an earlier era of reform in the 1970s, many states enacted laws intended to soften the rough edge of what had been complete exclusion of people with a criminal record from trades and professions.²⁹ Several states regulated public employers and licensing agencies together, requiring them to consider whether a conviction was “directly related” to a job or license, and whether the person was “rehabilitated.”³⁰ Some states that enacted detailed regulation of public employment and licensing prior to the 1980s have not made major changes to their licensing rules since that time.³¹

Beginning in 2013, a new era of occupational licensing reform took shape, transforming the policy landscape.³² By mid-2020, more than 30 states had enacted legislation to make it easier for qualified individuals with a criminal record to obtain occupational and professional licensure and the foothold in the middle class that this promises.³³ The modern reforms were heavily influenced by model occupational licensing laws proposed by two national organizations with differing regulatory philosophies: The Institute of Justice (IJ), a libertarian public interest law firm,³⁴ and the National Employment Law Project (NELP), a workers’ rights research and advocacy group.³⁵ Both of these model law proposals addressed the following five key issues:

1. **What records should be considered?** Both proposals limit the kinds of records that may be considered, recommending that only recent serious convictions should be the basis of denial or other adverse action, and that non-convictions and sealed or pardoned convictions not be considered at all.
2. **What are proper criteria for denial of licensure?** Under IJ’s proposal, denials must be based on evidence of public safety risk; under NELP’s proposal, denials must be based on a record’s “direct relationship” to the occupation, coupled with a lack of rehabilitation. Both proposals would eliminate mandatory bars to licensure and vague standards like “good moral character.”

3. **At what point in the process should criminal record be considered?** The timing for considering whether a criminal record should be disqualifying differs significantly in the two proposals. Under IJ’s proposal, a person may at any time petition for a “preliminary determination” whether a criminal record will be disqualifying, before investing in any training or special education, the agency must promptly respond and charge a minimal fee, and its determination is binding upon later application. Under NELP’s proposal the order of decision is reversed: consideration of the record should occur only after determining the person is otherwise qualified, a variation on its “ban-the-box” approach.
4. **What procedural protections should apply in licensing decisions?** Under both proposals, procedures for decision-making are well-defined, and both require agencies to bear the burden of showing unfitness, to issue written decisions defending denials, and to allow for appeals.
5. **How should licensing agencies be held accountable?** Both proposals require agencies to make periodic reports that will allow monitoring of compliance by the legislature or responsible executive agency.

The most ambitious and extensive licensing schemes enacted during the current reform period address each of these questions, while other states have been more selective in deciding which approaches to adopt. Between 2016 and mid-2020, 30 states enacted a total of 39 laws imposing new generally applicable obligations and limitations on licensing agencies, some states enacting multiple laws in successive years:³⁶ Arizona (2017, 2018, 2019), Arkansas (2019), California (2018), Colorado (2018), Georgia (2016), Idaho (2020), Illinois (2016, 2017), Indiana (2018, 2019), Iowa (2019, 2020), Kansas (2018), Kentucky (2017), Louisiana (2017), Maryland (2018, 2019), Massachusetts (2018), Mississippi (2019), Missouri (2020), Nebraska (2018), Nevada (2019), New Hampshire (2018), North Carolina (2019), Ohio (2019), Oklahoma (2019), Pennsylvania (2020), Rhode Island (2020), Tennessee (2016, 2018), Texas (2019), Utah (2019, 2020), West Virginia (2019, 2020), Wisconsin (2018), and Wyoming (2018).

Eight states regulated licensing decisions state-wide for the very first time,³⁷ while others expanded on laws originally enacted during the earlier reform era in the 1970s and 80s.³⁸ Many of them required agencies to publish lists of disqualifying convictions and limit disqualification to convictions “directly related” to the regulated occupation, abolished vague “good moral character” criteria and emphasized public safety instead, barred licensing agencies from considering non-convictions and certain other types of records, and required agencies to justify denials with written reasons and defend them on appeal. Many states also required agencies to report periodically to the legislature on their progress.³⁹ The Institute for Justice keeps a running tab of the types of reforms enacted, by state, on its website.⁴⁰

The most ambitious of the new laws was the comprehensive scheme enacted by Indiana, which is strong both substantively and procedurally, and its requirements apply not only to state agencies but also to county and municipal governments that issue occupational and professional licenses and

permits.⁴¹ Rhode Island’s law comes in a close second.⁴² The most surprising were the extensive new schemes put in place in two Southern states, North Carolina and Mississippi, the first an expansion of a scheme from an earlier reform era, and the second a brand new effort by a state that previously had no law at all.⁴³ Minnesota evidently saw no need to modify a progressive set-up first enacted in 1974 and virtually unchanged since that time,⁴⁴ but Pennsylvania completely reworked the substantive standards intended to guide 29 licensing agencies controlling 255 licenses.⁴⁵ Pennsylvania, along with Nebraska, also imposed new reporting requirements on occupational licensing boards, perhaps a prelude to more extensive procedural regulation. Alabama and Washington authorized their courts to grant exemptions from many barriers to licensure.⁴⁶

