

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 397 Professional Regulation
SPONSOR(S): Business & Professions Subcommittee, Plakon, Scott and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 334

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	14 Y, 1 N, As CS	Wright	Anstead
2) Government Operations & Technology Appropriations Subcommittee			
3) Commerce Committee			

SUMMARY ANALYSIS

Generally, if an applicant for a professional license in Florida has a criminal background, they may be denied licensure if their history includes a crime that is specifically prohibited by a practice act, is related to good moral character, or if the crime is related to a profession for which they seek licensure.

The bill changes current procedures for reviewing the criminal history of applicants for barber, cosmetology, and certain construction contracting licenses under the Department of Business and Professional Regulation (DBPR); and certified nursing assistant licenses under the Department of Health (DOH).

The bill:

- expressly permits a person to apply for a license while under incarceration or supervision;
- generally limits the period during which the agency may consider criminal history as an impairment to licensure to 5 years for barbers, cosmetologists, and certain contractors, or 7 years for certified nursing assistants (CNA);
- requires DBPR and DOH to identify the crimes on their website that either do or do not impair a person's ability to qualify for licensure;
- still allows DOH to screen CNA applicants for crimes listed in the current level 2 background screenings; and
- requires the licensing agency and the Department of Corrections to permit applicants who are incarcerated or under supervision to appear by teleconference or video conference at a meeting of a board or the agency for a hearing concerning the person's license application.

The bill has an indeterminate fiscal impact on state government and does not appear to have a fiscal impact on local government.

The bill provides an effective date of October 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Department of Business and Professional Regulation Umbrella Chapter

The Department of Business and Professional Regulation (DBPR) has 12 divisions tasked with the regulation of several professions and businesses in Florida.¹

Chapter 455, F.S., applies to the regulation of professions constituting “any activity, occupation, profession, or vocation regulated by the DBPR in the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulation.”² It also provides the general powers of the DBPR and sets forth the procedural and administrative framework for all of the professional boards housed under DBPR.³

Licensing Determinations and Criminal History

Section 112.011, F.S., outlines broad guidelines for considering criminal convictions during licensure determinations. Generally, a person may be denied a professional license, permit, or certification for prior conviction for a crime if the crime was a felony or first-degree misdemeanor that is directly related to the standards determined by the regulatory authority to be necessary and reasonably related to the protection of the public health, safety, and welfare for the specific profession for which the license, permit, or certificate is sought.⁴ Notwithstanding any law to the contrary, a state agency may not deny an application for a license, permit, certificate, or employment based solely on the applicant’s lack of civil rights.⁵

Specifically, for DBPR licensed applicants, DBPR or an applicable board may deny a license application for any person having been “convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee’s profession,”⁶ or for other reasons in the applicable practice act.

There are no statutory provisions or rules that prohibit individuals from applying for licensure by DBPR while they are still incarcerated or under some form of supervised release, nor are such individuals charged any additional fees.⁷

Specifically, for DOH licensed applicants, DOH or an applicable board may deny a license application for any person having been “convicted of or pled guilty or nolo contendere to, regardless of adjudication, any felony or misdemeanor related to the practice of a health care profession regulated by this state,”⁸ related to certain types of fraud,⁹ or for other reasons in the applicable practice act.

¹ S. 20.165, F.S., creates the divisions of Administration; Alcoholic Beverages and Tobacco; Certified Public Accounting; Drugs, Devices, and Cosmetics; Florida Condominiums, Timeshares, and Mobile Homes; Hotels and Restaurants; Pari-mutuel Wagering; Professions; Real Estate; Regulation; Service Operations; and Technology.

² S. 455.01(6), F.S.

³ S. 455.203, F.S. The DBPR must also provide legal counsel for boards within the DBPR by contracting with the Department of Legal Affairs, by retaining private counsel, or by providing DBPR staff counsel. *See s. 455.221(1)*, F.S.

⁴ S. 112.011(1)(b), F.S.

⁵ S. 112.011(1)(c), F.S.

⁶ S. 455.227(1)(c), F.S.

⁷ Florida Department of Business and Professional Regulation, Agency Analysis of 2018 Senate Bill 1114, p. 2 (Jan. 8, 2018).

⁸ Ss. 456.024(3)(c); 456.072(1)(c), (x), (ii), (ll); and 456.072(2)(a), F.S.

⁹ S. 456.0635, F.S.

