

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 Policy and Steering Committee on Ways and Means

BILL: SB 340

INTRODUCER: Senator Wilson and others

SUBJECT: Ex-Offenders/Licensing and Employment

DATE: April 20, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>McKay</u>	<u>Wilson</u>	<u>GO</u>	Favorable
2.	<u>Clodfelter</u>	<u>Cannon</u>	<u>CJ</u>	Favorable
3.	<u>Daniell</u>	<u>Maclure</u>	<u>JU</u>	Favorable
4.	<u>Frederick</u>	<u>Coburn</u>	<u>WPSC</u>	Favorable
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill makes changes to Florida’s laws relating to the restoration of civil rights, restrictions on the employment of ex-offenders, negligent hiring, and sealing and expunging criminal records. Specifically, the 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.
- Requires state agencies and regulatory boards to submit to the Governor and certain legislative officers a report that outlines current disqualifying policies on the employment or licensure of ex-offenders and possible alternatives that are compatible with protecting public safety.
- Requires an employer to review and consider the results of a criminal history background investigation and take certain steps consistent with the findings of the investigation in order to satisfy a statutory presumption against civil liability for negligent hiring.
- Provides that an ex-offender may lawfully deny or fail to acknowledge any arrests or subsequent dispositions covered by a sealed or expunged record and that a person cannot be liable for perjury for doing so on an employment application.
- Permits the subject of an expunged record to receive the contents of that record without a court order.
- Allows for a second sealing of a criminal record.

This bill substantially amends the following sections of the Florida Statutes: 112.011, 768.096, 943.0585, and 943.059.

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 may 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 necessarily a disqualification. 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

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

According to a report 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 two years prior to the report were due to statutory restrictions relating to criminal convictions and not for a requirement for civil rights restoration.³ More than 4,000 licenses were denied during the prior year, 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)⁴ and the Department of Business and Professional Regulation's (DBPR) Construction Industry Licensing Board (two denials).⁵ 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.

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 Bd.*, 919 So. 2d 542 (Fla. 1st DCA 2005); *Scherer v. Dep't of Business and Professional Regulation*, 919 So. 2d 662 (Fla. 5th DCA 2006); *Vetter v. Dep't of Business and Professional Regulation, Electrical Contractors' Licensing Bd.*, 920 So. 2d 44 (Fla. 2d DCA 2005).

² Section 112.011(2), F.S.

³ Public Safety Unit, Office of Policy and Budget, Executive Office of the Governor, *Report on the Survey of License and Employment Restrictions in State Agencies* (Oct. 2007).

⁴ The Board of Nursing removed its discretionary requirement of civil rights restoration in November 2007.

⁵ Section 489.115(6), 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.

The EOG's review found that the DOH and the Department of Highway Safety and Motor Vehicles restrict some licenses based upon a requirement for restoration of civil rights.⁶ 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 with statute include the right to serve on a jury, to possess a firearm, and to engage in certain regulated occupations or businesses.⁷

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 so that more convicted felons who have completed their sentences are eligible for restoration of civil rights. Between July 1, 2007, and September 30, 2008, 123,232 felons had their rights restored.⁸ This contrasts with 11,002 restorations during Fiscal Year 2005-2006, the last full fiscal year before the clemency rules were amended.⁹ 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, 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; or
- 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

⁶ 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 the DBPR (s. 447.04, F.S. – labor union business agent license; s. 550.1815, F.S. – horseracing, dogracing, or jai alai fronton permit).

⁷ Section 944.292, F.S., provides: “[u]pon conviction of a felony as defined in s. 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to s. 8, Art. IV of the State Constitution.”

⁸ Florida Parole Commission, *Annual Report 2007-2008*, 21 (Dec. 31, 2008), available at <https://fpc.state.fl.us/PDFs/FPCAnnualreport200708.pdf> (last visited Apr. 10, 2010).

