

From Prisons to Professions

Increasing Access to Occupational and Professional Licenses for D.C.'s Returning Citizens

.....
**THE COMMUNITY
JUSTICE PROJECT**
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GEORGETOWN LAW
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cce Council for
Court Excellence
Improving Justice for the Community

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ABOUT THE CONTRIBUTORS

This report was prepared by Owen Bement, Shea Diaz, and Franziska Schroder, students at The Community Justice Project at Georgetown University Law Center, for the Council for Court Excellence. The report's analysis and findings are based on interviews with local stakeholders and policy research.

THE COMMUNITY JUSTICE PROJECT

The Community Justice Project (CJP) is one of seventeen law clinics within the clinical program at Georgetown University Law Center. CJP students learn how to advocate for individual and organizational clients using a wide range of legal strategies and tactics, including litigation and courtroom advocacy, public policy research and analysis, media outreach, and community organizing. In the CJP, students work on various projects that challenge traditional notions of lawyering because there is no obvious litigation or transactional strategy that will “solve” the problem.

CJP is committed to giving students an appreciation for the complexity of working for social justice, an understanding of the variety of skills and strategies that lawyers can use to seek justice, and the belief that they have the capacity to make a difference throughout their lives as lawyers.

COUNCIL FOR COURT EXCELLENCE

Formed in the District of Columbia in 1982, the Council for Court Excellence (CCE) is a nonprofit, nonpartisan civic organization that envisions a justice system in the District of Columbia that equitably serves its people and continues to be a model for creating stronger and more prosperous communities. CCE's mission is to enhance the justice system in D.C. to serve the public equitably. CCE identifies and proposes solutions by collaborating with diverse stakeholders to conduct research, advance policy, educate the public, and increase civic engagement.

ACKNOWLEDGMENTS

The authors would like to thank Council for Court Excellence (CCE) for its longstanding efforts to improve the criminal justice system. We are grateful for the opportunity to play a role in CCE's work to provide returning citizens with a fair chance at successful re-entry. We are thankful to Emily Tatro, our primary contact at CCE, for her valuable guidance and input over the course of this project.

Additionally, we would like to thank the D.C. community members who shared their experience and strength. Thank you to Carlos Tyler, Changing Perceptions; Sakenia Hammond; Marina Duane, Urban Institute; Brian Ferguson, Mayor's Office on Returning Citizen Affairs; Brooke Fallon, Institute for Justice; Jonathan Gitlen, American Bar Association; Charlene Hutson, Neighborhood Legal Services Program; Maya Sheppard, Neighborhood Legal Services Program; Ashlee Johnson, Neighborhood Legal Services Program; David Lloyd, Department of Employment Services; Katherine Mereand, Department of Small and Local Business Development; Chiquisha Robinson, Public Defender Service for the District of Columbia; Theresa Rainey, District of Columbia Office of Human Rights; Thea Sebastian, Executive Office of the Mayor; and Jessica Steinberg, George Washington School of Law, Prisoner and Reentry Clinic.

Furthermore, we would like to thank Brent Futrell for designing the cover pages of this report. We are also grateful to Theodore Whitehouse and Willkie Farr & Gallagher LLP, Chair of CCE's Re-entry Subcommittee, for hosting our presentation of this report.

Finally, we thank Brian Reichart, our supervisor at The Community Justice Project, for his tireless support in the preparation of this report.

ABOUT THIS DOCUMENT

The Council for Court Excellence (CCE) retained the Community Justice Project (CJP) in January 2017 to develop a plan to address collateral consequences to a criminal conviction in the District of Columbia. We began our research by ascertaining which collateral consequences were ripe to be addressed. We identified that, for our purposes, collateral consequences were ripe for reform when to do so would be politically feasible, affect a large number of people, and were likely to have a high impact on an individual returning citizen's life.

There are thousands of collateral consequences in D.C., and narrowing our focus was a formidable task. We used a two-fold methodology to do so. First, we researched collateral consequences according to the 15 categories that the National Inventory of Collateral Consequences to Conviction (NICCC) use to order their database. Second, we interviewed local stakeholders. These stakeholders included returning citizens, lawyers, policy experts, and government officials. Our work stands on the shoulders of many advocates and returning citizens who have spent years making D.C.'s criminal justice system more equitable.

Our methodology led us to address returning citizens' access to occupational and professional licenses. Several members of D.C.'s criminal justice reform community expressed that increasing returning citizens' access to licenses was a priority for them. We continued our research and outreach to stakeholders. At various times, our investigation focused on how to deliver information to returning citizens, change the licensure process by amending the D.C. Code, and increase transparency in the licensing process.

We wrote this report after we concluded the main problem was that the D.C. criminal justice reform community lacked enough information to approach this complex and opaque problem. Many local advocates are interested in making licenses more accessible to returning citizens and have useful information on how to do so. However, each interested party's information is limited to their perspective. We found that, more often than not, they had not been in communication with one another about the problem. This report compiles the information that we found over months of investigation and puts forth substantive recommendations for change.

We hope that proponents for criminal justice reform in D.C. can mobilize around this work. The journey *From Prisons to Professions* is difficult, but we hope the path is much clearer because of this report.

TABLE OF ACRONYMS

Acronym	Definition
CJP	Community Justice Project
CCE	Council for Court Excellence
NICCC	National Inventory of Collateral Consequences to Conviction
OPLA	Occupational and Professional Licensing Administration
FBI	Federal Bureau of Investigation
DCRA	Department of Consumer and Regulatory Affairs
NELP	National Employment Law Project

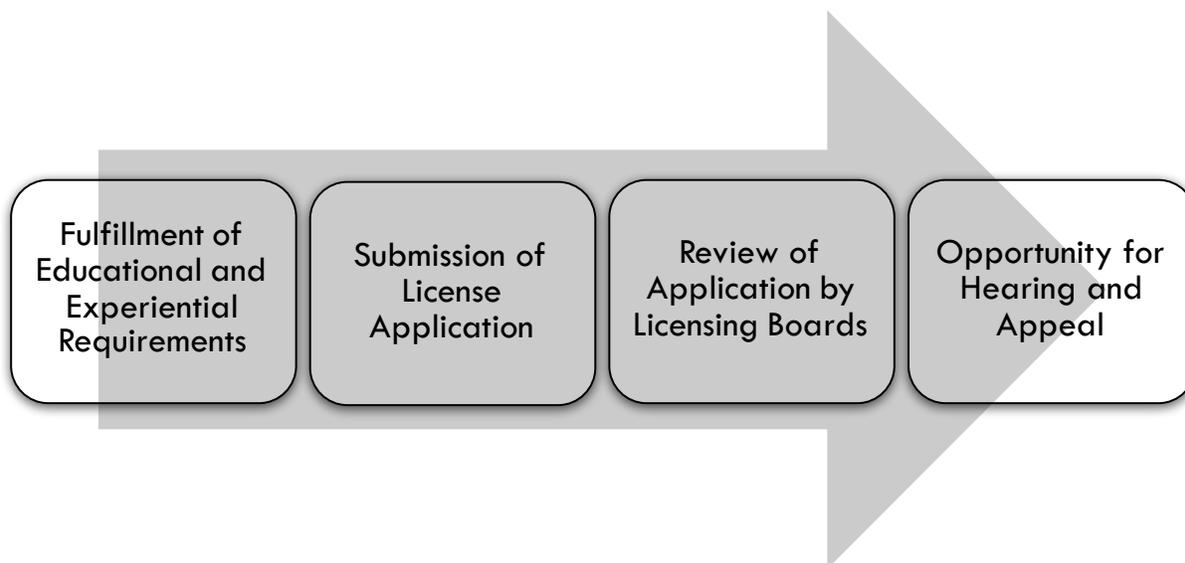
EXECUTIVE SUMMARY

Returning citizens in the District of Columbia are not connected to the employment that they desperately seek.¹ Among employable returning citizens entering supervision during 2015, 71 percent were still unemployed after 90 days.² Without income, returning citizens are unable to meet their basic needs like food and housing.³ Employment is a foundational requirement for successful re-entry.⁴

Increasing returning citizens' access to occupational and professional licenses in D.C. is one avenue to increasing employment. Jobs requiring qualifications like licenses are likelier to pay more, giving returning citizens a greater chance at successful reentry.⁵

This report examines barriers returning citizens may experience at four stages in the journey to obtaining an occupational or professional license:

STAGES OF THE LICENSING PROCESS



¹ COUNCIL FOR COURT EXCELLENCE, BEYOND SECOND CHANCES: RETURNING CITIZENS' REENTRY STRUGGLES AND SUCCESSSES IN THE DISTRICT OF COLUMBIA vi (2016), available at <http://www.courtexcellence.org/uploads/File/BSC-FINAL-web.pdf> (last visited April 27, 2017).

² *Id.*

³ *Id.* at 40.

⁴ See, e.g., CHRISTY VISHER ET AL., URBAN INST. JUSTICE POLICY CTR., EMPLOYMENT AFTER PRISON 8 (2008), available at <http://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF> [hereinafter EMPLOYMENT AFTER PRISON].

⁵ See, e.g., *id.* at 8 ("Respondents who were employed and earning higher wages after release were less likely to return to prison the first year out.").

With the goal of removing unnecessary and unjust challenges faced by D.C.'s returning citizens in their efforts to obtain an occupational or professional license, this report makes eight recommendations for reform:

Recommendation 1: Create a pre-licensing petition process for people with criminal records. In addition to informing returning citizens as to whether a professional license is worth their time and effort, this policy would protect returning citizens from enrolling in high-cost trade schools without any assurance that their criminal record will not be a bar to licensure.

Recommendation 2: Clarify the criminal background question on license applications. License applications should be clear as to the criminal background information that applicants are required and not required to disclose.

Recommendation 3: Add information to the application and instructions to explain the review process. This information should empower returning citizens to effectively advocate for a fair consideration of their convictions.

