



VIA ELECTRONIC MAIL

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 Pennsylvania Department of State
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**Re: 16A-66 (Consideration of Criminal Convictions)
 Comments re: Proposed Regulations Implementing Act 53 of 2020
 Occupational Licensing Reform Bill – IRCC No. 3361**



The American Civil Liberties Union (ACLU) and the ACLU of Pennsylvania¹ write to oppose the proposed regulations drafted in response to Act 53 of 2020. The proposed regulations ignore Act 53’s intent and will result in racial inequity. If adopted as drafted, the regulations will predictably cause a disproportionate number of people of color to be denied occupational licenses despite posing no threat to public safety, and despite no other rational connection between the regulation and any legitimate state interest. We therefore request that the proposed regulatory package be revised to limit what constitutes a “directly related” offense and include time limits for how long the presumption continues.

The scope of the potential harm must be considered. The Bureau of Professional and Occupational Affairs has issued around a million licenses to one in twelve Pennsylvanians. Nearly three million people have a criminal record in Pennsylvania, and people of color continue to be disproportionately targeted by the criminal justice system. Thus, the scope of the impact of criminal history requirements in licensing is staggering, particularly from a racial justice perspective. Act 53 and the subsequent regulations create an opportunity to build a stronger workforce without sacrificing quality or safety. The Bureau of Professional and Occupational Affairs must do everything in its power to ensure equity and transparency in this area of licensing. Doing so is not only fair but consistent with Governor Wolf’s recent pledge² to prioritize criminal justice reform.

Act 53 was passed with the explicit intent to curtail occupational licensing boards’ ability to deny licenses based on irrelevant criminal records. The legislature intended to ensure more predictable results with less racial disparity, in part by providing a list of directly related crimes that could disqualify candidates from

¹ The ACLU is a non-partisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality enshrined in the Constitution. The ACLU of Pennsylvania is its state affiliate.

² See *Gov. Wolf’s Criminal Justice Reform Legacy: Removed Barriers, Clean Slates, and Opportunities for Success*, GOVERNOR TOM WOLF (Sept. 15, 2022), <https://www.governor.pa.gov/newsroom/gov-wolfs-criminal-justice-reform-legacy-removed-barriers-clean-slates-and-opportunities-for-success/>.



licensure. 63 Pa.C.S. § 3113(b). The proposed regulations, however, broadly define such crimes and fail to impose time limits on how long convictions can serve as a barrier to an occupational license. They are thus contrary to the legislature’s intent and undermine the goals of removing unnecessary barriers to occupational licenses.

The Crimes Identified as Directly Related Are Overly Broad

The statutes define directly related offenses as those where “[t]he 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; 63 Pa.C.S. § 3113. Conviction of such crimes creates a rebuttable presumption that an individual poses a substantial risk to health and safety. 63 Pa.C.S. § 3113(b)(1). The regulations, however, do not limit eligibility to offenses *directly related* to the duties of the job for which the license is sought and instead apply to a much broader array of offenses. The following are just a few instances where the regulations identify crimes that are not reasonably considered “directly related” to the occupation at issue:

- The regulations list theft by unlawful taking or disposition (18 Pa.C.S. § 3921) as a directly related offense for barbers. Although the job, like any, entails the exchange of money for goods or services, that exchange is incidental to the job itself. Including it here would therefore be overly inclusive because nearly every profession would be foreclosed to people convicted of this offense. By contrast, a reasonable example of a directly related offense for barbers would involve, for example, the misuse of scissors or related instruments.
- The regulations list intimidation of witnesses or victims (18 Pa.C.S. § 3921) as a directly related offense for chiropractors.
- The regulations list forgery (18 Pa.C.S. § 4101) as a directly related offense for cosmetologists.

These are just a few examples of the many offenses that the regulations define as “directly related” that have no direct bearing on people’s fitness or ability to perform the duties or responsibilities of these trades. Indeed, the regulations do not identify the relevant duties and responsibilities for each trade, leaving the public to guess as to how the listed crimes are directly related. Identifying the relevant duties and responsibilities through an evidence-based process will increase consistency across occupations, reduce racial inequity, and accord with the legislature’s intent.



Narrowing or limiting the lists of directly related offenses would have no impact on public safety. This is because, under Act 53, in the rare circumstance where an applicant is convicted of a crime that has not been identified as directly related but the nature of the crime poses a substantial risk to health and safety, the relevant licensing board may still conduct an individualized assessment of the conviction as described in 63 Pa.C.S. § 3113 (b)(2) to determine whether the applicant should receive a license. The overinclusiveness of the listed crimes thus places an unnecessarily heavy burden on applicants to prove their rehabilitation for potentially unrelated convictions without further ensuring public safety.

