

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: CS/SB 2152

INTRODUCER: Criminal Justice Committee; and Criminal Justice Committee

SUBJECT: Disqualification for Employment

DATE: April 1, 2008

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Krol / Dugger	Cannon	CJ	Fav/CS
2. _____	_____	GO	_____
3. _____	_____	JU	_____
4. _____	_____	_____	_____
5. _____	_____	_____	_____
6. _____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

Restoration of Civil Rights

This bill provides that restoration of civil rights cannot be required as a condition of eligibility for public employment or to obtain a license, permit, or certificate. Conviction of a felony or first degree misdemeanor may still be disqualifying if the offense is directly related to the job, license, permit, or certificate that is sought.

Unlawful Employment Practices

This bill prohibits employers from requesting, making, or keeping certain criminal history records and prohibits the criminal prosecution for perjury in certain circumstances.

Restrictions on the Employment of Ex-Offenders

This bill requires state agencies and regulatory boards to submit to legislative officers and committees a report that outlines current restrictions on the employment of ex-offenders and possible alternatives that are compatible with protecting public safety.

Sealing and Expungement of Criminal History Records

The bill would make the following changes to the sealing and expunction statutes:

- Permit the designee of an arresting agency or a state attorney to endorse an application for an administrative expunction.
- Expand who may request an administrative expunction to include either the arresting agency or the agency where the warrant was issued.
- Require the Clerk of Court to place on his or her website information on the availability of criminal history record sealing and expunction, including a link to the Florida Department of Law Enforcement's (FDLE) website for sealing and expunction applications and information.
- Clarify how a potential applicant can answer a "conviction" question on a job or licensing application concerning sealed or expunged records by specifying that a person may lawfully deny or fail to acknowledge the arrests and subsequent dispositions covered by the sealed or expunged record.
- Clarify that no person can be liable for perjury when denying or failing to acknowledge the arrests and subsequent dispositions, including when asked on an employment application.
- Permit the contents of an expunged record to be disclosed to the subject of the record without requiring him or her to obtain a court order.
- Allow for a second sealing of a criminal record if the subject of the record has been crime-free for five years (meaning no subsequent arrests have occurred since the date of the court order for the initial criminal history record expunction or sealing).
- Direct the Office of Program Policy Analysis and Government Accountability (OPPAGA), in consultation with the FDLE, to study the accuracy of criminal history records and report its findings to the Legislature by February 1, 2009.

This bill substantially amends sections 112.011, 760.10, 943.0581, 943.0585, and 943.059 of the Florida Statutes.

II. Present Situation:***Restoration of Civil Rights***

Section 112.011(1)(a), F.S., provides that a criminal conviction does not automatically disqualify a person from eligibility for public employment. However, a person who has been convicted of a felony or first degree misdemeanor can be denied employment if the crime is directly related to the position sought. This section does not refer to restoration of civil rights.

Section 112.011(1)(b), F.S., relates to the impact of a prior criminal conviction on obtaining a license, permit, or certificate from a public agency to engage in an occupation, trade, vocation,

profession, or business. If a person has had his or her civil rights restored, the status of having a prior conviction is not disqualifying in itself. However, the conviction may be disqualifying if the specific crime for which the person was convicted was a felony or first degree misdemeanor that is directly related to the position for which the license, permit, or certificate is required. In addition, some licensing boards have interpreted this statute to imply a requirement for restoration of civil rights.¹

Section 112.011(2), F.S., exempts counties and municipalities that are hiring for positions deemed to be critical to security or public safety, law enforcement agencies, and correctional agencies from the provisions of subsection (1). Fire departments are also prohibited from hiring firefighters with a prior felony conviction sooner than 4 years after expiration of sentence unless the applicant has been pardoned or had his or her civil rights restored.

According to the “Report on the Survey of License and Employment Restrictions in State Agencies, October 2007,” prepared by the Public Safety Unit of the Office of Policy and Budget within the Executive Office of the Governor (EOG), the overwhelming majority of licenses that were denied in the last two years were due to statutory restrictions relating to criminal convictions and not for a requirement for civil rights restoration. Last year, over 4,000 licenses were denied, but only 14 were denied due to a lack of restoration of civil rights. These denials were by the Department of Health’s (DOH) Board of Nursing (12 denials)² and the Department of Business and Professional Regulation’s (DBPR) Construction Industry Licensing Board (2 denials).³ There is no way to estimate how many persons were deterred from applying for licensing because of an actual or perceived requirement for civil rights restoration.

