

Collateral Sanctions: Florida's Laws and Policies Impacting Employment Opportunities of Ex-Offenders

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Governor Bush, in his Executive Order creating his Ex-Offender Task Force, said “the ability of ex-offenders to obtain employment after incarceration and become productive members of their communities is essential to reducing recidivism rates.” And he charged the Task Force with identifying “legal, policy, structural, organizational, and practical barriers to successful reentry,” with the goal of eliminating such barriers.

This memo begins the process of identifying employment barriers. Since there has been talk of the Governor and Task Force working with the private sector, responding to their concerns about hiring ex-offenders and persuading the business community to consider, where reasonable and feasible, opening their doors to people with criminal records, it seemed that the place to start this inquiry was to look at the hiring laws and policies of the state.

Florida employs tens of thousands of people, and the state regulates and licenses many other jobs. Its own policies and practices can set an example for the private sector.

If the state closes off job opportunities and provides no mechanism for case by case review, or for a realistic means by which rehabilitation can be shown and disqualifications from employment lifted, then it is hard for the state to argue to the private sector that it should be more forgiving toward people coming out of prison.

On the other hand, to the extent that the state opens doors of opportunity and rescinds restrictions that foreclose opportunity, it sends a signal to the private sector that the state is serious about giving ex-offenders a second chance. And it is walking the walk that it wants the private sector to walk.

Mixed Signals

Currently, the signal being sent – if one were to listen – is very mixed. On the one hand, there is a law that allows people with felony convictions, after a three-year waiting period following a disqualifying conviction, to obtain an exemption from the disqualification and seek employment in fields and facilities from which they would otherwise be barred.¹ The agencies that know of this law and appear to have policies in place that follow it include legacy agencies of the Department of Rehabilitation Services, including the Departments of Juvenile Justice; Children and Family Services; Health (in some instances); and the Agency for Health Care Administration. Indeed, I have been told that this law – also creating two levels of background

¹ 435.07, F.S. The law, called “Employment Screening,” in the Labor title of the Florida Statutes, is explained more fully below.

screening – was an effort to pull together what had grown to be a large number of disparate background screening rules once used by DRS divisions.

Significantly, non-DRS agencies appear not to have been involved in negotiating or passing this law and appear to know nothing of it and do not follow it. Also, at least one DRS-legacy agency, the Department of Health, was part of the process but does not use the exemption process for initial nursing licensing and certification.

Instead, these other agencies and the Department of Health (at least, but probably not limited to, in the case of nursing) require that a person with a felony conviction apply to the Clemency Review Board for restoration of civil rights – the same process that must be followed in order for people convicted of felonies to vote. In November, 2004, the *Miami-Herald* estimated that there are 500,000 people in Florida ineligible to vote due to their conviction records. If this is true, then those same 500,000 are barred from any job requiring a restoration of rights.

Since 1999, over 200,000 applications for restoration of rights have been denied and about 48,000 have been granted. Also, it should be noted that while all cases do not need to go the Board for a hearing, many cases do (*e.g.*, when the conviction is for any of over 200 different crimes enumerated in the Board’s rules and less than five years have passed since the completion of supervision; and when less than 15 years have passed since the completion of supervision for “capital or life” felonies). The Board has been hearing about 134 cases a year.

One could argue that the better mechanism for opening a door to employment that might otherwise be shut is the exemption process. It allows case by case review, a showing of rehabilitation, and appeals.

BACKGROUND: THE GOVERNING FLORIDA LAW.

Forfeiture of civil rights and restoration of civil rights

Because the chief employment bar found in Florida (thus far) is that which requires the restoration of civil rights, the discussion here begins with just what it means to have forfeited civil rights, thus requiring them to be restored.

The concept of “restoration of rights” is found in the Article VI of the Florida Constitution governing “Suffrage and Elections.” It says only that the rights to vote and hold public office are forfeited by convicted until restored:

Article VI; Suffrage and Elections
SECTION 4. Disqualifications.--

- (a) **No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.**

As you can see, the Constitution does not say one has forfeited the right to any kind of job, license, right or privilege other than voting and holding office.

The implementing statute is found in the Florida Corrections Code. It does not create any additional forfeitures or elaborate on the two forfeitures found in the Constitution:

944.292 Suspension of civil rights.--

(1) Upon conviction of a felony as defined in s. 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to s. 8, Art. IV of the State Constitution.

(2) This section shall not be construed to deny a convicted felon access to the courts, as guaranteed by s. 21, Art. I of the State Constitution, until restoration of her or his civil rights.

Article IV, establishing the powers of the Executive, grants the Governor's powers with regard to the restoration of these rights. And again, we find no mention of the forfeiture of any additional rights.

Article IV: Executive

SECTION 8. Clemency.--

(a) Except in cases of treason and in cases where impeachment results in conviction, **the governor may**, by executive order filed with the custodian of state records, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, **with the approval of two members of the cabinet**, grant full or conditional pardons, **restore civil rights**, commute punishment, and remit fines and forfeitures for offenses.

The Clemency Chapter of the Criminal Procedure and Corrections title of the Florida Statutes implements this Constitutional provision; and again, there is no elaboration of what rights have been forfeited, nor of what rights may be restored.

940.05. Restoration of civil rights

Any person who has been convicted of a felony may be entitled to the restoration of all the rights of citizenship enjoyed by him or her prior to conviction if the person has:

- (1) Received a full pardon from the board of pardons;
- (2) Served the maximum term of the sentence imposed upon him or her; or
- (3) Been granted his or her final release by the Parole Commission.

The Correctional System Chapter of the same title sets forth the procedure involved in restoration; and still again, we find no additional rights that have been forfeited or the nature of the rights to be restored.

944.293 Initiation of restoration of civil rights.

--With respect to those persons convicted of a felony, the following procedure shall apply: Prior to the time an offender is discharged from supervision, an authorized agent of the department shall obtain from the Governor the necessary application and other forms required for the restoration of civil rights. The authorized agent shall assist the offender in completing these forms and shall ensure that the application and all necessary material are forwarded to the Governor before the offender is discharged from supervision.

