



**Regulatory Package 16A-66 (Consideration of Criminal Convictions)  
Violates the Letter and the Intent of Act 53 of 2020  
With Its “Directly Related” Lists Leading to a Presumption of Unfitness**

**Submitted by Community Legal Services, Inc., December 16, 2022**

During the height of the pandemic in 2020, the Pennsylvania General Assembly made a priority of approving Act 53, known as the occupational licensing reform bill. The bill was guided to passage by bipartisan lead sponsors and supported by both conservative and liberal advocates, including the Pennsylvania Chamber. The goal of all concerned was obvious: to open occupational licensure to people with old and unrelated criminal convictions, helping both Pennsylvania families and businesses.

But the Bureau of Professional and Occupational Affairs (BPOA) and its boards and commissions, which were tasked with drafting implementing regulations and generating lists of “directly related” offenses, have missed the boat. In its regulatory package, the bureau repeatedly says that the purpose of Act 53 was to provide “transparency and clarity” about what crimes can be disqualifying. Given the bureau’s fundamental misconception of the point of the law, its proposed regulations undermine, rather than support, Act 53’s goal of opening the licensed occupations to people with unrelated criminal records.

The regulatory package includes “directly related” lists of criminal offenses that carry a presumption of unfitness of a license applicant. These lists are generally overbroad, and in no instance is any offense time limited. Although the presumption of unfitness may be overcome in an individualized assessment, that step will not occur until *after* completion of training. Few people will be able to devote the time and resources to a training program for a profession knowing that they face such a presumption at the end. In this way, the proposed regulations frustrate the purpose of Act 53 by deterring and excluding low-risk people with criminal convictions.

The proposed regulatory package must be revised before it can be approved.

- Its lists of “directly related” offenses must be revised.
- Each offense must have a time limit for how long the presumption continues.
- These changes must be made through an evidence-based process.

These recommendations by Community Legal Services, Inc. (CLS) are bolstered by two expert reports that we commissioned, with the support of funding by Arnold Ventures. The report of Dr. Toni S. Locklear, an Industrial-Organizational Psychologist whose expertise focuses on determining the job-relatedness of criminal offenses, reviews the “directly related” lists previously published by the boards and commissions and identified deficiencies. The report of Dr. Kiminori Nakamura, a criminologist, discusses redemption and recidivism research implications for Act 53. These reports are Appendices B and C, respectively.

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**I. Background: The regulatory package undermines Act 53’s primary goal of removing barriers to the licensed professions for people with criminal records who present minimal risk of workplace misconduct**

**A. Scope and description of the population affected by Act 53**

A 2018 report by the Department of State provides an informative snapshot of the scope of occupational licensure in the Commonwealth and the size of the licensed occupations.<sup>1</sup> The incidence of licensure is significant: 20.2% of Pennsylvania’s workforce has occupational licenses, comprising over one million people.<sup>2</sup>

Housed within the Department of State, BPOA in turn houses 29 boards and commissions to which it provides administrative, logistical and legal support.<sup>3</sup> The boards and commissions that oversee the largest numbers of licensees are:

- Nursing (312,586 licensees)
- Medicine (135,995)
- Cosmetology (128,636)
- Real estate (65,877)
- Engineers/surveyors/geologists (53,109)
- Pharmacy (43,533)

By contrast, the State Navigation Commission regulates only 42 licensees.<sup>4</sup>

Other notable licensed occupations within BPOA include architects, accountants, barbers, dentists, massage therapists, occupational therapists, physical therapists, psychologists, social workers, vehicle dealers and salespersons, and veterinarians.<sup>5</sup>

However, not all regulated occupations are within the ambit of BPOA. Teachers and attorneys are regulated by the Pennsylvania Department of Education and the Supreme Court of Pennsylvania, respectively.<sup>6</sup> Other professions are governed in some respect by statute (such as security guards, who generally are governed by the Private Detective Act)<sup>7</sup> or have certifications instead of licenses (such as certified nursing assistants).

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<sup>1</sup> Pa. Dept. of State, *Review of State Professional and Occupational License Requirements and Processes*, June 11, 2018, available at <https://www.dos.pa.gov/ProfessionalLicensing/Documents/EO2017-03-Executive-Report-Occupational-Licensing.pdf> (hereinafter “*Department Report*”).

<sup>2</sup> *Id.* at 16-17.

<sup>3</sup> *Id.* at 14.

<sup>4</sup> *Id.* at 17-18.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 14.

<sup>7</sup> 22 P.S. §23.

In sum, BPOA's regulation of Pennsylvania workers is extensive. As a consequence, Act 53's rules regarding the consideration of criminal records have an outsized impact on job entrance in many of the most significant professions in the Commonwealth. Moreover, job entrance has even broader ramifications for the Commonwealth beyond just its workers. For instance, as noted in the Department's report, licensure-caused barriers to entry can make health care more expensive and less accessible.<sup>8</sup>

## **B. Act 53 was a bipartisan priority of the General Assembly**

Along with the Justice Action Network (JAN), CLS was one of the original advocates for occupational license reform to address consideration of criminal records. These organizations had partnered on the state's groundbreaking Clean Slate automated sealing law several years earlier.

CLS has been a national leader in representation and advocacy for people with criminal records. It has advised and represented more than 10,000 Philadelphians whose criminal records presented barriers to employment.

Before Act 53 was passed, occupational licensing reform with respect to consideration of criminal records was needed for four reasons, the first of which was by far the most significant.

- **The law was overbroad.** It allowed the boards to reject anyone with a felony conviction, no matter how old the offense was.<sup>9</sup> Thirteen boards were prohibited from issuing licenses to people with drug felony convictions until at least 10 years had passed.<sup>10</sup> Many persons convicted of certain offenses, such as simple assault and theft by unlawful taking, were disqualified on the grounds that they had committed "crimes of moral turpitude."<sup>11</sup>
- **Application of the law was inconsistent.** Discretion to apply these standards was invested in the boards and commissions, who are primarily comprised of practitioners in the occupations, along with some members of the public.<sup>12</sup> Few have expertise in criminal records issues.
- **The results were unpredictable for people seeking to enter a profession.** People with criminal records were forced to go through extensive and expensive training without knowing whether they would be excluded when it came time to be licensed. In CLS's experience, many of our clients gave up on their dream jobs because of this uncertainty.
- **The outcomes were susceptible to racially disparate results.** Because Blacks and Hispanics are convicted of crimes at disproportionate rates, consideration of criminal records tends to disproportionately keep them out of the licensed professions, as they have been shown to do in other employment situations.<sup>13</sup>

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<sup>8</sup> *Department Report*, *supra* note 1, at 18.

<sup>9</sup> 18 P.S. §9124(c)(repealed as to BPOA boards and commissions by Act 53).

<sup>10</sup> *Department Report*, *supra* note 1, at 24-25.

<sup>11</sup> *Id.* at 28-29.

<sup>12</sup> *Id.* at 15.

<sup>13</sup> Equal Employment Opportunity Commission, Enforcement Guidance, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act* (April 25, 2012),

CLS's view of the need for occupational license reform was shared by legislators in both parties and in both chambers of the General Assembly. In the House, Rep. Sheryl Delozier (R-Cumberland) and Rep. Jordan Harris (D-Philadelphia) were the lead sponsors on HB 1477. In the Senate, Sen. John DiSanto (R-Dauphin) and Sen. Judith Schwank (D-Berks) were the leads on SB 637.

In their co-sponsorship memorandum, Senators DiSanto and Schwank described their intended legislation as follows.

In the near future, we will introduce legislation to create a fair, modern set of rules for consideration of criminal records in occupational licensure, which will remove unnecessary barriers to employment and entrepreneurship.

Our legislation will require occupational licensure boards and commissions to apply one common set of rules when considering whether to deny, suspend, or revoke a license on the basis of a criminal conviction. It will amend the Criminal History Record Information Act (CHRIA) to require that boards only withhold a license for convictions which are directly related to the practice of the occupation, and that the boards consider the nature of the offense, the amount of time that has passed since conviction, evidence of the applicant's fitness to practice the occupation, and other relevant factors prior to withholding a license.

Over thirty occupational fields require a government license or registration in Pennsylvania and under current law, many people who have paid their debts to society after incarceration are hindered from reentering the workforce when boards deny licenses due to convictions unconnected to the practice of their desired profession. This wastes taxpayer dollars as state correctional institutions regularly train inmates in professional skills only for the person to be subsequently denied a license to practice.

Our legislation will also require that boards publish regulations to explain how the new CHRIA rules will be applied in the context of a particular profession and provide that interested persons can request pre-application notice of whether their criminal history records pose a potential barrier to licensure. This will ensure that boards use criminal records in a fair and consistent way, and that individuals considering a training program have a fair opportunity to learn in advance what types of criminal history can be expected to pose a barrier to licensure.<sup>14</sup>

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available at: <https://www.eoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.

<sup>14</sup> Memorandum from Senator John DiSanto and Senator Judith Schwank to All Senate Members on Occupational Licensure Reform, April 3, 2019, available at <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=29091>.

During the pendency of the bills, business also joined to support them. The Pennsylvania Chamber of Business and Industry praised the bills for adding suitable professionals to a tight Commonwealth workforce in an environment in which businesses struggled to fill vacancies.

Even with the emergence of the covid pandemic and the enormity of the challenges that it presented for state government, SB 637 quickly made its journey through the legislative process. On June 24, 2020, the Senate unanimously rendered its final concurrence with the bill as amended by the House. In his floor remarks, Sen. DiSanto said:

Today, we take a major step forward in overhauling our State's restrictive occupational licensure laws that deny many qualified residents the right to work because of an old or irrelevant criminal record. State licensing boards and commissions must now give applicants individualized consideration and review one's demonstrated rehabilitation and fitness for the job. Licensing entities will no longer be able to deny job licenses for vague and broad terms, such as moral turpitude, and must consider if an offense is directly related to the profession.

My legislation also requires licensing entities to develop clear and accessible guidelines for what crimes are directly job-related and will be applied in licensure decisions. The bill even allows for prospective applicants to petition for preliminary determinations so they do not waste time and money on training and education only to be later denied a job license. Senate Bill No. 637 provides much-needed balance, predictability, and transparency to a licensing process that has been a disservice to our entire Commonwealth and what its skilled workforce needs.

I thank my cosponsor, Senator Schwank, as well as Representative Delozier and Representative Harris, for making this proposal a bipartisan success.<sup>15</sup>

Senator Schwank added:

I had the opportunity, a few years ago, to visit the correctional institute at Muncy. It is one of the two women's correctional institutes in the Commonwealth, and I had the opportunity to watch a class where women were learning hairdressing skills. I did not have the opportunity to talk with them, but they were so engaged in the work that they were doing. I thought to myself how this is so beneficial, that these women are learning a skill, they can go back to their communities, have a career, have the ability to support their families, and become productive members of society. I did not realize at the time how difficult that is because of the outdated, archaic way that we provide licenses to individuals in careers that require them.

So, this legislation, I think, will take some of that subjectivity that Senator DiSanto talked about out of this process, give people more of a chance to be able to work in

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<sup>15</sup> 2020 Legislative Journal – Senate (June 24, 2020), page 662.

the fields that they want to, and fulfill their life's goals. We talk a lot about criminal justice reform, and we have made great strides. We also, by this bill, in a very important way, are helping those individuals who are returning to society to be able to work in the careers that they wish to. But not just them, because the way the system works right now, this could happen to anybody, and you just do not have much of a chance to overcome this process.<sup>16</sup>

On July 1, 2020, Governor Wolf signed SB 637, which became Act 53 of 2020. The Act went into effect on December 28, 2020.

### **C. Changes to consideration of criminal records made by Act 53**

As Sen. DiSanto indicated, Act 53 substantially changed the consideration of criminal records by the BPOA boards and commissions. Gone are the boards' ability to disqualify applicants for all felonies without any time restrictions, the occupation-specific lists of disqualifying offenses in the "practice acts," and disqualifications for "crimes of moral turpitude" and similar concepts.

In their place is a new two-stage method of evaluating criminal records. Stage 1 involves a determination of whether an applicant's offense is on a published list of crimes as "directly related" to the profession applied for. If yes, then the board will then consider whether the person poses a "substantial risk" by conducting an individualized assessment."<sup>17</sup> ***There is a presumption that the person would pose a substantial risk to the health and safety of clients or of future offending.*** The applicant is permitted to rebut this presumption with evidence of rehabilitation.<sup>18</sup>

Stage 2 requires that even if the offense is not on the board's "directly related" list, the board must determine whether the conviction, due to its nature, poses a substantial risk. If so, the board conducts an individual assessment, and the person can produce evidence of rehabilitation.<sup>19</sup>

The "directly related" lists for each profession were to be published by the Commissioner of BPOA, in consultation with its boards and commissions and the business community. Ultimately, the lists were required to be published for regulatory review, which is a major reason for the current regulatory package and the opportunity for public comment and review by the Independent Regulatory Review Commission (the IRRC).<sup>20</sup> Preliminary versions of these lists were developed and posted on the boards and commissions' websites, with notice given to the public on December 26, 2020.<sup>21</sup>

On the surface, this method for evaluating criminal records provides for a great deal of individualized consideration. However, the "directly related" lists have an outsized importance for a simple reason: the individualized analysis is only done after training has been completed and

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<sup>16</sup> *Id.* at 662-63.

<sup>17</sup> The law sets out 11 factors to be considered in an individualized assessment. 63 Pa. C.S. §3113(c).

<sup>18</sup> 63 Pa. C.S. §3113(b)(1).

<sup>19</sup> 63 Pa. C.S. §3113(b)(2).

<sup>20</sup> 63 Pa. C.S. §3117.

<sup>21</sup> Volume 50, *Pennsylvania Bulletin*, page 7316, December 26, 2020.



license applications are submitted. *Applicants will not know before entering training whether their conviction will be disqualifying or not after individualized consideration. They will only know whether their offense will be presumed to make them a substantial risk.* For this reason, the “directly related” lists must be appropriately tailored, in order to avoid presenting the barriers to occupational entry that were discussed so eloquently by Act 53’s sponsors.

#### **D. BPOA and the boards’ “directly related” lists reflect their misunderstanding of the goals of Act 53**

Notwithstanding the clear intentions of all who collaborated on Act 53, most notably the members of the General Assembly, the “directly related” lists promulgated by the boards and commissions are breathtaking in their scope, as is discussed in the next two sections of these comments. Perhaps this flaw follows from BPOA and the boards’ misunderstanding of the point of Act 53.

One searches in vain in the Notice of Proposed Rulemaking (NRP)(which is published in the *Pennsylvania Bulletin*) or the Regulatory Analysis Form (RAF)(which is not published but was submitted to the IRRC) for *any* indication that removing barriers to access to the professions for people with criminal records was *any goal*, much less *the primary goal*. Instead, these documents are replete with references to “transparency and clarity” as the primary goal, as if the General Assembly made a point of enacting occupational licensing reform during the height of an unprecedented pandemic just so ex-offenders could have clarity that their offenses were going to keep them out of their profession of choice.

The most notable discussion of the goals perceived by BPOA was in answer to Question #10 in the RAF, where they were asked to address why the regulation is needed and to explain the “compelling public interest.” The answer states in pertinent part:

***The regulation is needed to provide transparency and clarity to applicants with criminal histories relating to the types of crimes that may be an impediment to licensure and the factors that the boards and commissions will consider in determining whether an applicant with a criminal conviction may be granted a license. It is also intended to level the playing field at application hearings, because all parties will be aware of which crimes are deemed to be directly related to the professions/occupations, resulting in a rebuttable presumption that licensure of the individual would pose a significant risk to the health and safety of the individual’s patients or clients or a significant risk of further criminal convictions. It will also assist applicants to determine what kinds of evidence they may need to bring forth at a hearing in an application case by providing the list of factors that the boards and commissions may consider in determining whether to grant a license notwithstanding the conviction.***

Regulatory Analysis Form, at 2 (emphasis added).

This is not an isolated paragraph that has been cherry-picked. The NPR also explains:

This proposed rulemaking is *intended to provide transparency* to applicants with criminal histories relative to the types of crimes that may be an impediment to licensure and the factors that the boards and commissions will consider in determining whether an applicant with a criminal conviction may be granted a license....

52 Pa.B. 7108 (November 19, 2022)(emphasis added.) “Transparency and clarity” are also referenced in the RAF at pages 3, 12, and 13 (twice). Nowhere is access to the professions even mentioned.

Increasing clarity and transparency about the criminal record barriers to licensure, without lessening those barriers, will actually make the situation worse than it was before Act 53. This impact makes doubly clear that these regulations are inconsistent with the intent of Act 53.

BPOA and its boards and commissions either fail to understand or reject the actual primary purpose of Act 53. This misunderstanding must have led to the promulgation of “directly related” lists that overbroadly presume that formerly convicted persons present risk, as is discussed in the next two sections.

## **II. Proposed Lists of “Directly Related” Offenses Are Far Too Broad And Must Be Substantially Revised**

The promulgated lists of “directly related” crimes are in many cases far too broad, encompassing many offenses which do not meet Act 53’s definition of the term. The statute defines this term of art:

“Directly relates.” The nature of the criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform one or more of the duties or responsibilities necessarily related to the profession, trade or occupation for which the individual seeks licensure.

63 Pa. C.S. §3102.

Offenses meet this definition if they satisfy two primary components.

**1) They are related to *necessary* duties of the profession, not to duties that apply sometimes or are optional.** To comply with the dictates of Act 53, the professional obligations to be considered must apply generally in all cases in which a particular profession might be practiced, rather than to concerns that might arise depending upon differing duties and job settings at various specific jobs. If a professional can practice their profession without meeting a particular duty, then that duty is not necessarily related to the profession. *For responsibilities unique to a particular job within the profession, suitability is decided by hiring employers, not licensure.*

**2) They *directly* bear on whether someone is fit and able to do those necessary duties.** Creation of the lists likewise requires consideration of whether various offenses in the crimes code bear a meaningful relationship to the work of the profession.

The “directly related” lists need to be revised so that all listed offenses actually meet this definition. This section of our comments analyzes in detail several reasons why the BPOA’s proposed lists are overbroad and must be revised. *Appendix A enumerates those offenses which must be deleted from the “directly related” lists for five boards: Barber Examiners; Cosmetology; Nursing; Occupational Therapy; and Physical Therapy.* CLS selected these lists for detailed analysis because these professions present particularly important employment options for our client population.

In the case of the Nursing Board, we strongly encourage the Board to pay particular attention to two sources of expertise. First, comments are being submitted by several professional organizations representing thousands of rank-and-file practitioners in the nursing field. These organizations are intimately familiar with the requirements of nursing, and they propose a much more narrowly tailored list of “directly related” offenses.

Second, Dr. Locklear conducted a demonstration exercise with an expert panel of nurses to review the Nursing Board’s proposed list, giving very careful attention to the professional requirements and the elements of numerous offenses on it. Under Dr. Locklear’s guidance, the nurses reached very thoughtful and nuanced conclusions about which offenses should or should not be on the “directly related” list. These results are discussed in the concluding section of Dr. Locklear’s report, found in Appendix B.

**A. Offenses are included that do not meet Act 53’s definition of “directly related”**

The promulgated lists for numerous boards fail to meet the standard set out in Act 53: they include many offenses which do not have any direct bearing on the applicant’s fitness or ability to perform duties necessarily related to the profession. This is true of, among others, the state boards of Nursing, Barber Examiners, Cosmetology, Physical Therapy and Occupational Therapy.

