

**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.)

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Prepared By: The Professional Staff of the Committee on Regulated Industries

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BILL: SB 1302

INTRODUCER: Senator Burgess

SUBJECT: Criminal History Information

DATE: January 14, 2022

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>CJ</u>	_____
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 1302 revises the process by which a regulatory board within the Department of Business and Professional Regulation (DBPR) may consider the criminal background of license applicants. Under the bill, the process for considering the criminal background of a license applicant applies to all professions licensed by regulatory boards within the DBPR.

The bill prohibits DBPR's regulatory boards from inquiring into, or considering the criminal conviction history of, an applicant for a license until the applicant is determined to be otherwise qualified for licensure. The bill also repeals the provision in current law authorizing a board to consider the criminal history of an applicant for licensure if the criminal history has been found to relate to good moral character. However, many of the practice acts for professions regulated by DBPR boards require the license applicant to be of good moral character.

The bill provides several factors for a board to consider when determining if the criminal history of an applicant directly relates to the practice of the applicable profession for which the license is sought or held, including the nature and seriousness of the conviction, the age of the person at the time the felony was committed, the length of time since the conviction, evidence of mitigation or rehabilitation, and the applicant's current ability to practice the profession competently in accordance with the actual practice of the profession.

Under the bill, if a DBPR regulatory board intends to deny a license application solely or in part on the basis of the applicant's prior felony conviction, the board must give the applicant written notice before making a final decision and give the applicant 10 business days to respond with information challenging the accuracy of the information and evidence of mitigation or rehabilitation and his or her current ability to practice the profession competently in accordance with the actual practice of the profession.

If a DBPR regulatory board denies an application for a license solely or in part on the basis of the applicant's prior felony conviction, the applicable board must notify the applicant in writing of the final denial, the appeal process, the applicant's eligibility for other licenses or professions, and the earliest date the applicant may reapply for a license.

The bill also revises the process for a court-ordered sealing of a criminal record under s. 943.059(1), F.S., to require a court to grant a petition for the sealing of a criminal history record if a criminal history record has been automatically sealed pursuant to s. 943.0595, F.S., and the subject of the sealed record presents a certificate of sealing issued by the Florida Department of Law Enforcement (FDLE). Under the bill, the FDLE must issue a certificate of eligibility for sealing to a person who is the subject of a criminal history record sealed by the FDLE pursuant to the automatic sealing of criminal history provisions in s. 943.0595, F.S.

The FDLE anticipates a fiscal impact of \$4,288,960 with \$3,869,260 recurring for 60 additional full time employees (FTEs) to implement the changes in the bill.

The bill takes effect July 1, 2022.

## II. Present Situation:

### Licensing Determinations and Criminal History

Section 112.011, F.S., provides guidelines for the review of a license applicant's criminal history by state agencies during licensure determinations. Generally, a person may be denied a professional license based on his or her prior conviction of a crime if the crime was a felony<sup>1</sup> or first-degree misdemeanor<sup>2</sup> 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 is sought.<sup>3</sup> Notwithstanding any law to the contrary, a state agency may not deny an application for a license based solely on the applicant's lack of civil rights.<sup>4</sup>

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<sup>1</sup> Section 775.08(1), F.S., defines "felony" as any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or a term of imprisonment in a state penitentiary that exceeds one year.

<sup>2</sup> Section 775.08(2), F.S., defines "misdemeanor" as any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by a term of imprisonment in a county correctional facility of less than one year. A first degree misdemeanor is punishable by a term of imprisonment not exceeding one year and a fine not exceeding \$1,000. Sections 775.082 and 775.083, F.S.

<sup>3</sup> Section 112.011(1)(b), F.S. *See also, e.g., State ex rel. Sbordy v. Rowlett*, 138 Fla. 330, 190 So. 59, 63 (1939), holding that "the preservation of the public health is one of the duties of sovereignty and in a conflict between the right of a citizen to follow a profession and the right of a sovereignty to guard the health and welfare, it logically follows that the rights of the citizen to pursue his profession must yield to the power of the State to prescribe such restrictions and regulations as shall fully protect the people from ignorance, incapacity, deception, and fraud."

<sup>4</sup> Section 112.011(1)(c), F.S.