Section 4 (I) (G) of the Rules of Executive Clemency, consistent with other state laws, references a forfeiture created by law (the right to possess a gun) and restrictions (on sexual predators) created by law. However, these rules neither reference nor impose additional forfeitures.²

Section 4 (I) G. Restoration of Civil Rights in Florida

The Restoration of Civil Rights restores to an applicant all of the rights of citizenship in the State of Florida enjoyed before the felony conviction, except the specific authority to own, possess, or use firearms. Such restoration shall not relieve an applicant from the registration and notification requirements or any other obligations and restrictions imposed by law upon sexual predators or sexual offenders.

The forfeiture of these other rights, such as possessing firearms, is elsewhere established by law. Thus, we see career criminals barred from possessing firearms under 790.235 of the Criminal Code unless both their “firearm authority” (a separate Clemency Board finding) and their civil rights have been restored.

Curiously, despite the fact that the formal rules reference no other forfeitures and no other reasons for restoring one’s civil rights, the Frequently Asked Questions on the Parole Commission’s website references the consequences of restoration as follows:

2. What rights are restored?

The basic civil rights that are restored are: the right to vote, the right to serve on a jury, and the right to hold public office. ***In addition, restoration of civil rights will allow you to be considered for certain types of employment licenses, such as, security guard, nursing, and contractor’s licenses.*** The right to own, possess, or use firearms requires a separate application and there is a waiting period of eight years from the date sentence expired or supervision terminated. [Emphasis added]

Jury service is forfeited by law. The Judicial Branch chapter of the Florida Statutes, at 40.013, says that people convicted of a felony are not qualified to serve as a juror “unless restored to civil rights.”³

It has been argued that under the common law, a felony conviction meant civil death and that therefore all rights were extinguished. However, “civil death,” under the common law took place in the form of an attainder delivered after conviction, and was imposed only in cases of

² The rules governing the circumstances under which one might seek to have civil rights restored through clemency have been substantially toughened over the years, and then somewhat loosened in December 2004. Still, cases that could go to the Board on paper for “automatic restoration” have narrowed; conviction of any of over 200 crimes listed in the Board rules (not in any statute) require a hearing before the Board instead of paper review; some cases require a five year waiting period; others a 15-year waiting period; and some will never be eligible for restoration because of the nature of the crime. According to a study done by the *Miami-Herald*, since 1999, 200,000 applications for restoration have been denied.

³ (1) No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror. 40.013, F.S.

treason. The forfeitures consequent to this attainder included the corruption of blood, which meant that not only was the person executed for treason punished, but his family was punished as well, for their rights to the traitor's property were extinguished by this additional sentence. The Founders thought that this was too harsh a punishment, and as a consequence embedded the provision against such forfeitures in the constitution at **Article III, Section 3, U.S. Constitution:**

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

These common law forfeitures also were barred under the 1868 Florida Constitution (Article I, Section 17).

Given that these were the only common law forfeitures, any additional forfeitures that would otherwise be imposed, by the states or the federal government, cannot be implied to have been imported from the common law, but would have to be established by law.

Statutory Employment Forfeitures

1. Statutory Employment Disqualifications *Requiring* the Restoration of Civil Rights

Acting within its legislative powers, the Florida General Assembly has created certain forfeitures (generally triggered by conviction of enumerated crimes) of employment rights that can only be recovered through the Clemency Board's restoration of rights process. Some of these are as follows:

- Manufacture, distribution and use of explosives. 552.094
- Manufacture, distribution and dealing of ether 499.64
- Holding racing or jai alai permits 550.1815
- Terminal supplier, importer, exporter, blender, carrier, terminal operator, or wholesaler license 206.026
- Private investigative, private security, and repossession services 493.6118
- Pest Control licensees 482.161
- Labor union business agents 447.04
- Medical transportation services providers 401.411
- Owners / directors of agencies providing substance abuse services 397.451
- Notary 117.01
- Lottery ticket retailers 24.112
- Liquor licenses 561.15
- Owners and licensed employees of Health Care Clinics 400.991

While the list above of occupations requiring restoration of rights is undoubtedly not exhaustive, it is clear that the legislature has not required the restoration of rights for most occupations and licenses.

The law requiring the restoration of rights for those working at Health Care Clinics is recent. When the legislature began requiring clinic owners and staff to undergo Level Two

background screening (this is Florida’s most extensive background screening⁴), it added that one must *also* obtain a formal restoration of rights prior to working in a health care clinic. As will be seen, this *statutory* requirement of restoration of rights is rather unusual.

2. Statutory Employment Disqualifications *Authorizing* the Restoration of Civil Rights

In the case of professional health care licenses, there is statutory *authority* to require restoration of rights to secure the license or certification. The legislature has given the Department of Health and its licensing boards the discretion to impose this requirement or rights restoration (in addition to the mandated background screening):

456.013 (b) If an applicant has been convicted of a felony related to the practice or ability to practice any health care profession, the board, or the department when there is no board, **may require the applicant to prove that his or her civil rights have been restored.**

The Department of Health’s Board of Nursing imposes this requirement of restoration of rights on the nursing profession. The requirement is not in the agency’s rules; it is found, however on the Department’s website⁵, where it states:

The application (or the background screening) that indicates a criminal history is considered a non-routine application and must be reviewed by the board staff and possibly referred to the Board of Nursing for action.

Each application is reviewed on its own merits. The Board of Nursing has created guidelines for specific offenses to be cleared in the board office; however, the staff cannot make determinations in advance as laws and rules do change over time. Violent crimes and repeat offenders are required to be presented to the Board of Nursing for review. Evidence of rehabilitation is important to the Board Members when making licensure decisions.