Recommendation 4: Prohibit boards from considering non-conviction background information and older convictions. The D.C. Code should only allow boards to consider convictions. Licensing boards should not be permitted to consider felony convictions more than seven years old (measured from the completion of the sentence) or misdemeanor convictions more than three years old.

Recommendation 5: Tailor the standard boards use to review convictions and apply the new standard across all licensed professions. The licensing boards should apply one standard that focuses their inquiry on a conviction's effect "on the applicant's ability to perform the specific duties and responsibilities necessarily related to the license." This standard should apply uniformly to all licensed professions.

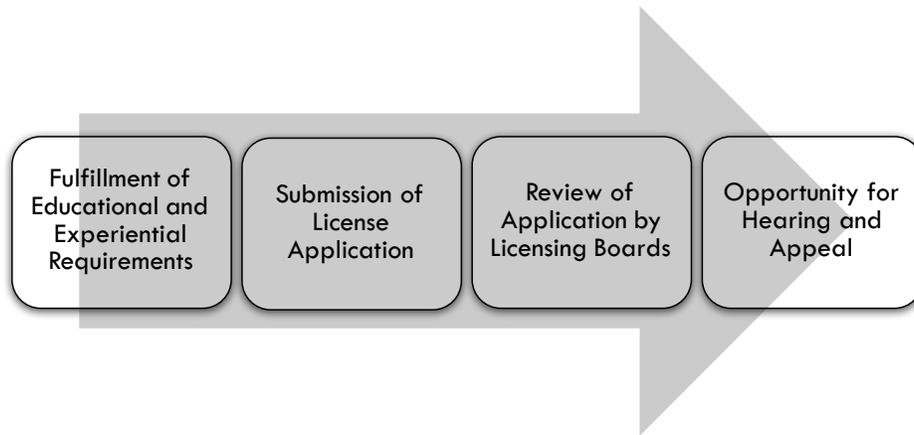
Recommendation 6: Change the language of the factors boards must consider under the standard and apply those factors across all professions. The seven factors that the D.C. Code requires should be amended to give returning citizens a fair chance at obtaining licenses. The factors could be applied to health professions, not just non-health professions.

Recommendation 7: Increase reporting requirements for annual board reports. These reports should include data providing insight on the success of justice-involved applicants in the process of obtaining a license.

Recommendation 8: Improve the accessibility of board decisions. Licensing boards should provide easy access to their decisions by publishing them online in a centralized repository.

BACKGROUND: PROFESSIONAL AND OCCUPATIONAL LICENSES IN D.C.

Professional licenses are required to practice over 70 occupations in the District of Columbia.⁶ Licenses for health professions are administered by the D.C. Department of Health's Office of Health Professional Boards.⁷ This office supports 19 health professional boards that decide whether applicants for licensure meet professional standards.⁸ Licenses for non-health professions are administered by the D.C. Department of Consumer and Regulatory Affairs Occupational and Professional Licensing Administration (OPLA).⁹ OPLA supports nine professional boards and oversees the licensing of 31 occupations (see Appendix for a chart of professional boards).¹⁰ In 2016, these nine professional boards issued 9,314 new licenses and renewed and reinstated over 38,000 licenses.¹¹



Though the particular requirements of each profession differ, applicants are generally required to have obtained a certain degree of knowledge, skills, and experience in their chosen field. This requirement may be fulfilled by a particular amount of work experience or educational credit, and/or by passing a professional examination.¹² Applicants must complete and submit a license application form for review by a licensing board. If the board intends to deny the application, the applicants are entitled to a hearing.¹³

⁶ D.C. CODE ANN. §§ 3-1205.01(a)(1), 47-2853.04 (2012).

⁷ *Health Regulation and Licensing Administration, D.C. Dep't of Health*, <https://doh.dc.gov/page/health-regulation-and-licensing-administration> (last visited Apr. 27, 2017).

⁸ *Id.*

⁹ ANNUAL REPORT 2016, D.C. OCCUPATIONAL & PROF'L LICENSING BDS. & COMM. 2 (2016), available at <https://home.pearsonvue.com/getattachment/a224c761-91f3-4f14-b60a-258c258d9821/DC%20OPLA%202016%20Annual%20Report.aspx> (last visited Apr. 27, 2017).

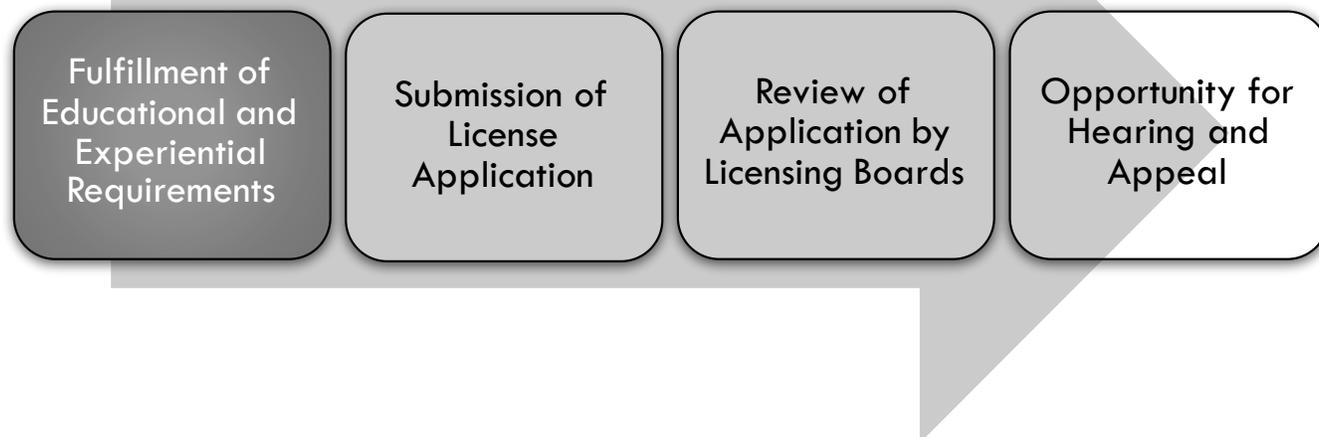
¹⁰ *Id.* at 1.

¹¹ *Id.* at 5.

¹² See D.C. CODE ANN. §§ 3-1205.04, 47-2853.04(1) (2012).

¹³ *Id.* §§ 3-1205.20, 47-2853.23.

FULFILLMENT OF EDUCATIONAL AND EXPERIENTIAL REQUIREMENTS



Before returning citizens can even apply for occupational and professional licenses, they must reckon with several preliminary requirements that D.C. imposes on all applicants. These requirements include: meeting profession-specific education or training requirements; paying expenses and fees; taking one or more examinations; being of a certain age; and completing a certain grade in school. The purpose of these requirements is ostensibly to ensure public safety or improve the quality of products or services.¹⁴ They also have the unfortunate consequence of keeping people of limited financial means out of the workforce.¹⁵ Returning citizens are among the impoverished populations most affected.¹⁶ A multi-year study by Princeton University found that time served in prison lowered a person's wages by as much as 20 percent.¹⁷ Professional licenses are a way out of the cycle of poverty for some returning citizens, but these requirements make obtaining a license difficult.

Would-be applicants may be required to complete several years of apprenticeship, time that returning citizens simply may not have. The Institute for Justice has observed that applicants in D.C. can expect to spend 311 days to complete these education requirements on average, across 42 commonly licensed occupations.¹⁸ Some of these education requirements seem entirely arbitrary. For example, interior

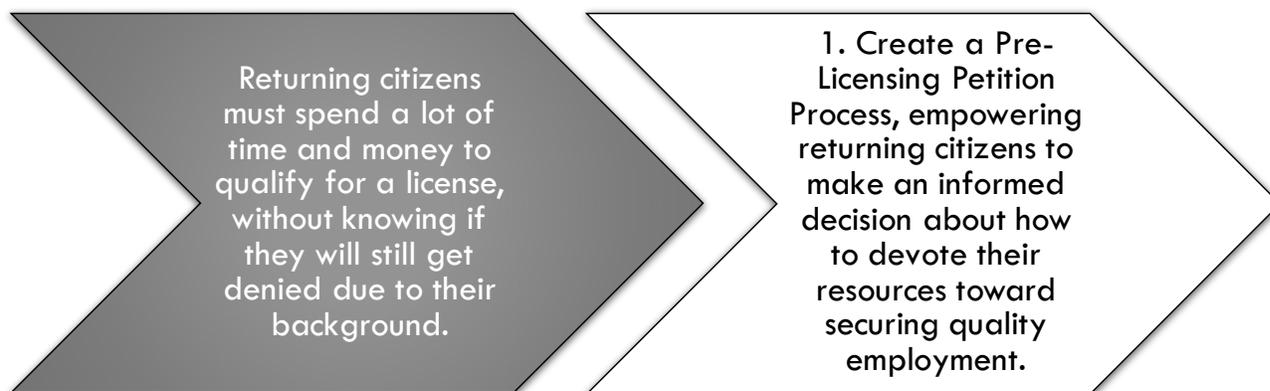
¹⁴ See DICK CARPENTER II ET AL., URBAN INST. JUSTICE POLICY CTR., LICENSE TO WORK 6 (2012), available at https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf [hereinafter LICENSE TO WORK].

¹⁵ See *id.* at 4.

¹⁶ Interview with Kate Mereand, Program Manager of Tech. & Innovation, Dep't of Small & Local Bus. Dev. (Feb. 10, 2017).

¹⁷ Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 535 (2002), available at http://scholar.harvard.edu/brucewestern/files/western_asr.pdf.