There are no statutory provisions or rules that prohibit individuals from applying for licensure by DOH while they are still incarcerated or under some form of supervised release.¹⁰

Barbers

Barbers are regulated under ch. 476, F.S., by the Barber's Board within the DBPR. To be licensed as a barber, a person must be at least 16 years of age, satisfactorily complete a licensure examination, and pay the required application fee. In order to be eligible to sit for the licensure examination, a person must have held a license to practice barbering in another state for at least one year or have received the required training.¹¹

"Barbering" includes any of the following practices when done for payment by the public, but not when done for the treatment of disease or physical or mental ailments: shaving, cutting, trimming, coloring, shampooing, arranging, dressing, curling, or waving the hair or beard or applying oils, creams, lotions, or other preparations to the face, scalp, or neck, either by hand or by mechanical appliances.¹²

A person may be denied a license as a barber for any violation of s. 455.227, F.S., which authorizes the denial of a license on the basis of a criminal background related to the practice of, or the ability to practice, a licensee's profession.¹³ Fingerprints are not required to be submitted to DBPR for a formal background check for barber license applicants.

For Fiscal Years 2011-12 through 2014-15, 18 out of 8,691 applicants for a barbering license were disqualified based on criminal history.¹⁴

Cosmetologists

Chapter 477, F.S., and the Board of Cosmetology govern the licensing and regulation of cosmetologists, hair wrappers, hair braiders, nail specialists, facial specialists, full specialists, body wrappers and related salons in the state.

A "cosmetologist" is a person who is licensed to engage in the practice of cosmetology in Florida under the authority of ch. 477, F.S.¹⁵ "Cosmetology" is defined as "the mechanical or chemical treatment of the head, face, and scalp for aesthetic rather than medical purposes, including, but not limited to, hair shampooing, hair cutting, hair arranging, hair coloring, permanent waving, and hair relaxing for compensation. This term also includes performing hair removal, including wax treatments, manicures, pedicures, and skin care services."¹⁶

To qualify for a license as a cosmetologist, the applicant must be at least 16 years old, have received a high school diploma, have submitted an application with the applicable fee and examination fee, and have either a license in another state or country for at least one year, or have received 1,200 hours training, and passed all parts of the licensure examination.¹⁷

A "specialist" is defined as "any person holding a specialty registration in one or more of the specialties registered under [ch. 477, F.S.]."¹⁸ The term "specialty" includes performing manicures, pedicures, and/or facials.¹⁹

¹⁰ Florida Department of Health, Agency Analysis of 2018 House Bill 1041, p. 2 (Jan. 24, 2018).

¹¹ See s. 476.114, F.S.

¹² S. 476.034(2), F.S.

¹³ See s. 455.227(1)(c), F.S.

¹⁴ Department of Business and Professional Regulation, *Response to Senate Bill 146 Ex-Offender Report*, p. 40 (2015), (on file with the Careers and Competition Subcommittee).

¹⁵ S. 477.013(3), F.S.

¹⁶ S. 477.013(4), F.S.

¹⁷ S. 477.019(2), F.S.

¹⁸ S. 477.013(5), F.S.

¹⁹ S. 477.013(6), F.S.

To qualify for a specialist license, the applicant must be at least 16 years old or have a high school diploma, obtain a certificate of completion from an approved specialty education program, and submit an application for registration with the DBPR with the registration fee.²⁰

A person may be denied a license as a cosmetology professional for any violation of s. 455.227, F.S., which authorizes the denial of a license on the basis of a criminal background related to the practice of, or the ability to practice, a licensee's profession.²¹ Fingerprints are not required to be submitted to DBPR for a formal background check for cosmetology professional license applicants.

For Fiscal Years 2011-12 through 2014-15, 18 out of 95,715 applicants for a cosmetology license were disqualified based on criminal history.²²

Construction Contracting Professionals

CILB and ECLB

The Construction Industry Licensing Board (CILB) within the DBPR is responsible for licensing and regulating the construction industry in this state under part I of ch. 489, F.S.²³ The CILB is divided into two divisions with separate jurisdictions:

- Division I is comprised of general, building, and residential contractors.
- Division II is comprised of the roofing, sheet metal, class A, B, and C air-conditioning, mechanical, commercial pool/spa, residential pool/spa, swimming pool/spa servicing, plumbing, underground utility and excavation, solar, and pollutant storage systems contractors.
- A specialty contractor is one whose scope of work and responsibility is limited to a particular phase of construction as detailed in an administrative rule adopted by the CILB.²⁴

The Electrical Contractors' Licensing Board (ECLB) within the DBPR is responsible for licensing and regulating electrical contractors in this state under part II of Ch. 489, F.S.²⁵

Construction contractors under part I of ch. 489, F.S., and electrical contractors under part II of ch. 489, F.S., must satisfactorily complete experience and education requirements, and a licensure examination before being licensed.²⁶

The CILB and the ECLB may deny a license application for any person who it finds guilty of any of the grounds for discipline set forth in s. 455.227(1), F.S., or set forth in the profession's practice act.²⁷ Specifically, the CILB and ECLB may deny a license application for any person having been convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of, or the ability to practice, a licensee's profession.²⁸

CILB and ECLB contractors must be of good moral character. In considering good moral character, they may consider any matter, including criminal background, that has a substantial connection

²⁰ S. 477.0201, F.S.