## **Department of Business and Professional Regulation**

### ***Licensure, Generally***

DBPR has 12 divisions that are tasked with the licensing and general regulation of several professions and businesses in Florida.<sup>5</sup> Fifteen boards and programs exist within the Division of Professions,<sup>6</sup> two boards exist within the Division of Real Estate,<sup>7</sup> and one board exists in the Division of Certified Public Accounting.<sup>8</sup>

Chapter 455, F.S., relates to the regulation of professions by the DBPR.<sup>9</sup> Sections 455.203 and 455.213, F.S., establish the DBPR's general licensing authority, including its authority to charge license fees and license renewal fees. Each board within the DBPR must determine by rule the amount of license fees for each profession, based on estimates of the required revenue to implement the regulatory laws affecting the profession.<sup>10</sup> When a person is authorized to engage in a profession or occupation in Florida, the DBPR issues a "permit, registration, certificate, or license" to the licensee.<sup>11</sup>

In Fiscal Year 2020-2021, there were 892,843 total active licenses in the Division of Certified Public Accounting, Division of Professions, Division of Real Estate, and Division of Regulation.<sup>12</sup>

### ***Denial of Licensure***

Chapter 455, F.S., provides procedural and administrative framework for the regulation of professionals by the DBPR, and boards housed under the DBPR, including the Divisions of

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<sup>5</sup> See s. 20.165, F.S., creating 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.

<sup>6</sup> Section 20.165(4)(a), F.S., establishes the following boards and programs which are noted with the implementing statutes: Board of Architecture and Interior Design, part I of ch. 481, F.S.; Florida Board of Auctioneers, part VI of ch. 468, F.S.; Barbers' Board, ch. 476, F.S.; Florida Building Code Administrators and Inspectors Board, part XII of ch. 468, F.S.; Construction Industry Licensing Board, part I of ch. 489, F.S.; Board of Cosmetology, ch. 477, F.S.; Electrical Contractors' Licensing Board, part II of ch. 489, F.S.; Board of Employee Leasing Companies, part XI of ch. 468, F.S.; Board of Landscape Architecture, part II of ch. 481, F.S.; Board of Pilot Commissioners, ch. 310, F.S.; Board of Professional Engineers, ch. 471, F.S.; Board of Professional Geologists, ch. 492, F.S.; Board of Veterinary Medicine, ch. 474, F.S.; Home Inspection Services Licensing Program, part XV of ch. 468, F.S.; and Mold-related Services Licensing Program, part XVI of ch. 468, F.S.

<sup>7</sup> See s. 20.165(4)(b), F.S. Florida Real Estate Appraisal Board, created under part II of ch. 475, F.S., and Florida Real Estate Commission, created under part I of ch. 475, F.S.

<sup>8</sup> See s. 20.165(4)(c), F.S., which establishes the Board of Accountancy, created under ch. 473, F.S.

<sup>9</sup> Section 455.017, F.S.

<sup>10</sup> Section 455.219(1), F.S.

<sup>11</sup> Section 455.01(4) and (5), F.S.

<sup>12</sup> See Department of Business and Professional Regulation, *Division of Certified Public Accounting, Division of Professions, Division of Real Estate, and Division of Regulation Annual Report, Fiscal Year 2020-2021*, p. 20, available at [http://www.myfloridalicense.com/DBPR/os/documents/DivisionAnnualReport\\_FY2021.pdf](http://www.myfloridalicense.com/DBPR/os/documents/DivisionAnnualReport_FY2021.pdf) (last visited Jan. 13, 2022).

Certified Public Accounting, Professions, Real Estate, and Regulation.<sup>13</sup> Provisions within the chapter specify that the provision applies to the DBPR if there is no board.<sup>14</sup>

The DBPR may regulate professions “only for the preservation of the health, safety, and welfare of the public under the police powers of the state.”<sup>15</sup> Regulation is required when:

- The potential for harming or endangering public health, safety, and welfare is recognizable and outweighs any anticompetitive impact that may result;
- The public is not effectively protected by other state statutes, local ordinances, federal legislation, or other means; and
- Less restrictive means of regulation are not available.<sup>16</sup>

However, “neither the department nor any board may create a regulation that has an unreasonable effect on job creation or job retention,” or a regulation that unreasonably restricts the ability of those who desire to engage in a profession or occupation to find employment.<sup>17</sup>

### ***Licensing and Criminal Background for Certain Professions***

The DBPR or a pertinent regulatory board may deny an application for licensure based on the grounds set forth in s. 455.227(1), F.S., or in the profession’s practice act.<sup>18</sup> Specifically, the DBPR or regulatory board may deny a licensure application for any person who was:

...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.<sup>19</sup> (Emphasis added.)

In 2019, the Legislature created a process for reviewing the criminal history of applicants for specified professions or occupations regulated by the DBPR.<sup>20</sup> The process applies to:

- Barbers;
- Cosmetologists and cosmetology specialists;
- Construction professionals, including:
  - Air-conditioning contractors;
  - Electrical contractors;
  - Mechanical contractors;
  - Plumbing contractors;
  - Pollutant storage systems contractors;
  - Roofing contractors;
  - Septic tank contractors;

<sup>13</sup> See ss. 455.01(6) and 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.