⁹ Comm. on Criminal Justice, The Florida Senate, *Rules for Restoration of Civil Rights for Felons and Impacts on Obtaining Occupational Licenses and Other Opportunities*, 6 (Interim Report 2008-114) (Dec. 2007), available at http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-114cj.pdf (last visited Apr. 10, 2010).

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 101,437 inmates in the custody of the Florida Department of Corrections as of December 31, 2009. Almost 90 percent of these inmates will be released one day. During the 2007-2008 fiscal year, 36,723 inmates were released from prison,¹⁰ and the current recommitment rate indicates that almost 33 percent of them will be recommitted within three years.¹¹

The federal Second Chance Act of 2007 (act) is designed to help inmates safely and successfully transition back into the community. Among its many initiatives, the act 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 one year after release, up to 60 percent of former inmates are not employed. The act also establishes 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.

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.¹² Rulemaking is not a matter of agency discretion – each agency statement defined as a rule must be adopted through the rulemaking procedure provided in ch. 120, F.S., as soon as feasible and practicable.¹³

¹⁰ Florida Department of Corrections Annual Report FY 2007-2008, p. 66. The number reported in the text of this analysis does not include inmates released by reason of death.

¹¹ Transcript of remarks by Secretary Walter A. McNeil at the Restoration of Rights Summit in Tallahassee, Florida, June 17, 2008, viewed on September 24, 2008 at http://free-rein.us/McNeil_Restoration_of_Rights_Summit_speech_06_18_08.pdf.

¹² Section 120.52(15), F.S.

¹³ Section 120.54(1)(a), F.S.

Agencies should not impose employment or licensing restrictions on applicants that are not based on statute or rules adopted pursuant to statutory authority.

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."¹⁴ The Task Force estimated that almost 40 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 ch. 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.

After the Task Force found that many state laws and policies imposed restrictions on the employment of ex-offenders, and that no 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.¹⁵ 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."¹⁶

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.

¹⁴ Executive Order No. 05-28.

¹⁵ Executive Order No. 06-89.

¹⁶ Governor's Ex-Offender Task Force, *Final Report to Governor Jeb Bush*, 27 (Nov. 2006), available at <http://www.aecf.org/upload/PublicationFiles/Final%20Report%20of%20Florida%20Ex-Offender%20Task%20Force.pdf> (last visited Apr. 10, 2010).

Liability for Negligent Hiring

In civil actions premised upon the death or injury of a third person as a result of intentional conduct of an employee, the employer is presumed not to have been negligent in hiring the employee if, prior to hiring, the employer conducted a background check on the employee which revealed no information that would cause an employer to conclude that the employee was unfit for work.¹⁷ The background investigation must include:

- A criminal background check obtained from the Department of Law Enforcement (FDLE or department).¹⁸
- Reasonable efforts to contact references and former employers.
- A job application form that includes questions requesting detailed information regarding previous criminal convictions.
- A written authorization allowing a check of the applicant's driver's license record if relevant to the work to be performed.
- An interview of the prospective employee.¹⁹

If the employer elects not to conduct an investigation prior to hiring, there is no presumption that the employer failed to use reasonable care in hiring an employee.²⁰

Sealing and Expunction 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 department 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.²¹ Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. The department, 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.²²

¹⁷ Section 768.096(1), F.S.

¹⁸ The employer must request and obtain from FDLE a check of the information as reported in the Florida Crime Information Center system as of the date of the request. Section 768.096(2), F.S.

¹⁹ Section 768.096(1)(a)-(e).

²⁰ Section 768.096(3), F.S.

²¹ Section 943.0585(4), F.S.

²² Section 943.0585(4)(c), F.S.

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 types of employment,²³ petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.²⁴

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.²⁵ 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.
- Is eligible to the best of his or her knowledge and has no other pending expunction or sealing petitions before the court.²⁶

In addition, the record must have been sealed for 10 years before it can be expunged, unless charges were not filed or were dismissed by the prosecutor or court.²⁷ 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.²⁸

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.²⁹

²³ These types of employment include: law enforcement, the Florida Bar, 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.