²¹ See s. 455.227(1)(c), F.S.

²² DBPR, *supra* note 14, at 50.

²³ See s. 489.107, F.S.

²⁴ For example, specialty swimming pool contractors have limited scopes of work for the construction of pools, spas, hot tub, and decorative or interactive water displays. See Fla. Admin. Code R. 61G4-15.032 (2016).

²⁵ S. 489.507, F.S.

²⁶ See ss. 489.113 and 489.516, F.S., respectively.

²⁷ S. 455.227(2), F.S.

²⁸ Ss. 489.129(1)(b) and 489.553(1)(d), F.S., proving the disciplinary grounds for construction contractors and electrical contractors, respectively.

between the good moral character of the applicant and the professional responsibilities of such a contractor by clear and convincing evidence.²⁹

For Fiscal Years 2011-12 through 2014-15, 6 out of 7,575 applicants for a ECLB license, and 29 out of 22,934 applicants for a CILB license were denied based on criminal history.³⁰

Septic Tank Contracting

Master septic tank contractors and septic tank contractors are regulated by the Department of Health (DOH) under part III of ch. 489, F.S. Septic tank contractors must have 3 years' training, pass an examination, and register with the DOH before engaging in the occupation.³¹ A master septic tank contractor" must be a registered septic tank contractor or a plumbing contractor who has provided septic tank contracting services for at least 3 years.

To be eligible for registration by the DOH, master septic tank contractors and septic tank contractors must be of good moral character. In considering good moral character, the DOH may consider any matter, including criminal background, that has a substantial connection between the good moral character of the applicant and the professional responsibilities of a registered contractor.³² This includes crimes which affect the profession of septic tank contracting.³³

Lookback Considerations for CILB, ECLB, and Septic Tank Contractors

The CILB must consider length of time since the commission of a crime and the rehabilitation of the applicant in denying or approving licensure.³⁴ The CILB may not deny licensure to an applicant based solely upon a felony conviction or the applicant's failure to provide proof of restoration of civil rights.³⁵ For licensing electrical or septic tank contractors, the ECLB or DOH, respectively, are not specifically required to consider the passage of time between the disqualifying criminal offense and the time of application before denying or granting a license or registration.

Certified Nursing Assistants

The Board of Nursing within DOH is responsible for licensing and regulating certified nursing assistants (CNA) under pt. II of ch. 464, F.S.³⁶ In Fiscal Year 2015-2016, there were 146,495 active certified nursing assistants.³⁷

The "practice of a certified nursing assistant" means:

[P]roviding care and assisting persons with tasks relating to the activities of daily living. Such tasks are those associated with personal care, maintaining mobility, nutrition and hydration, toileting and elimination, assistive devices, safety and cleanliness, data gathering, reporting abnormal signs and symptoms, postmortem care, patient socialization and reality orientation, end-of-life care, cardiopulmonary resuscitation and emergency care, residents' or patients' rights,

²⁹ Ss. 489.111(2)(b), (3)(a) and 489.513(1)(b), (c), F.S.

³⁰ DBPR, *supra* note 14, at 55. The numbers for CILB licenses include Div. I contractors who are not the subject of this bill, but the numbers in the report are inextricable.

³¹ Ss. 489.552 and 489.553, F.S.

³² S. 489.553(4)(a), F.S.

³³ *Id.*

³⁴ S. 489.115(6), F.S.

³⁵ *Id.*

³⁶ *See* s. 489.107, F.S.