The only permanent barrier to licensure in Florida is not having your civil rights. Some felony convictions cause a person’s civil rights to be taken away. The applicant is required to send documentation of restoration of civil rights at the time of application for licensure. [Emphasis added]

After a cursory review of *other* health profession regulations, applications and instructions, no other health profession *appears to* require the restoration of rights. For instance, the chiropractic, optometry, physician, naturopathic, optometry, osteopathic, pharmacy or podiatry statutes do not require the restoration of rights for licensure.⁶

⁴ As will be explained in more detail below, Florida has consolidated many of its background screening laws into a statutory scheme that does three things: (1) creates two tiers of screening – Level One and Level Two, with Level One covering fewer offenses and requiring only a Florida Department of Law Enforcement check, while Level Two covers more offenses and also requires an FBI check; (2) lists the disqualifying convictions for both Levels; and (3) creates an exemption process by which one can contest the disqualification with evidence of rehabilitation. See, *e.g.*, Chapter 435, Florida Laws.

⁵ http://www.doh.state.fl.us/mqa/nursing/nur_prospective.html

⁶ These seven medical professions were selected because both AWI and DOC provided the Task Force with a list of professions (plus nursing, discussed separately herein) requiring the restoration of civil rights for licensure. DOC’s list also contained citations to the provisions of the Florida Statutes creating this requirement. Of the eight cited provisions (including nursing), four of the statutes do not exist (and have not existed since at least 1995 – *i.e.*, “medical examiner” [458.1201; nursing [464.21]; optometry [463.11]; “osteopathic examiner” [459.14]). The cited statutes that do exist (“chiropractic examiner”[460.413]; “naturopathic examiner” [462.14]; pharmacist [461.101];

But again, nursing *does* require restoration of rights – just not by statute. Nor by rule. This requirement is a matter of Board of Nursing *policy*. This is important, for it means that legislation is not required to change this policy.

Given that the governing law gives the Department discretion over imposing this requirement, that at least seven other health professions regulated by the Department do not appear to impose this requirement, and that it cannot be said that nurses are in a position to impose any more risk to vulnerable populations than other health professionals, the Department can change this policy to comport with the policies that at least appear to be in place for licensing other health professionals.

One of the most significant growth industries in Florida is health care. At least one health care job – Certified Nurse Aid – requires only a high school diploma, rather brief CNA coursework at a community college, and passage of the state exam. The demand for CNAs in Florida is very substantial. The restoration of rights requirement imposed by the Board of Nursing creates a substantial barrier to employment in an industry where many people with criminal convictions could otherwise become qualified for employment.

3. Employment Disqualifications With No Constitutional or Statutory Authority for Requiring the Restoration of Civil Rights

Since neither the Constitution’s civil rights forfeiture provision nor its enabling statute creates any forfeitures beyond voting and public office, there must clear statutory authority for the forfeiture, or a statutory requirement (or authority) for civil rights being restored for the job or license (or any other privilege). For how can an agency require the restoration of a right that has not been forfeited under law?

Nonetheless, at least some agencies require restoration in practice, even where there is no statutory authority for the practice. One of these is the licensing by the Department of Business and Professional Regulation to be a construction contractor. As we have explained above, the general forfeiture provisions in the Constitution and its enabling statutes do not enumerate losses of any rights but voting or public office. Thus, we look elsewhere for the forfeiture of the right to apply for a construction license upon conviction of a felony and for the requirement of the restoration of civil rights.

The statutes governing the qualifications for this license mention neither anything concerning automatic disqualification, nor forfeiture upon conviction of a felony, nor a requirement of restoration of rights to secure the license.

Construction Contracting

489.111 Licensure by examination.--

and podiatrist [461.08]) either only state that one may not have been convicted of an offense related to the area of licensed practice – or something else entirely.

(1) Any person who desires to be certified shall apply to the department in writing.

(2) A person shall be eligible for licensure by examination if the person:

(a) Is 18 years of age;

(b) Is of good moral character; and . . .

(3)(a) The board may refuse to certify an applicant for failure to satisfy the requirement of good moral character only if:

1. There is a substantial connection between the lack of good moral character of the applicant and the professional responsibilities of a certified contractor; and

2. The finding by the board of lack of good moral character is supported by clear and convincing evidence.

(b) When an applicant is found to be unqualified for a certificate because of a lack of good moral character, the board shall furnish the applicant a statement containing the findings of the board, a complete record of the evidence upon which the determination was based, and a notice of the rights of the applicant to a rehearing and appeal.

(4) The department shall ensure that a sensitivity review committee has been established including representatives of various ethnic/minority groups. No question found by this committee to be discriminatory against any ethnic/minority group shall be included in the examination. . . .

489.129 Disciplinary proceedings.--

(1) The board may take any of the following actions against any certificateholder or registrant: place on probation or reprimand the licensee, revoke, suspend, **or deny the issuance or renewal of the certificate, registration, or certificate of authority**, require financial restitution to a consumer for financial harm directly related to a violation of a provision of this part, impose an administrative fine not to exceed \$5,000 per violation, require continuing education, or assess costs associated with investigation and prosecution, if the contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195 is found guilty of any of the following acts:

(a) Obtaining a certificate, registration, or certificate of authority by fraud or misrepresentation.

(b) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of contracting or the ability to practice contracting. . . .

The only mention of criminal convictions in the Department's rules governing contractor license applications is that one must, on the application for the license, state whether:

"any person in paragraph (i) below or has any business organization in which any such person was a responsible person as defined in paragraph (j) ever been convicted or found guilty of or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction within the past ten years? If yes, you must attach a copy of any such conviction or the order or judgment incorporating the finding of guilt or plea. Yes () No ()." 61G4-15.005 (h)

However, in bold print on the front page of the DBPR's construction license application, it states that:

If you have been convicted of a felony, you must submit proof of reinstatement of civil rights.

Given that one cannot submit a completed an application for this license until one has proof of reinstatement, the individual is likely not receiving notice of any right to seek review of the license denial either under 489.111 or 489.129. (But this must be explored, for it is not clear.) In any case, the front page of the application is enough to deter most who have a felony conviction but has not had his rights restored from seeking such a license.

