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SENATE BILL NO. 409

Offered January 12, 2022
Prefiled January 11, 2022

A BILL to amend and reenact §§ 54.1-100, 54.1-114, and 54.1-204 of the Code of Virginia, relating to Department of Professional and Occupational Regulation; effect of criminal convictions on licensure; data to be included in biennial report.

Patrons—Morrissey and Ebbin

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 54.1-100, 54.1-114, and 54.1-204 of the Code of Virginia are amended and reenacted as follows:

§ 54.1-100. Regulations of professions and occupations.

The right of every person to engage in any lawful profession, trade, or occupation of his choice is clearly protected by both the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when (i) it is clearly found that such abridgment is necessary for the protection or preservation of the health, safety, and welfare of the public and (ii) any such abridgment is no greater than necessary to protect or preserve the public health, safety, and welfare.

No regulation shall be imposed upon any profession or occupation except for the exclusive purpose of protecting the public interest when:

1. The unregulated practice of the profession or occupation can harm or endanger the health, safety, or welfare of the public, and the potential for harm is recognizable and not remote or dependent upon tenuous argument;

2. The practice of the profession or occupation has inherent qualities peculiar to it that distinguish it from ordinary work and labor;

3. The practice of the profession or occupation requires specialized skill or training and the public needs, and will benefit by, assurances of initial and continuing professional and occupational ability; and

4. The public is not effectively protected by other means.

No regulation of a profession or occupation shall conflict with the Constitution of the United States, the Constitution of Virginia, the laws of the United States, or the laws of the Commonwealth of Virginia. Periodically and at least annually, all agencies regulating a profession or occupation shall review such regulations to ensure that no conflict exists.

It is the intent of the General Assembly to enhance opportunities of gainful employment for all Virginians, including those who demonstrate rehabilitation after having been convicted of criminal offenses.

§ 54.1-114. Biennial report.

A. The Board of Bar Examiners, the Department of Professional and Occupational Regulation and the Department of Health Professions shall submit biennial reports to the Governor and General Assembly on or before November 1 of each even-numbered year. The biennial report shall contain at a minimum the following information for the Board of Bar Examiners and for each board within the two Departments: (i) a summary of the board's fiscal affairs, (ii) a description of the board's activities, (iii) statistical information regarding the administrative hearings and decisions of the board, (iv) a general summary of all complaints received against licensees and the procedures used to resolve the complaints, and (v) a description of any action taken by the board designed to increase public awareness of board operations and to facilitate public participation. The Department of Health Professions shall include, in those portions of its report relating to the Board of Medicine, a compilation of the data required by § 54.1-2910.1.

B. The biennial report shall include, with respect to all licenses, certificates, and registrations made:

1. The total number of applicants and of that number, the number of those granted a license and the number of those denied;

2. The total number of examinations administered and of that number, the number of applicants who were successful and the number of applicants who were unsuccessful in passing the examination requirements;

3. The number of initial applicants and renewal applicants with a criminal record and of those numbers, the number of times each board acted to grant the application or to deny, diminish, suspend, revoke, withhold, or refuse to renew or otherwise limit the requested license, certificate, or registration

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due at least in part to an individual's criminal conviction;

4. The number of each offense category for which each board acted in subdivision 3, whether that offense be property-related, person-related, or drug-related;

5. The number of guidance documents filed by each board under subsection F of § 54.1-204; and

6. Any other data, as determined by the Department to be (i) relevant and helpful to inform the Governor and General Assembly of the impact of criminal convictions on professional or occupational licensure or (ii) necessary to accurately account for all totals requested.

§ 54.1-204. Prior convictions not to abridge rights.

A. A person shall not be refused a license, certificate, or registration to practice, pursue, or engage in any regulated occupation or profession solely because of a prior criminal conviction~~, unless the criminal conviction directly relates to the occupation or profession for which the license, certificate or registration is sought. However, the regulatory board shall have the authority to refuse a license, certificate or registration if, based upon all the information available, including the applicant's record of prior convictions, it finds that the applicant is unfit or unsuited to engage in such occupation or profession~~ *until the regulatory board completes an individualized assessment of the individual's criminal record and current circumstances and determines upon clear and convincing evidence that (i) the criminal conviction directly relates to the occupation or profession for which the license, certificate, or registration is sought, as assessed pursuant to subsection C, and (ii) issuing the license, certificate, or registration presents a substantial risk to the public health, safety, or welfare and the individual has not shown sufficient rehabilitation to safely perform the duties and responsibilities of the occupation or profession, as assessed pursuant to subsection D.*

B. The regulatory board shall not require an applicant to disclose an excluded record, and an excluded record shall not be the basis for the refusal of a license, certificate, or registration by the board. An excluded record is any one of the following:

1. A conviction that has been sealed, annulled, dismissed, expunged, or pardoned;

2. A conviction for a misdemeanor offense if three years have elapsed since the conviction and the individual has not been convicted of a new offense in that three-year period, unless such conviction required proof of any nonconsensual sexual act; or

3. A conviction for a nonviolent felony offense if the individual's incarceration ended at least seven years before the date of the board's consideration and the individual has not been convicted of a new offense in that seven-year period.

