

HOUSE BILL 325

54TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2020

INTRODUCED BY

Andrea Romero and Mark Moores

This document incorporates amendments that have been adopted during the current legislative session. The document is a tool to show the amendments in context and is not to be used for the purpose of amendments.

AN ACT

RELATING TO EMPLOYMENT; EXPANDING THE CRIMINAL OFFENDER  
EMPLOYMENT ACT LIST OF CRIMINAL RECORDS THAT CANNOT BE  
CONSIDERED IN AN APPLICATION FOR PUBLIC EMPLOYMENT OR  
LICENSURE; REQUIRING PUBLIC AGENCIES TO PROMULGATE RULES  
IDENTIFYING MITIGATING CIRCUMSTANCES AND DISQUALIFYING CRIMINAL  
CONVICTIONS; ESTABLISHING EMPLOYMENT OR LICENSURE ELIGIBILITY  
CONSIDERATIONS FOR APPLICANTS WITH CRIMINAL RECORDS; REQUIRING  
NOTICE OF DISQUALIFYING EVENTS AND AN APPLICANT'S RIGHT TO  
CHALLENGE OR PROVIDE JUSTIFICATION OF DISQUALIFYING EVENTS;  
REQUIRING ANNUAL REPORTING OF THE NUMBER OF APPLICANTS WITH

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POTENTIAL DISQUALIFYING CRIMINAL CONVICTIONS; AMENDING THE UNIFORM LICENSING ACT TO ALIGN WITH THE CRIMINAL OFFENDER EMPLOYMENT ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. A new section of the Criminal Offender Employment Act, Section 28-2-2.1 NMSA 1978, is enacted to read:

"28-2-2.1. [NEW MATERIAL] DEFINITIONS.--As used in the Criminal Offender Employment Act:

A. "employment or licensing authority" means the state Hf1→, **except the judicial branch of the state government,** ←Hf1 or any of its political subdivisions or a board, commission, council, department or other regulatory agency having jurisdiction over employment, licensing or other authority for an individual to engage in employment or a regulated trade, occupation, profession or business;

B. "license" means a certificate, registration, permit or other authorization to engage in the professions or occupations regulated by a licensing authority in this state;

C. "occupation" means employment, trade, business or profession; and

D. "potential disqualifying criminal conviction" means a criminal conviction that an employment or licensing authority determines through rule promulgation may disqualify an applicant from employment or licensure."

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SECTION 2. Section 28-2-3 NMSA 1978 (being Laws 1974, Chapter 78, Section 3, as amended) is amended to read:

"28-2-3. EMPLOYMENT ELIGIBILITY DETERMINATION.--

A. [~~Subject to the provisions of Subsection B of this section and~~] Except as provided in Sections 28-2-4 and 28-2-5 NMSA 1978, in determining eligibility for employment with the state or any of its political subdivisions or for a license [permit, certificate or other authority] to engage in any regulated [trade, business or profession, the board or other department or agency] occupation, the employment or licensing authority having jurisdiction may take into consideration a conviction, but the conviction shall not operate as an automatic bar to obtaining public employment or a license [or other authority] to practice [the trade, business or profession. A board, department or agency] an occupation. An employment or licensing authority of the state or any of its political subdivisions shall not make an inquiry regarding a conviction on an initial application for employment or licensing and shall only take into consideration a conviction after the applicant has been selected as a finalist [for the position].

B. The following criminal records shall not be [~~used~~] distributed, [~~or~~] disseminated or used by an employment or licensing authority as a bar to employment or licensure in connection with an application for any public employment or an

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occupational license [or other authority]:

(1) records of arrest not followed by a valid conviction; ~~and~~

~~(2) misdemeanor convictions not involving moral turpitude]~~

(2) a conviction that has been sealed, dismissed, expunged or pardoned;

(3) a juvenile adjudication; or

(4) a conviction for a crime that is not directly related to the duties or responsibilities of the employment or licensed occupation.