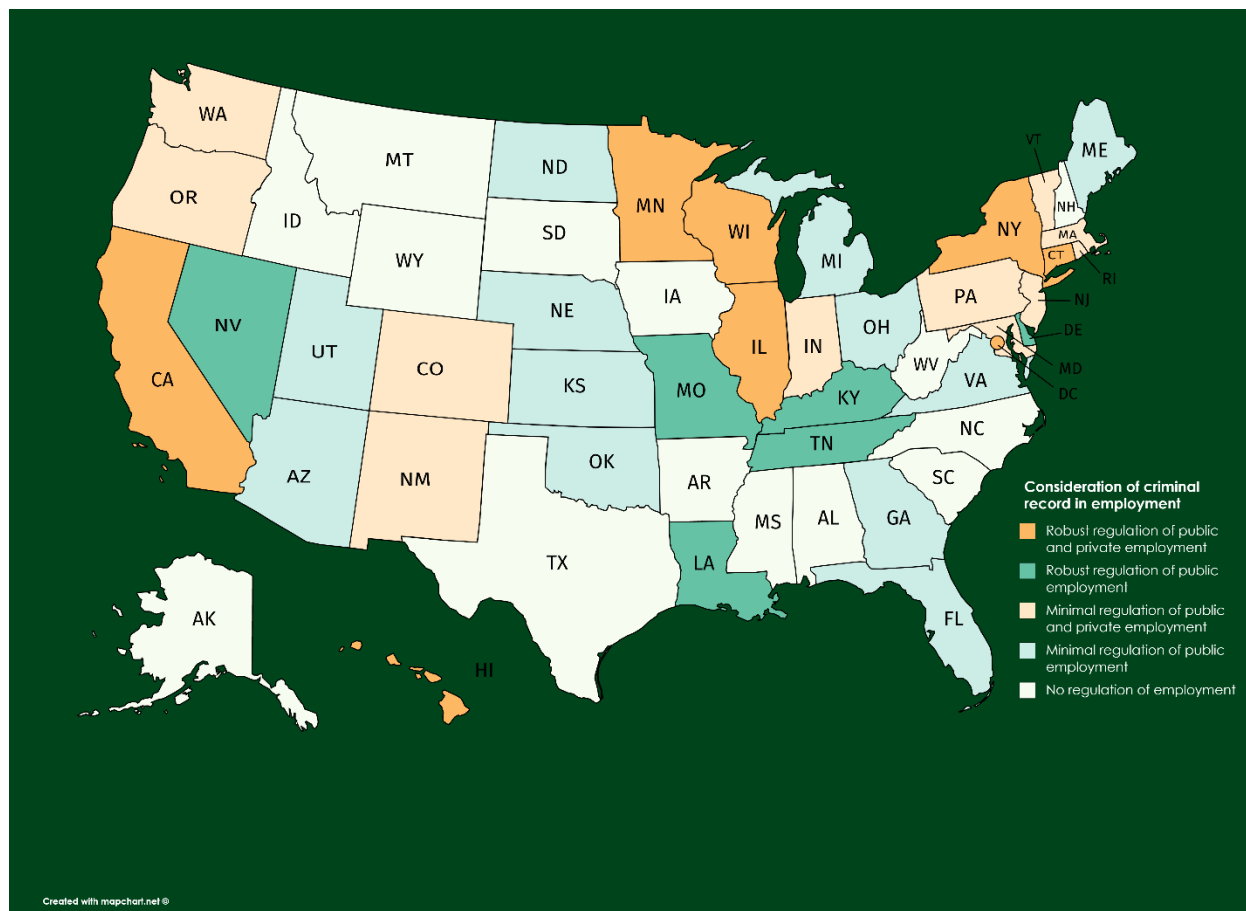
In addition to these general reforms, several additional states enacted laws regulating specific occupations or addressing narrower aspects of licensure. Five states (Connecticut, Delaware, Florida, Idaho, and Iowa) loosened restrictions on barbers and cosmetologists, and Florida and Iowa facilitated licensing in construction trades taught in their prisons. Wisconsin added discrimination by occupational licensing boards to its venerable fair employment law, and Alabama passed a law allowing individuals to petition a court to remove mandatory bars to specific occupational licenses so that applicants may be considered on the merits. Texas opened health care occupations to people who may have been barred from them earlier in life.⁴⁷ At the time this report went to press, Michigan had pending seven bills addressing different aspects of the licensing process.

In summary, given the number of work opportunities they control, licensing agencies play a key part in any reintegration strategy aimed at giving people with a criminal record a fresh start. While the philosophies behind the bipartisan advocacy for licensing reform may vary, the practical value of its guidance to the many individuals who stand to benefit cannot be overestimated. If a “clean slate” means “an absence of existing restraints,”⁴⁸ lifting legal and societal barriers to licensure seems an essential part of a clean slate agenda.