The EOG’s review found that DOH and the Department of Highway Safety and Motor Vehicles (DHSMV) restrict some licenses based upon a requirement for restoration of civil rights.⁴ Outside of the Governor’s agencies, the Department of Agriculture and Consumer Services and the Department of Financial Services have both statutorily-mandated and non-mandated requirements for restoration of civil rights.

The civil rights of a convicted felon are suspended until restored by pardon or restoration of civil rights. The Florida Constitution specifies only the loss of the right to vote and the right to hold public office as consequences of a felony conviction. Other civil rights that are lost in accordance

¹ In the space of two months, three District Courts of Appeal overturned licensing board decisions to deny licenses based upon interpreting s. 112.011(1)(b), F.S., to require restoration of civil rights. *See Yeoman v. Construction Industry Licensing Board*, 919 So.2d 542 (Fla. 1st Dist. 2005); *Scherer v. Department of Business and Professional Regulation*, 919 So.2d 662 (Fla. 5th Dist. 2006); *Vetter v. Department of Business and Professional Regulation, Electrical Contractors’ Licensing Board*, 920 So.2d 44 (Fla. 2nd Dist. 2005).

² The Board of Nursing removed its discretionary requirement of civil rights restoration in November 2007.

³ Section 489.115, F.S., was amended by Senate Bill 404 in 2007 to provide that the Construction Industry Licensing Board cannot deny a contractor’s license based solely upon a felony conviction or the applicant’s failure to provide proof of restoration of civil rights. If the applicant was convicted of a felony, licensure denial may be based upon the severity of the crime, the relationship of the crime to contracting, or the potential for public harm. The Board is also required to consider the length of time since the commission of the crime and the rehabilitation of the applicant.

⁴ It appears that there are also statutorily-mandated requirements for civil rights restoration related to the Department of Revenue (s. 206.026, F.S. - terminal supplier, importer, exporter, blender, carrier, terminal operator, or wholesaler fueler license); and DBPR (s. 447.03, F.S. - labor union business agent license; s. 550.1815, F.S. - horseracing, dogracing, or jai alai fronton permit).

with statute include the right to serve on a jury, to possess a firearm, and to engage in certain regulated occupations or businesses.

The power to restore civil rights is granted by the Florida Constitution to the Governor with the consent of at least two Cabinet members pursuant to Article IV, Section 8(a), of the Florida Constitution. In April 2007, the Governor and Cabinet changed the Rules of Executive Clemency to make more convicted felons who have completed their sentences eligible for restoration of civil rights. In the eight months since the change, almost twice as many felons have had their rights restored as in the previous year. Many offenses for which restoration of rights was either excluded or delayed for a period of years are now eligible for restoration after verification that all qualifying conditions have been met.

Eligibility for restoration of civil rights requires that the felon have completed all sentences, that all conditions of supervision have been satisfied or expired, and that there is no outstanding victim restitution. Thereafter, the felons fall into one of three categories based upon the Clemency Board's assessment of the seriousness of the offense:

- Immediately eligible for automatic approval of restoration
- Immediately eligible for restoration without a hearing
- Eligible for restoration without a hearing after 15 years

The Florida Parole Commission acts as the agent of the Clemency Board in verifying eligibility, and has prioritized processing of the automatic approval cases for which it conducts a less extensive review. A more extensive investigation is conducted for those who are immediately eligible for restoration without a hearing. Due to the large number of persons who are eligible for automatic approval, persons who are immediately eligible for restoration without a hearing may face a delay of several years before their rights are restored.

The Florida Department of Law Enforcement's criminal history database includes records of approximately 800,000 persons who have been convicted of a felony in Florida. This is not an accurate reflection of the number of Florida residents who have lost their civil rights, because it includes persons who have died or left the state and does not include persons who were convicted in other jurisdictions. However, it illustrates the magnitude of the population that is affected by loss of civil rights.

There were 92,884 inmates in the custody of the Florida Department of Corrections as of June 30, 2007. The Governor's Ex-Offender Task Force (Task Force) estimates that almost ninety percent of these inmates will be released one day, but that over a quarter of them will return to prison within 3 years. In the 2005-2006 fiscal year, 21,336 inmates were released from prison without community supervision afterward.

The Task Force estimated that almost forty percent of the 7.6 million jobs in Florida are subject to criminal background checks or restrictions based on criminal history. The restrictions include requiring restoration of civil rights, disqualification based on commission of specific crimes, or requiring the passing of a background check under Chapter 435, F.S. Less defined restrictions require assessment of whether the applicant has good moral character or has committed an act or

crime of moral turpitude. The Task Force found that convicted felons face significant barriers to employment because of these restrictions.