As a consequence, license applicants stand on line seeking the restoration of their rights.⁷

Still, some *have* appealed this requirement. According to a brief filed by the agency defending its practice of requiring restoration of rights and according to the lawyer in the Attorney General's office who handles construction licensing appeals, DBPR (and the AG) takes the position that the statutory authority for this restoration of rights requirement is ("implied[ly]") found in paragraph (b) of the following section of the Public Officers, Employees and Records Law:

112.011 Felons; removal of disqualifications for employment, exceptions.--

(1)(a) Except as provided in s. 775.16, a person shall not be disqualified from employment by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime. However, a person may be denied employment by the state, any of its agencies or political subdivisions, or any municipality by reason of the prior conviction for a crime if the crime was a felony or first degree misdemeanor and directly related to the position of employment sought.

⁷ The requirement that applicants for a contractor's license who have felony convictions obtain the restoration of their rights escaped my "legal" research (because it is not in the law) and came to my attention when the Task Force director, Jean Gonzalez, sent me a newspaper clipping from the local paper about a man who has "been trying to get his civil rights restored for six years. . . . After spending more than three years scratching off the days in a state prison," the reporter wrote, "Whalley's found that time might pass more easily on this side of the prison bars, but it's no more swift. It's moving even more slowly because he needs his civil rights restored to get a general contractor's license. Then he can start making a living. . . . While he'd also like to vote, Whalley's main frustration is watching the clock tick toward retirement with no way to build up savings. At 44, he's not getting any younger. "All they've done is just move my paperwork from one huge pile to another huge pile," Whalley gripes. And he's not griping just to me. Every month, he sends e-mails and faxes to a long list of elected officials and bureaucrats, hoping something, anything, will spur action on the part of the state. So far, no go. Whalley's experience isn't unique. The state has a backlog of 4,000 applications for clemency, and that's expected to grow to 10,000 by next year. It takes an average of 18 months for the typical ex-con's rights to be restored. But Whalley may hold the record for longest serving clemency applicant. After languishing for three years in the Office of Executive Clemency within the Governor's Office, his application was routed to the state Parole Commission, where it languishes now. ("Ex-Prisoners Need Rights to Be Restored," Tallahassee *Democrat*; May 20, 2005)

(b) Except as provided in s. 775.16, a person whose civil rights have been restored shall not be disqualified to practice, pursue, or engage in any occupation, trade, vocation, profession, or business for which a license, permit, or certificate is required to be issued by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime. However, a person whose civil rights have been restored may be denied a license, permit, or certification to pursue, practice, or engage in an occupation, trade, vocation, profession, or business by reason of the prior conviction for a crime if the crime was a felony or first degree misdemeanor and directly related to the specific occupation, trade, vocation, profession, or business for which the license, permit, or certificate is sought.

The brief argues that paragraph b of the above statute “implies that if a person’s civil rights have not been restored, no license shall be issued.” But it *says* no such thing. Section 112.011 *removed* what was apparently some kind of blanket disqualification of felons for state jobs and licenses. Curiously, while the plain language of this provision neither creates a licensing disqualifications nor requires restoration of rights for a license, the brief argues that the common law statutory interpretation doctrine of “*expressio unius est exclusio alterius*” (mention of one thing implies the exclusion of another) supports this position.⁸

Also, it must be noted that in 1973, two years after passage of the law creating this statutory provision, the Florida Attorney General issued an opinion interpreting it. He was in accord that the statute does not *require* restoration of civil rights for state employment or a license. Westlaw’s annotation⁹ to this provision reads as follows:

Subject to the exceptions and qualifications for law enforcement agencies and fire departments under subsec. (2) of this section, the state or any of its agencies or political subdivisions or municipalities, may not deny employment to a former offender regardless of whether his civil rights have been restored, unless the employing authority determines, after due investigation, that the offense is directly related to the position sought and the crime was a felony or first degree misdemeanor. Op.Atty.Gen., 073-355, Sept. 20, 1973.

Moreover, if DBPR and the current Attorney General’s interpretation of this statute were correct, then all licenses issued by the state, and indeed, all state jobs, could be subject to the condition precedent of restoration of rights requirement. However, based on my cursory and preliminary research, Section 112.011 (1) (b) is not elsewhere relied upon to require restoration. Nor have I uncovered another instance (yet) where any other agency, or even DBPR as to licenses other than contractors’, in the absence of at least statutory *authority*, requires restoration of rights for a job or license. But there is more research to be done on this question.

⁸ The invocation of this doctrine of statutory construction is particularly ironic, for the case cited in the brief explaining this doctrine held that the statute that forbade gain-time to those sentenced for gun crimes could not be interpreted to include another kind of gain time, namely, “work gain-time”:

Construing the mandatory gun law in accordance with the above rule of statutory construction, we conclude that since the statute enumerates the specific statutory gain-time provisions which are to be included within the statute, and work gain-time is not specifically mentioned, work gain-time is specifically excluded from the statutory gain-time ban set forth in the mandatory gun law. On this basis, we find that the DOC is without statutory authority to prohibit prisoners from earning work gain-time while serving a mandatory minimum three year sentence under the mandatory gun law. James v. Department of Corrections, 424 So.2d 826, 827 (Fla. 1st DCA. 1982).

⁹ This 1973 AG opinion is not immediately available. I cannot vouch for Westlaw’s summary.

Background Screening and the Exemption Statute

The far more common method of creating employment barriers in Florida is through the background screening laws that list disqualifying convictions. These screening laws apply to state jobs; occupational licensing; and employment in facilities with vulnerable populations (e.g., children, people with disabilities and the elderly), at financial institutions, and at entities that have security responsibilities or concerns.

In 1983, the legislature mandated “security background checks” for employee positions with “special trust or responsibility or sensitive location of those positions,” as follows:

Each employing agency shall designate those employee positions that, because of the special trust or responsibility or sensitive location of those positions, require that persons occupying those positions be subject to a security background check, including fingerprinting, as a condition of employment. 110.1127 (1).¹⁰

I have found no agency that has designated jobs that have “special trust or responsibility,” let alone a masters list of all state jobs in this category. Instead, some agencies screen all their employees (e.g., DCF and Juvenile Justice) and use the exemption process to open doors to state jobs. Some have only recently begun to screen employees. For instance, in 2004, the Agency for Health Care Administration (ACHA) issued a notice to its employees that in 2005 there would background screenings and that employees could, in the interim, amend their employment applications to disclose any criminal convictions not disclosed on their original applications. No employees were terminated either for the initial failure to disclose or for the actual offense. So they never got the exemption process phase.