REPORT CARD ON FAIR CHANCE EMPLOYMENT

Identification of categories: The following map assigns each state to one of five color-coded categories reflecting the textual strength of the law regulating how criminal record is taken account of in the employment application process. (We cannot and do not comment on how these laws operate or how they are enforced.) The five categories are: 1) Orange: robust regulation of both public and private employment; 2) Green: robust regulation of public employment only; 3) Light orange: minimal regulation of both public and private employment; 4) Light green: minimal regulation of public employment only; and 5) White: no regulation of either public or private employment. In determining which laws were robust and which were minimal, consideration was given to whether a state’s fair employment law extends to discrimination based on criminal record; whether a “ban-the-box” law prohibits inquiry until

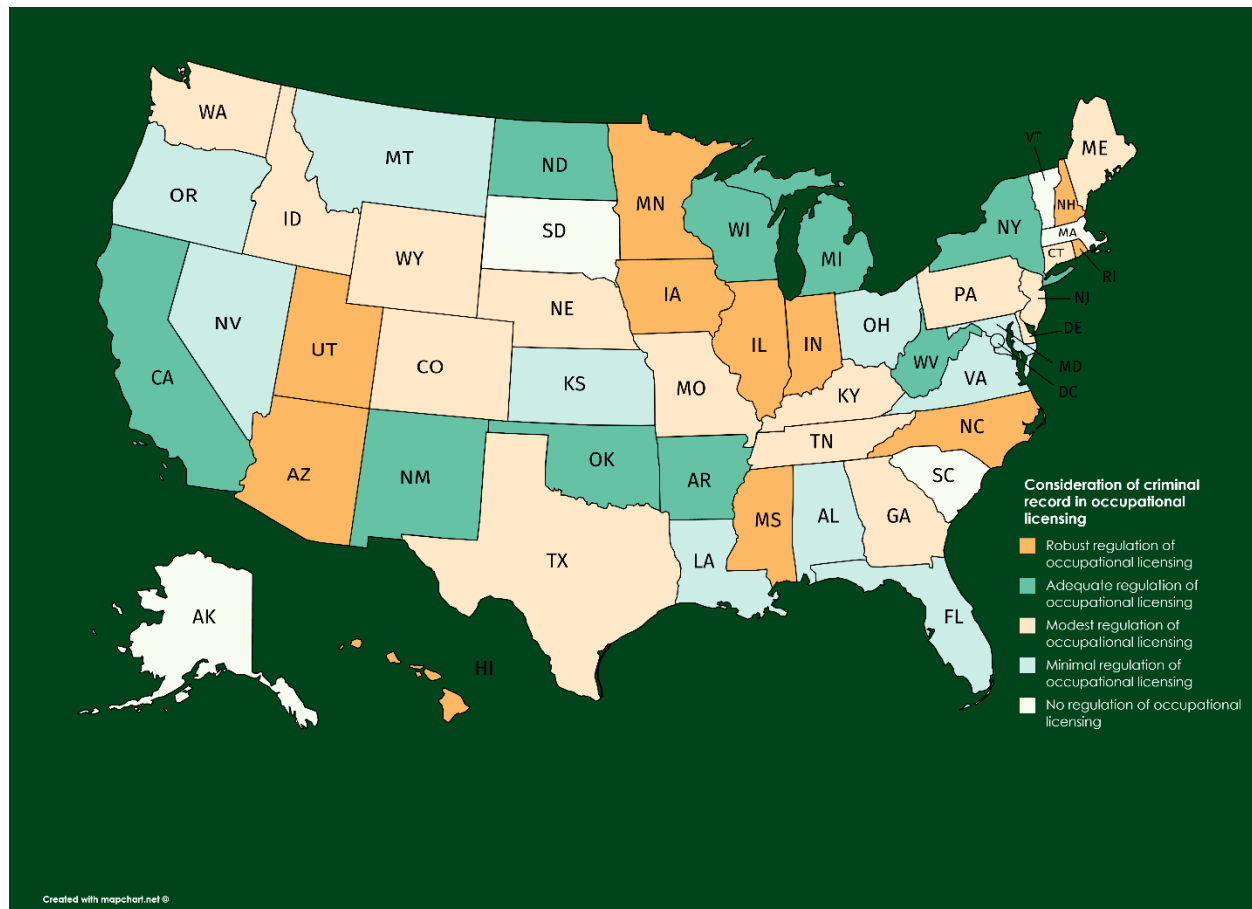
after a conditional offer has been made; whether clear standards determine how employers should consider a record in the employment application process; and, whether the law provides for administrative enforcement.



REPORT CARD ON REGULATION OF OCCUPATIONAL LICENSING

Note for licensing: The following map assigns each state to one of five color-coded categories reflecting the textual strength of the law regulating consideration of criminal record by occupational licensing agencies. Orange designates a robust regulatory scheme, green an adequate one, light orange a modest one, light green a minimally acceptable one, and states colored white have no general licensing scheme at all. Rankings were determined by 1) whether clear and specific standards apply to test the relevance of an applicant’s criminal record to the occupation, by reference to public safety rather than character; 2) whether certain categories of records (notably non-conviction records) are excluded as irrelevant to licensure; 3) whether the law provides an opportunity for aspiring applicants to get an early read on their likelihood of success, and whether that early read is binding on a later

determination; 4) whether procedural protections are available through written reasons for denial and opportunities to appeal; 5) whether there is an external accountability mechanism to monitor agency performance, such as periodic reporting requirements. Even licensing schemes deemed “robust” may not have gotten that mark because of high marks in all five categories.