Perhaps the most obvious example of this overinclusion is the offense of driving under the influence (DUI), 75 Pa. C.S. §3802. A DUI conviction indicates that, on one occasion, the applicant for licensure was found to have been operating a motor vehicle while impaired by drugs or alcohol. The boards of Barber Examiners and Nursing have listed DUI as a directly related offense. However, safely operating a motor vehicle is not a duty which is necessarily related to either of these professions. Although sobriety while working is of course important to perform nursing or barbering, a DUI conviction, by itself, has no direct bearing on an applicant’s fitness to perform the duties of these professions. Simply having a DUI conviction does not prove that an applicant has an ongoing alcohol dependency, nor does a DUI have a bearing on the applicant’s ability to be sober while on the job.

Of course, the specific facts and circumstances of a particular applicant’s DUI offense might be relevant to their ability to perform the work of one of these professions. In such a case, the board would still have the full ability to consider that offense in connection with an application for

licensure, in the second stage of the analysis of the conviction. 63 Pa. C.S. §3113(b)(2). Moreover, boards will always retain the ability to discipline licensees who perform in an unprofessional manner as a result of alcohol dependency. What the boards of Nursing and Barber Examiners cannot do, consistent with Act 53, is to list DUI as one of the offenses which is automatically, by law, a “directly related” offense, and thereby creates a presumption of unfitness. In the relatively unusual circumstances that driving is a job duty, such as for a visiting nurse, the employer may consider the offense, but the person should not be barred from the entire nursing profession just because such jobs exist.

Another example of non-compliance with Act 53’s directive is the many crimes listed by the Board of Nursing under chapters 39, 41, 49, 51, 73 and 76 of the Crimes Code.<sup>22</sup> These offenses encompass potential behaviors that are only distantly related to the work of nurses – and sometimes completely unrelated (such as “witness or informant taking bribe”). To the extent they suggest a generalized “tendency towards dishonesty,” that is the type of vague, overbroad category of crimes referred to as “lack of good moral character” or “crimes of moral turpitude.” Act 53 explicitly directs boards not to deny or revoke licensure on the basis of crimes that supposedly display a generalized character trait. 63 Pa. C.S. §3113(a)(1). Moreover, the Board is incorrect to assert that crimes of dishonesty have a special relationship to nursing. While we want all people, including nurses, to be honest, having unmonitored access to an incapacitated patient’s valuables is not an essential part of nursing – it is something that many nurses never experience.

#### **B. Lists include offenses omitted from the lists for directly analogous professions**

The need to revise the lists is especially evident in the obvious inconsistencies between the lists for professions which perform similar duties in similar settings with nearly identical patients or clients. The most striking example is the discrepancy between the lists for the boards of Nursing and Medicine. The Board of Medicine has, quite appropriately, drafted a much more limited set of offenses than the Board of Nursing, hewing much more closely to the definition of offenses that actually are “directly related” to the work of doctors. The Board of Medicine lists only 27 individual offenses as “directly related,” while the Board of Nursing lists at least 92 offenses, notwithstanding that nurses and doctors will generally perform very similar work and often have access to literally the same patients. The Board of Medicine does not list simple assault or harassment, any theft crimes, any forgery or similar fraudulent practices, or at least 11 of the falsification-related offenses that the Board of Nursing proposes to include.

The nursing board has published a “rationale” statement, available on the Department’s website,<sup>23</sup> setting forth a justification for keeping so many offenses on the list, but which does not meet the standard of Act 53. For instance, for crimes involving fraud or theft, the rationale statement indicates, “Nurses also provide around the clock care, working [in] settings where there is often no direct supervision of the nurse... there may be periods where the individual [dependent on a

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<sup>22</sup> Respectively, Chapter 39 - Theft; Chapter 41 - Forgery and Fraudulent Practices; Chapter 49 - Falsification and Intimidation; Chapter 51 - Obstructing Governmental Operations; Chapter 73 - Trade and Commerce; Chapter 76 - Computer Offenses.

<sup>23</sup> Available at

<https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Documents/Board%20Documents/Act-53-List-Rationale.pdf> (last visited Dec. 12, 2022).

nurse's care] is...incapacitated.” [Emphasis added.] This statement shows the lack of a true justification to keep so many theft offenses on the “directly related” list, because nurses generally will **not** have unfettered access to a patient’s valuables, and nurses generally work in settings where there **is** direct supervision. Thus, many theft offenses, especially less-serious misdemeanor offenses, do not have a direct bearing on the fitness to perform the duties necessarily related to nursing. Please see the full list in Appendix A for the offenses that should be deleted from the Nursing Board’s list.

This point is all the more glaring in that these offenses are not listed by the Board of Medicine. Some doctors work overnight shifts where they may sometimes have unfettered access incapacitated patients and their valuables, yet the Board of Medicine recognizes that many crimes of dishonesty are not actually directly related to the overall work of a healthcare practitioner.

Another glaring example is the disjuncture between the lists of the boards of Barber Examiners and Cosmetology. There is no logical reason why drug dealing felonies, 35 P.S. §780-113(a)(30), and DUI should be on the Barber Board’s list when the Cosmetology Board has correctly omitted them. Conversely, the Cosmetology Board has included seven different offenses from Chapter 41 of the Crimes Code (including forgery, receiving deposits in a failing financial institution, and misapplication of entrusted property and property of government or financial institutions) which were omitted by the Barber Examiners. Barbering and cosmetology are twinned professions -- the laws governing each one have typically been drafted with an eye to compatibility with the other, and they concern extremely similar activities which take place in extremely similar settings. Logically, crimes which are not directly related to cosmetology are not directly related to barbering either, and vice versa.

**C. Lists include offenses which are not related to the respective professions under Pennsylvania law, as explained by Pennsylvania courts**

Some boards have included offenses where the only possible justification is that the offense could be committed in some type of business establishment or committed against an individual victim. One prime example is recklessly endangering another person, a common misdemeanor which is included by the Boards of Barber Examiners, Cosmetology, and Physical Therapy. Pennsylvania law, however, has already established that this type of vague, unfocused, generalized concern does not qualify to make an offense legally “related” to a business or profession.

Pennsylvania courts have explained that, under Pennsylvania law, where the possibility of criminal activity arises only from the fact that the professional setting is a commercial establishment, not from the specific nature of the licensed profession, and would be equally present in other commercial establishments, that criminal activity is not related to the practice of the profession. See Fulton v. Commonwealth, 169 A.3d 718 (Pa. Commw. 2017). In Fulton, the Board refused to reinstate a barber license on the grounds of a conviction for selling drugs, but the Commonwealth Court reversed, since “[t]he possibility of drug sales... would be equally present in other commercial establishments, such as corner grocery or convenience stores, that are not subject to professional licensure requirements.” Id. at 726. Thus, selling drugs was not related to barbering as a profession.

Mere supposition that a licensee who had harmed someone in the past could, in theory, have access to and harm someone of a vulnerable population has been rejected by the courts as insufficient grounds to deny or revoke a license. See, e.g., King v. Bureau of Professional and Occupational Affairs, State Board of Barber Examiners, 195 A.3d 315, 329-330 (Pa. Commw. 2018). In King, the Commonwealth Court found that a conviction for involuntary deviate sexual intercourse was not sufficient grounds to deny barber license, because it bore no relation to the job; speculative concerns about King’s access to children arose from the simple fact that a barbershop is a commercial establishment, not from the nature of barbering as a licensed profession. Id. at 321, 330.

Finally, the inclusion of harassment as a “directly related” offense by the nursing board is yet more evidence that these lists were composed with little consideration of existing Pennsylvania law. Harassment is typically a summary-level offense, see 18 Pa. C.S. § 2709. By law, it is illegal for a board to use a summary offense in consideration of an application for a license. 18 Pa. C.S. §9124(b)(3). The nursing board lists purports to give the board authority to do something which is already illegal under state statute.

#### **D. Crimes of violence are too broadly included on many lists**

Act 53 already incorporates a catalog of crimes of violence which the General Assembly has determined are, by their very nature and severity, to be considered as automatically related to the conduct of all licensed professionals. 63 Pa. C.S. §3113(e). While these automatically related offenses include two particularly serious forms of aggravated assault, aggravated assault of less serious forms and reckless endangerment are not in the legislature’s catalog.

Where a crime of violence is not part of the Act 53 “automatically related” catalog, it must meet the definition of “directly related” in order to be included on a board’s individual crimes list. A simple generalized concern for the possibility of future aggression is too vague and unfocused to have a direct bearing on an applicant’s ability to perform a specific responsibility of the profession.

The boards that have included these less serious crimes have not actually provided any specific explanation of how they are directly related to the specific profession. Given that the legislature has decided which crimes of violence are directly related to all licensure by virtue of the inherent risk, when the boards lack any particularized justification for why a less serious offense is directly related to their profession, having that offense on the list violates both longstanding law on the relevance of criminal convictions to professional work and the letter and intent of Act 53. Thus, for example, it is not appropriate for the boards of barber examiners and cosmetology to include reckless endangerment and the less serious forms of aggravated assault, or for the board of nursing to include simple assault and harassment.

#### **E. The severity of offenses was not sufficiently considered by the boards**

The board’ lists include minor crimes and do not differentiate between minor and serious crimes, indicating that the boards have not properly considered the severity of the offenses. For example, as stated above, the Nursing Board included Harassment on their list, which is most commonly a very low-level summary offense. In another example, the Nursing Board has included a variety

of theft-related crimes without differentiating between major and minor thefts. Because all theft is treated the same, a theft of less than \$50 (misdemeanor of the third degree<sup>24</sup>) creates the same presumption against licensure as a theft of \$100,000 (felony of the second degree<sup>25</sup>).

Dr. Toni Locklear, an I-O psychologist and expert in the job-relatedness of criminal records, reviewed various boards' preliminary lists as part of a report applying her expertise to Act 53.<sup>26</sup> Her report is contained in Appendix B. Dr. Locklear faulted the boards' lists for failing to take the seriousness of offenses into account.<sup>27</sup> Dr. Locklear states, "the boards should have weighted the criminal code's designation of crimes as "minor" (i.e., misdemeanor or summary), together with the research related to the risk of re-offending when a crime is less severe."<sup>28</sup>

As Dr. Locklear explains, recidivism research tells us that the risk of committing a future crime is lower if a person is convicted of a minor crime. For that reason, she suggests that minor crimes should be excluded from the directly related lists altogether and considered as part of the individualized assessment stage.

Individualized assessment allows for the thoughtful consideration of [factors that significantly decrease the risk of recidivism, including education and post-conviction employment]. Minor crimes should be evaluated as part of an individualized assessment so all factors relevant to recidivism can be assessed prior to making the high-stakes decision to presume risk and potentially exclude otherwise qualified applicants from licensure.<sup>29</sup>

If minor crimes are included in the lists, Dr. Locklear opines that they must be coupled with short time parameters to reflect recidivism research.<sup>30</sup> Time parameters will be discussed in detail in Section III.

#### **F. The boards' failure to apply an evidence-based approach resulted in the inclusion of offenses that are not "directly related"**

The boards and BPOA should have considered an evidence-based approach in which they carefully examined the specific job duties of the profession, identified risk factors, identified related crimes, and determined suitable exclusionary time frames, according to Dr. Locklear. This section of our analysis implicates the first three of the four steps; the next section discusses the fourth.

The "directly related" lists in the proposed regulatory package hew closely to preliminary draft lists created by the boards and commissions and posted on their websites in December 2020. Dr.

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<sup>24</sup> 18 Pa.C.S. §3903.

<sup>25</sup> Id.

<sup>26</sup> Toni S. Locklear, Ph.D., *Evaluation of Pennsylvania Bureau of Professional and Occupational Affairs Boards' Proposed "Directly Related" Crimes Lists under Act 53 of 2020* (hereinafter *Evaluation of BPOA Proposed Lists*), at 10-12 (Appendix B), also available at <https://clsphila.org/wp-content/uploads/2022/12/Toni-Locklear-PhD-Evaluation-of-BPOA-Directly-Related-Crimes-Lists-12.2.22-1.pdf>.

<sup>27</sup> Id. at 13.

<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id.

Locklear reviewed the preliminary lists – which do not differ markedly from those included in this regulatory packet – applying her evidence-based analysis for job relatedness.

Dr. Locklear concluded that the lists were defective in much the same ways that we have explained here:

- Failure to consider occupation-specific duties and responsibilities;
- Disregard of relevant court rulings;
- Different “directly related” crime lists for similar occupations; and
- Reliance on crime lists of boards in other states.<sup>31</sup>

The failure to take an evidence-based approach certainly contributed to lists of offenses that are so overbroad. Dr. Locklear’s report will be discussed in more detail in Section 4 of these comments.

### **III. “Directly Related” Lists Create a *Lifelong* Presumption Against Licensure; Time Since Conviction Must Be Considered When Determining Relatedness So That People with Old Convictions Do Not Face a Presumption of Unfitness**

#### **A. Proposed regulations frustrate the intent of Act 53 by excluding and deterring low-risk people with old convictions**

The proposed regulations frustrate the purpose and intent of Act 53 of 2020 by creating lifetime barriers to licensure. The intent of Act 53 is to open the licensed professions to people with criminal convictions who do not pose a “substantial risk” if licensed and who are “fit” for licensure. People with old criminal convictions are part of this low-risk group. In fact, as explained in detail below, one of the primary factors that determines whether a convicted person poses a risk is the amount of time that has passed since conviction. A person with a recent conviction may pose a heightened risk of committing a crime at work, but a person with an old conviction does not. But while the legislature intended to help people with old criminal convictions, the Department’s regulations do the opposite.

By not having time limits, the boards’ proposed lists of “directly related” crimes do not distinguish between old convictions and recent ones, creating a lifetime barrier to licensure. A 20-year-old conviction to a crime is treated like a conviction from last week: both create a presumption that the convicted person poses a “substantial risk” if licensed, and therefore should not be licensed. As discussed below, this conclusion is factually untrue.

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<sup>31</sup> Toni S. Locklear, Ph.D., *Evaluation of Pennsylvania Bureau of Professional and Occupational Affairs Boards’ Proposed “Directly Related” Crimes Lists under Act 53 of 2020* (hereinafter *Evaluation of BPOA Proposed Lists*), at 10-12 (Appendix B), also available at <https://clsphila.org/wp-content/uploads/2022/12/Toni-Locklear-PhD-Evaluation-of-BPOA-Directly-Related-Crimes-Lists-12.2.22-1.pdf>.



**B. To be consistent with the text of Act 53, the time since conviction must be considered when determining whether a crime is “directly related”**

Lifetime barriers to licensure are inconsistent with Act 53’s definition of “directly related.” Old, stale convictions cannot be deemed “directly related” to professions because they do not *directly bear* on the *fitness* to do a job and do not create a *substantial risk*.

Again, when considering this issue, it is worth returning to the statutory text. Under Act 53, a crime is directly related if:

The nature of the criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform one or more of the duties or responsibilities necessarily related to the profession, trade or occupation for which the individual seeks licensure.<sup>32</sup>

The concepts of “directly related,” “fitness or ability,” and “substantial risk” are closely connected in Act 53. If a person has a “directly related” conviction, that person is presumed to be “a substantial risk to the health and safety of the individual’s patients or clients or the public or a substantial risk of further criminal convictions.”<sup>33</sup> Act 53 seeks to prohibit individuals who pose a substantial risk from being licensed – these are the individuals who are deemed *unfit* under the Act. In other words, the “fitness or ability” requirement must be read in terms of the Act’s intent of avoiding “substantial risk” and protecting patients, clients, and the public.

Thus, under Act 53’s definition of “directly related,” a person is unfit for a profession if the person poses a “substantial risk”. A conviction should be considered “directly related” under the Act only if it has a direct bearing on a necessary duty of the profession and *makes a person unfit for the profession due to substantial risk*.

Relatedness depends on fitness, which is tied to risk. As is explained in detail in the next section, research tells us that risk level is tied to the recency of a conviction. An old, stale conviction ceases to meaningfully predict future offense. Therefore, relatedness is tied to recency.

Because the risk posed by a person with a conviction decreases over time, convictions cease to be “directly related” to jobs over time. Time since conviction is a primary factor determining whether a conviction makes a person unfit due to risk level, and therefore is a primary factor in determining whether a crime is “directly related” to a job. In the words of Act 53, an old conviction that does not meaningfully predict future behavior no longer has a “direct bearing on the fitness or ability to perform” duties of a job, and therefore is not “directly related.”

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<sup>32</sup> 63 Pa. C.S. §3102.

<sup>33</sup> 63 Pa. C.S. §3113(b).

### **C. Lifetime barriers to licensure are inconsistent with recidivism research, which establishes that risk decreases over time**

Criminologist researchers studying the level of risk of committing a future crime posed by people with convictions have found that risk level is tied to the recency of a conviction.<sup>34</sup> The risk of committing a future crime presented by a person with a conviction decreases as years pass without another conviction. More specifically, research shows that recidivism risk drops significantly after a short time, and then drops so low after four to seven (4 – 7) years that a convicted person poses nearly the same risk as a person without a record.

A new report by Dr. Kiminori Nakamura, attached as Appendix C, applies research about “redemption” to the context of Act 53. Redemption is the process by which the risk of recidivism declines over time and a criminal record no longer meaningfully predicts future reoffending. Professor Nakamura’s research has been funded by the National Institute of Justice, has appeared in leading criminology journals, and has been cited in the Equal Employment Opportunity Commission’s enforcement guidance on the use of criminal history records in employment. In his report, Professor Nakamura states,

[T]he research has found that the recidivism risk of those with a prior criminal record falls below the risk of arrest for the general population approximately after four to seven years for violent offenders, four years for drug offenders, and three to four years for property offenders... [F]or those who are concerned about the risk of individuals with a criminal record, the value of the criminal record in predicting future criminality diminishes with time and likely becomes virtually irrelevant for many purposes after approximately seven years or even less.<sup>35</sup>

Professor Nakamura faults the boards’ “directly related” lists because they are “not consistent with the recidivism and redemption research... Recidivism risk is not static, as the list presumes; rather, risk is variant and declines considerably even within a few years of the last conviction.”<sup>36</sup> Professor Nakamura recommends that a “time-limited use of criminal records based on the length of recidivism-free time should be applied to as many offense types that are currently on the ‘directly related’ list as possible.”<sup>37</sup>

### **D. I-O psychologist Dr. Locklear explains that the time since conviction must be considered as part of a job-relatedness analysis**

Dr. Locklear, the expert in determining job-relatedness of criminal offenses, agrees that the time since a conviction is a necessary component of relatedness analysis. She states:

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<sup>34</sup> See, e.g., Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology & Pub. Pol’y* 483 (2006); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *Criminology* 327 (2009).

<sup>35</sup> Kiminori Nakamura, *Redemption and Recidivism Research Implications for Act 53 of 2020* (2021), at 3 (internal citations removed), (Appendix C), also available at <https://clsphila.org/wp-content/uploads/2022/11/Kiminori-Nakamura-PA-Occupational-Licensing-and-Redemption-10-28-21.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Since crimes' ability to predict re-offense decreases as time passes, setting exclusionary time frames is necessary to ensure job-relatedness. A crime that fails to predict re-offense within a given time period can no longer be considered "directly related."<sup>38</sup>

Similarly, she explains:

To be considered job-related in the context of occupational licensure, crimes must 1) have a direct relationship with common work activities, common work settings, and shared job characteristics (such as level of supervision and work site security measures), and 2) *be committed recently enough to predict the likelihood of re-offense.*<sup>39</sup>

Because of the close connection between relatedness, recidivism risk and recency, Dr. Locklear emphasizes that boards must determine appropriate time frames for otherwise-related crimes as part of the process of determining job-relatedness under Act 53. According to Dr. Locklear, boards should:

[L]everage the recidivism research to set suitable time frames for the crimes identified as "directly related." Only crimes that have occurred within that period would be considered job-related. ... According to the recidivism research, the time period since a crime was committed is an important determinant of its ability to predict the likelihood of re-offending.... there is a point in time – generally six to seven years since an individual's offense – at which they pose no greater risk than those without criminal records.<sup>40</sup>

## **E. The Department of State's arguments against including time limits are unconvincing**

### **1. The Department of State ignores their primary mandate: to promulgate regulations consistent with the intent of Act 53**

The Department of State has chosen not to include time limits in the proposed regulations because "the definition of 'directly relates' in Act 53 is not time-bound, nor has the General Assembly placed time limits on which crimes ... may be considered ... it is the nature of the criminal conduct that dictates whether a crime directly relates to a profession, and not when the crime occurred."<sup>41</sup> It is true that Act 53 does not explicitly specify that the Department must promulgate regulations with time limits. But the Act does mandate that the Department promulgate lists of "directly related" crimes that are consistent with the intent of the General Assembly. The only way the regulations can be consistent with this intent is to avoid excluding and discouraging people with old convictions.