³⁷ *See* Florida Department of Health, Division of Medical Quality Assurance, *Annual Report & Long-range Plan, Fiscal Year 2016-2017*, at <http://mqawebteam.com/annualreports/1617/#1/z> (last visited February 12, 2018) at page 13.

documentation of nursing-assistant services, and other tasks that a certified nurse assistant may perform after training beyond that required for initial certification and upon validation of competence in that skill by a registered nurse.³⁸

To be certified, a person must have a high school diploma, or its equivalent; or be at least 18 years of age; and pass a nursing assistant competency examination. Alternatively, a person may be certified if they have been licensed in another state and not have been found to have committed abuse, neglect, or exploitation in that state.³⁹

Applicants for certification may be disqualified based on crimes related to the practice of certified nurse assisting.⁴⁰ Additionally, as with all health care practitioner licenses, pursuant to s. 456.0635, F.S., CNA applicants will automatically be disqualified for felonies related to health care fraud or violent crimes under chs. 409, 817, and 893, F.S., or similar offenses in other jurisdictions, and certain federal offenses, until the sentence and any subsequent probation has ended and for a certain time frame afterward, ranging from 5 to 15 years.⁴¹

The applicant also must successfully pass a required background screening for working in many medical capacities,⁴² either pursuant to s. 400.215, F.S., which requires the personnel of nursing homes and related healthcare facilities to pass a level 2 background screening, or pursuant to s. 408.809, F.S., which requires level 2 background screening for specified persons, including employees of medical facilities.⁴³ The background screening must be completed every five years following licensure, employment, or entering into contract in a capacity that requires background screening, or retained in the FBI National Retained Print Arrest Notification Program.⁴⁴ Both of these background screenings include checking for prohibited offenses listed in s. 435.04(2) and (3), F.S., which include:

- violent crimes,
- property crimes, and
- sexual offenses.⁴⁵

A level 2 background screening includes, but is not limited to, fingerprinting for statewide criminal history records checks through the Florida Department of Law Enforcement (FDLE) and national criminal history checks through the Federal Bureau of Investigation (FBI), and may include local criminal records checks through local law enforcement agencies. Once the background screening is completed, and FDLE receives the information from the FBI, the criminal history information is processed by DOH for licensure or the appropriate agency for employment screening to determine if the screening contains any disqualifying information.⁴⁶

If a person is disqualified from employment due to failing the required background screening, the DOH may grant an exemption from disqualification for:

1. Felonies for which at least three years have elapsed since the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court for the disqualifying felony;
2. Misdemeanors prohibited under any of the statutes cited in this chapter or under similar statutes of other jurisdictions for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court;

³⁸ S. 464.201(5), F.S.

³⁹ S. 464.203, F.S.

⁴⁰ DOH, *supra* note 37, and s. 464.204(1)(b), F.S., via 456.024(3)(c), F.S.

⁴¹ S. 456.0635(2)(a), F.S.

⁴² S. 464.203(1), F.S.

⁴³ S. 408.809(1), F.S.

⁴⁴ S. 408.809(2), F.S.

⁴⁵ S. 435.04(2), (3), F.S. This process is used to screen those giving certain service for certain vulnerable populations.

⁴⁶ S. 435.04, F.S.

3. Offenses that were felonies when committed but that are now misdemeanors and for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court; or
4. Findings of delinquency.⁴⁷ However, if the delinquency would be a felony if committed by an adult and the record has not been sealed or expunged, the exemption may not be granted until at least three years have elapsed since completion or lawfully released from confinement, supervision, or nonmonetary condition imposed by the court for the disqualifying offense.⁴⁸

To be granted an exemption, a person must have paid any court-ordered amount for any fee, fine, fund, lien, civil judgment, application, costs of prosecution, trust, or restitution as part of the judgment and sentence for the disqualifying crime.⁴⁹

DOH may not grant an exemption:

- to those required to register as a sexual predator, career offender, or sexual offender;⁵⁰
- for crimes listed in s. 435.07(4), F.S., which include violent felonies, crimes against children, and sex-related crimes, such as felony domestic violence, luring or enticing a child, sexual battery, child pornography, and child abuse;⁵¹ and
- to those found guilty of, or who have entered a plea of nolo contendere or guilty to, regardless of adjudication, any felony covered by s. 435.03 or s. 435.04, F.S., solely by reason of any pardon, executive clemency, or restoration of civil rights.⁵²

Effect of the Bill

The bill changes the standards used in the current procedures for reviewing the criminal history of applicants for specified professions or occupations regulated by the DBPR and DOH.

The bill amends s. 455.213, F.S., dealing with the general licensing provisions of the DBPR, and s. 464.203, F.S., dealing with the certification requirements for certified nursing assistants under the DOH.

The licensing application provisions in the bill apply to the following professions and occupations:

- CNAs.
- Septic Tank Contractors.
- Barbers.
- Cosmetologists and cosmetology specialists.
- Construction Professionals:
 - Electrical Contractors;
 - Swimming pool and spa contractors;
 - Sheet metal contractors;
 - Roofing contractors;
 - Air-conditioning contractors;
 - Mechanical contractors;
 - Plumbing contractors;
 - Underground utility and excavation contractors;
 - Solar contractors;
 - Pollutant storage systems contractor; and
 - Other specialty contractors whose scope of work and responsibility is limited to a particular phase of construction, e.g., drywall, glazing, swimming pool excavation, etc.