Comparison of State Ratings Between Employment and Licensing

Looking at how states performed on the two report cards, it is interesting that there is not a particularly strong correlation between their rankings. That is, states that have a robust system for regulating consideration of conviction in employment may not and frequently do not have similarly strong systems for regulating occupational licensing agencies. In fact, only two states (Illinois and Minnesota) scored at the top of both categories. Three other states that scored well on employment also scored well on occupational licensing (California, New York, and Wisconsin), but the last two jurisdictions in the top employment category (Hawaii and the District of Columbia) scored poorly on occupational licensing. Four of the six states that have robust

regulation of public employment scored in the middle tier of occupational licensing (Delaware, Kentucky, Missouri, and Tennessee), but the other two with good scores on public employment scored poorly on occupational licensing (Louisiana and Nevada).

Conversely, four states that ranked in the top tier for occupational licensing had no law at all regulating employment (Iowa, Mississippi, New Hampshire, and North Carolina) and two others had only minimal regulation of public employment (Indiana and Utah). Three states had no regulation at all governing either employment or occupational licensing (Alaska, South Carolina, and South Dakota).

Appendix C contains a 50-state summary of laws regulating consideration of conviction in employment and licensing in each state, with links to specific state profiles that may be consulted for additional detail.

ENDNOTES

¹ Studies have shown that having a well-paying job has a demonstrable impact on recidivism rates for those released from prison. *See, e.g.,* Crystal Yang, *Local labor markets and criminal recidivism*, 147 J. PUB. ECONOMICS 16 (2017). Recent years have produced an extraordinary literature on the public policy importance of removing barriers to employment and licensure for those with criminal records, as a matter of economic efficiency, public safety, and fairness. *See, e.g.,* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2461 (2020). The chapter on "Consequences for Employment and Earnings" from the report of the National Research Council of the National Academy of Sciences, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 211-259 (Jeremy Travis and Bruce Western, eds.), remains the most thorough scientific treatment of the impact of incarceration on the life prospects of those who experience it.

² Recent reforms in a few states call for automatic sealing of records on a categorical basis, legislative relief that is described in Part II of this report on Record Relief.

³ The term “clean slate” is frequently used to describe the desired effect of record-sealing laws, but its definition as “an absence of existing restraints or commitments” makes it equally apt in connection with regulation imposition of unwarranted record-related restrictions in employment and occupational licensing. *See* OXFORD DICTIONARY OF IDIOMS 65 (John Ayto, ed., 2020), https://www.lexico.com/definition/clean_slate.

⁴ One caveat that has been raised by researchers about ban-the-box strategies is that barring early inquiry into criminal record may lead employers to rely on stereotypes about which applicants are likely to have one. *See generally infra* note 24, *infra*.

⁵ The only national standards for employment of people with a criminal record, the 2012 EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 tests the validity of employment policies affecting people with a criminal record in terms of their adverse effect on groups that are otherwise protected from discrimination. The EEOC has taken the position that employers may not reject applicants based on an arrest record alone and may not

impose an across-the-board exclusion of people with a conviction record. The Guidance requires individualized consideration using a multifaceted screening test that considers the nature of the person’s offense, the time elapsed since it occurred, and the nature of the position. *See* MARGARET LOVE, JENNY ROBERTS & WAYNE LOGAN, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY, AND PRACTICE*, § 6:5 (3d ed. 2018-2019). In 2019 the Fifth Circuit invalidated the Guidance, so its legal status is no longer clear. *See Texas v. Equal Employment Opportunity Commission*, 933 F.3d 433, 451 (5th Cir. 2019) (finding that the EEOC overstepped its statutory authority in promulgating guidance on employers’ use of criminal records in hiring).

⁶ A fourth state, Connecticut, included as early as 1980 provisions addressing discrimination based on criminal record in public employment in its human rights code. *See* CONN. GEN. STAT. § 46a-80 (citing the former Sec. 4-61o which was transferred to Sec. 46a-80 in 1981). However, the state Commission on Human Rights and Opportunities evidently never regarded enforcement of these provisions as within its mandate. *See* 1994 memorandum from the Office of Legislative Research on Employment Discrimination Based on Prior Conviction of a Crime to the Connecticut General Assembly (Jan. 19, 1999), <https://www.cga.ct.gov/PS94/rpt/olr/htm/94-R-0201.htm>.

⁷ *Compare Boone v. New York City Department of Education*, 38 N.Y.S.3d 711, 721 (N.Y. Sup. Ct. 2016) (holding that denial of security clearance for a position as a School Bus Attendant to petitioner convicted of shop-lifting from her employer, without due regard to the factors set forth in Article 23-A, or petitioner’s CRD, was arbitrary and capricious) *with Arrocha v. Bd. of Educ. Of City of N.Y.*, 93 N.Y.2d 361, 366 (1999) (holding that the Board of Education’s determination that teaching license applicant’s prior conviction for sale of cocaine came within statutory “unreasonable risk” exception to general rule that prior conviction should not place person under disability, was neither arbitrary nor capricious, where Board properly considered all statutory factors and determined that those weighing against granting license outweighed those in favor; age of conviction, applicant’s positive references and educational achievements, and presumption of rehabilitation were outweighed by teacher’s responsibility as role model and nature and seriousness of applicant’s offense.).