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<sup>38</sup> *Evaluation of BPOA Boards' Proposed Lists*, *supra* note 24, at 3.

<sup>39</sup> *Id.* at 2 (emphasis added).

<sup>40</sup> *Id.* at 9 (internal citations removed).

<sup>41</sup> Regulatory Analysis Form, at 16.

## 2. The Department's interpretation of Act 53's definition of "directly related" is unnecessarily narrow

The Department interprets the definition of "directly related" in Act 53 inappropriately narrowly, as if it requires that crimes be analyzed absent all important context. The Department proposes that the term "nature of the criminal conduct" cannot include a consideration of the time that a crime was committed. But there is no reason to believe this is true. Webster's Dictionary defines "nature" as "the particular combination of qualities belonging to a person, animal, thing or class by birth, origin or constitution."<sup>42</sup> How long ago a crime was committed is one of the fundamentally important characteristics of a crime, especially when we are analyzing the risk presented by a conviction, so the age of a conviction can be considered as part of the "nature of the criminal conduct." In fact, because the definition of "directly related" hinges on the "fitness" of a person to do a job, and because an old conviction cannot bear on a person's fitness to do a job, the text of Act 53 requires that the determination of relatedness include an analysis of the age of the conviction.

## 3. The Department's interpretation of "directly related" runs contrary to other Pennsylvania law

The Department argues that time parameters cannot be added to lists of "directly related" crimes because Act 53 did not explicitly specify that the Boards should add these parameters. However, the Department's position ignores the existing landscape in Pennsylvania law, where lists of crimes that create barriers to employment regularly include time parameters, and where lifetime barriers to employment have been invalidated. The General Assembly designated to the boards the responsibility of developing lists of directly related crimes. It is completely reasonable to expect the Boards to create lists following the norms established in Pennsylvania law by adding time parameters.

Pennsylvania courts have long and repeatedly held that lifetime criminal record bans to employment violate the Pennsylvania state constitution.<sup>43</sup> For example, the lifetime criminal record bans in the Older Adult Protective Services Act (OAPSA) were found unconstitutional because they excluded workers with convictions that were too old to present a risk.<sup>44</sup> The Commonwealth Court held that OAPSA's employment restriction:

[M]ust be 'fine-tuned' to relate the particular criminal conviction to particular employment. [OAPSA]'s current blanket prohibition lacks fine-tuning because it

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<sup>42</sup> Random House Webster's College Dictionary (Random House, Inc. 2000).

<sup>43</sup> See, e.g., Peake v. Com., 132 A.3d 506 (Pa. Commw. 2015); Warren Cnty. Human Servs. v. State Civil Service Comm'n (Roberts), 844 A.2d 70 (Pa. Commw. 2003); Nixon v. Commonwealth, 789 A.2d 376, 382 (Pa. Commw. 2001), aff'd sub nom., Nixon v. Dep't of Pub. Welfare, 576 Pa. 385, 404 (2003); Megraw v. Sch. Dist. of Cheltenham Twp., No. 577 C.D. 2017, 2018 WL 2012130 at \*1-3, (Pa. Commw. May 1, 2018); Johnson v. Allegheny Intermediate Unit, 59 A.3d 10 (Pa. Commw. 2012); Jones v. Penn Delco School Dist., No. 294 M.D. 2012, 2012 WL 8668277 (Pa. Commw. Dec. 13, 2012); Croll v. Harrisburg School District, No. 210 M.D. 2012, 2012 WL 8668130 (Pa. Commw. Dec. 13, 2012).

<sup>44</sup> See Peake, 132 A.3d at 522-23.

treats all the enumerated crimes, regardless of their vintage or severity, as the same even though they present very different risks of employment.<sup>45</sup>

Similarly, lifetime criminal records bans related to employment in the Child Protective Services Act (CPSL) have been found unconstitutional.<sup>46</sup> The Commonwealth Court reviewed the law as applied to a caseworker with a conviction that was over twenty years old, stating that his “remote conviction does not reflect upon his present abilities to perform the duties of a caseworker.”<sup>47</sup> The lifetime criminal record ban imposed on the plaintiff “creates limitations that have no temporal proximity to the time of hiring, [and therefore] it does not bear a real and substantial relationship to the Commonwealth’s interest in protecting children and is unconstitutional.”<sup>48</sup>

In another example, a bus driver, a school custodian, and a teacher challenged the constitutionality of the lifetime employment bans in the Pennsylvania Public School Code of 1949, which were imposed upon them due to decades-old convictions.<sup>49</sup> The Commonwealth Court found that the statutory lifetime employment ban “ha[d] no temporal proximity to [the plaintiffs’] present ability to perform the duties of [their jobs], and...[did] not bear a real and substantial relationship to the Commonwealth’s interest in protecting children....”<sup>50</sup> On that basis, the court held that the lifetime bans violated the Pennsylvania constitutional, as applied to the plaintiffs.<sup>51</sup>

It comes as no surprise, then, that Pennsylvania laws containing lists of crimes which create barriers to employment also include temporal limitations to those barriers. Pennsylvania’s Ridesharing law<sup>52</sup>, which imposes criminal record bans on Uber and Lyft drivers, is one such example. It contains temporal tiers, and the enumerated convictions create bans for different numbers of years.<sup>53</sup> Another example is the Medical Marijuana Act (MMA), which contains a five (5) year ban for some drug-related convictions for caregiver licenses<sup>54</sup>, and a ten (10) year employment-related ban for some drug-related convictions.<sup>55</sup> Likewise, the Mortgage Licensing Act contains a seven (7) year employment-related ban for certain convictions.<sup>56</sup>

In sum, Pennsylvania law, both statutory and judicial, regularly rejects across-the-board lifetime bans on criminal records. It would be odd indeed if the General Assembly were envisioning something different in the “directly related” lists to be promulgated by the boards and commissions.

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<sup>45</sup> *Id.*

<sup>46</sup> Warren Cnty. Human Servs., 844 A.2d at 74.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Croll v. Harrisburg School Dist., No. 210 M.D. 2012, 2012 WL 8668130, \*1–\*2 (Pa. Commw. Dec. 13, 2012);

Jones v. Penn Delco School Dist., No. 294 M.D. 2012, 2012 WL 8668277, \*1–\*2 (Pa. Commw. Dec. 13, 2012).

<sup>50</sup> Croll, 2012 WL 8668130 at \*7; Jones, 2012 WL 8668277 at \*7.

<sup>51</sup> Croll, 2012 WL 8668130 at \*7; Jones, 2012 WL 8668277 at \*7.

<sup>52</sup> 53 Pa. C.S. § 57A12.

<sup>53</sup> This statute includes three temporal tiers: 7 years, 10 years and lifetime. While, to our knowledge, no legal challenges have been brought, it is important to note that the lifetime bans are constitutionally suspect under the caselaw previously cited.

<sup>54</sup> 35 P.S. §10231.502(b).

<sup>55</sup> 35 P.S. §10231.614.

<sup>56</sup> 7 Pa. C.S. §6133(d)(1).

#### **F. Considering the age of a conviction at the second stage, after imposing a presumption against licensure, is insufficient**

Under the proposed regulations, a person with a 20-year-old record and a person with a recent record stand on the same footing. Both face a presumption against licensure; both are disadvantaged and discouraged. People with old, irrelevant criminal records must bear the burden of trying to prove that they are worthy of licensure, contrary to the very goal of Act 53.

The Department asks us to be satisfied with their proposed regulations despite the imposition of a presumption against people with old convictions, because they will consider the age of the conviction at a later stage.<sup>57</sup> Under the proposed regulations, if the applicant presents evidence to overcome the presumption, the boards will start the “second stage,” where they will consider the time that has passed since the conviction as part of an 11-factor individualized assessment.<sup>58</sup>

However, the fact that the board will consider time along with other factors at a later stage does not correct the problem. A person with an old, irrelevant conviction should not face a presumption and the procedural requirement of presenting evidence of rehabilitation. To be consistent with research and the intent of Act 53, the regulations must include time limitations, so that an old criminal conviction does not create a presumption of substantial risk in the first place.

Perhaps most importantly, a lifelong presumption against licensure will deter many people from pursuing the licensing professions. Few people can put years and thousands of dollars into studying nursing, for instance, if they know they are presumed unfit and might not be licensed.

The mere existence of a procedural hurdle will prove daunting to many. Being forced to present evidence before a licensure board is intimidating, especially for someone who is not represented by counsel. Applicants may choose to abandon the process.

Even if an applicant presents evidence at a board hearing, there is no guarantee that the Boards will properly weigh the age of the conviction amongst 10 other factors. The intent of Act 53 is that more people with criminal records can gain licensure – not to allow the boards to discourage and reject people with irrelevant criminal records. If we are forced to trust in the benevolence of the boards, it is as if Act 53 never became law, and the intent of the law has not been accomplished.

#### **IV. The Boards Should Employ an Evidence-Based Process to Develop “Directly Related” Lists with Time Parameters, Following the Methodology Outlined by Dr. Locklear**

To accomplish the intent of Act 53, the lists of “directly related” crimes must include only those crimes that have a direct bearing on the ability to perform necessary duties of the profession and must identify the length of time that each crime, or each such crime type, is “directly related” to the professions regulated. The lists and time periods should be determined utilizing expertise from

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<sup>57</sup> Regulatory Analysis Form, at 16.

<sup>58</sup> See proposed 49 Pa. Code §43b.404, published at Title 52, *Pennsylvania Bulletin*, page 7112, November 19, 2022.

within the professions, from criminal law experts and from criminology experts or criminology research. The time periods must be supported by relevant recidivism research.

Dr. Toni Locklear’s report, included in Appendix B, provides a demonstration of this process. Dr. Locklear is an Industrial-Organization psychologist and Chief Technical Officer and Litigation Practice Leader for APTMetrics. Industrial-Organizational psychologists use scientific methods to analyze jobs, identify related job requirements, and create selection procedures – such as criminal background checks – tied to job requirements. Dr. Locklear has over 25 years’ experience in the fields of I-O psychology and Human Resources Management and has served as a settlement expert reviewing and modifying the companies’ approach to criminal history screening to ensure fair and equitable screening practices that focus on job-related crimes.

At CLS’s request, Dr. Locklear prepared a report where she analyzed the preliminary lists of “directly related” crimes which were later published in the proposed regulations.<sup>59</sup> She used her expertise in determining the job-relatedness of criminal records. In her report, Dr. Locklear evaluates the “directly related” crimes lists and lays out a systematic and evidence-based methodology that the boards should use to develop appropriately tailored lists.

In her report, Dr. Locklear analyzes “directly related” crimes lists in the proposed regulations. She also proposes a systematic, evidence-based methodology for creating a “directly related” crimes list.<sup>60</sup> She designed this methodology based on the definition of “directly related” in Act 53 and on evidence-based methods for identifying job-related criminal history screening criteria.<sup>61</sup> The steps that she identified were:

- 1) Specify job duties;
- 2) Identify risk factors;
- 3) Identify related crimes; and
- 4) Determine suitable exclusionary time frames.<sup>62</sup>

Dr. Locklear conducted a demonstration exercise with experts in the nursing field to illustrate her methodology and show what boards should do to ensure that their lists are “directly related” to the occupations they regulate.<sup>63</sup> She led a focus group of nursing experts that reviewed the job-relatedness of 18 crimes included on the Board of Nursing’s “directly related” list. After hearing from a criminal law expert and discussing each of the crimes, the group determined that only 6 of the 18 crimes created a substantial risk related to nursing.<sup>64</sup>

After developing this list, the focus group considered generally accepted recidivism research. Because “directly related” crimes are ones that make a person *unfit* and create a presumption of

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<sup>59</sup> These preliminary lists were published on the websites of the boards and commissions around December 2020. The proposed lists at issue in this regulatory package differ little from the preliminary lists, despite stakeholder input, including from CLS. Where boards removed offenses from those preliminary lists, we are removed those offenses from our critique.

<sup>60</sup> *Evaluation of BPOA Boards’ Proposed Lists*, *supra* note 24, at 3.

<sup>61</sup> *Id.* at 5-9.

<sup>62</sup> *Id.* at 8-9.

<sup>63</sup> *Id.* at 14.

<sup>64</sup> *Id.* at 18.

risk under the Act, crimes should be considered directly related only for that period when they create a substantial risk, rather than acting as a lifetime ban. Based on recidivism research, the focus group determined that 4 of the 6 crimes were directly related for up to 3 years after the conviction, while the other two crimes were directly related for up to 6 years.<sup>65</sup>

## V. Conclusion

In the context of occupational licensing, a presumption matters, a lot. Being presumed unfit is not only insulting to people with a criminal record who have struggled to rebuild their lives and redeem themselves. In this context, the presumption creates doubt about ultimate success in a licensure proceeding that would lead many, if not most, rationale people not to invest the time and money in training for a profession. This scenario was exactly what Act 53 was enacted to reform.

The proposed regulatory package must be revised before it can be approved.

- Its lists of “directly related” offenses must be revised.
- Each offense must have a time limit for how long the presumption continues.
- These changes must be made through an evidence-based process.

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<sup>65</sup> Id. at 18-19.



**Appendix A**  
**Offenses which Must Be Deleted from the “Directly Related” Lists for Five Boards**  
**(Barbering, Cosmetology, Nursing, Occupational Therapy, Physical Therapy)**

**State Board of Barber Examiners – proposed § 43b.506**

The essential work of barbering involves cutting and styling hair. There is no specific concern for vulnerable clients. Barbers do not assume position of special trust over property. Customers are not more vulnerable to theft, violence or fraud than in any commercial establishment. Barbering doesn’t involve driving or access to controlled substances. For these reasons the following crimes are not “directly related” to barbering.

- Chapter 27. Assault<sup>66</sup>
  - 18 Pa. C.S. § 2702. Aggravated Assault
  - 18 Pa. C.S. § 2705. Recklessly endangering another person.
- Chapter 39. Theft and Related Offenses
  - 18 Pa.C.S. §3921. Theft by unlawful taking or disposition
  - 18 Pa.C.S. §3922. Theft by deception
  - 18 Pa.C.S. § 3924. Theft of property lost, mislaid, or delivered by mistake
  - 18 Pa.C.S. § 3926. Theft of Services
- Chapter 41. Forgery and Fraudulent Practices
  - 18 Pa.C.S. §4107. Deceptive or fraudulent business practices
  - 18 Pa.C.S. §4115. Falsely impersonating persons privately employed
- Additional Drug and Alcohol Offenses<sup>67</sup>,
  - 35 P.S. § 780-113(a)(30). The manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered [.]<sup>68</sup>
  - 75 P.C.S.A. § 3802. Driving under the influence of alcohol or controlled substance (felony only)

**State Board of Cosmetology – proposed § 43b.509**

The essential work of cosmetology involves cutting and styling hair. There are no specific concerns for vulnerable clients. Stylists are not entrusted to care for personal property or sensitive information. Their customers are not more vulnerable to theft, violence or fraud than in

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<sup>66</sup> Act 53 incorporates list of directly related crimes of violence set out at 42 Pa.C.S. § 9714(g). Aggravated assault (all types) and reckless endangerment are not on the 9714(g) list. Courts have held that far more serious crimes are not related to barbering. See, e.g., King v. Bureau of Professional and Occupational Affairs, State Board of Barber Examiners, 195 A.3d 315, 329-330 (Pa. Commw. 2018) (involuntary deviate sexual intercourse); Kirkpatrick v. BPOA, 117 A.3d 1286, 1294 (Pa. Commw. 2015) (indecent assault).

<sup>67</sup> Possession with intent to deliver, 35 P.S. 780-113(a)(30) [“PWID”] and DUI are omitted by Cosmetology Board. Logically, crimes not directly related to cosmetology are not directly related to barbering either.

<sup>68</sup> Courts have already held: PWID not related to barbering. Fulton v. Commonwealth, 169 A.3d 718, 726 (Pa. Commw. 2017).

any commercial establishment. Indeed, Pennsylvania courts have already ruled that the Board of Cosmetology is wrong to automatically presume that Cosmetology involves driving or access to controlled substances. For these reasons, the following crimes are not “directly related” to cosmetology.

- Chapter 27. Assault<sup>69</sup>
  - 18 Pa. C.S. § 2702. Aggravated Assault
  - 18 Pa. C.S. § 2705. Recklessly endangering another person.
- Chapter 39. Theft and Related Offenses
  - 18 Pa. C.S. § 3921. Theft by unlawful taking or disposition
  - 18 Pa. C.S. § 3922. Theft by deception
  - 18 Pa. C.S. § 3924. Theft of property lost, mislaid, or delivered by mistake
  - 18 Pa. C.S. § 3926. Theft of Services
- Chapter 41. Forgery and Fraudulent Practices<sup>70</sup>
  - 18 Pa. C.S. § 4101. Forgery
  - 18 Pa. C.S. § 4104. Tampering with records or identification
  - 18 Pa. C.S. § 4107. Deceptive or fraudulent business practices
  - 18 Pa. C.S. § 4108. Commercial bribery and breach of duty to act disinterestedly
  - 18 Pa. C.S. § 4112. Receiving deposits in a failing financial institution
  - 18 Pa. C.S. § 4113. Misapplication of entrusted property and property of government or financial institutions
  - 18 Pa. C.S. § 4114. Securing execution of documents by deception
  - 18 Pa. C.S. § 4115. Falsely impersonating persons privately employed
  - 18 Pa. C.S. § 4120. Identity theft

### **State Board of Nursing – proposed § 43b.518**

Nursing means diagnosing and treating human responses to actual or potential health problems through case-finding, teaching, counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens.<sup>71</sup> Nurses are not specially entrusted to care for personal property; patients and subordinates are encountered in a wide variety of settings, and are not more vulnerable to theft or fraud than in any commercial establishment. Nurses’

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<sup>69</sup> Act 53 incorporates list of directly related crimes of violence set out at 42 Pa. C.S. § 9714(g). Aggravated assault (all types) and reckless endangerment are not on the 9714(g) list. Courts have held that far more serious crimes are not related to barbering – and, therefore, logically, not to cosmetology either. See, e.g., King v. Bureau of Professional and Occupational Affairs, State Board of Barber Examiners, 195 A.3d 315, 329-330 (Pa. Commw. 2018) (involuntary deviate sexual intercourse); Kirkpatrick v. BPOA, 117 A.3d 1286, 1294 (Pa. Commw. 2015) (indecent assault).

<sup>70</sup> Chapter 41 Fraud and forgery offenses (other than §§ 4107 & 4115) are omitted by Barbering Board. Logically, crimes not directly related to barbering are not directly related to cosmetology either. The Board previously recognized this: in the past, since the Beauty Culture Law only permitted discipline for *related* convictions, the Board cited only 18 Pa.C.S. § 9124(c) (permitting revocation for *unrelated* felonies) as grounds to discipline for forgery – but Act 53 revokes application of § 9124(c) to BPOA, see 63 Pa. C.S. § 3113(a)(2). The Board cannot now pretend that forgery and related crimes were ‘directly related’ for all of this time.