Section 110.1127 also makes all positions within the Division of Treasury of the Department of Financial Services “positions of special trust or responsibility;” and similarly designates all positions “in programs providing care to children, the developmentally disabled, or vulnerable adults.”¹¹

In 1995, the legislature responded to the disparate background screening requirements of a number of agencies and divisions within agencies with a law that creates two levels of background screening. Each level contains its own list of disqualifying offenses. If one is

¹⁰ Despite this requirement, other than the DRS legacy agencies discussed below, we have found no agency that has formally designated positions requiring background checks due to special trust or responsibility or sensitive location. There appears to be no master list developed.

¹¹ In a case challenging the constitutionality of this law as originally enacted, the court described its previous terms as follows” “[A person] “*shall be* disqualified for employment in any such position by reason of having been found guilty of any one of several enumerated felonies, including bank robbery. The Statute provides for no exceptions. It provides for no hearing whatsoever in which a person who has been convicted of one of the crimes may establish his or her rehabilitation. It provides no exceptions for those people already employed by HRS who have good records. It is a blanket exclusion of a group of people forever from positions of special trust or responsibility within HRS. No other Florida Statute grants any relief whatsoever from the absolute prohibition contained in Florida Statute 110.1127(3)(a)(1).” *Fewquay v. Page*, 682 F.Supp. 1195, *1197 (S.D.Fla.1987.), affirmed, 896 F.2d 558 (Table) (11th Cir. 1990). The court declared the statute unconstitutional, but while the case was pending, the legislature amended it, creating right to seek an exemption from disqualification and administrative review, which is now incorporated in 435.07.

disqualified by virtue of a conviction of a disqualifying offense, one can seek, under this law, an exemption from disqualification. The statute also provides for an administrative appeal of the denial of an exemption. (Chapter 435, F.S.)

The law's applicability and definition sections do not specify which agencies, which jobs, or which licenses are covered:

435.01 Applicability of this chapter.--Whenever a background screening for employment or a background security check is required by law for employment, unless otherwise provided by law, the provisions of this chapter shall apply.

435.02 Definitions.--For the purposes of this chapter:

(1) "Employee" means any person required by law to be screened pursuant to the provisions of this chapter.

(2) "Employer" means any person or entity required by law to conduct screening of employees pursuant to this chapter.

(3) "Licensing agency" means any state or county agency which grants licenses or registration permitting the operation of an employer or is itself an employer. When there is no state licensing agency or the county licensing agency chooses not to conduct employment screening, "licensing agency" means the Department of Children and Family Services.

As noted above, there are two levels of screening standards, each with its own list of disqualifying convictions.

435.03 Level 1 screening standards.--

(1) All employees required by law to be screened shall be required to undergo background screening as a condition of employment and continued employment. For the purposes of this subsection, level 1 screenings shall include, but not be limited to, employment history checks and statewide criminal correspondence checks through the Florida Department of Law Enforcement, and may include local criminal records checks through local law enforcement agencies.

(2) Any person for whom employment screening is required by statute must not have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under any of the following provisions of the Florida Statutes or under any similar statute of another jurisdiction . . . [list of 32 criminal offenses]

435.04 Level 2 screening standards.--

(1) All employees in positions designated by law as positions of trust or responsibility shall be required to undergo security background investigations as a condition of employment and continued employment. For the purposes of this subsection, security background investigations shall include, but not be limited to, fingerprinting for all purposes and checks in this subsection, statewide criminal and juvenile records checks through the Florida Department of Law Enforcement, and federal criminal records checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies.

(2) The security background investigations under this section must ensure that no persons subject to the provisions of this section have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under any of the following provisions of the Florida Statutes or under any similar statute of another jurisdiction: . . . [list of 47 criminal offenses]

Section 435.06 requires that the employer terminate [or presumably not hire] any employee who fails the background check "unless the employee is granted an exemption from disqualification pursuant to s. 435.07."

The exemption process is as follows:

435.07 Exemptions from disqualification.--Unless otherwise provided by law, the provisions of this section shall apply to exemptions from disqualification.

(1) The appropriate licensing agency may grant to any employee otherwise disqualified from employment an exemption from disqualification for:

- (a) Felonies committed more than 3 years prior to the date of disqualification;
- (b) Misdemeanors prohibited under any of the Florida Statutes cited in this chapter or under similar statutes of other jurisdictions;
- (c) Offenses that were felonies when committed but are now misdemeanors;
- (d) Findings of delinquency; or
- (e) Commissions of acts of domestic violence as defined in s. 741.30.

For the purposes of this subsection, the term "felonies" means both felonies prohibited under any of the Florida Statutes cited in this chapter or under similar statutes of other jurisdictions.

(2) Persons employed by treatment providers who treat adolescents 13 years of age and older who are disqualified from employment solely because of crimes under s. 817.563, s. 893.13, or s. 893.147 may be exempted from disqualification from employment pursuant to this section without the 3-year waiting period.

(3) In order for a licensing department to grant an exemption to any employee, the employee must demonstrate by clear and convincing evidence that the employee should not be disqualified from employment. Employees seeking an exemption have the burden of setting forth sufficient evidence of rehabilitation, including, but not limited to, the circumstances surrounding the criminal incident for which an exemption is sought, the time period that has elapsed since the incident, the nature of the harm caused to the victim, and the history of the employee since the incident, or any other evidence or circumstances indicating that the employee will not present a danger if continued employment is allowed. The decision of the licensing department regarding an exemption may be contested through the hearing procedures set forth in chapter 120.

(4) Disqualification from employment under subsection (1) may not be removed from, nor may an exemption be granted to, any personnel who is found guilty of, regardless of adjudication, or who has entered a plea of nolo contendere or guilty to, any felony covered by s. 435.03 solely by reason of any pardon, executive clemency, or restoration of civil rights.