⁸ *See e.g. Palmer v. Cree, Inc.*, ERD Case No. CR201502651 (LIRC, Dec. 3, 2018) (finding that lighting products company could not show that a job applicant’s convictions—for felony strangulation and suffocation, and misdemeanor battery, fourth degree sexual assault, and damage to property—were substantially related to employment as a lighting applications specialist who would have contact with the public; “Whether the crime is an upsetting one may have nothing to do with whether it is substantially related to a particular job.”); *Staten v. Holton Manor, supra*, ERD Case No. CR201303113 (LIRC, Jan. 30, 2018) (holding that skilled nursing facility could not refuse to hire based on misdemeanor theft conviction that had been expunged; permitting the employer to do so would conflict with the purpose of the statute permitting expungement, which is to permit certain offenders to “wipe the slate clean of their offenses and to present themselves to the world—including future employers—unmarked by past wrongdoing.”).

⁹ For example, Minnesota’s Criminal Rehabilitation Act of 1974 prohibits discrimination in public employment and licensing and sets out a detailed set of standards for determining whether a criminal record is “directly related” to a specific job so that it justifies adverse employment action. *See* MINN. STAT. § 364.03, subd. 2. Even where a crime is found to be directly related, a person may not be disqualified if the person can show “competent evidence of sufficient rehabilitation and present fitness to perform the duties of the public employment sought or the occupation for which the license is sought.” § 364.03, subd. 3. Rehabilitation may be established by a record of law-abiding conduct for one year after release from confinement, and compliance with all terms of probation or parole. The problem is that, unlike the laws enacted in Wisconsin and New York, the Minnesota law contains no enforcement mechanism, leaving aggrieved individuals to seek relief in the courts, which have tended to interpret the standard in favor of the employer. *See, e.g., Peterson v. Minneapolis City Council*, 274 N.W.2d 918 (Minn. 1979) (finding that conviction for attempted theft by trick directly related to the operation of a massage parlor); *In re Shelton*, 408 N.W.2d 594 (Minn. Ct. App. 1987) (holding that embezzlement directly related to fitness to teach;

teacher with 20 years of service terminated in spite of efforts to make restitution); *In re Shelton*, 408 N.W.2d 594 (Minn. Ct. App. 1987).

¹⁰ See, e.g., *Green v. Missouri Pacific Railroad Co.*, 523 Fed. 2d 1158 (8th Cir. 1975), and discussion of early EEOC practice and policies in *Love et al. supra* note 5 at § 6:4 (“Title VII – Applied to criminal records – Judicial interpretations (3d ed. 2018-2019, West/NACDL).

¹¹ See HAW. REV. STAT. §§ 378-2.5(b), (c) (an employer may withdraw a conditional offer of employment only if a conviction within the previous 10 years “bears a rational relationship to the duties and responsibilities of the position.”); Sheri-Ann S.L. Lau, *Recent Development: Employment Discrimination Because of One’s Arrest and Court Record in Hawaii*, 22 U. HAW. L. REV. 709, 714-15 (2000).

¹² See D.C. CODE §§ 1-620.42, 1-620.43. Public employers and private employers with 10 or more employees may not inquire into an applicant’s criminal record until after the employer has extended a conditional offer of employment, may not consider arrests or charges that are not pending and that did not result in a conviction, and may withdraw a conditional offer of employment based on an applicant’s conviction history only for a “legitimate business reason” that is “reasonable” in light of a multifactor test. The applicant may also file a complaint with the D.C. Office of Human Rights, which can bring administrative proceedings against an employer that it believes has violated the law and levy fines.

¹³ See CAL. GOV’T CODE § 12952. It is unclear what effect the enactment of § 12952 will have on DFEH regulations, also promulgated in 2017, providing that consideration of criminal history may violate FEHA if it has “an adverse impact on individuals on a basis protected by the Act, including, but not limited to, gender, race, and national origin.” CAL. CODE REGS. tit. 2 § 11017.1(d)–(g). Because the regulations are not coextensive with § 12952 and because they are rooted in a theory of liability not based *directly* on criminal history discrimination, it is possible that they may provide an alternate path to relief for some applicants disqualified due to criminal history.

¹⁴ Effective January 1, 2020, the Illinois Human Rights Act prohibits inquiries about, or discrimination in employment and real estate transactions, based on “arrest record,” defined as “an arrest not leading to a conviction, a juvenile record, or criminal history record information ordered expunged, sealed, or impounded.” 775 ILL. COMP. STAT. ANN. 5/1-103 - 5/3-103, as amended by SB1780 (explaining how previously the law covered only employment, and only discrimination based on “the fact of an arrest” and expunged and sealed records). A claim of racial discrimination has also been sustained under this law where a criminal conviction was the articulated basis for a refusal to hire. See *Bd. of Trs. v. Knight*, 516 N.E.2d 991, 996-97 (Ill. App. Ct. 1987) (stating that no business necessity justified denial of employment as university police position to person convicted of single misdemeanor weapons charge; mitigating circumstances existed including time passed since conviction and record of responsible employment).