²⁴ Section 943.0585(4)(a), F.S.

²⁵ Section 943.0585(2), F.S.

²⁶ Section 943.0585(1)(b), F.S.

²⁷ Section 943.0585(2)(h), F.S.

²⁸ Section 943.0585(1), F.S.

²⁹ 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:

Section 2: Restrictions on the Employment of Ex-Offenders

Each state agency, including professional and occupational regulatory boards, will submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2010, and every eight years thereafter. This report will include policies imposed by the agency or board that disqualify a person who has been convicted of a crime from employment or licensure. The report will also contain a review of these restrictions and their availability to prospective employees. The report 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 report may propose restrictions that more precisely describe the basis for employment decision making.

Section 3: Restoration of Civil Rights

Section 112.011(1)(b), F.S., is rewritten to exclude any reference to restoration of civil rights. The bill amends the original language to allow 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 relevant to the standards normally associated with, or determined by the regulatory authority to be necessary for the protection of the public or other parties 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, though it does not apply to applications for a license to carry a concealed weapon. However, the exemptions within the section of law for county and municipal positions, which are 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 precluded 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 re-incarceration. 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.

Section 4: Employer Presumption Against Negligent Hiring

The bill amends s. 768.096, F.S., to revise an existing statutory presumption against a civil claim of negligent hiring. Current law allows an employer to receive the presumption by satisfying any one of the items in the statutory list. The bill replaces the conjunction “or” with “and” in the list of items that must be included in the employee background investigation. As a result, an employer must complete each item in the list in order to satisfy the negligent hiring presumption.

The bill also revises the criminal background investigation required as one of the elements of the presumption. The bill provides that the employer must review and consider the results of the criminal background investigation and if the prospective employee has engaged in past criminal conduct, the employer must: (1) make sure the employee is not assigned to particular work that will place the employee in a position in which conduct that is similar to the employee’s past criminal conduct is facilitated; and (2) determine whether other information revealed by the investigation demonstrated the unsuitability of the employee for the particular work or the context of the employment in general.

Sections 5 and 6: Sealing and Expunction of Criminal History Records

The bill makes the following changes to the statutes governing the sealing and expunction of criminal records:

- 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 the Florida Department of Law Enforcement’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.
- Clarifies 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.
- Permits 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.
- 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). The current requirements and other provisions in the sealing and expunction statutes would continue to apply when seeking a second sealing under the bill.

Section 7: Effective Date

The bill provides an effective date of July 1, 2010.

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:

The Florida Department of Law Enforcement estimates that \$573,675 in annual revenue will be generated from the certificate of eligibility fees. This is based on an estimated 7,649 new applications the department anticipates it will receive (\$75 per application x 7,649 additional applications each year).³⁰

B. Private Sector Impact:

The bill may have a positive fiscal impact by providing more job opportunities for convicted felons. That could reduce recidivism, thus reducing the direct costs of crime as well as costs of re-incarceration.

C. Government Sector Impact:

While the Florida Department of Law Enforcement anticipates that additional resources will eventually be required to handle the increasing workload generated by the provision in the bill which allows persons to apply for a second criminal history records sealing, it indicates that any workload increases for the Fiscal Year 2010-2011 can be absorbed within existing resources.

VI. Technical Deficiencies:

The bill allows for a second sealing of a criminal record if the subject of the record has been crime-free for five years. The bill adds this exception several places in s. 943.059, F.S. (see lines 537, 580, and 613); however, the exception is not added to substantially similar sections of law

³⁰ Florida Dep't of Law Enforcement, *Senate Bill 340 Relating to Ex-offenders/Licensing and Employment/Sealed Records*, 2 (Jan. 21, 2010) (on file with the Senate Committee on Judiciary).

within s. 943.0585, F.S. (see lines 245, 319, and 366). It is unclear if the exception needs to be added to s. 943.0585, F.S., which relates to court-ordered expunction of criminal history records.

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.)

None.

B. Amendments:

None.

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