



Legislative Monitoring Analysis: H.R. 1893 and S. 697

Bill Name: [“Next Step Act 2019”](#)

Title Name: “Fair Chance Licensing Act”

Principal Sponsor: Sen. Cory Booker (D) and Rep. Bonnie Watson Coleman (D)

Introduced: S. 697 3/7/2019

H.R. 1893 3/26/2019

Stated Purpose: “To reform sentencing, prisons, re-entry of prisoners, and law enforcement practices, and for other purposes”

Status (as of 4/12/2019): H.R. 1893 Referred to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security

S. 697 Read twice and referred to the Committee on the Judiciary

Overview:

This comprehensive criminal justice reform bill – a follow-up to last year’s “First Step Act,” which was enacted into law – seeks to reform federal sentencing, prison, and drug laws, among other matters. Relevant to professional certification, Title VIII of the legislation – entitled the Fair Chance Licensing Act – aims to restrict the use of criminal conviction records by occupational licensing authorities, occupational certification authorities, and employers or others authorized to access criminal background checks. These “covered entities” would be prohibited from using criminal records to disqualify individuals from employment, occupational licensing, or occupational certification, unless the covered entity follows specific notice and consideration procedures, makes a determination that the conviction is directly related to the job or profession, and determines that the individual has not been rehabilitated. The bill sets forth requirements for state/local “qualifying background check laws” and limits who has access to background check records. The bill also establishes a notice requirement and appeals process if an individual will be disqualified from employment/licensure/certification, solely or in part because of a criminal conviction that has a direct and negative bearing on the ability of the individual to perform the position or occupation sought. The bill further requires a qualifying background check law to provide that a covered entity must engage in certain education, outreach, and transparency activities.

It is unclear whether the bill is intended to only apply to governmental licensing or certification authorities, but Congress should amend the bill to ensure that the legislation does not

undermine private certification standards for competency and ethics/conduct and that the bill does not prevent licensing authorities from enforcing practice acts that require current certification, even if an applicant's failure to hold current certification is linked to a criminal conviction.

Analysis:

Qualifying Background Check Laws

The primary requirement in the Fair Chance Licensing Act is that states or localities may not use criminal background checks unless they have enacted either: (1) a "qualifying background check law" or (2) "a law that is more favorable to an individual with a criminal history than a qualifying background check law." The bill does not provide a specific definition for "qualifying background check law"; instead, it enumerates certain requirements for such a law. Most relevant to the PCC, the law must regulate how "covered entities" may use criminal conviction history. The term "covered entity" includes "an occupational certification authority." That term is not further defined in the bill.

First, the bill says that a "qualifying background check law" must provide that that a covered entity may not consider any of the following criminal history information in determining whether to disqualify an individual employment, licensure, or certification:

- A conviction that is not directly related conviction
- Non-conviction information, such as participation in a deferred adjudication or diversion program
- A conviction that has been sealed, dismissed, or expunged
- A juvenile adjudication
- A misdemeanor conviction without imprisonment
- A misdemeanor conviction that is more than 1 year old
- A felony conviction that is more than 5 years old, excluding any period of incarceration or custody.

Second, the bill sets forth requirements for qualifying background check laws pertaining to how a licensing or certification authority should address situations in which an individual applying for employment/licensure/certification has a "directly related conviction." The bill directs that such laws should require covered entities, in making determinations related to employment/licensure/certification, to consider: (1) the nature/gravity of the directly related conviction; (2) the period of time that has elapsed since the conviction or the completion of the sentence; (3) and the nature of employment/license/certification held or sought. Additionally, the bill states that a qualifying background check law shall prohibit a covered entity from disqualifying an individual from employment, occupational licensure, or occupational certification solely or in part because of a directly related conviction if the individual can establish significant mitigation or rehabilitation and fitness to perform the duties of the position or occupation. The bill sets forth

numerous factors that would constitute mitigation or rehabilitation, such as lack of subsequent criminal activity, mitigating circumstances surrounding the commission of the crime in question, and evidence of rehabilitation (e.g. education, training, substance abuse treatment) during an individual's incarceration.

Third, the bill directs that a qualifying background check law must contain provisions that require the covered entity to provide notice to an individual of its decision to deny employment/licensure/certification and to offer a chance for the individual to appeal if the covered entity disqualifies such individual from employment/licensure/certification. In particular, the covered entity would have to notify the individual about the rationale for the disqualification and provide the individual examples of mitigation or rehabilitation evidence that the individual may voluntarily provide. The individual would then have 30 days to respond to the notice by challenging its accuracy or submitting evidence of mitigation or rehabilitation. Thereafter, the qualifying background check law would require the covered to notify the individual in writing regarding its final decision, explain additional appeals procedures available to the individual (if any), and identify the earliest date on which the individual may reapply for the employment/license/certification.