(5) Exemptions granted by one licensing agency shall be considered by subsequent licensing agencies, but are not binding on the subsequent licensing agency.

The background check law and exemption process is very different than the requirement that one must have one's civil right restored. First, despite the extensive list of criminal offenses enumerated in 435, it is still a shorter list than "any felony," which is what triggers, for instance, both the nursing and construction contractor license requirements of restoration of rights.

Second, the waiting period to seek an exemption is shorter than the wait for the restoration of rights. Under 435.07 (1) (a), an exemption may be sought to waive the disqualification for "Felonies *committed* more than 3 years prior to the date of disqualification." The Clemency Board's rules governing restoration of rights are far stricter. They require that in order to be eligible for restoration of rights, one must (1) have no outstanding charges; (2) have completed all sentences and conditions of release or supervision; and (3) paid all restitution. Then depending on the nature of the individual's crime(s), the individual may either seek (a)

restoration immediately and without a hearing upon satisfaction of the three above criterion; (b) seek restoration without a hearing upon satisfaction of the three above criterion after a five-year conviction and *arrest*-free period following the completion of sentence and conditions; or (c) seek restoration through a hearing before the Board upon satisfaction of the three above criterion after a fifteen-year conviction and *arrest*-free period following the completion of sentence and conditions. (The types of criminal convictions that determine which of these three approaches must be followed are enumerated in the rules.)

Third, the proceedings and the record developed upon a request for an exemption are open to the applicant; a decision is rendered by the agency that rules on the exemption that states the findings and basis for the determination; and an administrative appeal lies from the initial agency decision, which then triggers a right to court review of that final agency decision. By contrast, in proceedings before the Clemency Board, one cannot see the file created for the Board to review, nor learn of the basis for the decision. Nor does any form of appeal lie from the Board's determination.

Given that the background check / exemption process appears to create a mechanism for opening doors that would otherwise be closed to various employment opportunities, some of the critical questions worth exploring are as follows:

- To what extent have state agencies implemented this statute? Do all branches and agencies of state and local government screen and exempt applicants, for their own positions, for licensing, and for positions in government-regulated or funded positions under Section 435?
- Are there clear processes and procedures in place to consider and rule on exemptions? Are applicants for employment and licenses given notice of the exemption process? And, upon denial, is the right to appeal (and how to do so) made clear?
- Does anyone ever get an exemption? If so, under what circumstances? Do the criteria for granting exemptions vary across agency lines?
- When an agency grants an exemption, what can be said about any adverse public safety events? Are those granted exemptions later found to have caused any the harms that the legislature sought to prevent by imposing the background checks? Are those granted exemptions causing any greater harm than those with no disqualifying convictions?

Agency implementation. From our research thus far, it is clear is that the DRS legacy agencies use Section 435 in connection with screening the employees of facilities and agencies (state, local and private) that the state DRS legacy agencies supervise, regulate and/or fund. Thus, for instance, the Agency for Health Care Administration follows this law and its exemption process in connection with the background checks for people working in long-term care facilities; DCF (at the regional level) applies it in the case of those working in child care centers; and Juvenile Justice applies it to its own workforce and to all of its facilities (both state and private) and contracted agencies.

At the Department of Health, 435's background screening law and exemption process is used in the case of people who are *already* licensed or certified. As noted above, those seeking licensure (at least in nursing) first must have their civil rights restored.

On the other hand, officials questioned at some agencies are not aware of the law and have no processes in place to lift disqualifications. For example, the individuals interviewed at AWI did not know of this law; nor did those at the DBPR (or the AG handling construction licensing appeals).

Processes and procedures. The DRS legacy agencies have created rules, forms and procedures to implement 435. AHCA, for example, has a page on its website¹² that clearly explains who must seek an exemption, how one applies for one, and the right to an administrative appeal under Chapter 120, Florida Statutes. It also provides a form to download to make the application.

We have not found any such procedures in other agencies.

Exemption practices and results. The agencies that have put the exemption process in place do indeed actually grant exemptions. Upon request for their exemption data, they have been forthcoming and helpful.

AHCA's exemption numbers are as follows:

Between 01/01/2000 and 04/30/2005, AHCA reviewed 1160 exemption requests cases that led to a final dispositions (*i.e.*, they were not withdrawn, abandoned or incomplete), of those:

- 68% were granted (623 by desk review and 163 through the hearing process)
- 14% were denied (157) (also includes those that have offended within 3 years and are not eligible for exemption per statute)
- 19% were considered not disqualified (217)

The Department of Health provided the following information:

Since 1995, the CNA Registry has manually issued over 1500 letters of exemption. The CNA Registry was relocated to the Board of Nursing in 2001. The exemption application process has been automated since summer of 2002.

Since January 2002, the Board of Nursing office has approved 473 letters of exemption for CNAs. An additional 170 cases were not able to be approved by board staff and were presented to the CNA Council and Board of Nursing. Of those 170 cases, 114 or 67% were approved by the Council and Board. The main reason for denial of CNA exemption applications was the failure of the CNA to demonstrate evidence of adequate rehabilitation, *i.e.*, completion of court-ordered probation, probation violations, continuing education courses, additional convictions, and restitution.

The list of 587 approved CNA exemptions was compared to the list of 235 CNAs who have been disciplined by the Board of Nursing since 2001. Only one CNA was on both lists. That CNA's discipline was actually triggered because the CNA applied and received an exemption in 2003 but had not reported

¹² http://ahca.myflorida.com/MCHQ/Long_Term_Care/Background_Screening/exemption.shtml

her conviction for assault and battery to the Board of Nursing. That CNA was placed on probation for 2 years but subsequently was fired from a long-term care facility and has not worked as a CNA since.

Currently, CNAs must apply to the Board of Nursing for the exemption after receiving their certification [which, as noted herein currently requires that one's civil rights have first been restored]. This summer, the Board office will be further enhancing the process so that all applications for CNA certification will be automatically reviewed for exemption and a letter issued as appropriate. In addition, the exemption status of CNAs will be made available to the Agency for Health Care Administration (AHCA) for use in the agency's long-term care employment Internet look-up screens. These enhancements should reduce the duplication of background screening among the Board of Nursing, AHCA, and employers.