<sup>14</sup> For example, s. 455.227(2), F.S., dealing with grounds for discipline, penalties, and enforcement, provides “[w]hen the board, or the department when there is no board, finds...”

<sup>15</sup> Section 455.201(2), F.S.

<sup>16</sup> Section 455.201(2), F.S.

<sup>17</sup> Section 455.201(4)(b), F.S.

<sup>18</sup> Section 455.227(2), F.S.

<sup>19</sup> Section 455.227(1)(c), F.S.

<sup>20</sup> Chapter 2019-167, L.O.F., codified at s. 455.213(3), F.S.

- Sheet metal contractors;
- Solar contractors;
- Swimming pool and spa contractors;
- Underground utility and excavation contractors; and
- Other specialty contractors; or
- Any other profession for which the DBPR issues a license, provided the profession is offered to prisoners in any correctional institution or correctional facility as a vocational training or through an industry certification program.<sup>21</sup>

Under this process, a prisoner may apply for a license before he or she is lawfully released from confinement or supervision.<sup>22</sup> The application may not be denied solely on the basis of the applicant's current confinement or supervision.

A license for one of the above-listed occupations may not be denied on the basis of a conviction for a crime occurring more than five years before the date of application.<sup>23</sup> However, a board may deny a license if the applicant's criminal history includes a crime listed in s. 775.21(4)(a)1., F.S., relating to sexual predator crimes, or s. 776.08, F.S., relating to forcible felonies,<sup>24</sup> if such criminal history relates to the practice of the applicable profession.<sup>25</sup> A regulatory board may also consider the criminal history of an applicant if such criminal history is found to relate to good moral character.<sup>26</sup>

Additionally, a board must:

- Permit a person to apply for a license while under criminal confinement (incarceration) or supervision;<sup>27</sup>
- Compile a list of crimes by rule of crimes that do not impair a person's qualifications for licensure;<sup>28</sup>
- Compile a list of crimes that have been used in the past two years as the basis for a license denial;<sup>29</sup> and
- 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.<sup>30</sup>

The DBPR or a board may refuse to issue an initial license to any applicant who is under investigation or prosecution in any jurisdiction for an action that would constitute a violation of

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<sup>21</sup> Section 455.213(3)(a), F.S.

<sup>22</sup> Section 455.213(3)(c), F.S.

<sup>23</sup> Section 455.213(3)(b)1., F.S. "Conviction" means a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld.

<sup>24</sup> Section 776.08, F.S., defines "forcible felony" to mean "treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual."

<sup>25</sup> Section 455.213(3)(b)1., F.S.

<sup>26</sup> Section 455.213(3)(b)2., F.S.

<sup>27</sup> Section 455.213(3)(c), F.S.

<sup>28</sup> Section 455.213(3)(d), F.S.

<sup>29</sup> Section 455.213(3)(e), F.S.

<sup>30</sup> Section 455.213(5), F.S.

ch. 455, F.S., or the professional practice acts administered by the department and the boards, until such time as the investigation or prosecution is complete.<sup>31</sup>

### ***License Qualifications Based on Moral Character***

Several professions licensed by the DBPR require the applicant to be of good moral character, including applicants for a license to practice:

- Boxing, kick boxing and mixed martial arts issued by the Florida Athletic Commission;<sup>32</sup>
- Construction contracting issued by the Construction Industry Licensing Board;<sup>33</sup>
- Electrical contracting issued by the Electrical Contractors' Board.<sup>34</sup>
- Athlete agents issued by the DBPR;<sup>35</sup>
- Building code administrators and inspectors issued by the Florida Building Code Administrators and Inspectors Board;<sup>36</sup>
- Certified public Accountants issued by the Board of Accountancy;<sup>37</sup>
- Engineers issued by the Board of Professional Engineers;<sup>38</sup>
- Real estate brokers and agents issued by the Florida Real Estate Commission; and<sup>39</sup>
- Mold-related services issued by the DBPR.<sup>40</sup>

### ***License Qualifications Based on Criminal History Related to the Profession***

Many professional practice acts do not require the applicant to be of good moral character but permit a license application to be denied if the applicant's criminal history directly relates to, or relates to, the practice of the profession. For example, the license qualifications for the following professions require that the applicant not have a criminal history directly related, or simply related, to the practice of the profession:

- Architecture issued by the Board of Architecture and Interior Design;<sup>41</sup>
- Asbestos contracting and consulting issued by the DBPR;<sup>42</sup>

<sup>31</sup> Section 455.213(4), F.S.

<sup>32</sup> Section 548.071(3), F.S., provides a basis for the Florida Athletic Commission to disqualify for a license any person who has been convicted of, has pleaded guilty to, has entered a plea of nolo contendere to, or has been found guilty of a crime involving moral turpitude in any jurisdiction within 10 years preceding the suspension or revocation.