C. No later than July 1, 2021, an employment or licensing authority shall promulgate rules for compliance with the provisions of the Criminal Offender Employment Act and shall specifically promulgate rules that identify mitigating factors, such as rehabilitation, the passage of time without offending or an applicant's fitness to perform employment or occupational duties and shall additionally include a comprehensive list of the specific potential disqualifying criminal convictions relating to employment or licensure that could disqualify an applicant from employment or licensure. The list of all potential disqualifying criminal convictions shall be posted on each employment or licensing authority's website and a link to the list provided for use on the sunshine portal. In developing a list of potential disqualifying

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criminal convictions, an employment or licensing authority shall:

(1) not use vague, generic or subjective terms, including "moral turpitude" or "good character";

(2) only list specific potential disqualifying criminal convictions that are directly related to the duties and responsibilities of the employment or license sought;

(3) not include lifetime disqualifying criminal convictions absent articulating convincing evidence that employment or licensure in the specific occupation substantially increases the likelihood of reoffending; and

(4) provide a reasonable time limit for applicability of a listed potential disqualifying criminal conviction based on research documenting the reduced likelihood of reoffending over time.

D. In determining an applicant's eligibility for employment or licensure, the employment or licensing authority shall consider:

(1) the public policy of this state, as provided in the Criminal Offender Employment Act, to encourage the licensure of individuals with arrest and conviction records;

(2) whether the elements of an applicant's potential disqualifying criminal conviction are directly related to the specific duties and responsibilities of the

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employment or license sought;

(3) whether the employment or license sought by an applicant offers an unwarranted opportunity for the same or a similar crime as that of the applicant's prior conviction to occur; and

(4) the relationship, if any, of the applicant's potential disqualifying criminal conviction to the public safety purposes of regulating the employment or licensed occupation sought.

E. If an employment or licensing authority intends to disqualify an applicant for employment or licensure based solely or in part on the applicant's potential disqualifying criminal conviction, prior to issuing a notice of contemplated action pursuant to rules issued by the personnel board or to Subsection B of Section 61-1-4 NMSA 1978 or a similar document that initiates disciplinary action, the employment or licensing authority shall provide the applicant with a written notice that informs the applicant of:

HSEIC→~~(1) each potential disqualifying criminal conviction that forms the basis of the pending denial and the reason each conviction is directly related to the duties and responsibilities of the employment or license sought and include a copy of the applicant's criminal history report on which the employment or licensing authority relies;~~←HSEIC

HSEIC→~~(2)~~←HSEIC HSEIC→~~(1)~~←HSEIC the

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applicant's right to provide a written challenge of the accuracy of each conviction;

HSEIC→(3)←HSEIC HSEIC→(2)←HSEIC the applicant's right to provide a written justification demonstrating that the applicant's prior potential disqualifying criminal conviction should not bar employment or licensure; HSEIC→and←HSEIC

HSEIC→(4)←HSEIC HSEIC→(3)←HSEIC the deadline upon which the employment or licensing authority must receive the applicant's written challenge or justification; the deadline to be thirty calendar days from the date of the written notice Hf1→HSEIC→; and←HSEIC←Hf1 Hf1→Hf1→; and←Hf1←Hf1

HSEIC→(5)←~~the rules adopted by the employment or licensing authority outlining the attributes of a justification that demonstrates rehabilitation, mitigating circumstances or an applicant's fitness to perform the duties and responsibilities of the employment or licensed occupation, including a list of possible mitigating factors that may be presented in the justification.~~←HSEIC

Hf1→Hf1→(5)←~~the rules adopted by the employment or licensing authority outlining the attributes of a justification that demonstrates rehabilitation, mitigating circumstances or an applicant's fitness to perform the duties and responsibilities of the employment or licensed occupation,~~

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~~including a list of possible mitigating factors that may be presented in the justification~~←Hf1 .←Hf1

F. No later than October 31 of each year, while ensuring the confidentiality of individual applicants, each employment or licensing authority shall make available to the public an annual report containing the following:

(1) the number of applicants for licensure and, of that number, the number granted a license;

(2) the number of applicants for employment, licensure or license renewal with a potential disqualifying criminal conviction record who received notice of potential disqualification;

(3) the number of applicants for employment, licensure or license renewal with a potential disqualifying criminal conviction who provided a written justification with evidence of mitigation or rehabilitation; and

(4) the number of applicants for employment, licensure or license renewal with a potential disqualifying criminal conviction that were employed, granted a license, denied employment or a license for any reason or denied employment or a license because of a conviction."