¹⁸ See LICENSE TO WORK, *supra* note 14, at Introduction.



designers must complete 2,190 days of education and training to be licensed in D.C.¹⁹ Licensure for interior designers is not required at all in 47 states.²⁰ Applicants may also have to pay fees to apply for occupational or professional licenses. These may present a nearly insurmountable obstacle to those living in poverty. Applicants for occupational licenses can expect to pay \$240 on average to obtain the license that they seek.²¹

Barriers to Licenses Faced by Returning Citizens Prior to Application Submission

These requirements pose a challenge to returning citizens in particular because they affect occupations in which returning citizens are interested. For example, many local stakeholders have identified barber and cosmetology licenses as being among the most sought after licenses for returning citizens. The D.C. Council has also identified these professions as especially attractive to returning citizens.²² Individuals seeking to become barbers and cosmetologists in D.C. must fulfill onerous education, training, and fee requirements. They must attend barber school for a total of 500 hours.²³ They must fulfill at least 2,000 hours of

¹⁹ D.C. MUN. REGS. tit. 17, § 3203.1 (2017); see also *Exam & Eligibility*, NCIDQ EXAMINATION, available at https://d2oc0ihd6a5bt.cloudfront.net/wp-content/uploads/sites/232/2015/09/NCIDQ_ExamEligibilityFinal.pdf (last visited Apr. 26, 2016).

²⁰ See LICENSE TO WORK, *supra* note 14, at Table 1.

²¹ *Id.* at 52.

²² In 2005, D.C. enacted its Omnibus Public Safety Ex-Offender Self-Sufficiency Reform Amendment Act, which made several occupational licenses more accessible for returning citizens, including barber and cosmetology licenses. See D.C. COUNCIL, REPORT ON BILL 16-205, at 1 (Dec. 1 2004), available at http://dcregisterarchives.dc.gov/sites/default/files/dc/sites/OS/release_content/attachments/13921/05-27-05_5_Part_2.pdf.

²³ D.C. MUN. REGS. tit. 17, § 3704.5 (2017).

training after completing school and must take at least a year to do so.²⁴ Then they must pay a fee of \$230 before they can take the examination necessary to obtain their license.²⁵ For returning citizens, the significant outlay of time, effort, and money to meet these requirements may be followed by a rejection of a license application based on criminal history.

We spoke to one returning citizen whose story exemplifies the challenges of meeting pre-application requirements.²⁶ This individual wants to use the skills she gained while working in her prison salon. Since her release one year ago, she has been trying to become a licensed cosmetologist. She enrolled in a beauty school that was tuition-free.²⁷ Two months into her program, however, she learned that the school did not grant the certification required by the barber and cosmetology board.²⁸ She would need to pay \$1,700 in tuition at an accredited school, which is more than she can afford.²⁹ Now she hopes to transfer the hours that she accumulated to an accredited school to lessen the cost.³⁰ Despite her efforts, she has yet to even apply for her license, at which point her criminal record will be subject to the scrutiny of the licensing board.³¹

Recommendations for Increased Access

A comprehensive approach to making professional licenses more accessible to returning citizens must address over-burdensome requirements, such as those for training and fees.³² This report offers some guidance as to how policy makers might determine whether those requirements are over-burdensome. It also describes a mechanism by which returning citizens may avoid unnecessarily fulfilling these requirements, only to be denied a license because of their backgrounds.

DEVELOP CRITERIA TO DETERMINE WHETHER A NON-CRIMINAL BARRIER TO LICENSURE IS NECESSARY

In their 2012 report *License to Work*, the Institute for Justice recommended that states reevaluate their licensing laws using the following questions:

- *Is an occupation licensed in other states?*

²⁴ *Id.* § 3704.1, .5.

²⁵ *Barber Application Instructions*, BD. OF BARBER & COSMETOLOGISTS, (June 2015), available at <https://home.pearsonvue.com/getattachment/9365eda0-3c01-4c94-a518-5fe31764c792/District%20of%20Columbia%20Board%20of%20Barbers%20and%20Cosmetology%20Application%20Instructions%20and%20Forms%20for%20a%20Barbers%20License.aspx> [hereinafter *Barber Application Instructions*].

²⁶ Telephone Interview with Sakenia Hammond (Apr. 14, 2017).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See STEPHEN SLIVINSKI, CTR. FOR STUDY OF ECON. LIBERTY AT ARIZ. STATE UNIV., *TURNING SHACKLES INTO BOOTSTRAPS 7* (2016), available at <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf> [hereinafter *TURNING SHACKLES INTO BOOTSTRAPS*].

- Are the licensure burdens for an occupation high compared to other states?
- Are the licensure burdens for an occupation high compared to other occupations with greater safety risks?³³

The public safety justifications are probably not as strong for a given profession if the burdens in other states are less stringent for that profession, or if fewer states regulate that profession altogether.³⁴ If one occupation has more stringent burdens than another occupation with greater safety risks, the burdens are probably more stringent than is necessary.³⁵ Master Refrigeration and Air Conditioning Mechanic is one profession that could be targeted for reform in D.C. using these guidelines.³⁶ Individuals complete five years of training before applying for this license.³⁷ This is the second highest training requirement in the country among all equivalent professions; the national average training requirement is 891 days.³⁸

CREATE A PRE-LICENSING PETITION PROCESS FOR PEOPLE WITH CRIMINAL RECORDS

We propose a pre-licensing petition process through which returning citizens may learn, prior to applying, whether their criminal record will present a barrier to licensure. Armed with this information, applicants would know whether seeking a professional license is worth their investment *before* they set about meeting the various preliminary requirements. Texas has a similar process in place.³⁹ Prior to applying for a license, a justice-involved individual can ask the Texas Department of Licensing and Regulation to review their record and issue a criminal history evaluation letter.⁴⁰ The Department then issues a recommendation, which is non-binding on the boards, as to whether the individual's record would bar the applicant from obtaining a license.⁴¹

Our proposed pre-licensing petition process closely follows the Institute for Justice's model legislation for reform of occupational licensing boards:⁴² After a justice-involved applicant has submitted a petition, the boards consider the applicant's record in light of the new standards for reviewing a criminal record,⁴³ proposed *infra*.⁴⁴ If a board determines that a petitioner cannot be licensed, the petitioner may submit another petition to the board in two years, during which time the petitioner may take rehabilitative measures to demonstrate qualification for a license.⁴⁵ The board may also recommend specific

³³ LICENSE TO WORK, *supra* note 14, at 33.

³⁴ *Id.* at 34.

³⁵ *Id.*

³⁶ There are three sub-types refrigeration and air conditioning professions. See D.C. MUN. REGS. tit. 17, §§ 305.1, .8 (2017).

³⁷ D.C. MUN. REGS. tit. 17, § 306.1 (2017).

³⁸ LICENSE TO WORK, *supra* note 14, at 52.

³⁹ TEX. DEP'T OF LICENSING & REGULATION, CRIMINAL HISTORY EVALUATION LETTER, <https://www.tdlr.texas.gov/crimHistoryEval.htm> (last visited Apr. 26, 2016).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² LICENSE TO WORK, *supra* note 14, at 1.

⁴³ *Id.* at 5-6.

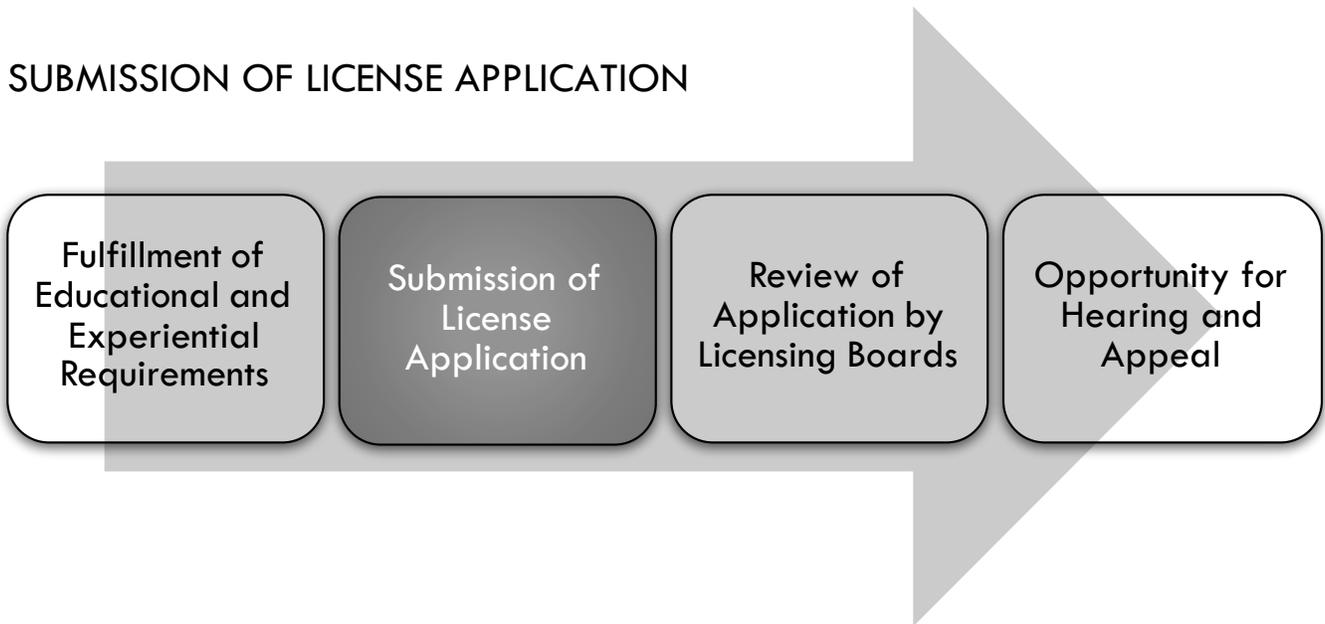
⁴⁴ See *infra* pp. 29-31.

⁴⁵ *Id.*

rehabilitative measures after denying a petition, in which case the individual may petition again after six months.⁴⁶

This pre-licensing petition process is fair, common sense public policy. In addition to informing returning citizens as to whether a professional license is worth their time and effort, it also protects returning citizens from enrolling in high-cost trade schools without any assurance that their criminal record will not be a bar to licensure. This proposal encourages returning citizens to set long-term goals and achieve personal success by permitting all returning citizens to petition the board every two years.