<sup>71</sup> These duties are enumerated in the definition of the “Practice of Professional Nursing” in the Professional Nursing Law. 63 P.S. §212(1).

involvement in billing and reimbursement will vary based on professional setting. In a large health practice, involvement may be minimal – and will often involve oversight by numerous colleagues. It is incidental, rather than essential, to the work of therapy. Nurses have no special connection to the administration of law. For these reasons, the following crimes are not “directly related” to nursing.

- Chapter 27. Assault<sup>72</sup>
  - 18 Pa. C.S. § 2701. Simple assault
  - 18 Pa. C.S. § 2706(a)(1). Terroristic threats.
  - 18 Pa. C.S. § 2709. Harassment.
- Chapter 39. Theft<sup>73</sup>
  - 18 Pa. C.S. § 3921. Theft by unlawful taking or disposition (misdemeanor).
  - 18 Pa. C.S. § 3922. Theft by deception.
  - 18 Pa. C.S. § 3923. Theft by extortion.
  - 18 Pa. C.S. § 3925. Receiving stolen property.
  - 18 Pa. C.S. § 3929. Retail theft (misdemeanor).
- Chapter 41. Forgery and Fraudulent Practices
  - 18 Pa. C.S. § 4101. Forgery.
  - 18 Pa. C.S. § 4104. Tampering with records or identification.
  - 18 Pa. C.S. § 4106. Access device fraud (misdemeanor).
  - 18 Pa. C.S. § 4114. Securing execution of documents by deception.
  - 18 Pa. C.S. § 4117. Insurance fraud.
  - 18 Pa. C.S. § 4121. Possession and use of unlawful devices
- Chapter 43. Offenses Against the Family
  - 18 Pa. C.S. § 4304. Endangering welfare of children.<sup>74</sup>
- Chapter 49. Falsification and Intimidation
  - 18 Pa. C.S. § 4902. Perjury.
  - 18 Pa. C.S. § 4903. False swearing.
  - 18 Pa. C.S. § 4904. Unsworn falsification to authorities.
  - 18 Pa. C.S. § 4905. False alarms to agencies of public safety.
  - 18 Pa. C.S. § 4906. False reports to law enforcement authorities.
  - 18 Pa. C.S. § 4909. Witness or informant taking bribe.
  - 18 Pa. C.S. § 4910. Tampering with or fabricating physical evidence.
  - 18 Pa. C.S. § 4914. False identification to law enforcement authorities.
  - 18 Pa. C.S. § 4952. Intimidation of witnesses or victims.
  - 18 Pa. C.S. § 4953. Retaliation against witness, victim or party.

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<sup>72</sup> Act 53 incorporates list of directly related crimes of violence set out at 42 Pa.C.S. § 9714(g). These offenses are not on the 9714(g) list. There are no grounds to go beyond the violent crimes enumerated by the legislature, where there is no direct link between the offense and the occupation. Moreover, harassment is a mere summary offense, the lowest level of offense in Pennsylvania. Simple assault is a misdemeanor.

<sup>73</sup> Chapters 39, 41, 49, 51, 73, 76: Many of the crimes listed by the Board under chapters 39, 41, 49, 51, 73 and 76 encompass potential behaviors that are only distantly related to the work of nurses – and sometimes completely unrelated. Moreover, the Board is incorrect to assert that crimes of dishonesty have a special relationship to nursing. It is true that we want all people, including nurses, to be honest, but having unmonitored access to an incapacitated patient’s valuables is not an essential part of nursing – it is something that many nurses never experience at all.

<sup>74</sup> Endangering the welfare of children is a very commonly charged crime that typically involves an act of omission – something any caregiver could do - not an affirmative commission of abuse.

- 18 Pa. C.S. § 4953.1. Retaliation against prosecutor or judicial official.
- Chapter 51. Obstructing Governmental Operations
  - 18 Pa. C.S. § 5105(a)(3) and (5). Hindering apprehension or prosecution.
  - 18 Pa. C.S. § 5123. Contraband.
- Chapter 73. Trade and Commerce
  - 18 Pa. C.S. § 7313. Buying or exchanging Federal Supplemental Nutrition Assistance Program (SNAP) benefit coupons, stamps, authorization cards or access devices.
  - 18 Pa. C.S. § 7314. Fraudulent traffic in Supplemental Nutrition Assistance Program (SNAP) benefits.
- Chapter 76. Computer Offenses
  - 18 Pa. C.S. § 7611. Unlawful use of computer and other computer crimes
  - 18 Pa. C.S. § 7613. Computer theft.
  - 18 Pa. C.S. § 7615(a)(3). Computer trespass.
- Drug Act Crimes<sup>75</sup>
  - 35 P.S. §§ 780-113(a)(1), (16)[if marijuana], (31), (32)
- Vehicular Crimes<sup>76</sup>
  - 75 Pa. C.S.A. § 3802. Driving under influence of alcohol or controlled substance

### **State Board of Occupational Therapy – proposed § 43b.520**

Occupational therapy is the evaluation, analysis, selection and adaptation of activities for individuals whose abilities to cope with the activities of daily living, or perform normal tasks or essential vocational tasks, are threatened or impaired. Therapists are not entrusted to care for personal property; customers not more vulnerable to theft or fraud than in any commercial establishment. Therapists' involvement in billing and reimbursement will vary based on professional setting, and may be minimal – and involve oversight by numerous colleagues - in a large health practice; it is incidental, rather than essential, to the work of therapy. Therapists have no special connection to the administration of law or submission of tax forms. For these reasons, the following crimes are not “directly related” to occupational therapy.

- Chapter 39. Theft and Related Offenses
  - 18 Pa. C.S. §3921 Theft by unlawful taking or disposition
  - 18 Pa. C.S. §3922 Theft by deception
  - 18 Pa. C.S. §3926 Theft of Services

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<sup>75</sup> Administering medicines is a central aspect of nursing, so a recent drug addiction or drug crime may be directly related to nursing. However, the minor drug crimes of simple possession of marijuana and possession of drug paraphernalia (e.g. a pipe) are not directly related. These crimes are minor and do not by themselves indicate drug addiction, especially if they are not recent or repeated.

<sup>76</sup> As noted above, a DUI conviction – especially if it is not recent or repeated – does not by itself indicate alcoholism. Moreover, alcoholism is not especially related to nursing since nurses do not administer alcohol to patients. A DUI conviction certainly does not indicate drug addiction, as most DUIs involve alcohol rather than drugs. The Board can, of course, evaluate the facts underlying a particular DUI case to determine whether it indicates a recent addiction to drugs, which would make the offense related to nursing. The fact that an offense *could in some circumstances* be related to an occupation does not mean it is “directly related.”

- 18 Pa. C.S. §3927 Theft by Failure to Make Required Disposition of Funds
- Chapter 41. Forgery and Fraudulent Practices<sup>77</sup>
  - 18 Pa. C.S. §4101 Forgery
  - 18 Pa. C.S. §4104 Tampering with Records and Identification
  - 18 Pa. C.S. §4106 Access Device Fraud
  - 18 Pa. C.S. §4107 Deceptive or fraudulent business practices
  - 18 Pa. C.S. §4108 Commercial Bribery
  - 18 Pa. C.S. §4114 Securing execution of documents by deception
  - 18 Pa. C.S. §4117 Insurance fraud
  - 18 Pa. C.S. §4120 Identity Theft
- Chapter 49. Falsification and Intimidation<sup>8</sup>
  - 18 Pa. C.S. §4902 Perjury
  - 18 Pa. C.S. §4903 False Swearing
  - 18 Pa. C.S. §4904 Unsworn Falsification to Authorities
  - 18 Pa. C.S. §4911 Tampering with Public Records
  - 18 Pa. C.S. §4952 Intimidation of witnesses or victims
  - 18 Pa. C.S. §4953 Retaliation against witness, victim or party
- Chapter 51. Obstructing Governmental Operations
  - 18 Pa. C.S. §5101 Obstructing administration of law or other governmental function
  - 18 Pa. C.S. §5105 Hindering apprehension or prosecution.
  - 18 Pa. C.S. § 5111 Dealing in proceeds of unlawful activity
- Federal offenses
  - 18 U.S.C. §1341 Mail fraud
  - 26 U.S.C. §7206 Filing fraudulent tax returns

### **State Board of Physical Therapy – proposed § 43b.524**

The essential work of physical therapy involves the evaluation, treatment, and therapeutic management of disabling physical conditions in the general population. Therapists are not entrusted to care for personal property; customers are not more vulnerable to theft, violence, trafficking, or fraud than in any commercial establishment; therapy is not especially focused on children or care-dependent people, when a typical patient is an able-bodied adult with a temporary ailment. Therapists’ involvement in billing and reimbursement will vary based on professional setting, and may be minimal – and involve oversight by numerous colleagues - in a large health practice; it is incidental, rather than essential, to the work of therapy. For these reasons, the following crimes are not “directly related” to physical therapy.

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<sup>77</sup> Chapters 41 & 49: These fraud/forgery/falsification crimes encompass potential behaviors that are only distantly related to the work of many occupational therapists. To the extent they suggest a generalized “tendency towards dishonesty,” that is the type of vague, overbroad category of crimes referred to as “lack of good moral character” or “crimes of moral turpitude” – Act 53 explicitly directs boards not to deny/revoke licensure on the basis of crimes that supposedly display a generalized character trait.

Also, several of these offenses (including §§ 4108, 4114, 4117) are omitted by the State Board of Physical Therapy. Logically, crimes not directly related to authorization/billing requirements of physical therapy are not directly related to occupational therapy either.

- Chapter 27. Assault<sup>78</sup>
  - 18 Pa. C.S. § 2705 (Recklessly endangering another person)
- Chapter 39. Theft and Related Offenses
  - 18 Pa. C.S. § 3921 (Theft by unlawful taking or disposition)
  - 18 Pa. C.S. § 3922 (Theft by deception)
  - 18 Pa. C.S. § 3923 (Theft by extortion)
  - 18 Pa. C.S. § 3927 (Theft by failure to make required disposition of funds received)
- Chapter 41. Forgery and Fraudulent Practices<sup>79</sup>
  - 18 Pa. C.S. § 4101 (Forgery)
  - 18 Pa. C.S. § 4104 (Tampering with records or identification)
  - 18 Pa. C.S. § 4106 (Access device fraud)
  - 18 Pa. C.S. § 4107 (Deceptive or fraudulent business practices)
  - 18 Pa. C.S. § 4117 (Insurance Fraud)
- Chapter 43. Offenses Against the Family<sup>80</sup>
  - 18 Pa. C.S. § 4304 (Endangering the welfare of children)
- Chapter 49. Falsification and Intimidation
  - 18 Pa. C.S. § 4904 (Unsworn falsification to authorities)
  - 18 Pa. C.S. § 4952 (Intimidation of witnesses or victims)

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<sup>78</sup> Act 53 incorporates list of directly related crimes of violence set out at 42 Pa.C.S. § 9714(g). Reckless endangerment is not on the 9714(g) list. It is inappropriate to go beyond the violent crimes enumerated by the legislature, where there is no direct link between the offense and the occupation.

<sup>79</sup> Chapters 41: These fraud/forgery crimes encompass potential behaviors that are only distantly related to the work of many physical therapists. To the extent they suggest a generalized “tendency towards dishonesty,” that is the type of vague, overbroad category of crimes referred to as “lack of good moral character” or “crimes of moral turpitude” – Act 53 explicitly directs boards not to deny/revoke licensure on the basis of crimes that supposedly display a generalized character trait.

<sup>80</sup> Endangering the welfare of children is a very commonly charged crime that typically involves an act of omission – something any caregiver could do - not an affirmative commission of abuse.

## Evaluation of Pennsylvania Bureau of Professional and Occupational Affairs Boards' Proposed "Directly Related" Crimes Lists under Act 53 of 2020

Toni S. Locklear, Ph.D.

*December 15, 2021, updated November 28, 2022*

I was retained by Community Legal Services of Philadelphia ("CLS") to review and evaluate the preliminary steps Pennsylvania's state occupational licensing boards and commissions have taken to comply with the provisions of Act 53, a new licensing reform law enacted in 2020 (63 Pa. C.S. §§3112-3118). The new law applies to the criminal history screening of workers licensed by state boards and commissions<sup>1</sup> under the purview of the Bureau of Professional and Occupational Affairs ("BPOA"). Act 53 sets forth a new method for considering the criminal history of prospective licensees and requires that boards identify and publish a list of disqualifying criminal offenses "directly related" to the occupations for which they provide licenses, certifications, registrations, or permits.<sup>2</sup> I have been asked to review and comment on the published "directly related" lists, discuss the factors that should be considered when identifying job-related exclusionary crimes, and identify the methodology that should have been used to create the lists. In addition, I was asked to conduct a demonstration exercise with nurses to illustrate the steps state boards should have taken to ensure the list of criminal offenses identified was "directly related" to the target occupation(s).

In evaluating the boards' "directly related" lists I found problems to indicate they deviated from the type of systematic, evidence-based approach I recommend for identifying job-related crimes. The lists I reviewed had a number of deficiencies relative to job-relatedness, including "directly related" crimes unrelated to the Department of Labor's occupation profiles, a disregard of court rulings that deemed particular crimes non-job-related, different "directly related" crime lists for similar occupations, and reliance on crime lists published by other state boards. The lists also failed to consider recidivism research relative to the recency and severity of criminal offenses and did not set appropriate exclusionary time frames on that basis.

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<sup>1</sup> While Act 53 applies to BPOA boards and commissions, this report will refer to both entities as "boards" for the sake of brevity.

<sup>2</sup> The licenses, registrations, certifications, and permits issued by BPOA boards and commissions will be referred to generically as "licenses" throughout this report.

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## EXECUTIVE SUMMARY

At issue here are the “directly related” lists issued by the BPOA boards to meet the requirements of Act 53 of 2020. The new legislation mandates that the boards identify and publish a list of crimes to be used for screening the criminal history of licensee applicants. Applicants with a criminal offense that matches one of the “directly related” crimes are presumed – pending an individualized assessment – to be a “substantial risk” to the health and safety of others; and at “substantial risk” of re-offending.

Due to my expertise in establishing the job-relatedness of criminal history screening criteria, I have been asked to review and evaluate the published “directly related” crimes lists and discuss my approach to identifying job-related crimes for employers. To be considered job-related in the context of occupational licensure, crimes must 1) have a direct relationship with common work activities, common work settings, and shared job characteristics (such as level of supervision and work site security measures), and 2) be committed recently enough to predict the likelihood of re-offense.



The job-crime relationship can be demonstrated using a systematic, evidenced-based approach I have used with clients to identify job-related criminal history screening criteria. My approach uses subject matter experts with in-depth knowledge of the occupation and leverages multi-disciplinary experts such as criminologists, criminal attorneys or law enforcement personnel, and Industrial-Organizational psychologists, like myself, to assist as needed.

In this approach, subject matter experts work with the organization, and its experts, to:

- 1) define important and critical job responsibilities performed with reasonable frequency across various jobs, employers, and work settings;
- 2) identify risk factors that would allow a licensee to exhibit criminal behavior on the job and result in substantial risk to co-workers, patients, customers, or the general public;
- 3) identify crimes that relate directly to the presence of those risk factors on the job; and
- 4) leverage the recidivism research to estimate how long post-offense a crime should be considered “directly related.”

The recidivism research provides insight into how long after conviction or release a person with a criminal record is at risk of re-offending. Research has shown that six to seven years after an individual commits a crime, the risk of re-offending is significantly reduced and almost equivalent to the risk posed by individuals without a criminal record.

In evaluating the boards’ “directly related” lists I found problems to indicate they deviated from the type of systematic, evidence-based approach I recommend for identifying job-related crimes. The lists I reviewed had a number of deficiencies relative to job-relatedness, including “directly related” crimes unrelated to the Department of Labor’s occupation profiles, a disregard of court rulings that deemed particular crimes non-job-related, different “directly related” crime lists for similar occupations, and reliance on crime lists published by other state boards.

The lists also failed to consider recidivism research relative to the recency and severity of criminal offenses and did not set appropriate exclusionary time frames on that basis. Since crimes’ ability to predict re-offense decreases as time passes, setting exclusionary time frames is necessary to ensure job-relatedness. A crime that fails to predict re-offense within a given time period can no longer be considered “directly related.”

To illustrate the application of my evidence-based methodology to the BPOA occupations, I was asked to conduct a demonstration exercise for the nursing occupation. The objective was to identify job-related crimes and establish exclusionary time frames for a subset of criminal offenses. Nursing professionals were recruited as subject matter experts to participate in a series of focus groups. The initial focus groups were used to identify common work activities, work settings, and risk factors, while a final focus group was used to identify job-related crimes. For the final focus group, the subject matter experts were joined by a public defender to ensure the participants understood the nature of each crime before judging its relationship to the risk factors of the job.

Focus group participants reviewed the job-relatedness of 18 crimes included on the Board of Nursing's "directly related" list. Only 6 of the board's 18 "directly related" crimes were linked to one or more risk factors and judged to be of substantial risk. After identifying the six job-related crimes, the focus group participants used the recidivism research to determine how long the crimes should be considered "directly related." The results of this demonstration exercise illustrate the need for boards to use an evidence-based approach to ensure a narrowly tailored, job-related list of "directly related" crimes with associated exclusionary time frames.

The decision whether to license an applicant is high stakes for both the individual and the profession. Overbroad "directly related" lists will unfairly exclude otherwise qualified applicants from the profession. Moreover, due to minorities' overrepresentation in the population of people with criminal records, Blacks and Hispanics are most likely to be disadvantaged by overbroad lists. Appropriately developed lists of "directly related" crimes will allow fair and equitable access to the profession such that only crimes linked directly to the risk factors of the job are used to flag applicants as a substantial risk.

## **BACKGROUND & RELEVANT EXPERIENCE**

I am an Industrial-Organizational Psychologist currently employed as the Chief Technical Officer and Litigation Practice Leader for *APTMetrics*, working in the firm's Atlanta, Georgia office. I am a graduate of Auburn University, where I earned a Ph.D. in Industrial and Organizational Psychology in 1992. The field of Industrial and Organizational (I-O) psychology involves the application of psychological theory and scientific research methods to the study of human behavior in the workplace. As the branch of psychology that focuses on the workplace, Industrial-Organizational or I-O psychologists use scientific methods to analyze jobs, identify related job requirements, and create selection procedures – such as criminal background checks – tied to job requirements. As a result of their expertise, I-O psychologists are called upon to comment on the validity, fairness and/or adequacy of criminal history screening practices.

My work experience over the past 25 plus years has been in the fields of I-O psychology and Human Resources Management focusing primarily on the analysis of job content and requirements, the development and validation of employee selection procedures, and the design of related human resource processes. The analysis of job content and requirements is critical to identifying the job-related crimes appropriate for use in criminal history screening. I have served as an expert witness and consultant to counsel in employment discrimination cases, including cases related to criminal history screening. I am currently serving as a settlement expert, approved by both defendants and plaintiffs, to help carry out the provisions of consent decrees in matters involving criminal history screening at three large employers: a retail industry leader, a global leader in transportation services, and a top rental car company. My role in these settlements has included reviewing and modifying the companies' approach to criminal history screening to ensure fair and equitable screening practices that focus on job-related crimes. My qualifications are set forth in my vita which is attached to this report as Attachment A.

My firm was among the first to develop and use evidence-based methodologies for establishing the job-relatedness of criminal background checks. This evidence-based approach has been used in the matters referenced above, as well as several high-profile class action settlements involving criminal history screening. Below I discuss the application of this evidence-based approach to development of the “directly related” crimes lists required by Act 53.

The professional and scientific literature and the other documents I reviewed to form my opinions in this matter are listed in Attachments B and C, respectively. I reviewed Act 53 and the BPOA boards’ “directly related” crimes lists, as well as information relevant to the history of Act 53. I also reviewed documents opposing the list of crimes proposed by various state boards (including a letter from several professional nursing associations to the State Board of Nursing).