A regulatory board or department review of a person's criminal history record shall be limited to any conviction, finding of guilt, or plea of guilty open to disclosure pursuant to § 19.2-389.3, regardless of whether the sentence is imposed, suspended, or executed. Any plea of nolo contendere shall be considered a conviction for the purposes of this section. No regulatory board shall consider information in a criminal history record related solely to an arrest or charge.

~~B.~~ *C.* In determining whether a criminal conviction directly relates to an occupation or profession, the regulatory board shall consider the following criteria:

1. The nature and ~~seriousness~~ *circumstances* of the crime;

2. The relationship of the crime to the purpose for requiring a license to engage in the occupation;

3. The extent to which the occupation or profession might ~~offer an opportunity~~ *present a substantial risk* to engage in further criminal activity of the same type as that in which the person had been involved; *and*

4. The relationship of the crime to the ~~ability, capacity or fitness~~ *qualifications* required to ~~perform the duties and discharge the responsibilities of~~ *practice* the occupation or profession~~;~~ *in a competent manner.*

D. In determining whether an applicant would pose a substantial risk to public health, safety, or welfare because the applicant has not shown sufficient rehabilitation to safely perform the occupation for which he seeks licensure, certification, or registration, the regulatory board shall consider the following:

~~5.~~ *1.* The extent and nature of the person's past criminal ~~activity~~ *convictions*;

~~6.~~ *2.* The age of the person at the time of the commission of the crime, *where commission of a crime by a minor shall be considered a mitigating factor*;

~~7.~~ *3.* The amount of time that has elapsed since the person's ~~last involvement in the commission of a crime~~ *most recent conviction*;

4. The reasonable progress made toward the completion of the sentence, whether the setting of that sentence be probation, parole, or a term of incarceration;

5. The successful completion of treatment for drugs or alcohol abuse, such treatment's relation to the criminal record at issue, and whether it was ordered, recommended, or assigned by a court or as a condition of probation or any community supervision program;

6. The successful completion of rehabilitative programming in the context of a term of incarceration or as a condition of probation, drug court, mental health court, diversion opportunity, or any community

supervision program;

~~8.~~ *7.* The conduct and work activity of the person prior to and following the criminal activity; and

~~9.~~ ~~Evidence~~ *8. Any other evidence* of the person's rehabilitation or rehabilitative effort while incarcerated or following release *that may mitigate against the relationship of past criminal conduct to the practice of the occupation or profession, including testimony or recommendations from correctional, probation, or parole officers, community or faith leaders, counselors or peer recovery specialists, employers, or other individuals as deemed relevant by the board.*

~~C.~~ *E. The board shall consider the criminal information contained in the applicant's state or national criminal records in lieu of the applicant providing certified copies of such court records and may request additional information from the applicant in determining whether a criminal conviction directly relates to an occupation or profession. If an applicant is denied a license, certificate, or registration because of the information appearing in his criminal history record, the regulatory board or department shall notify the applicant in writing of the specific offense or offenses that contributed to such denial, how the criminal history directly relates to the occupation, and how the rehabilitation factors contributed to the board's decision. The criminal history record information shall not be disseminated except as provided for in this section.*

A regulatory board or department may require any applicant for ~~registration,~~ licensure ~~or~~, certification, *or registration,* to submit to fingerprinting and to provide personal descriptive information to be forwarded along with the applicant's fingerprints through the Central Criminal Records Exchange to the Federal Bureau of Investigation for the purpose of obtaining criminal history record information regarding such applicant. Such applicant shall pay the cost of the fingerprinting or a criminal records check or both.

The regulatory board or department may enter into a contract to obtain the fingerprints and descriptive information as required for submission to the Central Criminal Records Exchange in a manner and format approved by the Central Criminal Records Exchange.

The Central Criminal Records Exchange, upon receipt of an applicant's record or notification that no record exists, shall make a report to the regulatory board or department or ~~their~~ *its* designee, who must belong to a governmental entity. ~~If an applicant is denied a registration, license or certificate because of the information appearing in his criminal history record, the regulatory board or department shall notify the applicant that information obtained from the Central Criminal Records Exchange contributed to such denial. The information shall not be disseminated except as provided for in this section.~~

~~D. A regulatory board or department shall consider the criminal information as contained in the applicant's state or national criminal history in lieu of the applicant providing certified copies of such court records in determining whether a criminal conviction directly relates to an occupation or profession or if an applicant is unfit or unsuited to engage in an occupation or profession. The regulatory board or department may request additional information from the applicant in making such determination.~~

F. All regulatory boards shall develop and publish on their website guidance documents that inform prospective applicants of the types of criminal offenses that may impede licensure, including specific convictions and application of the factors provided in subsections C and D.

2. That the provisions of the first enactment amending § 54.1-114 of the Code of Virginia shall become effective on July 1, 2025.

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