The U.S. House and Senate have recently passed H.R. 1593, known as the Second Chance Act of 2007, in an attempt to help inmates safely and successfully transition back into the community. Among its many initiatives, this bill authorizes the U.S. Justice Department's National Institute of Justice and the Bureau of Justice Statistics to conduct reentry-related research. The National Institute of Justice has found that 1 year after release, up to 60 percent of former inmates are not employed. This bill will also establish a national resource center to collect and disseminate best practices and provide training on and support for reentry efforts. It also provides an initiative to provide specific information on health, employment, personal finance, release requirements, and community resources to each inmate released.

Unlawful Employment Practices

Currently s. 760.10 (1)(a) F.S., defines unlawful employment practices as employers restricting the hiring of an individual based on their race, color, religion, sex, national origin, age, handicap, or marital status.

Section 760.10 (2)(b), F.S., states that it is an unlawful employment practice for an employer to limit, segregate, or classify employees or applicants for employment in a way that would deprive them of employment opportunities based on their race, color, religion, sex, national origin, age, handicap, or marital status.

Restrictions on the Employment of Ex-Offenders

State agencies restrict occupational licenses and employment to ex-offenders based upon statute, administrative rule, or agency policy. The nature and variety of occupational licenses and employment with state agencies dictates that different standards will apply to different types of employees and licensees.

Restrictions based on agency policy that are not adopted as rules could be problematic. Chapter 120, F.S., specifies that a "rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.⁵ Rulemaking is not a matter of agency discretion - each agency statement defined as a rule must be adopted by the rulemaking procedure provided in ch. 120, F.S., as soon as feasible and practicable.⁶ If agencies are imposing employment or licensing restrictions on applicants that are not based on statute or rules adopted pursuant to statutory authority, those policies amount to unadopted rules.

The Governor's Ex-Offender Task Force (Task Force) was established in 2005 to "help improve the effectiveness of the State of Florida in facilitating the re-entry of ex-offenders into their communities so as to reduce the incidence of recidivism."⁷ After the Task Force found that many state laws and policies imposed restrictions on the employment of ex-offenders, and that no

⁵ Section 120.52(15), F.S.

⁶ Section 120.54(1)(a), F.S.

⁷ Executive Order No. 05-28.

comprehensive review of those restrictions had been undertaken, executive agencies were instructed to produce for the Task Force a report detailing all employment restrictions and disqualifications based on criminal records.⁸ The Task Force released its Final Report to the Governor in November 2006, and recommended that employment restrictions be studied, specifically the “feasibility of a single background check act that would streamline, organize, and cohere employment restrictions based on the nature of the job.”

In October 2007, the Governor’s Office made a presentation to the Senate Criminal Justice Committee addressing licensing and employment restrictions, based on surveys of non-Cabinet agencies. Nine agencies reported licensing restrictions, citing criminal history or restoration of civil rights as the legal basis for the restrictions. The presentation noted that pursuant to s. 112.011, F.S., an agency *may* deny employment by reason of the prior conviction for a crime if the crime was a felony or first degree misdemeanor and *directly related* to the position of employment sought.

Pursuant to s. 112.011(1)(a), F.S., a person may not be disqualified from employment by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime, except for those drug offenses specified in s. 775.16, F.S. However, a person may be denied employment by those entities by reason of the prior conviction for a crime if the crime was a felony or first degree misdemeanor and directly related to the position of employment sought. Specific restrictions for licenses and employment are found throughout the Florida Statutes, as detailed in the Governor’s Survey of License and Employment Restrictions in State Agencies, presented to the Senate Criminal Justice Committee in October 2007.

Sealing and Expungement of Criminal History Records

Sections 943.0585 and 943.059, F.S., set forth procedures for sealing and expunging criminal history records. The courts have jurisdiction over their own judicial records containing criminal history information and over their procedures for maintaining and destroying those records. The FDLE can administratively expunge non-judicial records of arrest that are made contrary to law or by mistake.

When a record is expunged, it is physically destroyed and no longer exists if it is in the custody of a criminal justice agency other than the FDLE. Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. FDLE, on the other hand, is required to retain expunged records. When a record is sealed it is not destroyed, but access is limited to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, and certain other specified agencies for their respective licensing and employment purposes.

Records that have been sealed or expunged are confidential and exempt from the public records law. It is a first degree misdemeanor to divulge their existence, except to specified entities for licensing or employment purposes.