<sup>33</sup> Section 489.111(2)(b) and (3), F.S., provides that the Construction Industry Licensing Board may refuse to certify an applicant for failure to satisfy the requirement of good moral character if there is a substantial connection between the lack of good moral character and the professional responsibility of the certified contractor; and the lack of good moral character is supported by clear and convincing evidence. The board may deny a license application if the applicant's criminal history directly relates to the practice of the profession.

<sup>34</sup> Section 489.511(3)(a), F.S., defines good moral character as a history of honesty, fairness, and respect for the rights of others and for the laws of this state and nation and specifies that the Electrical Contractors' Licensing Board may refuse to certify an applicant for failure to satisfy the requirement of good moral character if certain requirements are met. The board may deny a license application if the applicant's criminal history directly relates to the practice of the profession.

<sup>35</sup> Section 468.453(2)(b), F.S.

<sup>36</sup> Section 468.609(3)(b), F.S., also permits a license application to be denied if the applicant's criminal history directly relates to the practice of the profession.

<sup>37</sup> Section 473.308(5) and (6), F.S., also permits a license application to be denied if the applicant's criminal history directly relates to the practice of the profession.

<sup>38</sup> Section 471.013(2)(a), F.S.

<sup>39</sup> Section 475.227(1)(c), F.S.

<sup>40</sup> Section 468.8414(3), F.S.

<sup>41</sup> Section 481.225(1)(d), F.S.

<sup>42</sup> Section 469.009(1)(g), F.S.

- Auctioneering issued by the Florida Board of Auctioneers;<sup>43</sup>
- Barbering issued by the Barbers' Board;<sup>44</sup>
- Community association management issued by the Regulatory Council of Community Association Managers;<sup>45</sup>
- Professional geology issued by the Board of Professional Geologists;<sup>46</sup>
- Home inspection issued by the DBPR;<sup>47</sup>
- Landscape architecture issued by the Board of Landscape Architecture;<sup>48</sup> and
- Veterinary medicine issued by the Board of Veterinary Medicine.<sup>49</sup>

***Disciplinary Actions and License Qualifications based on Section 455.227(1)(c), F.S.***

Section 455.227(1)(c), F.S., authorizes a board, or the DBPR if there is no board for the profession, to take disciplinary action against a licensee if the person is convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, of a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee's profession. This basis for discipline includes a criminal history that occurred prior to obtaining a license.<sup>50</sup>

Disciplinary action includes refusal to certify, or to certify with restrictions, an application for a license and suspension or permanent revocation of a license.<sup>51</sup>

Several professions regulated by the DBPR, or a board within the DBPR, rely on the grounds for disciplinary action in s. 455.227(1)(c), F.S., as a basis for denial or grant of a license. In some professional practice acts, a license disqualification based on s. 455.227(1)(c), F.S., may be a basis grounds for a license denial in addition to a good moral character requirement or a specific criminal history disqualifier. The practice act for following professional licenses within the DBPR cross reference the grounds for denial of a license in s. 455.227(1)(c), F.S.:

- Barbers;<sup>52</sup>
- Engineers issued by the Board of Professional Engineers;<sup>53</sup>
- Professional geologists;<sup>54</sup>
- Home inspectors;<sup>55</sup>
- Mold-related service providers; and<sup>56</sup>
- Real estate brokers and agents.<sup>57</sup>

<sup>43</sup> Section 468.389(1)(l), F.S.

<sup>44</sup> Section 476.144(6)(a)2.b., F.S., provides that the qualifications for a barber license include having no disciplinary history related to barbering for five years.

<sup>45</sup> Section 468.436(2)(b), F.S.

<sup>46</sup> Section 492.113(1)(d), F.S.

<sup>47</sup> Section 468.832(1)(d), F.S.

<sup>48</sup> Section 481.325(1)(d), F.S.

<sup>49</sup> Sections 474.214(1)(c), (p) and (2), F.S., authorize the Board of Veterinary Medicine to deny a license application based on criminal history, including conviction on a charge of cruelty to animals.

<sup>50</sup> Section 455.227(2), F.S.

<sup>51</sup> *Id.*

<sup>52</sup> Section 476.204(1)(h), F.S.

<sup>53</sup> Section 471.033(1)(a), F.S.

<sup>54</sup> Section 492.113(1)(d), F.S.

<sup>55</sup> Section 468.832(1)(a), F.S.

<sup>56</sup> Section 468.842(1)(a), F.S.

<sup>57</sup> Section 475.25(1)(a), F.S.

## **Administrative Procedure Act**

Chapter 120, F.S., the Administrative Procedure Act, provides uniform procedures for state agencies, including the conduct of rulemaking, implementing disciplinary actions, and the granting and denial of license applications.