The Lack of a Limited Lookback Period Further Undermines the Act’s Intent

A further concern with the proposed regulations is the lack of a defined lookback period for directly related crimes. Lifetime barriers to licensure are inconsistent with Act 53’s definition of “directly related.” The age of a conviction is critically important since the risk of recidivism declines as time passes from the date of the criminal act.³ Applicants should not bear the burden of proving rehabilitation for crimes committed long ago. Indeed, recidivism rates are actually higher in states with overly restrictive licensing bans as individuals struggle to successfully reenter society.⁴ For these reasons, many states limit the lookback period to just a few years when evaluating criminal histories for occupational licensing.⁵

Act 53 provides Pennsylvania with the opportunity to join a growing number of states that have recently reformed their occupational licensing standards to eliminate consideration of vague attributes such as moral character, to provide clearer guidelines on criminal history requirements, and to limit the lookback period for relevant convictions.⁶ Recent research shows that overly restrictive licensing requirements do not increase quality of services.⁷ The proposed regulations would put Pennsylvania out of step with national trends toward

³ Megan Kurlychek, Robert Brame & Shawn Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483 (2006).

⁴ Lisa Knepper et al., *License to Work: A National Study of Burdens from Occupational Licensing: 3rd Edition*, INST. FOR JUST. 47 (Nov. 2022), <https://ij.org/wp-content/uploads/2022/09/LTW3-11-22-2022.pdf>.

⁵ See, e.g., Me. Stat. tit. 5, § 5303 (limiting lookback period to three years for non-medical licenses); Ark. Code § 17-3-102 (limiting lookback period to five years for most crimes); Md. Code Crim. Proc. § 1-209 (limiting lookback period to seven years for most crimes); see also *Recent Licensing Reforms for Workers with Criminal Records*, INST. FOR JUST., <https://ij.org/legislative-advocacy/state-occupational-licensing-reforms-for-people-with-criminal-records/> (last visited Dec. 19, 2022) (showing 13 states with limited criminal record lookback periods).

⁶ See Beth Avery & Han Lu, *Nationwide Trend to Reform Unfair Occupational Licensing Laws*, NAT’L EMP. L. PROJECT (July 17, 2019), <https://www.nelp.org/publication/nationwide-trend-reform-unfair-occupational-licensing-laws/>; see also *Recent Licensing Reforms for Workers with Criminal Records*, *supra* note 5.

⁷ Kyle Sweetland & Dick M. Carpenter II, Ph.D., *Raising Barrier, Not Quality: Occupational Licensing Fails to Improve Services*, INST. FOR JUST. (Oct. 2022), <https://ij.org/wp-content/uploads/2022/10/Raising-Barriers-Not-Quality-10142022-WEB-REVISED.pdf>.

transparency and equity in occupational licensing without any benefits to the state's residents.

There are also constitutional concerns associated with the proposed licensing restrictions. The approaches taken in these proposed regulations appear to run afoul of rulings by the Pennsylvania Supreme Court and Commonwealth Court in two main ways. First, the regulations effectively create lifetime bans on pursuing certain occupations if the individual was convicted of one of the stated crimes at some point—even decades in the past. Yet “one of the rights guaranteed under Article 1, section 1 is the right to pursue a lawful occupation,” which requires that any such ban enacted by these regulations have “a real and substantial relationship to the interest the General Assembly is seeking to achieve.” *Nixon v. Commonwealth*, 839 A.2d 277, 289 (Pa. 2003). Barring a person who was convicted of theft by unlawful taking at age 18 from becoming a barber at age 30, or 40, or 50, seems unlikely to be substantially related to the legislature’s goal of avoiding “substantial risk” in the employment. Second, Pennsylvania’s equal protection guarantees are violated when “[s]imilarly situated licensed professionals . . . are not similarly restricted” by licensure requirements. *Haveman v. Bureau of Pro. & Occupational Affs.*, 238 A.3d 567, 579 (Pa. Commw. Ct. 2020); see also *Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 239 (1957) (licensure qualifications “must have a rational connection with the applicant’s fitness or capacity” to engage in that occupation to comport with equal protection and due process). Here, the lists of directly related offenses and lack of a limited lookback period appear arbitrary at best, and discriminatory at worst. The proposed regulations should be reformulated to pass constitutional muster.

For all of these reasons, we urge the Bureau to reject the proposed regulations and to instead draft regulations that more closely comport with the legislature’s intent in passing Act 53 by using evidence-based criteria to determine whether an offense is “directly related” to an occupation’s duties and by ensuring that individuals are not unnecessarily denied licenses based on offenses that are years or even decades old.

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