SUBMISSION OF LICENSE APPLICATION



License applications and their corresponding instructions are often incomplete, vague, and incompatible. This creates a vacuum of information. Returning citizens have no way of knowing the convictions that may lead to a denial of a license application. They also lack clear instruction about what information the licensing boards consider. As a result, returning citizens face the following barriers: they may be deterred from even applying, they may find the licensing process too difficult to navigate, or they may disclose damaging background information that they are not required to disclose. We propose to modify the applications and their instructions to remedy these problems.

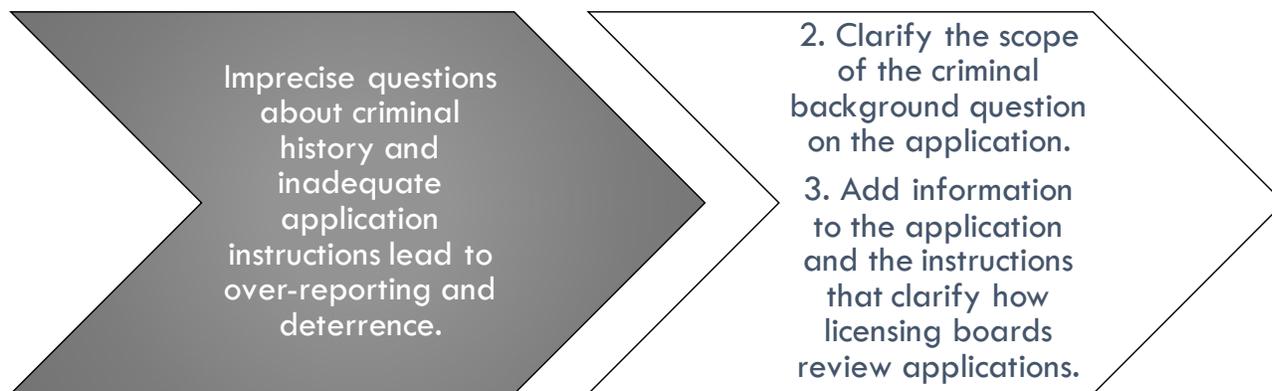
⁴⁶ *Id.*

License Applications and Instructions

In D.C., licensing boards inquire about criminal background information through a license application.⁴⁷ Each licensing board has also issued separate instructions that provide applicants with additional information on how to complete the application.⁴⁸

⁴⁷ See, e.g., *New License Application*, D.C. OCCUPATIONAL & PROF'L LICENSING ADMIN. 4 (Jan. 2014), available at <https://home.pearsonvue.com/getattachment/a5c51c28-f89f-4da1-9b1b-907c3cc86a1f/District%20of%20Columbia%20Barbers%20New%20License%20Application%20.aspx> [hereinafter *Barber Application*]; *New License Application*, D.C. BD. OF SECURITY (July 9, 2014), <https://home.pearsonvue.com/getattachment/1190ba1c-27a6-4fdc-9850-88eec9fb5838/District%20of%20Columbia%20Occupational%20and%20Professional%20Licensing%20Administration%20Board%20of%20Security%20New%20License%20Application.aspx> (license application for a security officer, special police officer, campus/university special police officer and private detective); *New License Application for Veterinarians (Vet)*, D.C. BD. OF VETERINARY MEDICINE 4, available at <https://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/2014%20New%20Veterinary%20License%20Application%2012-11-14.pdf> (last visited Apr. 12, 2017) [hereinafter *Vet Application*]; *Pearson VUE's Credentials Management System for Certification and Licensing Programs*, PEARSON EDUC., available at <https://www.pulseportal.com/> (last visited Apr. 12, 2017) (online portal for appraisers, accountants, elevator maintenance workers, architects, funeral directors, interior designers, professions under the real estate board, and tour guides); *New License Application, ADVISORY COMM. ON SURGICAL ASSISTANTS*, available at https://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/Surgical_Assistants_New_License_Application.pdf (last visited Apr. 12, 2017).

⁴⁸ *Application Instructions*, BD. OF ACCOUNTANCY 2 (July 2016), <https://home.pearsonvue.com/getattachment/823c02e9-7bad-4e07-994f-1f55913eb5cf/District%20of%20Columbia%20Board%20of%20Accountancy%20Application%20Instructions%20and%20Forms%20.aspx>; *Instructions for New License Application for Veterinarians (Vet)*, BD. OF VETERINARY MEDICINE 5 (May 2008), available at https://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/Veterinarian_Application_Instructions.pdf [hereinafter *Vet Instructions*]; *Application Instructions*, ADVISORY COMM. SURGICAL ASSISTANTS (Apr. 11, 2012), https://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/Surgical_Assistants_Application_Instructions.pdf [hereinafter *Surgical Assistant Instructions*]; *Application Instructions*, BD. OF ARCHITECTURE & INTERIOR DESIGNER, (May 2015), available at <https://home.pearsonvue.com/getattachment/598f0d74-f777-4850-822a-604199748af5/District%20of%20Columbia%20Board%20of%20Architecture%20and%20Interior%20Design%20Application%20Instructions%20.aspx>.



LICENSE APPLICATION QUESTIONS ARE IMPRECISE

After reviewing many license application forms, we have learned that the questions are overbroad and fail to put applicants on notice that they may be required to disclose additional information. A typical license application asks applicants a single yes-or-no question about their criminal background: whether they have been “convicted of a crime (other than minor traffic violations).”⁴⁹ The applications do not provide a definition of conviction. They also do not clarify the type of background information applicants are required to disclose.⁵⁰ For example, they do not indicate whether, in answering this question, returning citizens should disclose the existence of sealed and expunged records.⁵¹ In fact, a few applications require applicants to disclose non-conviction background information, such as arrests and sealed and expunged records.⁵² The application for Home Health Aide asks, “Have you ever been arrested, or pled guilty instead of going to trial, or been found guilty after trial, regardless of whether the arrest, conviction or plea of *nolo contendere* was sealed or expunged?”⁵³ While the law does not include an affirmative prohibition on boards considering non-conviction information, the law also does not

⁴⁹ See, e.g., *Barber Application* *supra* note 47.

⁵⁰ See, e.g., *Barber Application Instructions*, *supra* note 25.

⁵¹ See *id.*

⁵² See *Application for Certification*, BD. OF NURSING 4, <https://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/3%20-%20HHA%20Certification%20application.pdf> (last visited Apr. 26, 2017) [hereinafter *Home Health Aide Application*].

⁵³ *Id.*

mandate this inquiry.⁵⁴ Applications that require the disclosure of non-conviction background information are too expansive under the reforms we propose *infra*.⁵⁵

Applicants who answer “yes” to the application question about convictions are prompted by the application to “provide full information and complete details on a separate sheet of paper. . . .”⁵⁶ There is no guidance as to what applicants should include in this explanation.

LICENSE APPLICATION INSTRUCTIONS PROVIDE INADEQUATE GUIDANCE TO APPLICANTS

All licensing boards have issued instructions that are separate from the application forms.⁵⁷ Some application instructions describe requirements for applicants that are not an accurate reflection of the law. For example, the application for barbers states, “[An a]pplicant must not have been convicted of a crime or [sic] moral turpitude which bears directly on the applicant’s fitness to be licensed.”⁵⁸ As explained *infra*, a previous statutory reform explicitly repealed that standard.⁵⁹ These inaccuracies could simply indicate a lack of attention to detail. The typographical and formatting errors in some of the applications support this theory.⁶⁰

The instructions do not describe the way that licensing boards review these applications. Currently, the instructions imply that an applicant will be automatically excluded based on a conviction.⁶¹ Applicants are left in the dark about how their criminal convictions are evaluated. The instructions make no reference to the fact that the boards are restricted by laws that govern the basis for denying an application.⁶² They do not explain that boards can review applications on a case-by-case basis.⁶³ The instructions do not include what kinds of documents applicants can submit in their favor or what documents they are required to give the board.⁶⁴

⁵⁴ See D.C. CODE ANN. §§ 3-1205.03(a)(1), 47-2853.12(a)(1) (2012) (“An individual applying for a license under this chapter shall establish to the satisfaction of the board regulating the health occupation that the individual... has not been convicted of an offense which bears directly on the fitness of the individual to be licensed.”).

⁵⁵ See *infra* p. 29.

⁵⁶ See, e.g., *Barber Application*, *supra* note 47.

⁵⁷ See, e.g., *Barber Application Instructions*, *supra* note 25.

⁵⁸ *Id.* at 2.

⁵⁹ See *infra* p. 21.

⁶⁰ See generally *Surgical Assistant Instructions*, *supra* note 47. One example is the license applications instructions for surgical assistants. *Id.* The instructions require the submission of additional information for some screening questions. *Id.* at 3. However, instructions cut off after providing that “[t]yped answers to any ‘yes’ answer to questions 7B through.” *Id.* The screening question instructions also begin with two random words—that is, “of paper.” *Id.* The entire document contains significant formatting errors. See *id.* at 1 – 5.

⁶¹ See *id.* at 1; *Barber Application Instructions*, *supra* note 25, at 1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

Barriers at the Application Submission Stage

Imprecise application questions and unhelpful instructions create unfair barriers to returning citizens who apply for licenses. These application questions and instructions deter returning citizens from applying for licenses when they may be successful. Application questions and instructions may cause returning citizens to over-report their criminal background information because they do not understand what they are and are not obligated to report. Unhelpful instructions prevent returning citizens from a fair opportunity to obtain an occupational license because they do not sufficiently describe the process by which boards grant a license.