¹⁵ See MASS. GEN. LAWS ch. 151B, § 4(9) (It shall be an unlawful practice for an employer “to request any information . . . regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information”). The law is enforced by the Massachusetts Commission against Discrimination, and procedures are set forth in MASS. GEN. LAWS ch. 151B, § 5.

¹⁶ See *supra* note 5.

¹⁷ Beth Avery, *Ban-the-Box, U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, National Employment Law Project (July 2019), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>. Since this study was published, in 2020 the Virginia legislature swelled the roll of states that prohibit inquiry in public employment. See HB 757, 2020 Leg., (VI. 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB757&201+sum+HB757>.

¹⁸ Avery *supra* note 17. In early 2020, the Maryland legislature overrode a veto by its governor to extend its ban-the-box law to private employers. See Guy Brenner and Caroline Guensberg, *Maryland Legislature Overrides Governor’s Veto of “Ban the Box” Legislation*, X NAT’L L. REV. 214 (Feb. 2020) <https://www.natlawreview.com/article/maryland-legislature-overrides-governor-s-veto-ban-box-legislation>.

¹⁹ See CCRC Staff, *Fair Chance Act advances in Congress*, (Dec. 16, 2019), <http://ccresourcecenter.org/2019/12/16/fair-chance-act-advances-in-congress/>

²⁰ *Id.*

²¹ See Restoration of Rights Project, *50-State Comparison: Criminal Record in Employment & Licensing*, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/>.

²² See COLO. REV. STAT. § 24-5-101(3)(c), retaining exclusions for non-conviction records, and convictions that have been sealed, expunged or pardoned, and including for the first time convictions where “a court has issued an order of collateral relief specific to the employment sought by the applicant.” If none of the exclusions in (3)(c) apply, the agency “shall consider” the following factors in deciding whether to disqualify an applicant based on criminal record: (1) the nature of the conviction; (2) whether the conviction is “directly related” to the job; (3) the applicant’s rehabilitation and good conduct; and (4) time elapsed since conviction. *Id.* § 24-5-101(4).

²³ See Anastasia Christman and Michelle Rodriguez, *Research Supports Fair-Chance Laws*, National Employment Law Project (August 2016), <https://www.nelp.org/publication/research-supports-fair-chance-policies/>; Washington Lawyers Committee for Civil Rights and Urban Affairs, *The Collateral Consequences of Arrests and Convictions under D.C., Maryland, and Virginia Law* (2014), http://www.washlaw.org/pdf/wlc_collateral_consequences_report.pdf; D.C. Council Comm. on the Judiciary and Public Safety, Report on Bill 20-642, the ‘Fair Criminal Records Screening Amendment Act of 2014’ at 3 (May 28, 2014); Council for Court Excellence, *Unlocking Employment Opportunities for Previously Incarcerated Persons in the District of Columbia* (2011), http://www.courtexcellence.org/uploads/publications/CCE_Reentry.pdf.

²⁴ Researchers have found that ban-the-box policies may increase racial discrimination due to employers’ exaggerated impressions of racial differences in conviction outcomes, thereby artificially decreasing the number of qualified minority applicants who are given a second look. See, e.g., Amanda Agan and Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 QUART. J. ECON. 1, 195-235 (2018); Jennifer Doleac & Benjamin Hansen, *The Unintended Consequences of “Ban the Box”: Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, 38 J. LAB. ECON. 2, 321-74 (2020), <https://www.journals.uchicago.edu/doi/abs/10.1086/705880?af=R&mobileUi=0&>; see also Alana Semuels, *When Banning One Kind of Discrimination Results in Another*, THE ATLANTIC (Aug. 4, 2016), <https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435/>.

²⁵ See Love, *et al. supra* note 5 at §§ 6:18-6-29.

²⁶ See Texas profile Part IV, Restoration of Rights Project, *supra* note 21. Texas also relies on strict regulation of background screeners. Screeners are required to obtain records only from a criminal justice agency and must give individuals the right to challenge their accuracy. Screeners may not publish records whose disclosure is prohibited under another state law (e.g., records that have been expunged, or which are subject to an “order of nondisclosure”), and there is a civil remedy for violations.

²⁷ See Morris M. Kleiner and Evgeny F. Vorotnikov, *At What Cost, State and National Estimates of the Economic Costs of Occupational Licensing*, Institute for Justice (Nov. 2018), https://ij.org/wp-content/uploads/2018/11/Licensure_Report_WEB.pdf; Stephen Slivinski, Center for the Study of Economic Liberty at Arizona State University, *Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform* (Nov. 7, 2016), <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf>.