## **THE JOB-RELATEDNESS OF CRIMINAL HISTORY SCREENING UNDER ACT 53**

Act 53 of 2020 requires the licensing boards within the BPOA to take a new, job-related approach to the screening of criminal records. The new screening requirements dictate that each of the 29 BPOA boards and commissions identify and publish a list of criminal offenses “directly related” to the occupation; that is, job- or occupation-related. According to Act 53, an offense is “directly related” if:

“The nature of the criminal conduct for which the person was convicted has a direct bearing on the fitness or ability to perform one or more of the duties or responsibilities necessarily related to the professional, trade or occupation for which the individual seeks licensure.”

Where an applicant’s criminal offense matches the “directly related” list there is a presumption of risk and the board must conduct an individualized assessment to determine if the individual truly poses a “substantial risk” to the health and safety of patients, clients, or the general public, and a “substantial risk” of re-offending given factors such as post-conviction rehabilitation, age at the time of conviction, and references.<sup>3</sup>

Act 53’s focus on the job-relatedness of criminal history screening criteria to ensure fairness is consistent with the federal *Uniform Guidelines on Employee Selection Procedures* (Equal Employment Opportunity Commission, Civil Service Commission, Department of Labor, & Department of Justice, 1978) guidance on establishing the job-relatedness of screening and selection procedures (e.g., test, interviews) under Title VII of the Civil Rights Act.<sup>4</sup> The *Uniform Guidelines* were published to aid organizations in complying with federal laws prohibiting discriminatory employment practices. As discussed above, my 25 plus years of experience have

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<sup>3</sup> If an applicant’s criminal history reveals an offense not on the list of directly related crimes, there is no automatic presumption of risk by the board. However, Act 53 allows the board to conduct an individualized assessment to evaluate the individual’s potential risk and determine if it is “substantial.”

<sup>4</sup> According to the *Uniform Guidelines*, selection procedures must be “validated” if they have adverse impact when used as a basis for any employment decision (§1607.3). Validation is an empirical process for establishing job-relatedness; that is, whether a selection procedure provides meaningful information for predicting future job performance.

been focused on the use of scientific methods to analyze jobs, identify related job requirements, and create job-related selection procedures consistent with federal and state laws including Title VII of the Civil Rights Act.

## CRITERIA FOR IDENTIFYING “DIRECTLY RELATED” OFFENSES

As part of my settlement and consulting work, I have provided guidance to help companies develop criminal background check screening criteria using a reasonable, job-related process consistent with the *Uniform Guidelines* and the Equal Employment Opportunity Commission’s guidance on the *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (“EEOC Guidance;” EEOC, 2012).

The EEOC *Guidance* stresses the importance of taking a job-related, evidence-based approach to identifying criminal history screening criteria. Most organizations seeking to establish the job-relatedness of criminal conduct rely on three factors articulated in the EEOC’s guidance on targeted screens. These three factors – referred to as the Green factors<sup>5</sup> – can be used to identify specific crimes of relevance to a given job and define the duration of the criminal conduct exclusions (i.e., exclusionary timeframes).

1. Nature and Gravity of the Crime: indicated by the harm caused (e.g., property loss), the legal elements of the crime (e.g., knowledge, purpose), and/or classification as a felony or misdemeanor;
2. Time Elapsed: the time that has passed since the offense and/or completion of the sentence; and
3. Nature of the Job: job title, duties and essential functions, circumstances under which job is performed (e.g., level of supervision, direct contact with vulnerable populations), and environment in which duties are performed (e.g., office setting, private home).

The EEOC *Guidance* (2012) indicates that targeted screens be tailored to “the particular criminal conduct and the jobs involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies.” For example, when determining the appropriate length of time that should be considered when excluding individuals on the basis of a criminal conviction, widely accepted recidivism research findings are available to inform the appropriate exclusionary period. That research has found that people with criminal records are generally no more likely than a member of the general public to commit a crime approximately six to seven years after their offense (e.g., Kurlycheck, Brame & Bushway, 2006; 2007). My recommended methodology relies on past behavior as a predictor of future behavior and leverages this literature on the risk of re-offending and the factors that influence it.

An example of the targeted screens developed by my firm for a large online retailer is provided below. Job-related crimes and exclusionary time frames are shown for Warehouse Workers,

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<sup>5</sup> The three factors are known as the “Green factors” because they were first identified by the Eighth Circuit in *Green v. Missouri Pacific Railroad* (1977).

Delivery Drivers, and Customer Service Phone Representatives who work from home. This example illustrates criminal history screening criteria narrowly tailored to the specific jobs and work settings in question. For instance, at this retailer Fraud was deemed relevant for Delivery Drivers handling merchandise without supervision and Customer Service Phone Representatives with access to sensitive financial information, but not for Warehouse Workers handling merchandise in a work setting with close supervision and security measures to mitigate theft.

Crime	<i>Warehouse Worker</i>	<i>Delivery Driver</i>	<i>Customer Service Phone Representative</i>
Assault & Battery	7 years	7 years	N/A
Disorderly Conduct	N/A	N/A	N/A
DUI	N/A	N/A	N/A
Fraud	N/A	4 Years	7 years
Vehicular Assault	NA	4 years	N/A

N/A = Not Applicable

## **AN EVIDENCE-BASED APPROACH TO IDENTIFYING “DIRECTLY RELATED” CRIMES**

In view of the “directly related” crimes lists’ impact on applicants’ livelihood, the BPOA boards should have used a robust, evidence-based process to distinguish job-related crimes. My recommended approach links specific criminal conduct to the risks inherent in job responsibilities and applies recidivism research to determine how long a crime should be considered “directly related.” This approach to identifying job-related crimes is consistent with Act 53’s guidance that a “directly related” conviction “must have a direct bearing on the fitness or ability to perform one or more of the duties or job responsibilities necessarily related” to the occupation. While my work for employers has focused on jobs, the methodology I propose is equally appropriate for occupations with minor adjustments. Specifically, the process for identifying “directly related” crimes must contemplate common circumstances representative of the broader occupation rather than focusing on circumstances unique to particular employers and work settings.

Below I describe how my approach to identifying job-related crimes could be applied to the identification of “directly related” crimes under Act 53.

1. **Specify Job Duties.** Using this approach, the boards would first compile a list of important and critical job duties performed with reasonable frequency by members of the occupation across various jobs, employers, and work settings. Trivial job duties and duties specific to a given employer or work setting would be excluded.
2. **Identify Risk Factors.** Next, board members would think through and compile a tentative list of risk factors associated with the duties outlined in Step 1. In developing risk factors, the boards would consider occupational job duties, work environment, and job characteristics that would allow an individual to exhibit criminal or illegal behavior and result in a substantial risk to the health and/or safety of patients, clients, co-workers, or the general public. Risk factors would be restricted to those common across the majority of individuals working in the occupation; characteristics specific to a given employer or work setting would be excluded. Since the majority of employers conduct criminal history screening as part of the hiring process, companies could be expected to screen for offenses related to company-specific risk factors.

In identifying risk factors, the boards would consider questions such as the following; specifically, do members of the occupation...

- Handle merchandise or property? If so, is access to the merchandise or property supervised or unsupervised?
  - Handle cash, credit cards or checks? If so, is access supervised or unsupervised?
  - Have access to sensitive or confidential information? If so, is access monitored or supervised?
  - Have access to controlled substances? If so, is access monitored?
  - Have access to keys or key codes? If so, is access supervised or unsupervised?
  - Have access to vulnerable populations such as children or the elderly? If so, is access supervised or unsupervised?
  - Drive company vehicles? Operate equipment or machinery?
3. **Identify Related Crimes.** After identifying risk factors for the profession, board members would identify crimes associated with those risk factors by contemplating the extent to which each risk factor provides an employee with the opportunity to engage in criminal or illegal behavior that poses a substantial risk to clients, co-workers, or the general public. Before linking crimes to risk factors, the board should review the crime definitions and, if necessary, consult with law enforcement professionals or criminal attorneys to ensure their understanding. Furthermore, where board members lack comprehensive knowledge of the occupation, members of the profession should be recruited to serve as subject matter experts when identifying job-related crimes.

As part of the linkage activity, consideration should be given to how frequently an individual will experience a risk factor in the course of their occupation (hourly, daily, monthly). If a member of the profession will experience a risk factor infrequently, it most

likely should not be considered when identifying “directly related” offenses. In addition, subject matter experts should consider if individuals are supervised or unsupervised when they experience a risk factor and if policies or procedures exist to prevent criminal or illegal behavior when the risk factor is present. For example, if a risk factor such as handling cash exists, but there is little opportunity for criminal behavior to occur due to supervision, then crimes related to that risk factor (e.g., theft) should not be identified as “directly related.”

- 4. Determine Suitable Exclusionary Time Frames.** As a final step, the boards would leverage the recidivism research to set suitable time frames for the crimes identified as “directly related.” Only crimes that have occurred within that period would be considered job-related. In identifying their lists of “directly related” crimes, the BPOA boards would consider the importance of recency of the offense. According to the recidivism research, the time period since a crime was committed is an important determinant of its ability to predict the likelihood of re-offending. A robust finding in the criminology research literature is that an individual’s risk of re-offense or re-arrest peaks shortly after the initial arrest and then declines with time (Beck & Shipley, 1997; Kurlychek, Bushway, & Brame, 2012; Maltz, 1984). The highest probability of re-arrest is within the first three years after arrest or release, with the majority of re-arrests occurring within one year (Beck & Shipley, 1997). Furthermore, studies have demonstrated that the risk of re-arrest eventually approximates that of a person in the general population or a person without a criminal record (Blumstein & Nakamura, 2009; Kurlychek, Brame, & Bushway, 2007). In other words, there is a point in time – generally six to seven years since an individual’s offense – at which they pose no greater risk than those without criminal records (Alpner, Durose, & Markham, 2018; Blumstein & Nakamura, 2009; Kurlychek, Brame, & Bushway, 2006, 2007). Where board members find the recidivism research difficult to interpret and apply, they should consult with a criminologist to ensure appropriate time frames.

The crimes and associated exclusionary time frames identified using this methodology would comprise the board’s “directly related” lists. Crimes related to the risk factors but beyond the exclusionary time frame would be subject to individualized assessment under Act 53 but would not be included as part of the “directly related” list where the crime is presumed to pose a substantial risk.

## **CONCERNS RE: THE BOARDS’ LISTS OF “DIRECTLY RELATED” CRIMES UNDER ACT 53**

My review of the boards’ lists of “directly related” offenses revealed a number of issues, which are discussed in detail below. The problems I found relate to the job-relatedness of crimes on the “directly related” lists, including the lack of exclusionary time frames.

### ***Job-Relatedness of the “Directly Related” Crimes***

While I was unable to evaluate the “directly related” lists of all 29 BPOA boards comprehensively, the lists I did evaluate included offenses that appear not to be job-related. ‘Directly related’ lists contained crimes unconnected to the duties and responsibilities of the occupation including crimes judged irrelevant in court rulings.

#### **Failure to Consider Occupation Specific Duties & Responsibilities**

The “directly related” lists identified crimes unrelated to the job duties of the occupation, the circumstances under which the job is typically performed, and the usual work settings. Some examples of crimes unrelated to the common job duties of the profession are provided below.

- DUI on the Board of Barber Examiners list when barbers do not drive as part of their job duties.
- Bad checks on the Board of Landscape Architects list when landscape architects do not typically handle cash or have other money management responsibilities.
- Theft by failure to make required disposition of funds<sup>6</sup> on the Board of Engineers, Land Surveyors, & Geologists list for professions without accounting or finance-related job duties.

A review of the U.S. Department of Labor’s Occupational Information Network (“O\*NET”)<sup>7</sup> occupation profiles reveals that in none of these examples does the offense have an obvious bearing on the duties or responsibilities of the occupation.

The above illustrate the boards’ failure to think carefully about job responsibilities (or the lack thereof) when identifying crimes. Had the boards consciously considered common job responsibilities and risk factors, as recommended in the methodology I outlined above, crimes unrelated to the profession are unlikely to have been identified and included on the lists of “directly related” crimes.

It is important to note that circumstances unique to specific employers or work environments that are not representative of the broader profession should **not** be used to screen out licensees. Such nuanced screening is best left to the companies that hire members of a profession. Where a specific employer’s jobs include tasks not commonly performed at other companies, the employer can screen criminal history relative to the responsibilities and risk factors unique to those jobs.

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<sup>6</sup> Under Pennsylvania law, theft by failure to make required disposition of funds is when an individual enters into a legal agreement with another individual and agrees to make payments in exchange for some type of property. The individual then fails to make the agreed-upon payments yet treats the property they received as if it were their own.

<sup>7</sup> The O\*NET database (<https://www.onetonline.org/>) contains occupation-specific job descriptions covering the entire U.S. economy, which are continually updated with input by a broad range of workers in each occupation.



### **Disregard of Relevant Court Rulings**

The problems with job-relatedness of the “directly related” lists are underscored by the State Board of Barber Examiners’ decision to include offenses that are inconsistent with court rulings regarding what is “directly related” to the profession. In *Fulton v. Commonwealth* (2017) the Pennsylvania state appellate court rejected the Board’s argument that drug dealing is “directly related” to the profession of Barbering and ruled that it could instead occur in any commercial establishment. Despite this ruling, the Board of Barber Examiners included drug-related offenses on its list of “directly related” crimes. Had the Board carefully identified only risk factors that would allow an individual to exhibit criminal or illegal behavior and result in a substantial risk to the health and/or safety of patients, clients, co-workers, or the general public – as outlined in my methodology -- they would not have identified the manufacture, delivery, or possession of a controlled substance as a “directly related” offense.

### **Different “Directly Related” Crime Lists for Similar Occupations**

The lack of similarity in the “directly related” lists of similar professions further underscores problems with the job-relatedness of the crimes identified. For example, the “directly related” lists for the Board of Barber Examiners and the Board of Cosmetology are different, as are the lists for the Board of Occupational Therapy and the Board of Physical Therapy. As an illustration, while the Board of Barber Examiners’ lists includes only two offenses in the crime category of ‘Forgery and Fraudulent Practices,’ the Board of Cosmetology includes a total of nine offenses in that category. Given the similarity in job duties, work settings, and other job characteristics, one would expect the “directly related” lists of these two professions to be very similar if not identical. The differences indicate the Board of Cosmetology and the Board of Barber Examiners failed to use an evidence-based approach to identifying “directly related” crimes that relied upon careful consideration of the job.

### **Reliance on Crime Lists of Boards in Other States**

My concern with the boards’ approach to identifying “directly related” lists is reinforced by the State Board of Nursing’s reliance on another state’s list of “directly related” crimes. In the rationale for its “directly related” list, the Board of Nursing indicates the “... Texas and Delaware boards of nursing have previously published similar lists of crimes “directly related” to the profession.”<sup>8</sup> A point-by-point comparison of the Texas Board of Nursing’s rationale statement<sup>9</sup> to the Pennsylvania Board of Nursing’s rationale reveals that the Pennsylvania Board

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<sup>8</sup><https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Documents/Board%20Documents/Act-53-List-Rationale.pdf>

<sup>9</sup>[https://www.bon.texas.gov/pdfs/law\\_rules\\_pdfs/rules\\_regulations\\_pdfs/March%202021%20Rules%20and%20Regulations%203%204%2021.pdf](https://www.bon.texas.gov/pdfs/law_rules_pdfs/rules_regulations_pdfs/March%202021%20Rules%20and%20Regulations%203%204%2021.pdf)

borrowed heavily from the Texas Board’s document, including adopting the same “directly related” crime categories as well as the same language justifying adoption of those categories.<sup>10</sup>

The Pennsylvania Board of Nursing’s “borrowing” of crime categories, and the corresponding rationale for adoption of those categories, from another state further supports my conclusion that the boards lacked a systematic, evidence-based process for identifying “directly related” crimes. While it is appropriate to look at the lists of other boards as part of an evidence-based process, the lists will only be as good as the methodologies used to generate them. There is no guarantee other states’ boards are using job-related, evidence-based processes to identify their crime lists. Furthermore, the differences in crime definitions, and any state-specific differences in occupations, dictate an independent evaluation of crimes by the BPOA boards.

#### ***Failure to Consider the Recidivism Research and Establish Exclusionary Timeframes***

In identifying their lists of “directly related” crimes, it seems the BPOA boards failed to consider the importance of recency and severity of the offense, as well as the recidivism research bearing on those factors.

#### **Recency of the Offense**

As discussed in detail above, according to the recidivism research, the time period since a crime was committed is an important determinant of its ability to predict the likelihood of re-offending. This research means that a crime, which is “directly related” one year after an offense is unlikely to be “directly related” six to seven years after the offense. A crime that no longer predicts re-offense cannot be considered job-related. Thus, the “directly related” lists should be designed to identify only those individuals at true risk of re-offending. To that end, boards should have leveraged the recidivism research to identify appropriate exclusionary time frames for groups of crimes with a similar risk of re-offense (e.g., four years for non-violent crimes and seven years for violent crimes). Using this approach, a crime committed outside of the exclusionary time frame would no longer be considered “directly related.”

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<sup>10</sup> The Pennsylvania rationale statement identifies five categories of crimes as directly related to the profession: “crimes involving fraud or theft; crimes involving sexual misconduct; crimes involving lying, falsification or deception; crimes involving drugs or alcohol; and crimes involving violence or threatening behavior.” According to Brendan Lynch, a senior attorney at Community Legal Services of Philadelphia, the crimes are grouped differently under Pennsylvania and Texas law, yet the Pennsylvania crime groupings, and the order in which they are detailed, are wholly consistent with the Texas rationale statement as is most of the language justifying adoption of the crime categories. For example, the Pennsylvania crimes code (Title 18 of Pa. Consolidated Statutes) does not group the offenses of “lying, falsification, and deception” as Texas does. Many of the deception-related offenses are grouped with “Forgery and Fraudulent Practices” in Chapter 41, which is part of Article C, while others are in Chapter 49, “Falsification and Intimidation,” which is part of Article E.

### **Severity of the Offense**

The presence of minor crimes such as harassment, which is included on the Board of Nursing's "directly related" list, leads to further questions about the appropriateness of the "directly related" crimes lists. The severity of offenses should have been considered when determining what belonged on the "directly related" lists. Specifically, the boards should have weighted the criminal code's designation of crimes as "minor" (i.e., misdemeanor or summary),<sup>11</sup> together with the research related to the risk of re-offending when a crime is less severe. Non-violent crimes (drug and property offenses) carry a risk of recidivism for a shorter time period than violent crimes (Blumstein & Nakamura, 2009; 2012). For instance, the risk associated with property crimes flattens at about three years post-release (Rodriguez & Emsellem, 2011).

Where less severe crimes are judged to have a direct nexus to the duties of the profession, recidivism research suggests two options: 1) the crimes be paired with short exclusionary time frames to limit the number of years the offense is deemed 'directly related,' or 2) the crimes be excluded from the "directly related" lists and risk judged in the context of a broader individualized assessment of an individual's fitness for licensure. Factors such as age at time of conviction, post-conviction employment, and education have been found to significantly decrease the risk of recidivism (Brame, Mulvey., Schuber, & Piquero, 2016; Fabelo, 2002; Nally, Lockwood, Ho, & Knutson, 2014). Individualized assessment allows for the thoughtful consideration of these factors. Minor crimes should be evaluated as part of an individualized assessment so all factors relevant to recidivism can be assessed prior to making the high-stakes decision to presume risk and potentially exclude otherwise qualified applicants from licensure.

The exclusion of time frames from the "directly related" lists and the inclusion of minor crimes further illustrate the insufficiency of the state boards' approach. The boards failed to take advantage of recidivism research that is readily available online from credible sources such as the U.S. Bureau of Justice Statistics and the National Institute of Justice. Furthermore, the boards had the option of consulting with criminal justice experts at nearby colleges and universities, which they also failed to do. Several of the top researchers in the field of criminology are employed locally at the Pennsylvania State University.