APPLICATION QUESTIONS AND INSTRUCTIONS DETER RETURNING CITIZENS FROM APPLYING FOR LICENSES

Over-inclusive criminal background questions and ineffective license application instructions may deter returning citizens from applying for occupational and professional licenses. The mere presence of a question about convictions may be enough to keep returning citizens from applying.⁶⁵ Returning citizens may erroneously conclude that their criminal background bars them from obtaining a license. Some D.C. returning citizens have voiced this concern.⁶⁶ Additionally, the Executive Office of the Mayor recently surveyed 245 returning citizens about occupational licenses. When asked if they were interested in obtaining occupational licenses, 53 percent of them said yes, yet only 13 percent of them had actually applied.⁶⁷ The phenomenon of criminal background questions deterring returning citizens from applying has been well-noted in other contexts.⁶⁸

APPLICATION QUESTIONS AND INSTRUCTIONS MAY CAUSE RETURNING CITIZENS TO OVER-REPORT THEIR CRIMINAL BACKGROUND INFORMATION

Vague application questions may cause returning citizens to over-report their criminal background information, which may give boards prejudicial information that they would not otherwise have. The common rationale for self-reporting requirements on licensing applications is that applicants are being dishonest if their applications are inaccurate, and therefore their lack of candor makes them unfit to be admitted to the profession.⁶⁹ In reality, self-reported criminal background information is often inaccurate

⁶⁵ See JASON JUFFRAS ET AL., OFFICE OF D.C. AUDITOR, IMPACT OF "BAN THE BOX" IN DISTRICT OF COLUMBIA 8 (June 10, 2016), http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report_0.pdf (explaining that deterrence exists in the context of an application for employment).

⁶⁶ Returning Citizen, Remarks at the Beyond Second Chances Re-entry Forum (Feb. 14, 2017); Telephone Interview with Returning Citizen (Mar. 22, 2017).

⁶⁷ *Survey on Returning Citizens in D.C.*, EXEC. OFFICE OF MAYOR 1 (on file with authors).

⁶⁸ See, e.g., CENTER OF CMTY. ALT., *BOXED OUT v - vi* (March 2015), available at http://communityalternatives.org/pdf/publications/BoxedOut_FullReport.pdf (describing how 62.5% of applicants to SUNY schools stop filling out the application after checking a box indicating that they have been convicted of a felony and receiving a request for more information).

⁶⁹ See MICHELLE NATIVIDAD RODRIGUEZ & ANASTASIA CHRISTMAN, NAT'L EMP. L. PROJECT, FAIR CHANCE – BAN THE BOX TOOLKIT 18 – 19 (Mar. 2015), available at <http://www.nelp.org/content/uploads/NELP-Fair-Chance-Ban-the-Box-Toolkit.pdf> [herein *NELP BAN THE BOX TOOLKIT*].

because returning citizens do not fully understand their record or even know what is contained within it.⁷⁰ This problem renders self-reporting a poor measure of an applicant's truthfulness.⁷¹

Self-disclosed background information is especially problematic when licensing boards compare the information to a background check.⁷² Boards that license health professions are required to administer background checks, either through commercial vendors or by submitting an applicant's fingerprints to the Federal Bureau of Investigation (FBI).⁷³ As stated in their regulations, most health professions elect to use the FBI background checks.⁷⁴ Both types of background checks can be highly inaccurate. The accuracy of commercial background checks varies from vendor to vendor.⁷⁵ Fingerprint background checks are inaccurate because the FBI's database consists of information that states report to them.⁷⁶ D.C. is woefully inconsistent at reporting information to the FBI.⁷⁷ Some licensed non-health professions also require a background check.⁷⁸

Another cause of over-reporting is that applicants may misinterpret the vague language of the background question—the “convicted of a crime” language—to require them to report information that they are not required to report.⁷⁹ For example, they might misinterpret the language of the question to require them to report charges that resulted in participation in diversion programs.⁸⁰

UNHELPFUL INSTRUCTIONS DISADVANTAGE RETURNING CITIZENS FROM A FAIR OPPORTUNITY TO OBTAIN AN OCCUPATIONAL LICENSE

Without context and guidance about the licensing process in D.C., returning citizens are not in a position to effectively advocate for fair consideration of their convictions. While the law provides for a legal standard governing licensing boards and an opportunity for hearing in the event of a denial, neither the application nor the instructions indicate to returning citizens that the licensing process is limited by anything beyond the boards themselves. The law requires boards to consider evidence of an applicant's rehabilitation; however, neither the application nor the instructions empower returning citizens with that information, let alone examples of the types of documents they could submit to increase their chances of a favorable finding by the board. The absence of this information in the license applications and

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.*

⁷³ D.C. CODE ANN. § 3-1205.22 (2012).

⁷⁴ See, e.g., D.C. MUN. REGS. tit. 17, §§ 4611.5(f), 8105.2(d), 9906.7(c), 9303.1(j).

⁷⁵ MARINA DUANE ET AL., URBAN INST., CRIMINAL BACKGROUND CHECKS 8 (Mar. 2017), available at http://www.urban.org/sites/default/files/publication/88621/2017.03.01_criminal_background_checks_report_finalized.pdf.

⁷⁶ *Id.* at 5 – 6.

⁷⁷ *Id.* at 6.

⁷⁸ *Id.* at 5 – 6.

⁷⁹ See *Beyond the Box*, U.S. DEP'T OF EDUC. 22 – 23 (May 2, 2016), available at <https://www2.ed.gov/documents/beyond-the-box/guidance.pdf> (explaining the deterrence effect of criminal background questions in the context of higher education).

⁸⁰ See NELP BAN THE BOX TOOLKIT, *supra* note 70, at 18 – 19 (noting that justice-involved applicants often misunderstand the content of their criminal record).

instructions is a missed opportunity to empower returning citizens in the process. Returning citizens who rely on license application materials to navigate the process are not in a position to effectively avail themselves of the law's safeguards against unfettered board discretion.

Recommendations for Increased Access

To address some of the barriers to professional and occupational licenses that are created by the license application and instructions, we recommend several changes. These changes are intended to provide returning citizens with clarity concerning the documents and information that should or can accompany their licensure applications. They also aim to inform applicants about how licensing boards consider certain criminal information. We recommend that such additional instructions should be either (1) provided on the license application itself, or (2) incorporated into the corresponding license application instructions with a reference in the application question that directs applicants to review the instructions for more clarifying information.

CLARIFY THE CRIMINAL BACKGROUND QUESTION ON LICENSE APPLICATIONS

License applications should be clear about the criminal background information that applicants are required and not required to disclose. The most sensible place for this clarification would be immediately following the background question:

Have you have been convicted of a crime other than a minor traffic violation?

You are only required to report criminal convictions. The following are NOT criminal convictions, and you do NOT need to report them:

- (1) arrests;
- (2) criminal charges;
- (3) erased, sealed, expunged, or pardoned criminal records;
- (4) juvenile adjudications;
- (5) charges that have been dismissed, dropped, or resulted in you being found not guilty.

A criminal conviction does NOT disqualify you from getting a license. Please see the instructions for more details.

Licensing boards should exhaustively list which kinds of criminal background information they do not require applicants to report, as illustrated above. This report recommends affirmative prohibitions on what the boards may consider *infra*. These recommendations may further alter the face of the application.

ADD INFORMATION TO THE APPLICATION AND INSTRUCTIONS TO EXPLAIN THE REVIEW PROCESS

Instructions for completing the application should explain the boards' review processes for criminal background information. While this is not an exhaustive list, the instructions should state the following:

- **The boards' power to deny a license is discretionary, not mandatory.** The instructions should include an explicit statement that a conviction is not an automatic bar to licensure.
- **The review process governed by laws that explain how boards should reach their decisions.** The instructions should also concisely and accurately state the applicable legal standards.
- **Applicants can offer evidence of their rehabilitation to influence the boards' decision.** The instructions should include specific examples of documents returning citizens can submit.
- **If an application is denied due to a conviction, the applicant will receive a "notice of intent to deny" in the mail.** That notice will include an opportunity to request a hearing challenging the denial. The instructions should explain the time limit on this request.
- **Applicants can bring an attorney to a denial hearing.** The instructions should also encourage applicants to consult with a lawyer during the application process.
- **Applicants have the right to appeal if they are unsatisfied with the results of the denial hearing.**

LACK OF CLARITY IN THE LAW

All of our interviews with stakeholders in the District had one takeaway in common: people do not understand the legal standards that govern how boards should consider applicants' criminal convictions. As we attempted to summarize and explain these standards, we discovered areas of the D.C. Code and regulations that are, at best, lacking in clarity, and, at worst, facially inconsistent.

Is board decision-making with respect to an applicant's criminal background discretionary? The sections of the D.C. Code that govern health and non-health professions state, "An individual applying for a license under this chapter *shall* establish . . . that the individual . . . has not been convicted of an offense which bears directly on the fitness of the individual to be licensed."⁸¹ This language implies that if boards find that an applicant's conviction meets this standard, he or she will be automatically denied. However, in other sections, the Code states that boards "may" (not must) deny applicants due to criminal convictions.⁸² While in practice it appears boards do not interpret the law to require a mandatory bar for applicants with convictions,⁸³ the letter of the law is ambiguous as to whether boards can use discretion to grant a license to someone with a conviction that bears directly on their fitness.

Is the burden on applicants to demonstrate that their criminal background does not bear on their fitness for licensure? As referenced above, the Code states that applicants shall establish that their conviction satisfies the legal standard.⁸⁴ For health professional licenses, the applicant has the burden of proof in satisfying a board's requirements.⁸⁵ However, for non-health licenses, the Code states that a denial may be issued for a conviction only after the consideration of certain criteria.⁸⁶ The law does not clearly allocate the burden of production and persuasion to either the applicant or the board.

What is the standard for evaluating criminal convictions for applicants to health occupations? The D.C. Code includes two standards that apply to consideration of criminal convictions in license applications for health occupations. The first standard states, "An individual applying for a license under this chapter shall establish [that he or she] has not been convicted of an offense which bears directly on the fitness of the individual to be licensed." The Code provides no guidance for making a determination under this standard. The second standard states, "Each board...may [deny a license...to any applicant]...who... has been convicted... of any crime involving moral turpitude...."⁸⁷ There is some guidance for this second standard; the Code includes three definitions of "crime involving moral

⁸¹ D.C. CODE ANN. §§ 3-1205.03(a)(1), 47-2853.12(a)(1) (2012) (emphasis added).