Section 120.60, F.S., provides the process for the granting or denial of license applications. Upon receipt of a license application, an agency must examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency may not deny a license because of an applicant's failure to correct an error or omission or to supply additional information unless the agency has timely notified the applicant within this 30-day period. A license application is complete upon receipt by the agency of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired.

An agency must approve or deny a license application within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period is tolled by the initiation of a proceeding under ss. 120.569 and 120.57, F.S.<sup>58</sup> Any application for a license which is not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license.

## **Expunction and Sealing of Criminal History Records**

Sections 943.045 through 943.0595, F.S., set forth the processes for multiple ways in which to seal or expunge (destroy) a criminal history record. A criminal history record is "any nonjudicial record maintained by a criminal justice agency containing criminal history information."<sup>59</sup> Unless sealed or expunged, a criminal history record of an adult is generally accessible to the public. And the term "record" refers not to any single document, but instead to all documents or other records of a particular arrest or incident.<sup>60</sup>

"Expunction of a criminal history record" means:

...the court-ordered physical destruction or obliteration of a record or portion of a record by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order, except that criminal history records in the custody of the department must be retained in all cases for purposes of evaluating subsequent requests by the subject of the record for

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<sup>58</sup> Section 120.569 F.S., provides the administrative process for all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under the mediation process in s. 120.573, F.S., or the summary hearing process in s. 120.574, F.S. Section 120.57, F.S., provides additional procedures for matters involving disputed issues of material fact before an administrative law judge assigned by the Division of Administrative Hearings.

<sup>59</sup> Section 943.0045(6), F.S.

<sup>60</sup> See s. 943.045(17), F.S.



sealing or expunction, or for purposes of recreating the record in the event an order to expunge is vacated by a court of competent jurisdiction.<sup>61</sup>

“Sealing of a criminal history record” means:

...the preservation of a record under such circumstances that it is secure and inaccessible to any person not having a legal right of access to the record or the information contained and preserved therein.<sup>62</sup>

### ***Eligibility for Court Ordered Sealing and Expunction***

The processes for obtaining a court order to seal or expunge a criminal history record involve several similar steps. A person seeking the expunction or the sealing of a record must obtain a certificate of eligibility from the FDLE, and file a petition with the court for an order to seal or expunge his or her criminal history record.<sup>63</sup>

To successfully complete this process and receive a court order, a person must meet certain eligibility requirements. The person is eligible to petition a court for a court-ordered expunction or sealing of a criminal record when:

- The criminal history record is not ineligible for court-ordered expunction under s. 943.0584, F.S, which includes an extensive list of crimes such as terrorism, murder, and sexual battery crimes;<sup>64</sup>
- The person has never, as of the date the application for a certificate of eligibility is filed, been adjudicated guilty in this state of a criminal offense or been adjudicated delinquent in this state for committing any felony or any of the specified misdemeanors involving violence, firearms, or neglect of children, unless the record of such adjudication of delinquency has been expunged pursuant to s. 943.0515, F.S.;<sup>65</sup>
- The person has not been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge or seal pertains;<sup>66</sup>
- The person is no longer under court supervision for the arrest or alleged criminal activity to which the petition pertains;<sup>67</sup> or
- The person has never secured a prior sealing or expunction of a criminal history record, unless the expunction sought is of a criminal history record previously sealed for 10 years pursuant to s. 943.0585(2)(h), F.S.<sup>68</sup>

### ***Court-Ordered Sealing***

When a criminal history record is sealed, it is preserved so that it is secure and inaccessible to any person who does not have a legal right to access the record or the information contained

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<sup>61</sup> Section 943.045(16), F.S.

<sup>62</sup> Section 943.045(19), F.S.

<sup>63</sup> See ss. 943.0585(2)-(3), and 943.059, F.S.

<sup>64</sup> See ss. 943.0585(1)(c), and 943.059(1), F.S.

<sup>65</sup> See ss. 943.0585(1)(d), and 943.059(1), F.S.

<sup>66</sup> Sections 943.0585(1)(e), and 943.059(1), F.S.

<sup>67</sup> Sections 943.0585(1)(f), and 943.059(1), F.S.