While this data comparison is limited to the past 3½ years, the data does support the effectiveness of the decisions of the CNA Council and the Board of Nursing in applying the standards of Ch 435. The Board has authorized that exemption letters for CNAs also apply for licensure as an RN or LPN if the CNA pursues additional education. In addition, the exemption process allows qualified CNAs to work in long-term care and other settings from which they may have been barred previously due to positive criminal background screening.

The Department of Juvenile Justice explained that between 1997 and 2005, it has processed 250,115 applicants for jobs with the Department and at its facilities under Department contract, each of whom was subject to background screening. Of those, 4,682 were found to have disqualifying convictions. Of those there were 1,132 who requested exemptions; and 190 were denied and 430 were granted. 419 of the exemption applications were not completed or were abandoned. Of those denied, 38 requested an informal hearing; at which point 9 were granted the exemption and 4 were denied. (The outcome of the rest is not known.) Through the 27 formal hearings, 16 were granted exemptions and 11 were denied.

At the Department of Children and Families, the exemption process is decentralized and handled at the Department's regional offices. The exemption data from this agency is forthcoming.

Again, agencies that were not once part of HRS appear know nothing of the exemption process, and appear to follow this law neither for background screening of their own staff or in connection with licensing. As noted above, instead they may require restoration of rights, or follow some other process.

State and local hiring and licenses – other restrictions and openings

State jobs are governed by the following law cited by the Attorney General in support of DBPR's requirement that one must have his or her civil rights restored to get a contractor's license:

110.1127 Employee security checks.--

(1) Each employing agency shall designate those employee positions that, because of the special trust or responsibility or sensitive location of those positions, require that persons occupying those positions be subject to a security background check, including fingerprinting, as a condition of employment.

(2)(a) All positions within the Division of Treasury of the Department of Financial Services are deemed to be positions of special trust or responsibility, and a person may be disqualified for employment in any such position by reason of:

1. The conviction or prior conviction of a crime which is reasonably related to the nature of the position sought or held by the individual; or
2. The entering of a plea of nolo contendere or, when a jury verdict of guilty is rendered but adjudication of guilt is withheld, with respect to a crime which is reasonably related to the nature of the position sought or held by the individual.

(b) All employees of the division shall be required to undergo security background investigations, including fingerprinting, as a condition of employment and continued employment.

(3)(a) All positions in programs providing care to children, the developmentally disabled, or vulnerable adults for 15 hours or more per week; all permanent and temporary employee positions of the central abuse hotline; and all persons working under contract who have access to abuse records are deemed to be persons and positions of special trust or responsibility, and require employment screening pursuant to chapter 435, using the level 2 standards set forth in that chapter.

(b) The employing agency may grant exemptions from disqualification from working with children, the developmentally disabled, or vulnerable adults as provided in s. 435.07.

(c) All persons and employees in such positions of trust or responsibility shall be required to undergo security background investigations as a condition of employment and continued employment. For the purposes of this subsection, security background investigations shall be conducted as provided in chapter 435, using the level 2 standards for screening set forth in that chapter.

This law creates both restrictions and leaves open the door to employment opportunity in state or local government employment. Unless the criminal conviction is related to the job sought, it does not stand as an absolute bar. To this law, there are both exceptions and further restrictions.

In 2002, the legislature created an exception in the case of counties and municipalities:

- c. This section shall not be applicable to the employment practices of any county or municipality relating to the hiring of personnel for positions deemed to be critical to security or public safety pursuant to ss. [125.5801](#) and [166.0442](#).

Sections 125.5801 and 166.0442 have essentially the same language. The first applies to counties, the other to municipalities, the former reading as follows:

COUNTY GOVERNMENT

125.5801 Criminal history record checks for certain county employees and appointees.--Notwithstanding chapter 435, a county may require, by ordinance, employment screening for any position of county employment or appointment which the governing body of the county finds is critical to security or public safety, or for any private contractor, employee of a private contractor, vendor, repair person, or delivery person who has access to any public facility or publicly operated facility that the governing body of the county finds is critical to security or public safety. The ordinance must require each person applying for, or continuing employment in, any such position or having access to any such facility to be fingerprinted. The fingerprints shall be submitted to the Department of Law Enforcement for a state criminal history record check and to the Federal Bureau of Investigation for a national criminal history record check. The information obtained from the criminal history record checks conducted pursuant to the ordinance may be used by the county to determine an applicant's eligibility for employment or appointment and to determine an employee's eligibility for continued employment. This section is not intended to preempt or prevent any other background screening, including, but not limited to, criminal history record checks, which a county may lawfully undertake.

The state employment statute also has another exception that applies both to hiring and to licensing. This exception creates what can be viewed as either an additional hurdle or an avenue of relief. When the conviction is for a selling or trafficking in drugs, the individual is disqualified from employment or licensing unless he or she meets the additional statutory requirements of drug treatment and urine testing, as provided below:

775.16 Drug offenses; additional penalties.--In addition to any other penalty provided by law, a person who has been convicted of sale of or trafficking in, or conspiracy to sell or traffic in, a controlled substance under chapter 893, if such offense is a felony, or who has been convicted of an offense under the laws of any state or country which, if committed in this state, would constitute the felony of selling or trafficking in, or conspiracy to sell or traffic in, a controlled substance under chapter 893, is:

(1) Disqualified from applying for employment by any agency of the state, unless:

(a) The person has completed all sentences of imprisonment or supervisory sanctions imposed by the court, by the Parole Commission, or by law; or

(b) The person has complied with the conditions of subparagraphs 1. and 2. which shall be monitored by the Department of Corrections while the person is under any supervisory sanctions. The person under supervision may:

1. Seek evaluation and enrollment in, and once enrolled maintain enrollment in until completion, a drug treatment and rehabilitation program which is approved by the Department of Children and Family Services, unless it is deemed by the program that the person does not have a substance abuse problem. The treatment and rehabilitation program may be specified by:

a. The court, in the case of court-ordered supervisory sanctions;

b. The Parole Commission, in the case of parole, control release, or conditional release; or

c. The Department of Corrections, in the case of imprisonment or any other supervision required by law.