⁸² *Id.* at §§ 3-1205.14(c)(1), 47-2853.17(c-1) (2012).

⁸³ Telephone Interview with Clifford Cooks & Staci Mason, Program Manager & Program Officer, Occupational & Prof'l Licensing Admin. (Apr. 12, 2017) [hereinafter Telephone Interview with Clifford Cooks & Staci Mason].

⁸⁴ D.C. CODE ANN. §§ 3-1205.03(a)(1), 47-2853.12(a)(1) (2012).

⁸⁵ *In re Beck*, Case No. DH-B-06-800035, at *8 (2010) (citing D.C. MUN. REGS. tit. 17, § 4115.2).

⁸⁶ D.C. CODE ANN. § 47-2853.17(c-1) (2012).

⁸⁷ D.C. CODE ANN. § 3-1205.14(a)(4) (2012).

turpitude.”⁸⁸ Because of the differences between these two sections of the D.C. Code, the standard that actually applies to applicants for health licenses is not clear.⁸⁹

⁸⁸ *Id.*

⁸⁹ The D.C. Office of Administrative Hearings has acknowledged this lack of clarity. In one decision, the court noticed that “[a] literal reading of § 3-1205.03 suggests that any offense bearing upon an applicant’s fitness to practice a profession may disqualify an applicant; however, § 3-1205.14(a)(4) and § 3-1205.14(c) limit disqualifying offenses to ‘crimes of moral turpitude.’” *In re Beck*, Case No. DH-B-06-800035, 2007 WL 1138450, at *16 (D.C. Office of Admin. Hearings Feb. 16, 2007) [hereinafter *In re Beck* 2007]. The court found it unnecessary to address the “apparent conflict” because health care fraud satisfied both standards for a dentist.

**A Previous Attempt to Increase Access to Licenses
for Returning Citizens in D.C.**

In 2004, the D.C. Council undertook an effort to reform non-health licenses “to reduce barriers encountered by ex-offenders who return to the community seeking to reform their lives and become productive members of society.”⁹⁰ Was this effort successful?

The D.C. Council amended the law governing returning citizens’ access to licensed professions in 2004.⁹¹ The “Omnibus Public Safety Ex-Offender Self-Sufficiency Reform Amendment Act of 2004” was introduced by Councilmember Kathy Patterson, the Chairperson of the Committee on the Judiciary, and Councilmember Sandra Allen.⁹²

The bill purported to “clarif[y] that it is the policy of the District of Columbia to encourage the licensure and employment of ex-offenders, whenever possible and appropriate.”⁹³ The bill also specified seven criteria that “must be considered before denying an occupational license to an ex-offender,” discussed *supra*.⁹⁴ The report accompanying this bill explained that the criteria selected were based on a similar provision in New York state law.⁹⁵

In addition to reforming this general rule for considering convictions, the bill sought to exempt these ten professions that the Council identified as popular and desirable among returning citizens: asbestos worker, barber, cosmetologist, commercial bicycle operator, electrician, funeral director, operating engineer, plumber/gasfitter, refrigeration and air conditioning mechanic, and steam engineer.⁹⁶ Any limits on licensure for applicants with convictions would not apply to these enumerated occupations, unless the Mayor issued rules before May 24, 2005 specifying the criteria for these ten professions.⁹⁷

On May 27, 2005, the Mayor, through the DCRA, issued rules specifying the standards boards must satisfy to deny applications under those ten professions because of a conviction. Prior to denying a license, a board must first show either: (a) that there is a potential direct relationship between the criminal offense and the license sought; or (b) that the issuance of a license would involve an unreasonable risk to property, safety, or welfare of specific individuals or the general public.⁹⁸ These rules explicitly put the burden on boards, rather than applicants.⁹⁹

⁹⁰ D.C. COUNCIL, REPORT ON BILL 16-205, *supra* note 22, at 1.

⁹¹ *Id.*

⁹² *Id.*

⁹³ N.Y. CORRECT. LAW § 753 (McKinney 2007).

⁹⁴ D.C. COUNCIL, REPORT ON BILL 16-205, *supra* note 22, at 4.

⁹⁵ *Id.* at 5.

⁹⁶ *Id.* at 3.

⁹⁷ D.C. CODE ANN. § 47-2853.12(a)(1) (2012).

⁹⁸ D.C. MUN. REGS. tit. 17, § 114.2 (2005).

⁹⁹ *Id.*

However, in order to make a finding under either prong, the regulation requires boards to consider *the same seven factors* that the Code requires boards to consider in order to deny any non-health license.¹⁰⁰ This means that non-health licensing boards conduct a very similar analysis of convictions for all non-health professions, regardless of the Council's attempt to carve out an exception for ten specific professions. When we spoke to officials at DCRA, they did not distinguish between the analysis that the boards use for these ten professions and the general practices for all other licensed, non-health professions.¹⁰¹

Barriers to Returning Citizens Arising from Lack of Clarity In the Law

The lack of clarity in the law governing occupational and professional licenses in D.C. creates three types of barriers for returning citizens:

1. Returning citizens, and the providers that serve them, may interpret the law as automatically excluding them from licensure. An attorney in the General Counsel office for the Executive Office of the Mayor reported that many returning citizens erroneously believe they are ineligible.¹⁰² She hypothesized that this was due to misinformation circulating around their communities.¹⁰³

2. Writing a simple, accurate guide to communicate the law and empower returning citizens is impossible without further guidance. Many stakeholders identified a lack of information on this issue as the primary problem underlying barriers for returning citizens.¹⁰⁴ But the confusion in the law makes it difficult to compile accurate information in a concise manner.

3. Licensing boards do not have a clear mandate limiting their discretion. Instead, they are left to choose from multiple, ambiguous sections of the D.C. Code and regulations. This extra layer of discretion harms returning citizens' ability to obtain licenses. Even if the DCRA and the boards understand the law to be consistent,¹⁰⁵ their interpretation of the law is neither codified nor accessible to the public. The resulting ambiguity "leaves workers without clarity as to whether their past conviction could lead to disqualification" and may deter them from applying.¹⁰⁶

¹⁰⁰ D.C. MUN. REGS. tit. 17, § 114.5 (2005).

¹⁰¹ Telephone Interview with Clifford Cooks & Staci Mason, *supra* note 83.

¹⁰² Interview with Thea Sebastian, Associate Director General Counsel to the Mayor, Exec. Office of the Mayor, in Washington, D.C. (Apr. 27, 2017).

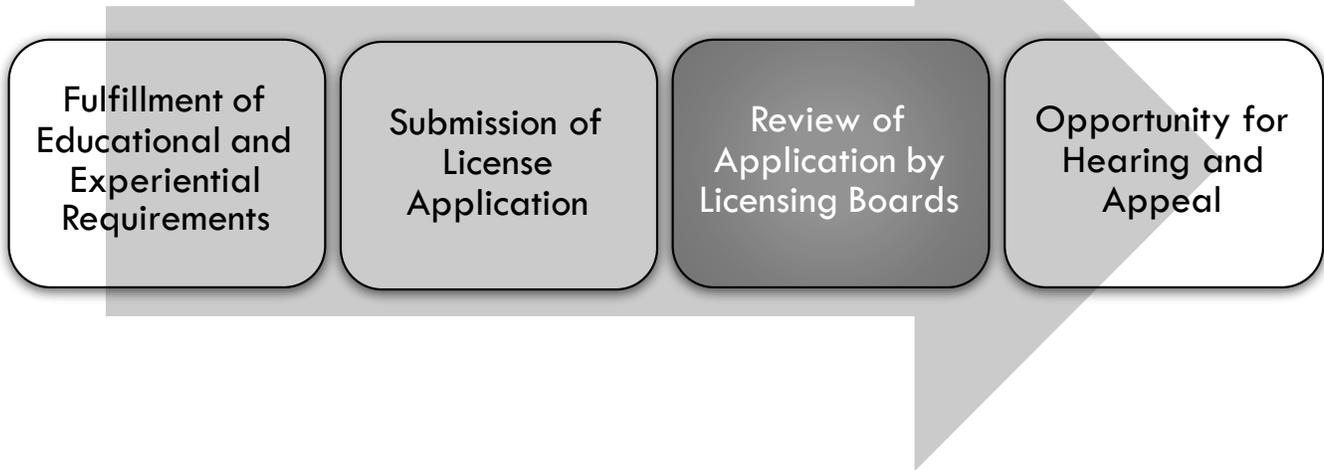
¹⁰³ *Id.*

¹⁰⁴ See, e.g., Interview with Jessica Steinberg, Director, Prisoner & Reentry Clinic, in Washington, D.C. (Mar. 20, 2017); Interview with Brian Ferguson, Executive Director, Mayor's Office on Returning Citizens, in Washington, D.C. (Mar. 20, 2017).

¹⁰⁵ Telephone Interview with Clifford Cooks & Staci Mason, *supra* note 83.

¹⁰⁶ MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT'L EMP. L. PROJECT, UNLICENSED AND UNTAPPED 2 (2016), available at <http://www.nelp.org/content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf> [hereinafter NELP UNLICENSED AND UNTAPPED].

REVIEW OF APPLICATION BY LICENSING BOARD



The standards for both types of licensing boards—non-health and health—are complex and difficult to parse. It is not clear how boards are currently using these standards to apply their discretion. We suggest amending the D.C. Code to more appropriately limit board discretion to give returning citizens a better chance of obtaining licenses.

Non-Health Occupations

The statutory and regulatory requirements governing board discretion for non-health occupations include two standards: a general standard applying to most non-health professions and a standard slightly more favorable to returning citizens that applies to ten professions specifically targeted for reform.¹⁰⁷ It is not clear if boards differentiate between these two standards in practice, and there is no publicly available guidance beyond the text of the complex statute and regulations.