**SECTION 3.** Section 28-2-4 NMSA 1978 (being Laws 1974, Chapter 78, Section 4, as amended by Laws 1997, Chapter 238, Section 5 and also by Laws 1997, Chapter 251, Section 1) is amended to read:

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"28-2-4. POWER TO REFUSE, RENEW, SUSPEND OR REVOKE PUBLIC EMPLOYMENT OR LICENSE.--

A. ~~[Any board or other agency]~~ An employment or licensing authority having jurisdiction over employment by the state or any of its political subdivisions or the practice of any trade, business or profession may refuse to grant or renew or may suspend or revoke any public employment or license or other authority to engage in the public employment, trade, business or profession for any one or any combination of the following causes:

(1) where the applicant, employee or licensee has been convicted of a felony ~~[or a misdemeanor involving moral turpitude]~~ and the criminal conviction directly relates to the particular employment, trade, business or profession;

~~[(2) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction does not directly relate to the particular employment, trade, business or profession, if the board or other agency determines after investigation that the person so convicted has not been sufficiently rehabilitated to warrant the public trust;]~~ or

~~[(3)]~~ (2) where the applicant, employee or licensee has been convicted of homicide, kidnapping, trafficking in controlled substances, criminal sexual penetration or related sexual offenses or child abuse and the

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applicant, employee or licensee has applied for reinstatement, renewal or issuance of a teaching certificate, a license to operate a child-care facility or employment at a child-care facility, regardless of rehabilitation.

B. The [~~board or other agency~~] employment or licensing authority shall explicitly state in writing the reasons for a decision [~~which~~] that prohibits the person from engaging in the employment, trade, business, occupation or profession if the decision is based in whole or in part on conviction of any crime described in [~~Paragraphs~~] Paragraph (1) [~~and (3)~~] or (2) of Subsection A of this section. [~~Completion of probation or parole supervision or expiration of a period of three years after final discharge or release from any term of imprisonment without any subsequent conviction shall create a presumption of sufficient rehabilitation for purposes of Paragraph (2) of Subsection A of this section.~~]"

SECTION 4. Section 28-2-6 NMSA 1978 (being Laws 1974, Chapter 78, Section 6) is amended to read:

"28-2-6. APPLICABILITY.--The provisions of the Criminal Offender Employment Act relating to [~~any board or other agency which~~] an employment or licensing authority that has jurisdiction over the practice of any trade, business, occupation or profession apply to authorities made subject to its coverage by law or [~~by any such~~] by those authorities' rules [~~or regulations~~] if permitted by law."

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SECTION 5. Section 61-1-1 NMSA 1978 (being Laws 1957, Chapter 247, Section 1, as amended) is amended to read:

"61-1-1. SHORT TITLE.--~~[Sections 67-26-1 through 67-26-31 NMSA 1953]~~ Chapter 61, Article 1 NMSA 1978 may be cited as the "Uniform Licensing Act"."

SECTION 6. Section 61-1-2 NMSA 1978 (being Laws 1957, Chapter 247, Section 2, as amended) is amended to read:

"61-1-2. DEFINITIONS.--As used in the Uniform Licensing Act:

A. "board" means:

(1) the construction industries commission, the construction industries division and the electrical bureau, mechanical bureau and general construction bureau of the construction industries division of the regulation and licensing department;

(2) the manufactured housing committee and manufactured housing division of the regulation and licensing department;

(3) a board, commission or agency that administers a profession or occupation licensed pursuant to Chapter 61 NMSA 1978; ~~and~~

(4) an employment or licensing authority pursuant to the provisions of the Criminal Offender Employment Act; and

~~(4)~~ (5) any other state agency to which the

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Uniform Licensing Act is applied by law;

B. "applicant" means a person who has applied for a license;

C. "license" means a certificate, permit or other authorization to engage in each of the professions and occupations regulated by the boards enumerated in Subsection A of this section;

D. "revoke a license" means to prohibit the conduct authorized by the license;

E. "suspend a license" means to prohibit, for a stated period of time, the conduct authorized by the license. "Suspend a license" also means to allow, for a stated period of time, the conduct authorized by the license, subject to conditions that are reasonably related to the grounds for suspension; and

F. "emergency" includes any man-made or natural disaster causing or threatening widespread physical or economic harm that is beyond local control and requires the resources of the state."