⁴⁷ S. 435.07(1)(a), F.S.

⁴⁸ *Id.*

⁴⁹ S. 435.07(1)(b), F.S.

⁵⁰ S. 435.07(4)(b), F.S.

⁵¹ S. 435.07(4)(c), F.S.

⁵² S. 435.07(4)(a), F.S.

The bill:

- Expressly permits a person to apply for a license while under criminal confinement (incarceration) or supervision.
- Limits the period during which the agency may consider criminal history as an impairment to licensure to 5 years prior to application for barbers, cosmetologists, and certain contractors, or 7 years prior to application for CNAs.
 - For CNAs, DOH may consider a certified nursing assistant applicant's criminal history from 7 years before the application if such applicant has committed health care fraud-related crimes, or crimes related to a level II background screening, which include violent crimes, property crimes, and sexual offenses.
- Still allows DOH to screen CNA applicants for crimes listed in the current level 2 background screenings.
- Requires the licensing agency to permit applicants who are incarcerated or under supervision to appear by teleconference or video conference at a meeting of a board or the agency for a hearing concerning the person's license application.
- Requires the Department of Corrections (DOC) to cooperate and coordinate with the board or department, as applicable, to facilitate the appearance of the license applicant at the hearing in person, by teleconference, or by video conference, as appropriate.

The bill requires the Barbers' Board, Board of Cosmetology, ECLB, and CILB (collectively "boards") to list on DBPR's website the crimes that if committed by an applicant, do not impair a person's qualifications for licensure. This list will be updated annually. Beginning October 1, 2019, the boards must compile a list of crimes that although reported by an applicant for licensure, were not used as a basis for denial. The list must identify the crime reported and the date of conviction, finding of guilt, plea, or adjudication entered or the date of sentencing for each such license application.

The bill requires each agency to identify the crimes that do impair a person's qualifications for licensure. The boards must compile a list of crimes that have been used as a basis for denial of a license in the past 2 years, which shall be made available on DBPR's website. Starting October 1, 2019, and updated quarterly thereafter, the boards must compile a list indicating each crime used as a basis for a license denial. For each crime listed, the board must identify the date of conviction, finding of guilt, plea, or adjudication entered, or date of sentencing. Such denials must be available to the public upon request. The bill also requires the Board of Nursing to perform these crime list procedures for CNAs.

The bill provides an effective date of October 1, 2019.

B. SECTION DIRECTORY:

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| Section 1 | Amends s. 455.213, F.S., providing specific standards for certain DBPR professional licenses regarding an applicant's criminal background. |
| Section 2 | Amends s. 464.203, F.S., providing specific standards for certified nursing assistant licenses regarding an applicant's criminal background. |
| Section 3 | Amends s. 400.211, F.S., making a conforming change. |
| Section 4 | Amends s. 489.553, F.S., providing specific standards for septic tank contractor licenses regarding an applicant's criminal background. |
| Section 5 | Provides an effective date. |

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

There is an insignificant negative fiscal impact on the DBPR, DOH, and DOC related to costs associated with providing new teleconferencing methods for licensure hearings. Additionally, DBPR and DOH will see a slight increase in workload and technology expenditures related to displaying the new crime listing requirements established in the bill to their respective websites. For a similar bill last year, DBPR, DOH, and DOC indicated that any increase in workload and expenditures associated with rulemaking or technology modifications could be absorbed within existing resources.⁵³

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There may be an increase in applications for barber, cosmetology, contracting, and CNA licenses from individuals with a criminal background.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

DBPR and DOH will need to promulgate rules to reflect changes in how the criminal background of an applicant is considered.

Current rulemaking authority is sufficient.

⁵³ DBPR, Agency Analysis of 2018 Senate Bill 1114, p. 6 (Jan. 8, 2018); DOH, Agency Analysis of 2018 House Bill 1041, p. 4 (Jan. 24, 2018); and, DOC, Agency Analysis of 2018 Senate Bill 1114, p. 5 (Jan. 30, 2018).

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 13, 2019, the Business & Professions Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- corrects the statutory references for septic tank contractors,
- clarifies the date used for considering certain applicant's criminal history, and
- corrects the statutory reference that allows the Department of Health in CNA licensing determinations to consider crimes that are part of a level II background check.

This analysis is drafted to the committee substitute as passed by the Business & Professions Subcommittee.