Persons who have had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except when they are applying for certain

⁸ Executive Order No. 06-89.

types of employment (law enforcement; The Florida Bar; or working with children, the developmentally disabled, or the elderly through the Department of Children and Family Services, the Department of Juvenile Justice, the Department of Education, any district school board, or local governmental entity licensing child care facilities; or a Florida seaport), petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.

In 1992, the Legislature amended the sealing and expunction statute to require a person seeking a sealing or expunction to first obtain a certificate of eligibility from FDLE and then, if the person meets the statutory criteria based on the department's criminal history check and receives a certificate, he or she can petition the court for a record sealing or expunction. It is then up to the court to decide whether the sealing or expunction is appropriate.

A criminal history record may be expunged by a court if the petitioner has obtained a certificate of eligibility and swears that he or she: has not previously been adjudicated guilty of any offense or adjudicated delinquent for certain offenses; has not been adjudicated guilty or delinquent for any of the charges he or she is currently trying to have sealed or expunged; has not obtained a prior sealing or expunction; and is eligible to the best of his or her knowledge and has no other pending expunction or sealing petitions before the court.

In addition, the record must have been sealed for ten years before it can be expunged, unless charges were not filed or were dismissed by the prosecutor or court. s. 943.0585, F.S. The same criteria apply for sealing a criminal history record under s. 943.059, F.S. Any person knowingly providing false information on the sworn statement commits a felony of the third degree.

The Legislature also prohibits criminal history records relating to certain offenses in which a defendant (adult or juvenile) has been found guilty or has pled guilty or nolo contendere, regardless of whether adjudication was withheld, from being sealed or expunged. These offenses include the following: sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients; luring or enticing a child; sexual battery; procuring a person under 18 years for prostitution; lewd, lascivious, or indecent assault upon a child; lewd or lascivious offenses committed on an elderly or disabled person; communications fraud; sexual performance by a child; unlawful distribution of obscene materials to a minor; unlawful activities involving computer pornography; selling or buying minors for the purpose of engaging in sexually explicit conduct; offenses by public officers and employees; drug trafficking; and other dangerous crimes such as arson, aggravated assault or battery, kidnapping, murder, robbery, home invasion robbery, carjacking, stalking, domestic violence, and burglary.

III. Effect of Proposed Changes:

Restoration of Civil Rights

Section 112.011(1)(b), F.S., is rewritten to exclude any reference to restoration of civil rights. The bill retains the original language that permits a government entity to deny an application for a license, permit, or certificate to engage in an occupation, trade, vocation, profession, or business if the applicant was convicted of a felony or first degree misdemeanor that is directly related to the position for which the license, permit, or certificate is required.

Paragraph (c) is added to expressly preclude disqualification of a person from receiving a license, permit, or certificate or from obtaining public employment on the grounds that his or her civil rights have not been restored. This applies notwithstanding any provision in another section of Florida Statutes. However, the exemptions within the section for county and municipal positions deemed to be critical to security or public safety, law enforcement agencies, correctional agencies, and fire departments are retained.

The effect of these revisions to s. 112.011(1), F.S., is that the restoration of civil rights will no longer be used as a measure of fitness for public employment and licensure. This recognizes that restoration of civil rights is dependent upon completion of sentence, not upon a demonstration of rehabilitation or suitability for employment. Public safety may be increased by precluding consideration of restoration of civil rights as a validation that a person is fit for employment regardless of the specifics of his or her criminal background. In addition, otherwise qualified persons will not be blocked from employment if they have a prior conviction for a crime that is not related to the position or permit which they seek. These increased employment opportunities should have some impact in reducing recidivism, thus reducing the direct costs of crime as well as costs of reincarceration. With the link between civil rights restoration and ex-offender employment eligibility separated, regulatory agencies and licensing boards may be more likely to establish criteria significant to their specific trades that can more effectively satisfy public safety concerns.

Unlawful Employment Practices

The bill would prohibit employee discrimination based on criminal history. It would allow ex-offenders seeking employment to lawfully deny the following types of criminal history if:

- The arrest, detention, or disposition resulted in no conviction
- A first and only conviction of a misdemeanor
- Any misdemeanor conviction or completion of any incarceration resulting from said misdemeanor, that occurred five or more years prior to the date of the applicant seeking employment.

Restrictions on the Employment of Ex-Offenders

Each state agency, including professional and occupational regulatory boards will submit a report to the President of the Senate, the Speaker of the House of Representatives, and the chairs of the appropriate legislative committees. This report will include a list of the laws, rules, policies, and practices imposed that disqualify from employment a person who has been convicted of a crime. The report will also contain a review of these restrictions and their availability to prospective employees. The boards will take into account these disqualifications and consider less restrictive ways to protect public safety while offering employment opportunities for ex-offenders. If any restriction is based on language referring to “good moral character” or “moral turpitude,” the board will propose restrictions that more precisely describe the basis for employment decision making. The boards will also describe ways to remove and reduce barriers to employment for ex-offenders.