### ***A Deficient Approach to Developing "Directly Related" Crimes Lists***

In conclusion, the boards' identification of non-job-related crimes, including minor crimes and crimes inconsistent with court rulings, as well as their failure to consider robust and widely accepted recidivism research findings, leads to serious questions regarding the

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<sup>11</sup> The Pennsylvania criminal code "grades" crimes by designating them as felony, misdemeanor, and summary. Summary offenses include crimes such as disorderly conduct, underage drinking, and traffic offenses. Misdemeanors include simple assault, low-dollar theft, driving under the influence offenses, and drug possession charges.

adequacy of the process used to create the “directly related” crimes lists. The shortcomings of the lists lead me to conclude that the boards’ methodologies were neither evidence-based nor methodical. Job-relatedness must be demonstrated, not just asserted. The boards’ subjective judgment that offenses have a “direct bearing on the fitness or ability to perform... responsibilities related to the profession” (63 Pa.C.S. §3102) is insufficient to establish their job relatedness. Instead, a direct relationship between the crime and job-related risk must be demonstrated explicitly for the occupation in question.

While the BPOA boards would not be expected to have expertise in developing job-related screening procedures, they had the opportunity to research appropriate methods and/or leverage experts who were appropriately qualified and competent to assist in their development. In the absence of internal capability, external experts such as I-O psychologists, criminologists, and/or criminal attorneys should have been consulted given the impact of “directly related” lists on licensee applicants’ future income and well-being.

## **JOB-RELATED METHODOLOGY IN ACTION – THE NURSING BOARD’S LIST**

To illustrate my recommended methodology for developing job-related lists of “directly related” crimes, I undertook a demonstration exercise for the nursing profession in partnership with Community Legal Services of Philadelphia and several professional associations whose nurses are licensed through the State Board of Nursing – specifically, the Pennsylvania State Nurses Association (“PSNA”), the Pennsylvania Coalition of Nurse Practitioners (“PCNP”), the Pennsylvania Association of Nurse Anesthetists (“PANA”), and the American College of Nurse-Midwives–Pennsylvania Affiliate (“ACNM-PA”). The goal of the study was to directly evaluate the job relatedness of a subset of crimes included on the State Board of Nursing’s “directly related” list and identify appropriate exclusionary time periods for the crimes deemed job-related. The methodology for this study used a panel of subject matter experts with extensive professional experience in the field of nursing.

Below I describe the methodology used to demonstrate the correct way to establish job-relatedness for purposes of developing “directly related” crime lists.

### ***Identification of Nursing Job Duties, Work Settings, and Risk Factors***

To allow for an evidence-based determination of job-relatedness, the first step was to develop a comprehensive understanding of nursing work activities and the common work settings in which those activities are performed. To that end, my team reviewed publicly available information on the job duties of nursing occupations licensed by the State Board of Nursing, as well as information (e.g., scope and standards of practice) provided by the professional associations. In particular, we leveraged the occupation profiles on O\*NET to develop preliminary lists of work activities for the three primary nursing roles licensed by the State Board: Registered Nurse (“RN”), Licensed Practical Nurse (“LPN”), and

Certified Registered Nurse Practitioner.<sup>12</sup> In addition, we used data from the U.S. Bureau of Labor Statistics data to identify the work settings where nurses are most commonly employed in the state of Pennsylvania.

As a next step, we used our understanding of the nursing job duties and common work settings to identify a preliminary set of risk factors that could allow a nurse to exhibit criminal or illegal behavior associated with substantial risk to the health and/or safety of patients, clients, co-workers, or the general public. In identifying those risk factors, we considered characteristics associated with the job and work setting such as access to sensitive or confidential information; access to keys or key codes; use of machinery or equipment; and handling of property or merchandise.

We next conducted focus groups with nursing subject matter experts to review, discuss, and finalize the preliminary work activities, work settings, and risk factors. The professional associations – ACNM-PA, PANA, PCNP, and PSNA – were asked to select subject matter experts who met the following qualifications:

1. Have extensive knowledge of the work performed in the targeted nursing roles;
2. Have sufficient experience and tenure working in, managing, and/or training nurses in those roles;
3. Have excellent communication skills and be able to clearly articulate and discuss their views on the jobs;
4. Adequately represent the nursing careers and specialties employing the largest numbers of nurses;
5. Adequately represent different work settings where nurses are employed; and
6. Be diverse with respect to race and gender, if feasible.

Two focus groups were conducted with a total of ten nurses serving as subject matter experts. During the focus groups, participants reviewed the preliminary list of work activities and identified the most important and frequently performed activities across common work settings. Participants then reviewed and updated the work settings to ensure the list included the settings where nurses in Pennsylvania are most commonly employed. As an example, the key work activities and work settings for Nurse Practitioner are provided below. Work activities and work settings for RN and LPN are provided in Attachment D.

<b>Certified Registered Nurse Practitioner Key Work Activities</b>
Administer non-intravenous medications and immunizations.
Advise patients on effects of health conditions or treatments and/or healthcare system processes.
Analyze quantitative data, test data or images to inform diagnosis or treatment and/or determine the effectiveness of Rx or therapies.

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<sup>12</sup> Clinical Nurse Specialist and Dietician-Nutritionist were excluded from the demonstration study due to the relatively small number of individuals licensed in those professions.

<b>Certified Registered Nurse Practitioner Key Work Activities</b>
Apply bandages, dressings, or splints.
Consult & collaborate with other healthcare professionals to plan or provide treatment.
Record patient medical histories
Communicate detailed medical information, medical procedures, test results, diagnoses, Rx plan, and/or care to patients & family members.
Develop medical treatment plans.
Diagnose medical conditions.
Order medical diagnostic or clinical tests.
Establish nursing policies or standards.
Follow protocols or regulations for healthcare activities.
Examine patients to assess general physical condition, functioning, capabilities, and/or health.
Maintain medical or professional knowledge, including maintaining licensure.
Monitor patient conditions during treatments, procedures, or activities.
Operate diagnostic or therapeutic medical instruments or equipment.
Prescribe treatments, assistive medical devices, and/or therapies
Prescribe medications.
Provide health and wellness advice to patients, program participants, or caregivers.
Record patient medical histories.
Refer patients to other healthcare practitioners, health resources, or specialists.
Schedule patient procedures or appointments.
Supervise patient care personnel (e.g., application of bandages, dressings, or splints).
Train patients, family members, and/or other non-medical personnel in caregiving, techniques for managing disabilities or illnesses, etc.
Treat acute illnesses, infections, or injuries.
Treat chronic diseases or disorders.
Treat medical emergencies, including responding to patient codes
Monitor medical facility activities to ensure adherence to standards or regulations.

<b>Certified Registered Nurse Practitioner Work Settings</b>
Hospitals (federal, state, local, and private)
Nursing Homes/Extended Care Facilities
Clinics (e.g., Urgent Care, Minute Clinics)
Physicians' Offices
Nurse Practitioner Offices
Home Healthcare Services
Schools
Private Homes
Prisons
Hospices
Ambulatory Surgical Centers
Telehealth
Insurance companies
Corporate Offices

Finally, the focus group participants reviewed, discussed, and finalized risk factors taking into consideration job characteristics that mitigate or heighten risk, for example, security measures and level of supervision. Throughout this exercise, the focus was on the occupation rather than individual jobs. In other words, subject matter experts were asked to focus on job duties, work environments, and job characteristics that cut across the occupation rather than being specific to a given employer or work setting. The objective was to identify a list of shared risk factors that would result in the identification of occupation-related crimes suitable for screening by the board rather than position-specific crimes more suitable for screening by a given employer at the time of hire. The risk factors identified for Nurse Practitioner, RN, and LPN are provided below.

Nursing Risk Factors	
Risk Factor	Definition
<b>Access to Personal Property</b>	Ability to access property belonging to coworkers, patients, and/or patients' families at any place in the hospital/facility, including patients' rooms, breakrooms, offices, lockers, etc.
<b>Access to Hospital/Facility Property</b>	Ability to access property belonging to hospital/facility including medical equipment and supplies (e.g., N-95 masks, PPE).
<b>Access to Sensitive Information/Medical Records</b>	Ability to review and record information of patients, coworkers, and other individuals, including personally identifiable information (e.g., date of birth, social security) and medical history available in medical records and regional & statewide electronic records.
<b>Access to Drugs</b>	Ability to access or divert prescription drugs, other forms of medication, and/or prescription pads.
<b>Access to Secured Areas</b>	Ability to access secure areas within the hospital/facility (including medicine storage cabinets, lock boxes, supply rooms, & offices), patient homes, or other work settings, and to provide access to someone not authorized to access those areas (e.g., badging family or friends into secure areas).
<b>Access to Patients</b>	Ability to interact verbally or physically with patients any place in the hospital/facility, including areas that may place them in vulnerable positions such as patient rooms, treatment rooms, restrooms, etc.
<b>Access to Vulnerable Populations</b>	Access to vulnerable populations such as children, the elderly, the disabled, cognitively impaired, and the sedated
<b>Access to Patients' Families, Vendors, and Coworkers</b>	Ability to interact verbally or physically with patients' families, vendors, or coworkers any place in the hospital/facility (including waiting rooms, lobbies, patient rooms, storerooms, offices, parking lot, restrooms, etc.), patients' homes, or other work settings.

***Identification of Job-Related Crimes and Exclusionary Time Frames***

After identifying risk factors for the occupation, our next step was to conduct a final focus group with nursing subject matter experts to identify the crimes associated with those risk factors and establish exclusionary time frames. Due to time constraints, we selected a subset of the crimes identified as “directly related” by the State Board; a total of 18 crimes were selected for evaluation. My team used the Pennsylvania criminal code to

draft clear and concise crime definitions appropriate for the layperson. To ensure their accuracy, the definitions were drafted in consultation with Katie Svoboda-Kindle of Community Legal Services of Philadelphia, an attorney formerly employed as a Public Defender.

In preparation for the focus groups, subject matter experts were provided with a pre-read packet, which included materials the participants were expected to review in advance of the session. The pre-read, included as Attachment D, was comprised of three documents: the key work activities, common work settings, and risk factors; a summary of the recidivism research findings relevant to setting exclusionary time frames; and definitions of the crimes to be reviewed during the focus group. In addition, for participants interested in more detailed information on the recidivism research, a fourth document was provided that summarized a few of the most important recidivism research studies.

Subject matter experts were selected to participate in the focus group using the same criteria used for the prior focus groups. In addition, a public defender employed by the Defender Association of Philadelphia as the Municipal Court Pretrial Unit Department Head was asked to participate in the session. As someone intimately familiar with the Pennsylvania criminal code and the nature of the criminal behavior typically associated with various charges, the public defender was able to educate the group and answer questions as each crime was discussed.

After an introductory discussion on the purpose of the focus group and the intent of Act 53, the participants reviewed key job responsibilities, work settings, and the risk factors and then transitioned to the job-relatedness exercise. The goal was to have participants evaluate the relationship between each crime and the occupational employment risk. Participants independently determined if a crime was related to one or more of the risk factors and then discussed the linkages as a group and came to consensus on the job-relatedness of the crime. All 18 crimes evaluated were included on the nursing board's "directly related" list. However, only 6 of those 18 crimes were judged to be "directly related" by the subject matter experts.

After completing the job-relatedness exercise, the research findings related to risk of re-offending were discussed and the subject matter experts identified appropriate exclusionary time frames for considering each crime during the licensure process. Participants were asked to independently estimate the time that must pass post-conviction before the crime no longer leads to a presumption of risk: Short (1-3 years), Medium (4-6 years), or Long (7-9 years). The participants then discussed their independent estimates, including the rationale for those estimates, and reached consensus on an appropriate timeframe. Of the crimes judged "directly related" by nursing subject matter experts: four crimes were judged to require Short exclusionary time frames (Drugs–Simple Possession, Drugs–Possession with Intent to Distribute, Felony Retail Theft, Felony Theft by Unlawful Taking or Disposition), one crime was judged



to require a Short to Medium exclusionary time frame (Stalking)<sup>13</sup>; and the remaining crime was judged to require a Medium exclusionary time frame (Identity Theft). The results of the focus group, including the exclusionary time frame estimates, are included in Attachment E.

## LICENSING AND RACIAL JUSTICE

Occupational licensing laws provide workers with government-sanctioned approval to work in a given occupation with the intention of ensuring service quality and protecting the public from unsafe or unskilled providers. With roughly 28.3% of all U.S. workers and 27.8% of all Pennsylvania workers requiring a license or certification to work in their chosen profession (Pennsylvania Department of State, 2018), occupational licensing restrictions have the potential for tremendous impact on people with criminal records across the United States. In addition to allowing licensing boards to enact costly and time-consuming education, experience, and examination requirements, many states permit “good character” requirements on the licensure of applicants with criminal offenses which give licensing boards the discretion to exclude anyone with a criminal offense, irrespective of its relationship to job responsibilities typical of the profession (U.S. Department of Treasury, 2015). Prior to Act 53, Pennsylvania was one of these states. In addition, the Pennsylvania criminal code included a statute that allowed licensing boards to deny a license for any felony regardless of severity, relationship to the occupation, or timeliness. Such laws significantly disadvantage minorities, underrepresented groups, the less educated, and those with lower incomes (Kleiner & Vorotnikov, 2018).

The impact of criminal background checks is compounded by the fact that Blacks and Hispanics are overrepresented among people with criminal records relative to their representation in the U.S. population, and much less likely to be hired than Whites with a criminal record. Over a quarter of the approximately 110 million people with criminal records in the U.S. are unemployed.<sup>14</sup> Minorities with a criminal record are disproportionately impacted; while the unemployment rate of people with criminal records is 27% overall, 43.6% of Black females and 35.2% of Black males are among the ranks of the unemployed. In comparison, the U.S. unemployment rate was 25% during the Great Depression.<sup>15</sup>

Given minorities’ overrepresentation among people with criminal records, even appropriately developed, job-related criminal background check criteria will negatively impact minority applicants. In its 2012 guidance on criminal history screening, the EEOC cited national statistics showing that racial minorities have substantially higher arrest rates than non-minorities, leading to a presumption of disparate impact in the use of criminal records screens. According to Bureau of Justice Statistics (“BJS”) data, in the 1980 to 2014 time period Blacks comprised only 13% of

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<sup>13</sup> The subject matter experts were unable to reach consensus on the crime of Stalking. One-half of the participants judged the crime to require a Short exclusionary time frame while the remaining participants judged the crime to require a Medium exclusionary time frame.

<sup>14</sup> Bureau of Justice Statistics, 2020; Prison Policy Initiative, 2018.

<sup>15</sup> Prison Policy Initiative, 2018.

the U.S. population but a full 28% of those arrested for crimes.<sup>16</sup> Recent BJS data supports the persistence of such racial differences in criminal histories over time. In 2019, Black males were imprisoned at a rate 5.7 times that of White males, and Hispanic males at a rate of 2.5 times that of White males.<sup>17</sup>

The net effect of long, overbroad “directly related” lists is the disproportionate exclusion of racial and ethnic minorities from occupational practice. Exclusions will impact both applicants and existing licensees since the new Act 53 rules apply to all board actions – refusal to issue a license, refusal to renew a license, suspensions, revocations, and limitations. The lists are also likely to have a chilling effect on people with criminal records interested in training for an occupation as well as those who already possess the necessary education and training but are not yet licensed. Individuals are unlikely to invest the time, money, and other resources required to be licensed if they have committed an offense on the “directly related” list. While Act 53 provides a path to preliminary determinations of licensure eligibility, many qualified applicants will be discouraged by overly inclusive lists and unwilling to believe that individualized assessment will yield a positive outcome. In its *Dothard v. Rawlinson* opinion the Supreme Court recognized the potential for alleged discriminatory policies to have a chilling effect that deters qualified applicants:

“[the] application process might itself not adequately reflect the actual potential applicant pool since otherwise qualified people might be discouraged from applying.”

Identifying only job-related crimes and using the recidivism research to establish appropriate exclusionary timeframes would be less adverse to minorities than the unrestrained use of crimes regardless of how long ago they were committed. Carefully curated lists of “directly related” crimes allow more qualified applicants to enter the profession while also serving the goal of racial justice.

## SUMMARY

The primary intention of criminal background checks is to identify unsuitable applicants from a safety or security perspective and eliminate those applicants from the licensing process (Society for Human Resource Management; SHRM, 2021). There is no reason to exclude people with criminal records who are otherwise qualified and do not present a substantial risk to the profession as defined by Act 53. The lists of “directly related” crimes I reviewed indicate the BPOA boards’ failure to take a systematic, evidence-based approach to identifying only those crimes that link to specific risks inherent in the job duties and work context associated with the occupation and are sufficiently recent to predict the likelihood of re-offending.

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<sup>16</sup> These statistics were generated using the Bureau of Justice Statistics Arrest Data Analysis Tool at [www.bjs.gov](http://www.bjs.gov). (7/20/2021). Snyder, H. N.; Cooper, A. D.; & Mulako-Wangota, J. Bureau of Justice Statistics. (1980-2014 US Arrest Estimates).

<sup>17</sup> Bureau of Justice Statistics, Federal Justice Statistics Program, 2019.

Given the impact of licensing decisions on applicants' lives and livelihood, the appropriate application of Act 53 is critical to identifying and excluding only those applicants who present a substantial risk to the profession. I suggest the boards revisit their lists with a focus on including only job-related crimes.

## ATTACHMENT A:

### TONI S. LOCKLEAR

*APTMetrics*  
150 East Ponce de Leon Ave, Suite 310  
Decatur, GA 30030-2497  
Phone: 404-370-0505

### EDUCATION

Ph.D.	Industrial/Organizational Psychology	Auburn University	1992
M.S.	Industrial/Organizational Psychology	Auburn University	1987
B.S.	Psychology	Kennesaw State University	1984

### PROFESSIONAL EXPERIENCE

2000 to Present

#### ***APTMETRICS***

2021 to Present

*Chief Technical Officer & Litigation Practice Leader.* As the firm's first Chief Technical Officer, responsible for maintaining *APTMetrics'* technical and legal expertise, and ensuring consultants' ability to deliver quality work. In this capacity responsible for establishing technical standards; employee technical & legal growth and development; providing technical and legal support to the firm's delivery teams; and further developing the firm's litigation support expertise,

Provides litigation support services, including supporting clients through OFCCP compliance audits; serving as an expert witness and consultant to counsel in employment discrimination, harassment, and wage-hour cases; acting as a settlement expert to help carry out the provisions of consent decrees in employment discrimination class actions; and conducting HR process audits to help organizations identify gaps between their current practice and industry best practices and mitigate the risk of litigation.

Consults with Fortune® 100 and public-sector clients on strategies and solutions to select, evaluate, develop, retain, and compensate their top talent and support a diverse workforce. Oversees consulting projects in job analysis, the design and validation of employee selection procedures, performance management, and compensation for clients across a broad range of industries.

2016 to 2021

*Vice President & Litigation Practice Leader.* Headed the Atlanta, GA office of APTMetrics and directed the firm's litigation practice. As Vice President, consulted with Fortune® 100 and public-sector clients on strategies and solutions to select, develop, retain, and compensate their top talent and support a diverse workforce. Oversaw consulting projects in job analysis, the design and validation of employee selection procedures, performance management, and organizational surveys for clients across a broad range of industries, including, manufacturing, consumer products, retail, hospitality, aerospace, and pharmaceuticals.

As Practice Leader, responsible for growing and managing the firm's Litigation Support consulting practice. In this capacity, accountable for practice area strategy and infrastructure, business development, and employee education on legal issues. Also provided litigation support services, including supporting clients through OFCCP compliance audits; serving as an expert witness and consultant to counsel in employment discrimination, harassment, and wage-hour cases; acting as a settlement expert to help carry out the provisions of consent decrees in employment discrimination class actions; and conducting HR process audits to help organizations identify gaps between their current practice and industry best practices and mitigate the risk of litigation.