**SECTION 7.** Section 61-1-4 NMSA 1978 (being Laws 1957, Chapter 247, Section 4, as amended) is amended to read:

"61-1-4. NOTICE OF CONTEMPLATED BOARD ACTION--REQUEST FOR HEARING--NOTICE OF HEARING.--

A. For the purpose of investigating complaints against licensees, the board may issue investigative subpoenas

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prior to the issuance of a notice of contemplated action as provided in this section.

B. When a board contemplates taking ~~any~~ an action of a type specified in Subsection A, B or C of Section 61-1-3 NMSA 1978, ~~it~~ after meeting the requirements of Subsection E of Section 28-2-3 NMSA 1978, if applicable, the board shall serve upon the applicant a written notice containing a statement:

(1) that the applicant has failed to satisfy the board of ~~his~~ the applicant's qualifications to be examined or to be issued a license, as the case may be;

(2) indicating in what respects the applicant has failed to satisfy the board;

(3) that the applicant may secure a hearing before the board by depositing in the mail within twenty days after service of the notice a certified return receipt requested letter addressed to the board and containing a request for a hearing; and

(4) calling the applicant's attention to ~~his~~ the applicant's rights under Section 61-1-8 NMSA 1978.

C. In ~~any~~ a board proceeding to take ~~any~~ an action of a type specified in Subsection A, B or C of Section 61-1-3 NMSA 1978, the burden of satisfying the board of the applicant's qualifications shall be upon the applicant.

D. When a board contemplates taking ~~any~~ an action

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of a type specified in Subsections D through N of Section 61-1-3 NMSA 1978, it shall serve upon the licensee a written notice containing a statement:

(1) that the board has sufficient evidence that, if not rebutted or explained, will justify the board in taking the contemplated action;

(2) indicating the general nature of the evidence;

(3) that unless the licensee within twenty days after service of the notice deposits in the mail a certified return receipt requested letter addressed to the board and containing a request for a hearing, the board will take the contemplated action; and

(4) calling the licensee's attention to ~~[his]~~ the licensee's rights as provided in Section 61-1-8 NMSA 1978.

E. If the licensee or applicant does not mail a request for a hearing within the time and in the manner required by this section, the board may take the action contemplated in the notice and such action shall be final and not subject to judicial review.

F. If the licensee or applicant does mail a request for a hearing as required by this section, the board shall, within twenty days of receipt of the request, notify the licensee or applicant of the time and place of hearing, the name of the person who shall conduct the hearing for the board

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and the statutes and regulations authorizing the board to take the contemplated action. The hearing shall be held not more than sixty nor less than fifteen days from the date of service of the notice of hearing.

G. Licensees shall bear all costs of disciplinary proceedings unless they are excused by the board from paying all or part of the fees or if they prevail at the hearing and an action specified in Section 61-1-3 NMSA 1978 is not taken by the board."

SECTION 8. Section 61-1-33 NMSA 1978 (being Laws 1981, Chapter 349, Section 23) is amended to read:

"61-1-33. DECLARATORY RULINGS.--

A. ~~[Any]~~ An applicant before a board or licensee of a board whose rights may be affected by the application of any statute enforced or administered by that board or by any decision, order or regulation of that board may request in writing a declaratory ruling from the board concerning the applicability of the statute, decision, order or regulation to a particular set of facts. The board shall respond in writing to such a written request within ~~[one hundred twenty days]~~ ninety days from receipt of the request.

B. The board may also issue declaratory rulings on its own motion.

C. The effect of a declaratory ruling shall be limited to the board and to the licensee, if any, who requested

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the declaratory ruling."

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