Fourth, the bill directs that a qualifying background check law shall require a covered entity to adopt education and outreach policies that incorporate input from stakeholders, including individuals with arrest or conviction records and explain to the public how the covered entity assesses criminal history information in making decisions regarding employment/licensure/certification.

Fifth, the bill directs the U.S. Attorney General, not later than 180 days after the law enters into effect (and semiannually thereafter), to review whether state and local background check laws comply with requirements described above.

Federal Requirements

In addition to mandating that states and localities institute qualifying background check laws to address ex-offenders' ability to obtain employment/licensure/certification, the bill also sets forth standards for how the federal government should handle cases in which criminal conviction history is relevant. As a baseline matter, the bill states that any agency that is considering an individual's criminal history information in connection with employment, occupational licensure, or occupational certification should follow the same set of standards required for state/local qualifying background check laws, as described above. The bill directs federal agencies to promulgate regulations necessary to comply with this general requirement within 180 days. However, agencies are not required to follow the standards for qualifying background check laws under any provision of law governing federal employment, the Armed Forces, law enforcement, or national security. As such, it is difficult to ascertain to whom the standards would apply, in the federal context. Additionally, the bill effectively describes the standards for qualifying background check laws, as applied in the federal context, as a floor rather than as a ceiling; in other words, those standards cannot supersede any other federal laws that impose requirements that are more favorable to an individual with a criminal history.

Finally, the bill says that the Fair Chance Licensing Act will enter into effect 1 year after the date the Act is enacted into law.

Proposed Amendments to Legislation:

The bill's provisions raise two significant concerns for PCC members:

- If an “occupational certification authority” includes private certification organizations, this bill represents an unprecedented intrusion into the substantive and procedural provisions of the ethics codes of certification organizations.
- Even if “covered entities” are defined only to cover employers and governmental licensing or certification agencies, requirements that are triggered if a decision is made “solely or in part because of a directly related conviction” can be interpreted to gut any regulatory or employer requirement that an applicant hold current certification, given that relevant criminal convictions may disqualify individuals from holding a private certification.

To address these problems, we propose the following amendments:

“(A) the term ‘covered entity’ means:

- (i) an occupational licensing authority*
- (ii) a **governmental** occupational certification authority; and*
- (iii) an employer or third-party entity that is authorized by Federal or State law...to access the records system created under this section for employment purposes;”*

This definition is not otherwise concerning to the PCC. Private certification programs do not conduct background checks “for employment purposes.” To the extent they do so, they conduct them for credentialing purposes. Moreover, most private certification organizations do not perform background checks. It would be prohibitively expensive for most. Instead, private certification programs usually rely on complaints, reports from licensing boards, news, or self-reporting.

Second, we would recommend that the bill be amended to include safe harbor language for private certification organizations, as follows:

Nothing in this chapter shall be construed to require a private certification organization to grant or deny private certification to any individual, nor alter or preempt any requirement in a federal, state, or local licensure statute or regulation for an individual to hold current private certification as a condition of licensure or renewal of licensure.

Indeed, this safe harbor may be sufficient on its own, but it would be better to also clarify the terms used in the bill by including a governmental connection in the definition of a “covered

entity” and anywhere the phrase “occupational certification authority” is used, as mentioned above.

Third, we recommend that the phrase “solely or in part because of a directly related conviction” be amended to “*solely or expressly in part because of a directly related conviction.*” This would still cover situations in which a licensing agency or employer disqualified an applicant based both on criminal conviction history and sine other factor, but it would not reach disqualifications based on applicant’s lack of a required certification.

The PCC will work to determine whether the bill sponsors share the view that the bill should exempt private certification programs from requirements that criminal history-based disqualification of certificants (or candidates for certification) include the very prescriptive procedural measures mandated by the bill and exceptions to disqualification for individuals who can individual can establish sufficient mitigation or rehabilitation and fitness to perform the duties of the occupation.

On the one hand, courts have affirmed a “strong public policy against reviewing the substance of a private organization’s adjudication of a dispute regarding one of its members.” See <https://www.ice-exchange.org/p/bl/et/blogaid=369>. Because private credentialing organizations are subject matter experts about the expectations for their profession, courts are reluctant to dictate or second-guess the substance of those expectations. Unless the conduct expectations are unlawful or discriminatory, a certification organization’s rules need only be “rationally related” to a “legitimate concern” of the organization.

On the other hand, the sponsors of this legislation may view this as the right time to redefine what kinds of considerations are unlawful or discriminatory. They may feel that, because certification is the precondition to licensure in many professions and a gateway to serious consideration by employers in many others, the federal government rightly has a role in demanding that any private certification program that includes criminal convictions as a disqualifying factor allow for review of individual circumstances. The PCC is prepared to address an ideologically-based resistance to its efforts to amend this bill.