2011 to 2016

*Managing Director & Litigation Practice Leader.* As Litigation Practice Leader, responsible for managing and building the firm's Litigation Support consulting practice, supporting clients through OFCCP compliance audits, and serving as an expert witness and consultant to counsel in employment discrimination, harassment, and wage-hour cases. Designed and implemented human resources processes to help organizations achieve key business objectives and ensure legal defensibility. Directed consulting projects in job analysis, the design and validation of employee selection procedures, performance management, and organizational surveys, and conducted HR process audits, for clients across a broad range of industries.

2008 to 2011

*Managing Director.* Designed and implemented human resources processes to help organizations achieve key business objectives and ensure legal defensibility. Directed consulting projects in job analysis, the design and validation of employee selection procedures, performance management, and the design and administration of 360-degree feedback and organizational surveys. Provided litigation support services, including supporting clients through OFCCP compliance audits and serving as an expert witness and consultant to counsel in employment discrimination and wage-hour cases. Conducted HR process audits to help organizations identify gaps between their current practice and industry best practices and mitigate the risk of litigation.

2000 to 2008 *Regional Director, Western Region.* Directed the Seattle, Washington office of APTMetrics.

1992 to 2000 ***THE BOEING COMPANY***

1994 to 2000 *Manager, Assessment Services.* Assessment Services is a company-wide program responsible for the development, validation and implementation of pre-employment tests, the company's management Assessment Center, and other assessment tools. Principal activities included supervising employees and external consultants in job analysis, the development and validation of selection procedures such as written examinations, structured interviews, and video assessments; developing test administration and scoring procedures; and providing technical guidance to the company on job analysis, test development, employee selection, training needs assessment, and measurement issues. Also developed and implemented the company's 360-degree assessment process.

1992 to 1993 *Assessment Specialist.* Conducted job analysis and developed and validated written examinations for entry-level manufacturing jobs.

1986 to 1991 ***CENTER FOR BUSINESS AND ECONOMIC DEVELOPMENT, AUBURN UNIVERSITY AT MONTGOMERY***

1990 to 1991 *Project Manager.* The Center is a university HR consulting firm whose principal activities include private and public-sector personnel administration, litigation support in EEO cases, organizational development, job analysis, and related research in industrial/organizational psychology and personnel management. Principal activities included project management; supervising and training professional support staff; developing selection procedures such as written examinations, structured interviews, and work sample exercises; conducting job analysis; developing hiring and transfer procedures; and developing training manuals.

1986 to 1989 *Research Associate.* Developed employee selection procedures, conducted job analysis, designed program evaluation studies, developed specifications for new job classifications, conducted training workshops, developed training manuals, and analyzed data.

## TEACHING EXPERIENCE

1984 to 1986

### **AUBURN UNIVERSITY**

*Teaching Instructor.* Taught introductory psychology and statistics to undergraduates

## PUBLICATIONS

Lundquist, K. K., Locklear, T. S., & Lippstreu, M. (2017). Using your data wisely: Proactive monitoring of employment disparities. In S. B. Morris & E. M. Dunleavy (Eds.), *Adverse Impact Analysis: Understanding Data, Statistics, and Risk*. New York: Psychology Press.

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Veres, J. G. III, Locklear, T. S., Sims, R. R., & Prewett, A. J. (1996). Job analysis in human resource management practice. In G. R. Ferris & M. R. Buckley (Eds.), *Human Resource Management: Perspectives, Context, Functions and Outcomes* (3rd Ed.) (pp. 122-154). Englewood Cliffs, NJ: Prentice-Hall.

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Veres, J. G., Sims, R. R., & Locklear, T. S. (1991). Improving the reliability of Kolb's revised Learning Style Inventory. *Educational and Psychological Measurement*, 51, 143-150.

Veres, J. G. III, Locklear, T. S., & Sims, R. R. (1990). Job analysis in practice: A brief review of the role of job analysis in human resource management. In G. R. Ferris, K. M. Rowland & M. R. Buckley (Eds.), *Human Resource Management: Perspectives and Issues* (2nd Ed.) (pp. 79-103). Boston: Allyn and Bacon.

Locklear, T. S., Granger, B. B., & Veres, J. G. III. (1989). Evaluation of a behaviorally based appraisal system. *Journal of Managerial Issues, 1*, 66-75.

Sims, R. R., Sims, S. J., Veres, J. G., & Locklear, T. S. (1989). A view from my side: Managing AIDS in the workplace. *Training and Management Development Methods, 6*, 137-144.

Sims, R. R., Veres, J. G., Locklear, T. S., & Wells, R. B. (1987). Training for public managers: The Alabama certified public manager program. *Journal of European Industrial Training, 11(6)*, 11-13.

### **PROFESSIONAL AFFILIATIONS**

American Psychological Association (APA)

Society for Industrial and Organizational Psychology, Inc. (SIOP)

Georgia Association for Industrial and Organizational Psychology (GAIOP)

Society for Human Resource Management

### **PROFESSIONAL SERVICE**

SIOP Awards Subcommittee Chair, 2020-2021 & 2021-2022 Award Cycles: Zedeck-Jacobs Adverse Impact Reduction Research Initiative and Action Grant

SIOP Awards Subcommittee Member, 2019-2020 Award Cycle: Zedeck-Jacobs Adverse Impact Reduction Research Initiative and Action Grant

SIOP Task Force on Assessment Member, 2021-2022



## PRESENTATIONS

- 2021 Locklear, T. S. (Panelist). In B. Timko (Chair), *Notorious and Never Forgotten: RBG's Impact on I/O Psychology*. Panel Discussion conducted at the 36th annual conference of the Society for Industrial and Organizational Psychology, Virtual, April 2021.
- 2019 Locklear T. S. (Panelist). In S. Herschcovis & M. E. Schouten (Chairs), *Gender Equity at Work: Pay Inequity and Underrepresentation*. Professional Development Workshop conducted at the Academy of Management Conference, Boston. August 2019.
- 2018 Locklear, T. S. & Foster, K. E. *Employment Decisions--The Current Legal and Ethical Landscape*. Workshop conducted for the Georgia Association of Industrial and Organizational Psychology (GAIOP). November 2018.
- 2017 Locklear, T. S. (Panelist). In D. B. Kohrman (Moderator), *Tech Progress that Enables Age Bias: Discrimination in Hiring and Big Data's Potential to Limit Opportunities for Older Workers*. Panel conducted at the AARP Foundation's conference, ADEA at 50: Silver Anniversary or Midlife Crisis?, University of California, Berkeley, School of Law. November 2017.
- 2017 Locklear, T. S. *Validation Issues in the Use of Big Data*. In B. B. Elfvin (Chair), *Impact Analysis: When to Use It & the Statistics to Support It*. Panel conducted at the annual convention of the National Employment Lawyer's Association, San Antonio. June 2017.
- 2017 Locklear, T. S. & Caver, K. *The Intersection of Diversity and Defensibility*. Invited Friday Seminar conducted at the 32nd annual conference of the Society for Industrial and Organizational Psychology, Orlando. April 2017.
- 2016 Locklear, T. S. *Legal Update: Emerging Areas of Concern for I/Os*. Presentation to Dallas Area Industrial Organizational Psychologists (DAIOP). October 2016.
- 2016 Locklear, T. S. & Lundquist, K. K. *Prepare for the Future of Pay Equity*. A Society for Human Resource Management webcast. September 2016.
- 2016 Lowrie, J., Locklear T. S., Moss, S., & Rafuse, N. E. *Moneyball in the Workplace: Using People Analytics and Big Data as a Recruitment and Selection Device*. Polsinelli Labor, Employment and Benefits Conference, Denver. September 2016.

- 2016 Locklear, T. S. & Keeney, J. *Update on Legal Context for Employment*. Workshop conducted for the Georgia Association of Industrial and Organizational Psychology (GAIOP). August 2016.
- 2016 Keeney, J. & Locklear, T. S. *Criminal Background Checks: Practical Issues for Employers and EEOC Concerns*. In A. A. Ali & A. M. Ryan (Chairs), *Ex-Offenders Navigating the Hiring Process: Insights from Research and Practice*. Symposium conducted at the 31st annual conference of the Society for Industrial and Organizational Psychology, Anaheim. April 2016.
- 2016 Locklear, T. S. *Functional Job Architecture: Practical Solutions for Large-Scale Job Analysis*. Master Tutorial conducted at the 31st annual conference of the Society for Industrial and Organizational Psychology, Anaheim. April 2016.
- 2015 Locklear, T. S. (Panelist). In J. Keeney & T. S. Locklear (Chairs), *Conducting Criminal Background Checks... Without Breaking the Law*. Panel discussion conducted at the 30th annual conference of the Society for Industrial and Organizational Psychology, Philadelphia. April 2015.
- 2015 Goldstein, H., Klein, A., Locklear, T. S., & Lossia, D. *The Role of Experts at Class Certification and Beyond*. Panel conducted at the 13<sup>th</sup> annual Impact Fund Class Action Conference, Oakland. February 2015.
- 2013 Lundquist, K. K., Ashe, R. L., Jr., Locklear, T. S., & Barsness, P. *Assessing the Legal Risks of Your Assessments*. Workshop conducted at the 28th annual conference of the Society for Industrial and Organizational Psychology, Houston. April 2013.
- 2012 Locklear, T. S., & Lewis, R. E. *Analyzing Jobs to Determine Exemption Status Under Wage-Hour Law*. In R. E. Lewis & T. S. Locklear (Chairs), *You've Got a Problem? We've Got the Solution: Job Analysis!* Symposium conducted at the 27th annual conference of the Society for Industrial and Organizational Psychology, San Diego. April 2012.
- 2012 Lewis, R. E., & Locklear, T. S. (Chairs). *You've Got a Problem? We've Got the Solution: Job Analysis!* Symposium conducted at the 27th annual conference of the Society for Industrial and Organizational Psychology, San Diego. April 2012.
- 2012 Locklear, T. S. (Chair). *Applied Technology: The I-O Psychologist as Customer*. Symposium conducted at the 27th annual conference of the Society for Industrial and Organizational Psychology, San Diego. April 2012.

- 2011 Lewis, R. E., & Locklear, T. S. *Wage and Hour Law: Your Company's Not Exempt from Litigation*. Webinar presented by Talent Management magazine. September 2011.
- 2011 Lundquist, K. K., & Locklear, T. S. *What You Don't Know Can Hurt You: The Value of an HR Process Audit*. Webinar presented by the Connecticut Society for Human Resource Management. March 2011.
- 2003 Locklear, T. S., & Kamin, A. M. (Chairs). *Attorneys' Perspectives on the Role of Experts in Employment Litigation*. Symposium conducted at the 18th annual conference of the Society for Industrial and Organizational Psychology, Orlando. April 2003.
- 2002 Locklear, T. S., & Scott, J. C. (Chairs). *Linking 360-Degree Feedback to Measures of Individual and Organizational Behavior*. Symposium conducted at the 17<sup>th</sup> annual conference of the Society for Industrial and Organizational Psychology, Toronto. April 2002.
- 2001 Lammlein, S. E., Schneider, R. J., Bosshardt, M. J., & Locklear, T. S. *Content Validation of an Equipment Driver Work Sample*. Paper presented at the 15th annual conference of the Society for Industrial and Organizational Psychology, San Diego. April 2001.
- 1988 Sadowski, C. J., Locklear, T. S., & Grah, C. R. *Structural properties of ability conceptualizations in age and sex stereotypes*. Paper presented at the meeting of the American Psychological Association, Atlanta. (ERIC Reproduction Service No. ED 303 761). August 1988.
- 1988 Chaplin, W. F. & Locklear, T. S. *Construct similarity and the convergence between self and other personality ratings*. In K. Lanning (Chair), *New approaches to the study of personality*. Symposium conducted at the meeting of the American Psychological Association, Atlanta. August 1988.

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## ATTACHMENT C: Documents Reviewed

Act 53 of 2020. 63 Pa. C.S. § 3113.
Act 53 of 2020 Best Practices Guide. Retrieved from <a href="https://www.dos.pa.gov/ProfessionalLicensing/Pages/ACT-53-2020.aspx">https://www.dos.pa.gov/ProfessionalLicensing/Pages/ACT-53-2020.aspx</a>
BPOA Boards' Criminal Offense Lists Unnecessarily Exclude Qualified Workers. Prepared by Community Legal Services, February 1, 2021.
Certified Registered Nurse Practitioner Pennsylvania Licensure Requirements. Retrieved from <a href="https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Pages/Certified-Registered-Nurse-Practitioner-Licensure-Requirements-Snapshot.aspx">https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Pages/Certified-Registered-Nurse-Practitioner-Licensure-Requirements-Snapshot.aspx</a>
Clinical Nurse Specialist Pennsylvania Licensure Requirements. Retrieved from <a href="https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Pages/Clinical-Nurse-Specialist-Licensure-Requirements-Snapshot.aspx">https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Pages/Clinical-Nurse-Specialist-Licensure-Requirements-Snapshot.aspx</a>
Certified Registered Nurse Practitioner Pennsylvania Licensure Requirements. Retrieved from <a href="https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Pages/Certified-Registered-Nurse-Practitioner-Licensure-Requirements-Snapshot.aspx">https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Pages/Certified-Registered-Nurse-Practitioner-Licensure-Requirements-Snapshot.aspx</a>
CLS Objections to Select Boards' Proposed "Directly Related Crimes" Lists. Prepared by Brendan Lynch & Katie Svoboda-Kindle, Community Legal Services, March 2021.
Discussion Paper: Scope of Practice for Nurse Practitioners. American Association of Nurse Practitioners, 2019.
Discussion Paper: Standards of Practice for Nurse Practitioners. American Association of Nurse Practitioners, 2019.
Letter, Dated November 20, 2020, to State Board of Nursing and Office of General Counsel, Pennsylvania Department of State from ACNM, PANA, PCNP, & PSNA re: Comment   Proposed Act 53 of 2020 List of Crimes Board of Nursing.
Licensed Practical Nurses Pennsylvania Licensure Requirements. Retrieved from <a href="https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Pages/Licensed-Practical-Nurses-Licensure-Requirements-Snapshot.aspx">https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Pages/Licensed-Practical-Nurses-Licensure-Requirements-Snapshot.aspx</a>
Occupational Therapy Education and Licensure Board - Schedule of Criminal Convictions That May Constitute Grounds to Refuse to Issue, Suspend or Revoke a License, Certificate, Registration or Permit. Community Legal Services PowerPoint Presentation.
Pennsylvania Commission on Sentencing. Summary of Sentences by Offense Category, Statewide, 2018. Run Date: September 21, 2021.
Rationale for Crimes Directly Related to the Profession of Nursing and Dietetics-Nutrition. Retrieved from <a href="https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Documents/Board%20Documents/Act-53-List-Rationale.pdf">https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Nursing/Documents/Board%20Documents/Act-53-List-Rationale.pdf</a>

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Sharon M. Dietrich & Brendan P. Lynch. Reentry Initiatives for Individuals with Criminal Records: Pennsylvania Reforms Occupational Licensing, Expands Clean Slate. *Pennsylvania Bar Association Quarterly*, 92 (2021): 122-131.

SB 637 Will Remove Criminal Record Barriers to Occupational Licensing, Is a Bipartisan Workforce Development/Economic Recovery Bill. SB 637 Fact Sheet. Prepared by Community Legal Services.

State Board of Nursing - Schedule of Criminal Convictions That May Constitute Grounds to Refuse to Issue, Suspend or Revoke a License, Certificate, Registration or Permit

State Board of Physical Therapy - Schedule of Criminal Convictions That May Constitute Grounds to Refuse to Issue, Suspend or Revoke a License, Certificate, Registration or Permit

State Board of Landscape Architects - Schedule of Criminal Convictions That May Constitute Grounds to Refuse to Issue, Suspend or Revoke a License, Certificate, Registration or Permit

State Board of Medicine – Schedule of Criminal Convictions That May Constitute Grounds to Refuse to Issue, Suspend or Revoke a License, Certificate, Registration or Permit

State Registration Board for Professional Engineers, Land Surveyors and Geologists - Schedule of Criminal Convictions That May Constitute Grounds to Refuse to Issue, Suspend or Revoke a License, Certificate, Registration or Permit

## ATTACHMENT D: Overview of Nursing Occupations

The current study will be focused on three Nursing occupations licensed by the Pennsylvania State Board of Nursing:

- Certified Registered Nurse Practitioner
- Licensed Practical Nurses
- Registered Nurses (including Advanced Practice Registered Nurses such as Nurse Midwives & Nurse Anesthetists)

Each occupation will be described on the following pages. The descriptions include the following:

1. **“Key” Work Activities** developed using the Detailed Work Activities from O\*NET OnLine (<https://www.onetonline.org/>). The O\*NET Detailed Work Activities were reviewed and revised in focus groups with input from nursing professionals.

*“Key” Work Activities were defined as the most **important** and frequently **performed** job responsibilities for a given occupation across common work settings*

2. **Common Work Settings** developed using data from the U.S. Bureau of Labor Statistics (<https://www.bls.gov/>). The U.S. Bureau of Labor Statistics work settings were reviewed and updated in focus groups with input from nursing professionals.
3. **Risk Factors** developed by APTMetrics and reviewed and revised in focus groups with nursing professionals. Risk factors are characteristics of an occupation which give an individual with a criminal history the opportunity to repeat the criminal behavior on the job. Risk factors are influenced by both job responsibilities and work settings.



## Certified Registered Nurse Practitioner

Nurse Practitioners diagnose and treat acute, episodic, or chronic illness, independently or as part of a healthcare team. They may focus on health promotion and disease prevention. They may order, perform, or interpret diagnostic tests such as lab work and x rays. They may prescribe medication. Must be registered nurses who have specialized graduate education.

Key Work Activities are included in the table below.

<b>Certified Registered Nurse Practitioner Key Work Activities</b>
Administer non-intravenous medications and immunizations.
Advise patients on effects of health conditions or treatments and/or healthcare system processes.
Analyze quantitative data, test data or images to inform diagnosis or treatment and/or determine the effectiveness of Rx or therapies.
Apply bandages, dressings, or splints.
Consult & collaborate with other healthcare professionals to plan or provide treatment.
Record patient medical histories
Communicate detailed medical information, medical procedures, test results, diagnoses, Rx plan, and/or care to patients & family members.
Develop medical treatment plans.
Diagnose medical conditions.
Order medical diagnostic or clinical tests.
Establish nursing policies or standards.
Follow protocols or regulations for healthcare activities.
Examine patients to assess general physical condition, functioning, capabilities, and/or health.
Maintain medical or professional knowledge, including maintaining licensure.
Monitor patient conditions during treatments, procedures, or activities.
Operate diagnostic or therapeutic medical instruments or equipment.
Prescribe treatments, assistive medical devices, and/or therapies
Prescribe medications.
Provide health and wellness advice to patients, program participants, or caregivers.
Record patient medical histories.
Refer patients to other healthcare practitioners, health resources, or specialists.
Schedule patient procedures or appointments.
Supervise patient care personnel (e.g., application of bandages, dressings, or splints).
Train patients, family members, and/or other non-medical personnel in caregiving, techniques for managing disabilities or illnesses, etc.
Treat acute illnesses, infections, or injuries.
Treat chronic diseases or disorders.
Treat medical emergencies, including responding to patient codes
Monitor medical facility activities to ensure adherence to standards or regulations.