<sup>68</sup> Sections 943.0585(2)(g), and 943.059(1), F.S.

within the record.<sup>69</sup> A court may order a criminal history record sealed,<sup>70</sup> rendering it confidential and exempt from Florida's public records laws.<sup>71</sup> Only the following entities may access a sealed criminal history record:

- The subject of the record;
- His or her attorney;
- Criminal justice agencies for criminal justice purposes;
- Judges in the state courts system for assisting in their case-related decision-making responsibilities; and
- Certain enumerated entities<sup>72</sup> for licensing, access authorization, and employment purposes.<sup>73</sup>

To seal a record, a person must first apply to the Florida Department of Law Enforcement (FDLE) for a certificate of eligibility, which the FDLE must issue to a person who:

- Has submitted a certified copy of the charge disposition he or she seeks to seal;
- Is not seeking to seal a criminal history record relating to a violation of certain enumerated offenses;
- Meets the criteria for eligibility for a court-ordered sealing as described above.
- Remits a \$75 processing fee to the FDLE, unless such fee is waived.<sup>74</sup>

Upon receiving a certificate of eligibility from the FDLE, a person must petition the court to seal the record.<sup>75</sup> A complete petition contains both a valid certificate of eligibility, issued within the previous 12 months, and a sworn statement from the petitioner attesting to his or her eligibility.<sup>76</sup> It is solely within the court's discretion to grant or deny a petition to seal.<sup>77</sup>

There is no statutory right to a court-ordered sealing and any request for sealing of a criminal history record may be denied at the sole discretion of the court.<sup>78</sup>

If the court grants a petition to seal, the clerk of the court then certifies copies of the order to the appropriate state attorney or the statewide prosecutor, the arresting agency, and any other agency that has received the criminal history record from the court. The arresting agency must provide the sealing order to any agencies that received the criminal history record information from the arresting agency. The FDLE must provide the order to the Federal Bureau of Investigation.<sup>79</sup>

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<sup>69</sup> Section 943.045(19), F.S.

<sup>70</sup> Section 943.059, F.S.

<sup>71</sup> Sections 943.059(6) and 119.07(1), F.S.; Art. I, s. 24(a), Fla. Const.

<sup>72</sup> Section 943.059(6)(b), F.S., provides that enumerated entities include criminal justice agencies, The Florida Bar, the Department of Children and Families, the Division of Vocational Rehabilitation within the Department of Education, the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Health, the Department of Elderly Affairs, the Department of Juvenile Justice, the Department of Education, a district school board, a university laboratory school, a charter school, a private or parochial school, a local governmental entity that licenses child care facilities, the Division of Insurance Agent and Agency Services within the Department of Financial Services, and the Bureau of License Issuance of the Division of Licensing within the Department of Agriculture and Consumer Services.

<sup>73</sup> Sections 943.059(6)(a), F.S.

<sup>74</sup> Section 943.059(2), F.S.

<sup>75</sup> Section 943.059(3), F.S.

<sup>76</sup> Section 943.059(2)(b), F.S.

<sup>77</sup> Section 943.059, F.S.

<sup>78</sup> Section 943.059(4)(e), F.S.

<sup>79</sup> Section 943.059(5)(b), F.S.

A person who has his or her criminal history record sealed may lawfully deny or fail to acknowledge arrests relating to the records that were sealed. However, there are several exceptions for which a person must disclose this information, including when a person is applying for certain state employment positions, seeking certain professional licenses, purchasing a firearm, applying for a concealed weapons permit, seeking expunction, or if the subject is a defendant in a criminal prosecution.<sup>80</sup>

### ***Automatic Sealing of Criminal History Record***

The FDLE must automatically seal a criminal history record that does not result from an indictment, information, or other charging document for a forcible felony as defined in s. 776.08, F.S.,<sup>81</sup> or for an offense enumerated in s. 943.0435(1)(h)1.a.(I), F.S.,<sup>82</sup> if:

- An indictment, information, or other charging document was not filed or issued in the case giving rise to the criminal history record;
- An indictment, information, or other charging document was filed in the case giving rise to the criminal history record, but was dismissed or nolle prosequi by the state attorney or statewide prosecutor or was dismissed by a court of competent jurisdiction. However, a person is not eligible for automatic sealing under this section if the dismissal was pursuant to s. 916.145, F.S., or s. 985.19, F.S.;<sup>83</sup>
- A not guilty verdict was rendered by a judge or jury. However, a person is not eligible for automatic sealing under this section if the defendant was found not guilty by reason of insanity; or
- A judgment of acquittal was rendered by a judge.

The clerk of court must transmit a certified copy of the disposition of the criminal history record to the FDLE, which must seal the record. The automatic sealing of such records does not require sealing by the court or other criminal justice agencies, or that such record be surrendered to the court, and such record must continue to be maintained by the department and other criminal justice agencies.<sup>84</sup>

## **III. Effect of Proposed Changes:**

### **DBPR Licensing and Criminal Background**

SB 1302 revises the process by which a regulatory board within the DBPR may consider the criminal background of license applicants. The process for considering the criminal background of a license applicant applies to all professions licensed by a regulatory board within the DBPR.

<sup>80</sup> Section 943.059(6)(b), F.S.

<sup>81</sup> See *supra* n. 24.

<sup>82</sup> Section 943.0435(1)(h)1.a.(I), F.S., defines the term “sexual offender” as a person who has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in this provision in Florida or similar offenses in another jurisdiction.