2. Submit to periodic urine drug testing pursuant to procedures prescribed by the Department of Corrections. If the person is indigent, the costs shall be paid by the Department of Corrections.

(2) Disqualified from applying for a license, permit, or certificate required by any agency of the state to practice, pursue, or engage in any occupation, trade, vocation, profession, or business, unless:

(a) The person has completed all sentences of imprisonment or supervisory sanctions imposed by the court, by the Parole Commission, or by law;

(b) The person has complied with the conditions of subparagraphs 1. and 2. which shall be monitored by the Department of Corrections while the person is under any supervisory sanction. If the person fails to comply with provisions of these subparagraphs by either failing to maintain treatment or by testing positive for drug use, the department shall notify the licensing, permitting, or certifying agency, which may refuse to reissue or reinstate such license, permit, or certification. The licensee, permittee, or certificateholder under supervision may:

1. Seek evaluation and enrollment in, and once enrolled maintain enrollment in until completion, a drug treatment and rehabilitation program which is approved or regulated by the Department of Children and Family Services, unless it is deemed by the program that the person does not have a substance abuse problem. The treatment and rehabilitation program may be specified by:

a. The court, in the case of court-ordered supervisory sanctions;

b. The Parole Commission, in the case of parole, control release, or conditional release; or

c. The Department of Corrections, in the case of imprisonment or any other supervision required by law.

2. Submit to periodic urine drug testing pursuant to procedures prescribed by the Department of Corrections. If the person is indigent, the costs shall be paid by the Department of Corrections; or

(c) The person has successfully completed an appropriate program under the Correctional Education Program.

The provisions of this section do not apply to any of the taxes, fees, or permits regulated, controlled, or administered by the Department of Revenue in accordance with the provisions of s. [213.05](#).

History.--s. 2, ch. 90-266; s. 21, ch. 92-310; s. 13, ch. 95-325; s. 292, ch. 99-8.

Even though this statute uses the language “additional penalties,” it also makes clear that once these hurdles are jumped, the door to employment opportunity is opened.

Still, I have not yet heard of any state agency putting the terms of this law into practice. There appears to be no mention of this requirement in connection with either any licensing or employment-related instructions.

In the case of licenses, there is related law that governs their suspension upon conviction of drug sales or trafficking. The same terms of rehab plus urine testing apply (or restoration of rights) to get the license back:

DRUG ABUSE AND PREVENTIONS

893.11 Suspension, revocation, and reinstatement of business and professional licenses.--Upon the conviction in any court of competent jurisdiction of any person holding a license, permit, or certificate issued by a state agency, for sale of, or trafficking in, a controlled substance or for conspiracy to sell, or traffic in, a controlled substance, if such offense is a felony, the clerk of said court shall send a certified copy of the judgment of conviction with the person's license number, permit number, or certificate number on the face of such certified copy to the agency head by whom the convicted defendant has received a license, permit, or certificate to practice his or her profession or to carry on his or her business. Such agency head shall suspend or revoke the license, permit, or certificate of the convicted defendant to practice his or her profession or to carry on his or her business. Upon a showing by any such convicted defendant whose license, permit, or certificate has been suspended or revoked pursuant to this section that his or her civil rights have been restored or upon a showing that the convicted defendant meets the following criteria, the agency head may reinstate or reactivate such license, permit, or certificate when:

- (1) The person has complied with the conditions of paragraphs (a) and (b) which shall be monitored by the Department of Corrections while the person is under any supervisory sanction. If the person fails to comply with provisions of these paragraphs by either failing to maintain treatment or by testing positive for drug use, the department shall notify the licensing, permitting, or certifying agency, which shall revoke the license, permit, or certification. The person under supervision may:
 - (a) Seek evaluation and enrollment in, and once enrolled maintain enrollment in until completion, a drug treatment and rehabilitation program which is approved or regulated by the Department of Children and Family Services. The treatment and rehabilitation program shall be specified by:
 1. The court, in the case of court-ordered supervisory sanctions;
 2. The Parole Commission, in the case of parole, control release, or conditional release; or
 3. The Department of Corrections, in the case of imprisonment or any other supervision required by law.
 - (b) Submit to periodic urine drug testing pursuant to procedures prescribed by the Department of Corrections. If the person is indigent, the costs shall be paid by the Department of Corrections; or
- (2) The person has successfully completed an appropriate program under the Correctional Education Program.

This section does not apply to any of the taxes, fees, or permits regulated, controlled, or administered by the Department of Revenue in accordance with s. [213.05](#).

This is admittedly a very cursory review of legal and policy restrictions. Much more work needs to be done. For example, while we know that DBPR has imposed the requirement of restoration of rights on contractor licenses, we do not know if it has imposed it on other licenses in instances where there is no statutory mandate to do so. We know that the 435.07 exemption process is in place at the DRS legacy agencies, but we don't know if other agencies are using it.

We still need to learn, for instance:

1. What are the other statutory restrictions that create disqualifications for jobs?
2. Does the statute allow the disqualifications to be lifted?
 - By an appeal or exemption?
 - By restoration of rights?
 - By both?
3. To what extent have state agencies created their own disqualifications or requirements to seek restoration of rights that are not mandated by law?
4. When disqualifications are imposed, is there any process by case by case review? For appeal of the determination?
5. How clear are the disqualifications / restrictions made to potential applicants and how clear are the remedies (exemption, case by case review, and appeal)?
6. Do the agency's forms accurately depict both the employment restrictions and remedies?

The focus and priorities for this exercise should be pointed toward the most relevant and in-demand occupations. Once we have this information, we could develop, for the agencies that work with people being released and other ex-offenders, some good, clear and accurate information about employment barriers and the policies that allow the barriers to come down.

At the end of this project, our report to the Governor would be able to show which barriers are imposed by law, and would require legislative action to be lifted or to allow review on a case by case basis or exemptions; and we would know which barriers could be lifted by executive action alone.