THE LEGAL STANDARD FOR NON-HEALTH PROFESSIONS REQUIRES BOARDS TO CONSIDER CERTAIN FACTORS BEFORE DENIAL

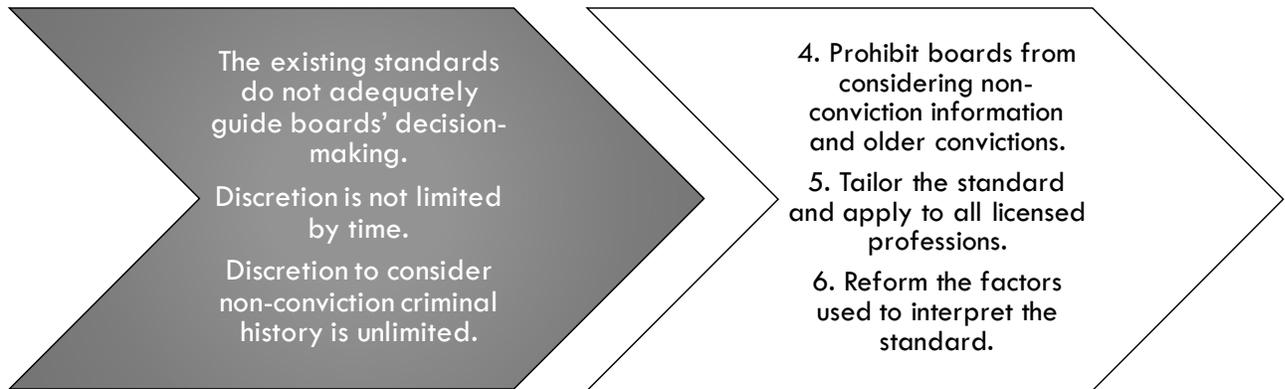
To qualify for a license in a non-health profession, an applicant must not have been convicted of a crime that “bears directly on the [applicant’s] fitness to be licensed.”¹⁰⁸ Licensing boards must consider seven criteria when making a denial determination under this standard.¹⁰⁹ These are:

- (1) *The specific duties and responsibilities necessarily related to the license sought;*

¹⁰⁷ D.C. MUN. REGS. tit. 17, § 114 (2005).

¹⁰⁸ D.C. CODE ANN. §§ 47-2853.12(a)(1), .17(c-1) (2012).

¹⁰⁹ *Id.* at § .17(c-1)(1)-(7).



(2) *The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more of the duties or responsibilities;*

(3) *The time that has elapsed since the occurrence of the criminal offense or offenses;*

(4) *The age of the applicant at the time of occurrence of the criminal offense or offenses;*

(5) *The seriousness of the criminal offense or offenses;*

(6) *Any information produced by the applicant, or produced on his behalf, in regard to his rehabilitation and good conduct; and*

(7) *The legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public.*¹¹⁰

As discussed *supra*,¹¹¹ there is a different standard for ten professions: asbestos worker, barber, cosmetologist, commercial bicycle operator, electrician, funeral director, operating engineer, plumber/gasfitter, refrigeration and air conditioning mechanic, and steam engineer.¹¹² Under this standard, the board must prove either of two prongs before denying a license for those ten professions based on a conviction:

¹¹⁰ See *id.*

¹¹¹ See *supra* p. 21.

¹¹² D.C. CODE ANN. §§ 47-2853.12-17(a)(5)(A)-(J) (2012).

(a) There is a potential **direct relationship** between the nature of one or more of the criminal offenses and the specific license sought or held; or

(b) The issuance or retention of the license could involve an **unreasonable risk** to property, safety, or welfare of specific individuals or the general public.¹¹³

This standard explicitly puts the burden on the board to show that the applicant's conviction is sufficient to deny their application. After making a finding of either (a) a potential direct relationship or (b) an unreasonable risk, the regulation requires boards to consider *the same seven factors* that the Code requires boards to consider in order to deny *any* non-health license, listed above.¹¹⁴

THE NON-HEALTH LICENSING BOARDS MAY MISAPPLY THE LEGAL STANDARDS

It is unclear that boards actually apply a different standard for those ten professions. This process does not seem systematized. To understand how boards apply the standards, we spoke to two DCRA officials.¹¹⁵ They told us that the licensing boards only used the statutes and regulations as guidance while reaching their decisions, not further written guidance.¹¹⁶ One DCRA official offered an example to illustrate how these statutory and regulatory requirements would be applied: if an applicant for a barber license committed a murder using a straight razor, their application would be denied.¹¹⁷ These officials also did not distinguish between the analysis that the boards use for the ten specially carved out professions and the general practices for all other licensed, non-health professions.¹¹⁸

Health Occupations

The D.C. Code includes two standards that apply to the consideration of criminal convictions in license applications for health occupations, as discussed *supra*:¹¹⁹

1. "An individual applying for a license under this chapter shall establish to the satisfaction of the board regulating the health occupation that the individual... has not been convicted of an offense which bears directly on the fitness of the individual to be licensed."¹²⁰
2. "Each board . . . may [deny a license . . . to any applicant] . . . who . . . has been convicted . . . of any crime involving moral turpitude"¹²¹

¹¹³ D.C. MUN. REGS. tit. 17, § 114 (2005).

¹¹⁴ See sources cited *supra* note 104; see also D.C. CODE ANN. § 47-2853.17(c-1) (2012); D.C. MUN. REGS. tit. 17, § 114.5 (2005).

¹¹⁵ Interview with Clifford Cooks & Staci Mason, *supra* note 83.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *supra* p. 21.

¹²⁰ D.C. CODE ANN. § 3-1205.03(a)(1) (2012).

¹²¹ D.C. CODE ANN. §§ 3-1205.14(a)(4), 1205.14(c)(1) (2012).

It is not clear which of the two standards boards use when evaluating applications. An opinion by the D.C. Office of Administrative Hearings acknowledged the standards are in conflict.¹²² The court did not find occasion to resolve this conflict because the conviction met both standards.¹²³ This opinion also reveals what health occupation boards consider in the absence of the seven guiding factors in the statutes and regulations for non-health occupations. The court engaged in an analysis somewhat similar to that of non-health licenses, considering “evidence of rehabilitation” and “risk to the public,” relying on law from D.C. and other jurisdictions as authority.¹²⁴

Barriers at the Application Review Stage

The standards under both the health and non-health licensing statutes fail to adequately limit the scope of criminal background information that boards may consider. The D.C. Code gives boards too much discretion to deny an applicant’s license based on background information that does not bear on fitness for licensure. The Code does not prohibit boards from considering older convictions that have no relevance to their fitness. While the D.C. Code only explicitly mentions convictions, there is no affirmative prohibition on boards’ ability to consider non-conviction background information.

THE EXISTING STANDARDS FOR OCCUPATIONAL LICENSES DO NOT ADEQUATELY GUIDE THE BOARDS’ DECISIONMAKING

The language of the health and non-health licensing sections of the D.C. Code may create unnecessary barriers to licensure for returning citizens.

The Standards Do Not Adequately Constrain the Boards’ Decision-Making Process

In its report on occupational licensing across the country, the National Employment Law Project (NELP) derides the “fitness” standard as “vague” and writes that it “needs improvement” because it does not focus boards’ inquiry on the duties that the occupation entails.¹²⁵ The boards may not be engaging in meaningful review, based on the barber-razor example offered by DCRA. Despite the attempt to make certain professions more accessible to returning citizens, many local stakeholders report that returning citizens continue to be denied licenses in those professions. The boards may be applying the different standards in a way that renders them functionally equivalent.

The “moral turpitude” and “good moral character” language peppered throughout the law complicates the review process.¹²⁶ It is seemingly disconnected from the rest of the statute, but based on its appearance in various application materials, has the potential to be misapplied by the boards.¹²⁷ These standards are so opaque that boards may even read them to automatically deny applicants by

¹²² See *In re Beck* 2007, *supra* note 89 at *16.

¹²³ *Id.* at *4-6.

¹²⁴ *Id.* at *16-17.

¹²⁵ NELP UNLICENSED AND UNTAPPED, *supra* note 106, at 42.

¹²⁶ See, e.g., D.C. CODE ANN. § 3-1205.14 (2012); D.C. MUN. REGS. tit. 17, § 114.2 (2005);

¹²⁷ *Barber Application Instructions*, *supra* note 25 (“Applicant must not have been convicted of a crime or moral turpitude which bears directly on the applicant’s fitness to be licensed.”) (last visited Apr. 26, 2017).

individuals with a criminal record.¹²⁸ This language also falsely equates a criminal record with character deficiencies.¹²⁹

The Seven Criteria Only Apply to Non-Health Occupations and Could Be More Returning Citizen-Friendly

The factors in the D.C. Code and regulations for non-health professions are largely positive for returning citizens. In fact, NELP writes that one problem with D.C.'s licensing scheme is that these factors only apply to non-health professions and recommends that they be applied to health professions as well.¹³⁰

Some of the factors should be changed or removed because they may allow for the board to make decisions based on bias. The D.C. Code requires boards to consider “[t]he seriousness of the criminal offense or offenses,” but offers no guidance as to when a crime is serious.¹³¹ One factor uses language that may encourage boards to be too wary of justice-involved applicants’ risk to reoffend: “[t]he legitimate interest of the public agency in protecting property, the safety, or welfare of specific individuals or the general public.”¹³²

The factors that potentially reflect more positively on citizens could also be refined to better effectuate this purpose. One factor requires the boards to consider information produced by the applicant to demonstrate that they have been rehabilitated.¹³³ NELP notes that, while this factor is a step in the right direction, the Code does not explain how to evaluate whether a justice-involved applicant is rehabilitated.¹³⁴ The 2005 Act added these factors as part of an effort “to encourage the licensure and employment of ex-offenders, whenever possible and appropriate.”¹³⁵ However, this policy is not itself written into the law, unlike the New York law upon which it is based.¹³⁶

DISCRETION TO CONSIDER CRIMINAL CONVICTIONS IS NOT LIMITED BY TIME

Despite evidence that the risk of recidivism decreases over time, the D.C. Code permits licensing boards to consider an applicant’s entire criminal history. In their regulations, some boards have established limitations for certain professions.¹³⁷ However, many boards have not restrained themselves in that

¹²⁸ NELP UNLICENSED AND UNTAPPED, *supra* note 106, at 2 (“The common use of vague statutory terms, such as a ‘good moral character’ requirement or restrictions against offenses of ‘moral turpitude,’ leaves workers without clarity as to whether their past conviction is a disqualification. Without any procedural safeguards, guidelines, or limits on discretion, this opaque process may shroud automatic denials.”).