<sup>83</sup> Section 916.145, F.S., relates to the dismissal of charges for certain crimes due to the mental illness of a defendant. Section 985.19, F.S., relates to the stay of juvenile delinquency proceedings due to the incompetency of the child named in the juvenile delinquency petition to proceed with a hearing.

<sup>84</sup> Section 943.0595, F.S.

The bill amends s. 455.213(3), F.S., to prohibit DBPR's regulatory boards from inquiring into, or considering the conviction history of, an applicant for license until the applicant is determined to be otherwise qualified for licensure.

The bill also amends s. s. 455.213(3), F.S., to repeal the prohibition against denial of an application on the basis of a conviction, or any other adjudication, for a crime more than five years before the date of application.

Under the bill, the following criminal background information may not be used, distributed, or disseminated by the DBPR, its agents, or political subdivisions<sup>85</sup> in connection with a license application:

- An arrest without a valid conviction;
- A conviction that has been sealed, dismissed, or expunged;
- Misdemeanor convictions without incarceration;<sup>86</sup> and
- Noncriminal infractions.

The bill also repeals the provision authorizing a board to consider the criminal history of an applicant for licensure if the criminal history has been found to relate to good moral character. However, many of the practice acts for professions regulated by the DBPR require the license applicant to be of good moral character.

The bill provides several factors for a board to consider when determining if the criminal history of an applicant directly relates to the practice of the applicable profession for which the license is sought or held. The bill does not require a board to consider these factors when reviewing a criminal history for a misdemeanor with incarceration. In determining if a felony conviction<sup>87</sup> directly relates to the practice of the applicable profession for which the license is sought or held, the bill requires the applicable board to consider:

- The nature and seriousness of the conviction;
- Whether the conviction directly relates to the practice of the applicable profession for which the license is sought or held;
- Whether the duties and responsibilities of the profession provide the opportunity for the same or a similar offense to occur;
- Whether circumstances leading to the offense for which the person was convicted will recur in the profession;
- The age of the person at the time the felony was committed;
- The length of time since the conviction;

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<sup>85</sup> Section 1.01(8), F.S., defines the term "political subdivision" to include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state. By definition, the term "political subdivision" does not apply to divisions within a state agency. The provisions of ch. 455, F.S., only apply to the regulation of professions by the DBPR.

<sup>86</sup> There are two classes of misdemeanors in Florida. Both classes may result in a period of imprisonment, i.e., incarceration. Section 775.082, F.S., provides that a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S. provides that a misdemeanor of the second degree is punishable by a fine not to exceed \$500. Section 775.082, F.S., provides that a misdemeanor of the first degree is punishable by a term of imprisonment not to exceed one year. Section 775.083, F.S. provides that a misdemeanor of the first degree is punishable by a fine not to exceed \$1,000.

<sup>87</sup> A crime for which the term of imprisonment is one year or more is a felony. See 775.082(3), F.S.

- All circumstances relative to the felony, including mitigating circumstances or social conditions surrounding the commission of the felony; and
- Evidence of mitigation or rehabilitation and the applicant's current ability to practice the profession competently in accordance with the actual practice of the profession.

If the board intends to deny a license application solely or in part on the basis of the applicant's prior felony conviction, the board must notify the applicant in writing of the following before making a final decision:

- Identify the reasons for the potential denial;
- Provide a copy of any criminal history record; and
- Provide examples of evidence of mitigation or rehabilitation and the current ability to practice the profession competently in accordance with the actual practice of the profession which the applicant may voluntarily provide.

The bill provides that an applicant who has been convicted of an offense that directly relates to the practice of the profession for which a license is sought may not be denied the license if he or she can show evidence of mitigation or rehabilitation and the current ability to practice the profession competently in accordance with the actual practice of the profession.

Under the bill, the license applicant has 10 business days after issuance of the board's written notice to respond with any information, including challenging the accuracy of the information and submitting evidence of mitigation or rehabilitation and his or her current ability to practice the profession competently in accordance with the actual practice of the profession.

The bill provides that the applicant's evidence of mitigation or rehabilitation and the applicant's current ability to practice the profession competently in accordance with the actual practice of the profession may be established by:

- Proof of compliance with the terms and conditions of probation or parole; or
- Other evidence, including, but not limited to, letters of reference or program or education certificates.

If an applicable board denies an application for a license solely or in part on the basis of the applicant's prior felony conviction, the applicable board must notify the applicant in writing of the:

- Final denial;<sup>88</sup>
- Appeal process;<sup>89</sup>
- Applicant's eligibility for other licenses or professions; and
- Earliest date the applicant may reapply for a license.