²⁸ The White House issued a report in July 2015 on occupational licensing, which noted that 25 states have standards requiring some kind of relationship between a license and an applicant’s criminal history, 25 states and the District of Columbia “have no standards in place.” See White House, *Occupational Licensing: A Framework for Policymakers*, 35–36 (July 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf. In April 2016, President Obama directed federal departments and agencies to ensure that federally-issued occupational licenses are not presumptively denied on the basis of a criminal record, and the Department of Justice announced support for technical assistance to states pursuing similar initiatives, as part of \$5 million grant solicitation focused on reentry. See White House Press Secretary, Fact Sheet: New Steps to Reduce Unnecessary Occupation Licenses that are Limiting Worker Mobility and Reducing Wages (June 17, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting>. The extent to which reforms have been successful in the intervening two years is reflected by the fact that by 2020 only eight states had no standards in place: Alaska, Alabama, Massachusetts, Nevada, Ohio, Rhode Island, South Dakota, and Vermont.

²⁹ In the 1970s, with public policy favoring encouraging employment opportunities for people with a criminal record, states began to enact laws that limit denial of licenses (and public employment) due to criminal convictions. Notable enactments included those in New Jersey (1968), Colorado (1973), Washington (1973), Hawaii (1974), Minnesota (1974), New York (1976), North Dakota (1977), Pennsylvania (1979), and Wisconsin (1981). See Love *et al. supra* note 5 at § 6:16. Many of these laws did little more than prohibit outright exclusion. Colorado’s law, for example, provides that a conviction for a felony or moral turpitude offense does not “in and of itself” prevent public employment or licensure (stating that with exceptions for certain sensitive positions), but may be considered in determining a person’s “good moral character.” COLO. REV. STAT. § 24-5-101(2). Others are stronger. For example, North Dakota’s provisions prohibit denial of licensure unless there is a determination, considering a number of factors that a person is not sufficiently rehabilitated (with presumption of rehabilitation five years after completion of sentence) or the offense has a “direct bearing” on ability to serve. N.D. CENT. CODE § 12.1-33-02.1. Minnesota has not substantially amended its law since it was enacted in 1974, and it was among the five top scorers in the ratings published in 2020 by the Institute for Justice. See *infra* notes 33 and 43.

³⁰ See, e.g., New Jersey’s Rehabilitated Convicted Offenders Act of 1968, N.J. STAT. ANN. § 2A:168A-1; Minnesota’s Criminal Rehabilitation Act (1974), MINN. STAT. § 364.01 *et seq.*; New Mexico’s Criminal Offender Employment Act of 1974, N.M. STAT. ANN. §§ 28-2-1 *et seq.*

³¹ Connecticut, Minnesota, New Mexico, New Jersey, and New York still retain the earlier structure of regulating public employment and licensing together. While several of these states have since amended their laws, the licensing law adopted almost half a century ago in Minnesota, see *supra* note 29, has changed little since its adoption, and it got high marks in the Institute for Justice’s 2020 report. See *supra* note 27. North Dakota and Virginia also still operate under detailed licensing regulations dating from the 1980s or earlier. Pennsylvania recently abandoned that structure in enacting a new chapter 31 of Title 68 to impose detailed substantive standards on its licensing agencies, though its new law still offers little by way of procedural protection for applicants with a record. See CCRC Staff, *Pennsylvania expands access to 255 licensed occupations for people with a record*, (July 14, 2020), <https://ccresourcecenter.org/2020/07/14/pennsylvania-expands-access-to-255-licensed-occupations-for-people-with-a-record/>.

³² While licensing was not the most well-publicized type of reform during the period of 2013-2016, new laws addressed licensing in four different ways: (1) seven states excluded certain records from consideration in licensing; (2) four states expanded the benefits of certificates of relief in licensing; (3) five states imposed new standards for license denials based on criminal record; and (4) one state provided greater oversight of licensing boards. See Collateral Consequences Resource Center, *Four Years of Second Chance Reforms, 2013-2016* (2017), <https://ccresourcecenter.org/2017/02/08/round-up-of-recent-second-chance-legislation-2013-2016/>.

³³ See NICK SIBILLA, *Barred from Working: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders*,” INSTITUTE FOR JUSTICE (May 2020), <https://ij.org/report/barred-from-working/>. At the time this report was published, three additional states had major reform bills awaiting their governor’s signature, all of which were later enacted. See CCRC Staff, note 31, *supra*.

³⁴ The Institute for Justice initially released its model law as part of its Occupational Licensing Review Act (OLRA). See Institute for Justice, *Model Occupational Licensing Review Law: Reforming Occupational Licensing Boards following NC Dental Board v. FTC*, (2018), <https://ij.org/activism/legislation/model-legislation/model-economic-liberty-law-1/>. Later, the provisions of OLRA relating to criminal records were revised and extended as its Collateral Consequences in Occupational Licensing Act (CCOLA) (2019), <https://ij.org/wp-content/uploads/2019/11/10-31-2019-Model-Collateral-Consequences-in-Occupational-Licensing-Act-2.pdf>. See generally *supra* note 33 at 4.

³⁵ NELP released its Model State Law as part of a report on barriers to licensing for people with a record. See Michelle Rodriguez and Beth Avery, *Unlicensed and Untapped: Removing Barriers to State Occupational Licenses for People with Criminal Records*, National Employment Law Project (2016), <http://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses>. NELP issued a report on its progress in 2018: Maurice Emsellem, Beth Avery, & Phil Hernandez, *Fair Chance Licensing Reform Takes Hold in the States*, National Employment Law Project (May 15, 2018), <https://www.nelp.org/publication/fair-chance-licensing-reform-takes-hold-states/>.