Common work settings are included in the table below

<b>Certified Registered Nurse Practitioner Work Settings</b>
Hospitals (federal, state, local, and private)
Nursing Homes/Extended Care Facilities
Clinics (e.g., Urgent Care, Minute Clinics)
Physicians' Offices
Nurse Practitioner Offices
Home Healthcare Services
Schools
Private Homes
Prisons
Hospices
Ambulatory Surgical Centers
Telehealth
Insurance companies
Corporate Offices

## Registered Nurse (including Advanced Practice Registered Nurses such as Nurse Midwives & Nurse Anesthetists)

Registered Nurses assess patient health problems and needs, develop, and implement nursing care plans, and maintain medical records. Administer nursing care to ill, injured, convalescent, or disabled patients. They may advise patients on health maintenance and disease prevention or provide case management. Licensing or registration required.

Nurse Midwives diagnose and coordinate all aspects of the birthing process, either independently or as part of a healthcare team. May provide well-woman gynecological care. Must have specialized, graduate nursing education.

Nurse Anesthetists administer anesthesia, monitor patient's vital signs, and oversee patient recovery from anesthesia. May assist anesthesiologists, surgeons, other physicians, or dentists. Must be registered nurses who have specialized graduate education.

Key work activities are included in the table below.

<b>Registered Nurse Key Work Activities</b>
Administer anesthetics or sedatives to control pain.
Administer basic health care or medical treatments.
Administer blood, other fluids, or medications intravenously.
Administer non-intravenous medications and immunizations.
Advise communities or institutions re: health or safety issues.
Advise or inform other medical personnel regarding healthcare issues, patient conditions, and care.
Advise patients on effects of health conditions or treatments, and/or healthcare system processes.
Advocate for patients' best interests.
Analyze patient data to determine patient needs or Rx goals.
Analyze quantitative data, test data or images to inform diagnosis or treatment and/or determine the effectiveness of Rx or therapies.
Apply bandages, dressings, or splints.
Assess patient work, living, or social environments.
Assist healthcare practitioners during examinations or treatments.
Assist patients with hygiene or daily living activities.
Care for women during pregnancy and childbirth.
Clean medical equipment or facilities.
Consult & collaborate with other healthcare professionals to plan or provide treatment.
Collect biological specimens from patients.
Collect medical information from patients, family members, or other medical professionals.
Record patient medical histories
Communicate detailed medical information, medical procedures, test results, diagnoses, Rx plan, and/or care to patients & family members.
Communicate health and wellness information to the general public.
Compile data or documentation.

<b>Registered Nurse Key Work Activities</b>
Conduct health or safety training programs.
Consult with others regarding safe or healthy equipment or facilities.
Design and/or develop public or employee health or education programs.
Develop procedures to evaluate organizational activities.
Diagnose medical conditions.
Order medical diagnostic or clinical tests.
Establish nursing policies or standards.
Evaluate data quality.
Follow protocols or regulations for healthcare activities.
Examine patients to assess general physical condition, functioning, capabilities, and/or health.
Evaluate patient outcomes to determine effectiveness of treatments.
Examine and maintain medical instruments or equipment to ensure proper operation.
Implement advanced life support techniques.
Interpret cultural or religious information for others.
Maintain medical facility records, inventories of medical supplies or equipment, etc.
Maintain medical or professional knowledge, including maintaining licensure.
Measure the physical or physiological attributes of patients.
Monitor patient conditions during treatments, procedures, or activities.
Operate diagnostic or therapeutic medical instruments or equipment.
Perform clerical work in medical settings, including ordering medical supplies/equipment.
Prepare medical supplies or equipment for use.
Sterilize medical equipment or instruments.
Prepare medications or medical solutions.
Prepare patients physically for medical procedures.
Prepare reports summarizing patient diagnostic or care activities.
Process healthcare paperwork.
Provide health and wellness advice to patients, program participants, or caregivers.
Record patient medical histories
Refer patients to other healthcare practitioners, health resources, or specialists.
Schedule patient procedures or appointments.
Select medical equipment for addressing patient needs.
Supervise medical support personnel.
Supervise patient care personnel (e.g., application of bandages, dressings, or splints).
Support the professional development of others, including educating or facilitating education of other nurses
Teach classes in area of specialization or medical procedures to healthcare personnel.
Test biological specimens to gather information about patient conditions.
Test patient nervous system functioning.
Train patients, family members, and/or other non-medical personnel in caregiving, techniques for managing disabilities or illnesses, etc.
Treat acute illnesses, infections, or injuries.
Treat chronic diseases or disorders.

<b>Registered Nurse Key Work Activities</b>
Treat medical emergencies, including responding to patient codes
Treat patients using physical therapy techniques. (e.g., range of motion)
Monitor medical facility activities to ensure adherence to standards or regulations.
Manage healthcare operations and/or direct healthcare delivery programs.
Assess patients, patients' families, etc. for potential violence and respond appropriately (e.g., notify security, call police or EMTs).
Develop medical treatment plans.
Prescribe medications.
Train medical providers.
Develop and implement anesthesia plan for patients.

Common work settings are included in the table below

<b>Registered Nurse Work Settings</b>
Hospitals (federal, state, local, and private)
Nursing Homes/Extended Care Facilities
Clinics (e.g., Urgent Care, Minute Clinics)
Physicians' Offices
Nurse Practitioner Offices
Home Healthcare Services
Schools
Private Homes
Prisons
Hospices
Ambulatory Surgical Centers
Telehealth
Insurance Companies
Corporate Offices
Birthing Centers

## Licensed Practical Nurse

Licensed Practical Nurses care for ill, injured, or convalescing patients or persons with disabilities in nursing homes, clinics, private homes, group homes, and similar institutions. They work under the supervision of a registered nurse. Licensing required.

Key work activities are included in the table below.

<b>Licensed Practical Nurse Key Work Activities</b>
Administer basic health care or medical treatments.
Administer blood, other fluids, or medications intravenously.
Analyze quantitative data to determine effectiveness of treatments or therapies.
Apply bandages, dressings, or splints.
Assist healthcare practitioners during examinations or treatments.
Assist patients with hygiene or daily living activities.
Clean medical equipment or facilities.
Consult & collaborate with other healthcare professionals to plan or provide treatment.
Collect biological specimens from patients.
Record patient medical histories
Communicate with patients and/or family members to explain medical procedures or test results, facilitate patient visits, and/or address questions or concerns during callbacks.
Maintain medical facility records, inventories of medical supplies or equipment, etc.
Maintain medical or professional knowledge, including maintaining licensure.
Manage preparation of special meals or diets.
Measure the physical or physiological attributes of patients.
Monitor patient conditions during treatments, procedures, or activities.
Operate diagnostic or therapeutic medical instruments or equipment.
Perform clerical work in medical settings, including ordering medical supplies/equipment.
Prepare medical supplies or equipment for use.
Sterilize medical equipment or instruments.
Prepare patients physically for medical procedures.
Record patient medical histories
Schedule patient procedures or appointments.
Supervise patient care personnel (e.g., application of bandages, dressings, or splints).
Test biological specimens to gather information about patient conditions.
Train patients, family members, and/or other non-medical personnel in caregiving, techniques for managing disabilities or illnesses, etc.
Treat patients using physical therapy techniques. (e.g., range of motion)

Common work settings are included in the table below

<b>Licensed Practical Nurse Work Settings</b>
Hospitals (federal, state, local, and private)
Nursing Homes/Extended Care Facilities
Clinics (e.g., Urgent Care, Minute Clinics)
Physician's Offices
Nurse Practitioner Offices
Home Healthcare Services
Schools
Private Homes
Prisons
Hospices

## Risk Factors

Risk factors were reviewed and edited in focus groups with nursing professionals. The focus group participants determined that the risk factors were common across Certified Registered Nurse Practitioner, Registered Nurse, and Licensed Nurse Practitioner roles.

<b>Nursing Risk Factors</b>	
<b>Risk Factor</b>	<b>Definition</b>
<b>Access to Personal Property</b>	Ability to access property belonging to coworkers, patients, and/or patients' families at any place in the hospital/facility, including patients' rooms, breakrooms, offices, lockers, etc.
<b>Access to Hospital/Facility Property</b>	Ability to access property belonging to hospital/facility including medical equipment and supplies (e.g., N-95 masks, PPE).
<b>Access to Sensitive Information/Medical Records</b>	Ability to review and record information of patients, coworkers, and other individuals, including personally identifiable information (e.g., date of birth, social security) and medical history available in medical records and regional & statewide electronic records.
<b>Access to Drugs</b>	Ability to access or divert prescription drugs, other forms of medication, and/or prescription pads.
<b>Access to Secured Areas</b>	Ability to access secure areas within the hospital/facility (including medicine storage cabinets, lock boxes, supply rooms, & offices), patient homes, or other work settings, and to provide access to someone not authorized to access those areas (e.g., badging family or friends into secure areas).
<b>Access to Patients</b>	Ability to interact verbally or physically with patients any place in the hospital/facility, including areas that may place them in vulnerable positions such as patient rooms, treatment rooms, restrooms etc.
<b>Access to Vulnerable Populations</b>	Access to vulnerable populations such as children, the elderly, the disabled, cognitively impaired, and the sedated
<b>Access to Patients' Families, Vendors, and Coworkers</b>	Ability to interact verbally or physically with patients' families, vendors, or coworkers any place in the hospital/facility (including waiting rooms, lobbies, patient rooms, storerooms, offices, parking lot, restrooms, etc.), patients' homes, or other work settings.



# ATTACHMENT E: Nursing Demonstration Exercise Results

CRIMINAL CHARGE	CRIME DESCRIPTION	Nursing Occupation to Crime Linkages								Directly Related Time Frame Years since conviction that the crime should be considered directly related				
		X = Risk factors that are the basis for Subject Matter Experts' linkages	Linkage Yes/No	Access to Personal Property	Access to Hospital/ Facility Property	Access to Sensitive Information/ Medical Records	Access to Drugs	Access to Secured Areas	Access to Patients		Access to Vulnerable Populations	Access to Patients' Families, Vendors, and Coworkers		
Forgery	Makes/issues/alters money, tokens, credit cards, badges, etc.; Forges signatures: Creates/executes/issues documents such as wills, contracts, etc.	No												
Identity Theft	Possesses or uses the identifying information of another person (e.g., SSN, driver's license, electronic signature) for an unlawful purpose including financial identity theft.	Yes	X			X			X				X	Medium
Drugs - Possession with Intent to Distribute	Distributes/manufactures/ delivers drugs; dispenses without prescription; includes intent to distribute. Possesses a controlled or counterfeit substance not obtained by a valid prescription or order of a healthcare practitioner; Exchanges a controlled or counterfeit substance.	Yes				X			X				X	Short
Drugs - Simple Possession	Drives/operates a vehicle under the influence of controlled substances, or sufficient alcohol or drugs to impair an individual's ability to safely drive or operate the vehicle.	Yes	X			X			X				X	Short
DUI - Controlled Substances or Alcohol	Possesses a small amount of marijuana for personal use or distribution but not for sale.	No												
Marijuana - Possession		No												

# ATTACHMENT E: Nursing Demonstration Exercise Results

CRIMINAL CHARGE	CRIME DESCRIPTION	Nursing Occupation to Crime Linkages									Directly Related Time Frame Years since conviction that the crime should be considered directly related	
		X = Risk factors that are the basis for Subject Matter Experts' linkages	Linkage Yes/No	Access to Personal Property	Access to Hospital/ Facility Property	Access to Sensitive Information/ Medical Records	Access to Drugs Secured Areas	Access to Patients	Access to Vulnerable Populations	Access to Patients' Families, Vendors, and Coworkers		
Adulterated or Misbranded Drugs	Manufactures, sells, delivers or possesses a controlled substance drug, device, or cosmetic that has been misbranded or adulterated.	No	No	No	No	No	No	No	No	No	No	Short (1-3), Medium (4-6); Long (7-9)
Receiving Stolen Property	Deals in stolen property; Receives, retains, or disposes of stolen property.	No	No	No	No	No	No	No	No	No	No	
Retail Theft (Misdemeanor)	Steals store merchandise; Alters/removes price tags to acquire merchandise at less than full retail value; Destroys/removes inventory control or other mechanisms to facilitate theft; Under-rings merchandise when employed by retail establishment.	No	No	No	No	No	No	No	No	No	No	
Retail Theft (Felony)	Steals store merchandise; Alters/removes price tags to acquire merchandise at less than full retail value; Destroys/removes inventory control or other mechanisms to facilitate theft; Under-rings merchandise when employed by retail establishment	Yes	X	X	X	X	X	X	X	X	X	Short
Theft by Unlawful Taking or Disposition (Misdemeanor)	Steals movable property; Unlawfully transfers or exercises control over immovable property.	No	No	No	No	No	No	No	No	No	No	
Theft by Unlawful Taking or Disposition (Felony)	Steals movable property; Unlawfully transfers or exercises control over immovable property.	Yes	X	X	X	X	X	X	X	X	X	Short

# ATTACHMENT E: Nursing Demonstration Exercise Results

CRIMINAL CHARGE	CRIME DESCRIPTION	Nursing Occupation to Crime Linkages								Directly Related Time Frame Years since conviction that the crime should be considered directly related		
		X = Risk factors that are the basis for Subject Matter Experts' linkages	Linkage Yes/No	Access to Personal Property	Access to Hospital/ Facility Property	Access to Sensitive Information/ Medical Records	Access to Drugs to Secured Areas	Access to Patients	Access to Vulnerable Populations		Access to Patients' Families, Vendors, and Coworkers	
Theft by Deception	Obtains or withholds an individual's property by deception (e.g., creates a false impression as to value or intentions; withholds information that would affect another's judgement regarding a transaction)	No										Short (1-3), Medium (4-6); Long (7-9)
Simple Assault	Fights with another by mutual consent; Attempts to cause bodily injury to another person; Knowingly or recklessly causes bodily injury; Physically menaces another to cause fear of serious bodily injury.	No										
Child Endangerment	As a parent, guardian, or person supervising a child, endangers the welfare of child under 18; In an official capacity, prevents/interferes with reporting of suspected child abuse.	Majority No*										
Stalking	Repeatedly follows or communicates with a person without proper authority, with an intent to place the person in reasonable fear of injury or to cause emotional distress to the person.	Split Decision^							X	X	X	Short/Medium (3-4 years)

# ATTACHMENT E: Nursing Demonstration Exercise Results

CRIMINAL CHARGE	CRIME DESCRIPTION	Nursing Occupation to Crime Linkages								Directly Related Time Frame Years since conviction that the crime should be considered directly related	
		X = Risk factors that are the basis for Subject Matter Experts' linkages	Linkage Yes/No	Access to Personal Property	Access to Hospital/ Facility Property	Access to Sensitive Information/ Medical Records	Access to Drugs Secured Areas	Access to Patients	Access to Vulnerable Populations		Access to Patients' Families, Vendors, and Coworkers
Harassment	Strikes, shoves, or kicks another person or threatens to inflict harm; Follows another person; Communicates in a lewd, lascivious, or threatening manner; Communicates repeatedly in an anonymous manner or at extremely inconvenient hours; Engages in a course of conduct or repeatedly commits acts which serve no legitimate purpose.	No									Short (1-3), Medium (4-6); Long (7-9)
Terroristic Threats	Directly or indirectly communicates a threat to commit a crime of violence or causes the evacuation of a building or other facility; Causes serious public inconvenience.	No									

\*Majority No = Panel was unable to reach consensus; the majority of the SMEs judged the crime not to be directly related.

^Split Decision = Panel was unable to reach consensus; half of the SMEs judged the crime to be directly related and half did not.

# **Appendix C**

## **Redemption and Recidivism Research Implications for Act 53 of 2020**

Kiminori Nakamura, Ph.D.

October 28, 2021

### ***Introduction***

It is my understanding that Act 53 provides for the Pennsylvania occupational licensing boards to create lists of “directly related” offenses that place the burden on the license applicants to demonstrate that they do not pose “substantial risk” in performance of the occupation. The vast majority of the listed offenses are not limited in duration, effectively creating lifetime barriers for the license applicants. However, research has consistently demonstrated that the reoffending risk of people with criminal history diminishes with the passage of time, providing a strong empirical basis for the time-limited use of criminal history records.

### ***Qualifications***

I am an Assistant Research Professor of Criminology and Criminal Justice at the University of Maryland. My research spans issues related to criminal justice policy (policing, courts, corrections), and research on criminal careers and consequences of criminal justice involvement. Much of my research focuses on the issue of “redemption” for individuals with criminal-history records. Redemption refers to the process through which the risk of recidivism declines to a level of appropriate benchmarks so that prior criminal convictions are no longer meaningfully predictive of future reoffending. My research on redemption has been funded by the National Institute of Justice, has appeared in leading criminology journals, and has been cited in the Equal Employment Opportunity Commission’s (EEOC) revised enforcement guidance on the use of criminal-history records in employment. I received my B.A. in Criminology, Law and

Society from University of California, Irvine, and my Ph.D. in Public Policy and Management from Carnegie Mellon University.

***Recidivism and Redemption Research: Diminishing Relevance of Criminal History over Time***

The unprecedented expansion of criminal justice control over the last half century has resulted in a dramatic increase in criminal records, especially for racial minorities (Brame et al., 2012; Brame et al., 2014; Shannon et al., 2017). The use of criminal history information for employment and occupational licensing purposes has thus raised concerns of collateral consequences that could stigmatize and handicap the job prospects of a large number of individuals (Agan and Starr, 2017; The National Inventory of Collateral Consequences of Conviction [NICCC], 2021; Pager 2008). While criminal history information could be relevant to predicting recidivism risk, it is clear that the predictive value decays over time. Recidivism research has long shown that recidivism risk is typically highest immediately following the last contact with the criminal justice system (e.g., arrest, conviction, release from incarceration) but the risk declines more or less steadily as time since the last criminal justice contact elapses (e.g., Durose et al., 2014; Maltz, 1984). This is consistent with theories of desistance in criminology, which posit that whether desistance from crime occurs gradually over time (Bushway et al., 2001; Sampson and Laub, 1993) or instantaneously at a discrete time point (Brame et al., 2018; Kurlychek et al., 2012), the length of recidivism-free time is a strong indicator of desistance. In other words, the risk that prospective workers with criminal records present decreases as time goes by without further criminal conduct.

Based on the empirical pattern of recidivism risk and desistance theories, redemption literature (Blumstein and Nakamura, 2009; Bushway et al., 2011; Kurlychek et al., 2006, 2007; Soothill and Francis, 2009) provides estimates of “redemption times”, i.e. how long it takes those

with a record to become sufficiently low risk, compared to benchmarks. More specifically, the **research has found that the recidivism risk of those with a prior criminal record falls below the risk of arrest for the general population approximately after four to seven years for violent offenders, four years for drug offenders, and three to four years for property offenders** (Blumstein and Nakamura, 2012).

Thus, while these redemption times can vary across characteristics such as the age of an individual under consideration and the extensiveness of criminal history (Blumstein and Nakamura, 2009; Bushway et al., 2011), for those who are concerned about the risk of individuals with a criminal record, **the value of the criminal record in predicting future criminality diminishes with time and likely becomes virtually irrelevant for many purposes after approximately seven years or even less** (Blumstein and Nakamura, 2012; see also DeWitt et al., 2017).

### ***Application of Research Findings to Act 53***

If an offense is listed as “directly related” to the profession or occupation defined in Act 53, it would be presumed that the person would pose a “substantial risk” to others’ health and safety. The lack of a time limit to how long an offense is “directly related” indicates that the offender continues to pose “substantial risk” uniformly over their career. This is not consistent with the recidivism and redemption research discussed above. Recidivism risk is not static, as the list presumes; rather, risk is variant and declines considerably even within a few years of the last conviction. Thus, the level of risk should be assessed as a function of the length of time elapsed since the last conviction, and approximately after 7 years, the risk should no longer be considered substantial. Such time-limited use of criminal records is not only evidence-based but also good public policy as it can help reduce recidivism and improve employment prospects

(Denver, 2017; Denver et al., 2017). Thus, the existing research supports that the time-limited use of criminal records based on the length of recidivism-free time should be applied to as many offense types that are currently on the “directly related” list as possible.

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