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<sup>88</sup> Section 120.60(3), F.S., requires agencies to give license applicants written notice, personally or by mail, that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act. Unless waived, the agency must deliver or mail to each party's attorney of record and to each person who has made a written request for notice of agency action. The notice must inform the recipient of the basis for the agency decision, inform the recipient of any administrative hearing pursuant to ss. 120.569 and 120.57, F.S., or judicial review pursuant to s. 120.68, F.S., which may be available, indicate the procedure that must be followed, and state the applicable time limits.

<sup>89</sup> *Id.*

### **Court-Ordered Sealing of Criminal History Records**

The bill creates subparagraph (f) of s. 943.059(1), F.S., to require a court to grant a petition for the sealing of a criminal history record if a criminal history record has been automatically sealed pursuant to s. 943.0595, F.S., and the subject of the sealed record presents a certificate of sealing issued by the FDLE. The court must grant the petition for the sealing of a criminal history record even if the person has previously been adjudicated guilty of a criminal offense listed in s. 943.059(1)(b), F.S., or the person has previously secured a sealing or expunction of a criminal record for one of the offenses listed in s. 943.059(1)(e), F.S., which would otherwise make the offense ineligible for sealing or expunction.

The bill also amends s. 943.059(2), F.S., to revise the requirements for the FLDE-issued certificate of eligibility to have a criminal record sealed by the court. Under the bill, the FDLE must issue a certificate of eligibility for sealing to a person who is the subject of a criminal history record that has been sealed by the FDLE pursuant to the automatic sealing of criminal history provisions in s. 943.0595, F.S. The eligibility certificate must indicate that the record has been sealed by the FDLE and is only valid for court-ordered sealing under s. 943.059(1)(f), F.S., of a record already automatically sealed pursuant to s. 943.0595, F.S. This provision applies even if the person seeking the certificate of eligibility does not satisfy the eligibility requirements for a court-ordered sealing, which includes payment of a \$75 processing fee.

### **Effective Date**

The bill takes effect July 1, 2022.

### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The bill also amends s. 943.059(2), F.S., to require the FDLE to issue a certificate of eligibility for sealing to a person who is the subject of a criminal history record that has been sealed by the FDLE pursuant to the automatic sealing of criminal history provisions in s. 943.0595, F.S. The bill exempts the person seeking an eligibility certificate from the payment of the \$75 processing fee. The FDLE anticipates a fiscal impact of \$4,288,960 with \$3,869,260 recurring for 60 additional full time employees (FTEs) to implement the changes in the bill.<sup>90</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill prohibits specified criminal background information from being used, distributed, or disseminated by the DBPR, its agents, or “political subdivisions” in connection with a license application. Section 1.01(8), F.S., defines the term “political subdivision” to include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state. By definition, the term “political subdivision” does not apply to divisions within a state agency.

Section 120.60(1), F.S., requires an agency to approve or deny a license application within 60 days of receipt of a completed application. The bill requires boards within the DBPR to give an applicant who has been convicted of an offense that directly relates to the practice of the profession for which a license is sought an opportunity to show evidence of mitigation or rehabilitation and the current ability to practice the profession competently in accordance with the actual practice of the profession. Under the bill, the license applicant has 10 business days after issuance of the notice to respond with any information, including challenging the accuracy of the information and submitting evidence of mitigation or rehabilitation and his or her current ability to practice the profession competently in accordance with the actual practice of the profession. This process does not toll the 90-day period in s. 120.60(1), F.S., during which an agency must approve or deny a completed license application.

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<sup>90</sup> Florida Department of Law Enforcement, *2022 Agency Legislative Bill Analysis for SB 1302* (Jan. 13, 2022) (on file with the Senate Committee on Regulated Industries).

The bill also provides that, if an applicable board denies an application for a license solely or in part on the basis of the applicant's prior felony conviction, the applicable board must notify the applicant in writing of the applicant's eligibility for other licenses or professions. It is not clear whether the board obligation to advise an applicant regarding their eligibility for other licenses or professions is limited to licensed professions within the board's jurisdiction. It is also not clear whether the board may be able to ascertain the applicant's eligibility for another profession based on the information provided to the board in the application it has denied.

Additionally, the bill also provides that, if an applicable board denies an application for a license solely or in part on the basis of the applicant's prior felony conviction, the board must provide an applicant who has been denied a license of the basis of their criminal history with written notice of the earliest date by which the applicant may reapply for a license. The bill requires a board to permit an applicant to provide evidence of mitigation or rehabilitation and the applicant's current ability to practice the profession competently in accordance with the actual practice of the profession. A board may not be able to anticipate when an applicant will be able to provide evidence of mitigation or rehabilitation and the applicant's subsequent ability to practice the profession competently in accordance with the actual practice of the profession.

#### **VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 455.213 and 943.059.

#### **IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

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

None.

**B. Amendments:**

None.