³⁶ Citations and descriptions of these laws can be found in the relevant state profiles from the Restoration of Rights Project, *supra* note 21. They are summarized in the RRP’s 50-state comparison chart on employment of licensing, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/>, which links to a longer description of each state’s law. Links to many of the amending bills are also posted on the website of the Institute for Justice, at <https://ij.org/activism/legislation/state-occupational-licensing-reforms-for-people-with-criminal-records/>.

³⁷ The regulatory schemes enacted by Kansas and Nebraska in 2018, by Mississippi, Nevada, and West Virginia in 2019, and by Idaho, Iowa, and Rhode Island in 2020, fall into this first-time category. Alabama’s 2019 law, modeled on the Uniform Collateral Consequences of Conviction Act, was also that state’s first regulation of licensing decisions.

³⁸ For example, the laws enacted by Missouri and Pennsylvania in 2020 represented those states’ first regulation of occupational licensing since 1980 and 1979, respectively. In 2019, Arkansas, Kentucky, Maryland, North Carolina, Ohio, Oklahoma, and Texas also augmented licensing laws originally enacted in the 1970s.

³⁹ The specific provisions of each state’s law are described and analyzed in the relevant profiles of the Restoration of Rights Project, *supra* note 21. Their terms may be compared through the 50-state chart at <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/>. See also the annual reports on legislative enactments issued by CCRC since 2017, collected at this link: <https://ccresourcecenter.org/resources-2/resources-reports-and-studies/>.

⁴⁰ As of August 2020, 17 states allowed ex-offenders to petition a licensing board at any time, including before enrolling in any required training, to determine if their record would be disqualifying, 20 states had done away with vague criteria like “good moral character” for some or all licenses, 16 states had prohibited consideration of non-conviction records, 16 states had blocked licensing boards from denying people with a record a license to work unless their criminal record is “directly related” to the license sought, and eight states have instituted new reporting requirements. The website also collects information on which states prohibit consideration of certain convictions after a stated period of time. See Institute for Justice, *State Occupational Licensing Reforms for Workers with Criminal Records* (last visited Aug. 1, 2020) <https://ij.org/activism/legislation/state-occupational-licensing-reforms-for-people-with-criminal-records/>

⁴¹ Indiana’s licensing law is described at CCRC Staff, *Indiana enacts progressive new licensing law*, (April 3, 2018), <https://ccresourcecenter.org/2018/04/03/indiana-enacts-progressive-new-licensing-law/>. Indiana was the only state to achieve an “A” rating in the Institute for Justice’s May 2020 “Barred from Working” grading of state laws. See *supra* note 33. The significance of extending regulation to licenses and permits issued by counties and municipalities is underscored in Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1 (2014).

⁴² As amended by S2824, R.I. Gen. Laws § 28-5.1-14 applies a “substantial relationship” standard to licensing boards under most departments of state government, defines it in detail, excludes certain records from consideration (including non-convictions, misdemeanors, and felonies that are “substantially related”), allows applicants to establish rehabilitation by detailed standards, provides detailed procedures in the event of denial, suspension or revocation, and includes accountability standards.

⁴³ CCRC Staff, *Two southern states enact impressive licensing reforms*, (Sept. 18, 2019), <https://ccresourcecenter.org/2019/09/18/two-southern-states-enact-impressive-occupational-licensing-reforms/>. The laws enacted by these two states were rated among the five strongest by the Institute for Justice in its May 2020 *Barred from Working* study. See *supra* note 33.

⁴⁴ The Minnesota Criminal Rehabilitation Act (1974), Minn. Stat § 364.01 *et seq.*, prohibits discrimination in public employment and licensing. It has only been amended once since its enactment, in 2013 to add text recognizing the special circumstances of veterans. The virtues of this half-century-old law were affirmed when Minnesota was judged among the top five states in the Institute for Justice’s May 2020 “Barred from Working” grading of state laws. See *supra* note 33.

⁴⁵ See CCRC Staff, *supra* note 31. Pennsylvania’s licensing law, like its employment law, has strong substantive standards but almost no procedures to ensure these standards are complied with, remitting disappointed applicants to the courts. The law does require agencies to report their progress to the legislature in two years, so perhaps this will encourage compliance.

⁴⁶ See ALA. CODE § 12-26-5 (Occupational Licensing Order of Limited Relief); WASH. REV. CODE § 9.97.010 (Certificates of Restoration of Opportunity). Both these judicial certificates may result in removing a mandatory bar to licensure, but without a standard to guide discretionary decision-making thereafter, Alabama’s certificate appears toothless. Washington’s law otherwise imposes a “direct relationship” standard and allows only convictions within 10 years to be considered.

⁴⁷ See Collateral Consequences Resource Center, *Pathways to Reintegration: Criminal Record Reforms in 2019*, pp. 24, 60-61 (2020), http://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf.

⁴⁸ See *supra* note 3.