Sealing and Expungement of Criminal History Records

The bill would make the following changes to the sealing and expunction statutes:

- Permit the designee of an arresting agency or a state attorney to endorse an application for an administrative expunction.
- Expand who may request an administrative expunction to include either the arresting agency or the agency where the warrant was issued.
- Require the Clerk of Court to place on his or her website information on the availability of criminal history record sealing and expunction, including a link to FDLE's website for sealing and expunction applications and information.
- Clarify how a potential applicant can answer a "conviction" question on a job or licensing application concerning sealed or expunged records by specifying that a person may lawfully deny or fail to acknowledge the arrests and subsequent dispositions covered by the sealed or expunged record.
- Clarify that no person can be liable for perjury when denying or failing to acknowledge the arrests and subsequent dispositions, including when asked on an employment application.
- Permit the contents of an expunged record to be disclosed to the subject of the record without requiring him or her to obtain a court order.
- Allow for a second sealing of a criminal record if the subject of the record has been crime-free for five years (meaning no subsequent arrests have occurred since the date of the court order for the initial criminal history record expunction or sealing). The current requirements and other provisions in the sealing and expungement statutes would continue to apply when seeking a second sealing under the bill.
- Direct the Office of Program Policy Analysis and Government Accountability, in consultation with the FDLE, to study the accuracy of criminal history records and report its findings to the Legislature by February 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill will make more persons available to employers, and open more jobs and career fields to convicted felons.

C. Government Sector Impact:

The FDLE is requesting appropriations in the Operating Trust Fund to cover 4 new positions needed because of the additional workload generated by the bill's provision allowing persons to apply for a second criminal history records sealing. **These positions would be funded by the fees collected for this service (\$75 fee for a certificate of eligibility).**

(FY 08-09) (FY 09-10) (FY 10-11)
Amount / FTE Amount / FTE Amount / FTE

A. Revenues	\$836,775	\$836,755	\$836,755
1. Recurring	(\$75.00 per application x 11,157 additional applications)		
2. Non-Recurring			

B. Expenditures (see chart below):

Positions 3 Criminal Justice Customer Service Specialists	\$120,856	\$120,856	\$120,856	Salary & Benefits
Standard Expense for 3 Positions	\$30,264	\$20,100	\$20,100	Expenses
Standard OCO for 3 Positions	\$3,000			Operating Capital Outlay
Standard HR Services for 3 Positions	\$1,194	\$1,194	\$1,194	Human Resources Services
Positions 1 Criminal Justice Communication Liaison	\$36,304	\$36,304	\$36,304	Salary & Benefits
Standard Expense for 1 Position	\$10,088	\$6,700	\$6,700	Expenses
Standard OCO for 1 Position	\$1,000			Operating Capital Outlay
Standard HR Services for 1 Position	\$398	\$398	\$398	Human Resources Services
TOTAL 4 Positions	\$203,104	\$185,552	\$185,552	

It is anticipated that the rest of the bill will have minimal or no fiscal impact. Some government agencies and boards may have to reword application forms and websites.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on April 1, 2008:

- Requires a report from state agencies reviewing employment barriers for ex-offenders and suggesting ways to reduce employment restrictions.
- Allows persons seeking employment to deny certain criminal history records and provides immunity from perjury for withholding such information.
- Permits the designee of an arresting agency or a state attorney to endorse an application for an administrative expunction.
- Expands who may request an administrative expunction to include either the arresting agency or the agency where the warrant was issued.
- Requires the Clerk of Court to place on his or her website information on the availability of criminal history record sealing and expunction, including a link to FDLE's website for sealing and expunction applications and information.
- Clarifies how a potential applicant can answer a "conviction" question on a job or licensing application concerning sealed or expunged records by specifying that a person may lawfully deny or fail to acknowledge the arrests and subsequent dispositions covered by the sealed or expunged record.
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- Allows for a second sealing of a criminal record if the subject of the record has been crime-free for five years (meaning no subsequent arrests have occurred since the date of the court order for the initial criminal history record expunction or sealing).
- Directs the Office of Program Policy Analysis and Government Accountability, in consultation with the FDLE, to study the accuracy of criminal history records and report its findings to the Legislature by February 1, 2009.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