¹²⁹ *Id.* at 13.

¹³⁰ *Id.* at 42.

¹³¹ D.C. CODE ANN. § 47-2853.17(c-1) (2012).

¹³² *Id.*

¹³³ D.C. CODE ANN. § 47-2853.-17(c-1)(6) (2012).

¹³⁴ See NELP UNLICENSED AND UNTAPPED, *supra* note 106, at 20 (“By failing to limit a board’s discretion and provide guidance as to what qualifies as rehabilitation, these vague standards promote inconsistency.”).

¹³⁵ D.C. COUNCIL, REPORT ON BILL 16-205, *supra* note 22, at 1.

¹³⁶ N.Y. CORRECT. LAW § 753 1.(h) (McKinney); see D.C. COUNCIL, REPORT ON BILL 16-205, *supra* note 22, at 5.

¹³⁷ See, e.g., D.C. MUN. REGS. tit. 17, § 313 (2005) (describing the requirements for of suspending or revoking a refrigeration and air conditioning license); D.C. MUN. REGS tit. 17, § 3732 (2005) (describing the requirements for of suspending or revoking

way.¹³⁸ The seven factors that non-health occupational licensing boards must consider include “the time that has elapsed since the occurrence of the criminal offense or offenses,”¹³⁹ yet D.C. law does not recognize how drastically the risk of re-offense for returning citizens diminishes over time. Returning citizens are only as likely to commit a new offense as people who have never been in the criminal justice system after six or seven years.¹⁴⁰ Returning citizens are most likely to reoffend in the three years immediately following their release.¹⁴¹

DISCRETION TO CONSIDER NON-CONVICTION CRIMINAL HISTORY IS UNLIMITED

The D.C. Code reads, “A person applying for licensure, certification, or registration under this subchapter shall establish . . . that the individual . . . [h]as not been convicted of an offense which bears directly on the fitness of the person to be licensed.”¹⁴² It does not affirmatively prohibit boards from considering information such as arrests, charges, and juvenile records. Even though applications for occupational licenses usually only inquire into convictions,¹⁴³ boards may still take other information they obtain into consideration. Recall that applicants may mistakenly over-report their criminal history, as described *supra*.¹⁴⁴

Allowing boards to consider information other than convictions is bad policy because unproven accusations do not bear a relationship to whether someone is qualified for licensure. It is also unjust because the barrier it creates has a racially disparate impact on D.C.'s most vulnerable populations. African Americans are over-represented in every part of the criminal justice system. In regard to arrest records, for example, it casts a disproportionate burden on African Americans, who are arrested at a much higher rate than people of other races. Forty-nine percent of African American men can be expected to be arrested before they turn 22.¹⁴⁵ The overwhelming majority of D.C. returning citizens are

a barber's license); D.C. MUN. REGS. tit. 17, § 9317 (2005) (describing the requirements for of suspending or revoking a home health aide license).

¹³⁸ See, e.g., D.C. MUN. REGS. tit. 16, § 1007.2 (2005) (for a secondhand dealers or junk dealers, those who have been convicted of a felony within ten years of applying are not eligible for a license); D.C. MUN. REGS. tit. 16, § 9303.4 (2005) (for home health aides, decision makers reviews the results of a criminal background check if the applicant has been convicted of certain enumerated felonies in the past seven years); D.C. MUN. REGS. tit. 16, § 2104.1(2005) (for private security officers, applicants are not eligible for a license if they have been released from prison for a felony offense within two years of the date of application and concealed weapon offense within one year of the date of application).

¹³⁹ D.C. CODE ANN. § 47-2853.17(c-1) (2012).

¹⁴⁰ See Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POLICY 3, 483, 483 (2006) [hereinafter *Scarlet Letters*]; Megan Kurlychek et al., *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 CRIME & DELINQUENCY, 64, 80 (2007).

¹⁴¹ See TURNING SHACKLES INTO BOOTSTRAPS, *supra* note 32, at 1.

¹⁴² D.C. CODE ANN. § 47-2853.12(a)(1) (2012).

¹⁴³ *But see Home Health Aide Application*, *supra* note 51, at 4 (“Have you ever been arrested, or pled guilty instead of going to trial, or been found guilty after a trial, or pled nolo contendere, regardless of whether the arrest, conviction or plea of nolo contendere was sealed or expunged?”).

¹⁴⁴ See *supra* p. 16.

¹⁴⁵ Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQUENCY 471 (2014).

African American men.¹⁴⁶ Without language affirmatively prohibiting boards from considering non-conviction criminal history, the D.C. Code has a disparate impact on returning citizens, especially those of color.

Recommendations for Increased Access

There should be more stringent limitations on the criminal background information that licensing boards may consider and better guidance on how boards consider that information. We propose four changes to the D.C. Code to increase returning citizens' access to licensure:

- **Prohibit boards from considering criminal background information other than convictions.** The D.C. Code should only allow boards to consider felony and misdemeanor convictions.
- **Prohibit boards from considering older convictions.** The Code should only allow licensing boards to consider felony convictions after a period of seven years and misdemeanor convictions after three years.
- **Tailor the standard boards use to review convictions and apply the new standard across all licensed professions.** The licensing boards should apply one standard that focuses their inquiry on a conviction's effect "on the applicant's ability to perform the specific duties and responsibilities necessarily related to the license." This standard should apply uniformly to all licensed professions.
- **Change the language of the factors boards must consider under the standard and apply those factors across all professions.** The seven factors that the D.C. Code requires could be amended to give returning citizens a fair chance at obtaining licenses. The factors should be applied to health professions, not just non-health professions.

PROHIBIT BOARDS FROM CONSIDERING CRIMINAL BACKGROUND INFORMATION OTHER THAN CONVICTIONS.

We propose to amend the D.C. Code to affirmatively prohibit licensing boards from considering criminal background information other than convictions. Pennsylvania's licensing statute¹⁴⁷ provides an example of how the D.C. Code might be improved. It lists information that boards may not consider:

The following information shall not be used in consideration of an application for a license ... :

- (1) Records of arrest if there is no conviction of a crime based on the arrest.*
- (2) Convictions which have been set aside, sealed or expunged.*

¹⁴⁶ COUNCIL FOR COURT EXCELLENCE, *supra* note 1.

¹⁴⁷ 18 PA. STAT. AND CONS. STAT. ANN. § 9124 (2017).

(3) Convictions of a summary offense.

(4) Convictions for which the individual has received a pardon from the Governor.¹⁴⁸

NELP's model legislation¹⁴⁹ offers a variation on this example, further restricting the scope of what boards may consider. NELP recommends prohibiting boards from considering: non-conviction information (i.e., deferred adjudications); convictions that have been sealed, dismissed, expunged, or pardoned; juvenile adjudications; and misdemeanor convictions for which no jail sentence is imposed.¹⁵⁰ We propose a similar list.

PROHIBIT BOARDS FROM CONSIDERING OLDER CONVICTIONS.

D.C. law on professional licenses does not sufficiently take into account how the rate of recidivism for returning citizens drastically diminishes over time. Limiting boards to considering felony convictions that have occurred only within the past seven years better reflects research on when returning citizens cease to reoffend.¹⁵¹ Our recommendation that boards not consider misdemeanor convictions older than three years aligns with when returning citizens are most at risk to reoffend.¹⁵² While boards are already required to consider "the time that has elapsed since the occurrence of the criminal offense or offenses," putting a firm time limit in place better protects justice-involved applicants.¹⁵³

We propose amending the Code so that the boards are prohibited from considering felony convictions older than seven years and misdemeanor convictions older than three years:

Boards may not consider:

- (1) arrests;
- (2) criminal charges;
- (3) erased, sealed, expunged, or pardoned criminal records;
- (4) juvenile adjudications;
- (5) charges that have been dismissed, dropped, or resulted in a finding of not guilty;
- (6) Felony convictions older than seven years; and

¹⁴⁸ *Id.*

¹⁴⁹ NELP UNLICENSED AND UNTAPPED, *supra* note 106, at 31.

¹⁵⁰ *Id.* (The section reads in its entirety: "(1) non-conviction information, including information related to a deferred adjudication, participation in a diversion program, an arrest non followed by a valid conviction, or infraction; [or other state-specific non-criminal offense]; (2) [c]onviction which has been sealed, dismissed, expunged, or pardoned; (3) [j]uvenile adjudication; (4) [m]isdemeanor convictions for which non jail sentence can be imposed;" or other state-specific low level conviction.).

¹⁵¹ See Brame et al., *supra* note 145, at 483 – 504.

¹⁵² TURNING SHACKLES INTO BOOTSTRAPS, *supra* note 32, at 1.

¹⁵³ D.C. CODE ANN. § 47-2853.17(c-1) (2012).

(7) Misdemeanor convictions older than three years.

TAILOR THE STANDARD BOARDS USE TO REVIEW CONVICTIONS AND APPLY THE NEW STANDARD ACROSS ALL LICENSED PROFESSIONS.

Licensing boards in D.C. should only consider whether the conviction is related to the work necessary to carry out the duties of the profession, rather than the nebulous “fitness” standard. This revised standard should apply across all licensed professions. Other jurisdictions have taken this approach. New Jersey allows boards to deny an occupational license “if a conviction of a crime relates adversely to the occupation.”¹⁵⁴ Occupational licensing boards in Minnesota may not deny someone a license on the basis of their criminal record, unless the conviction “directly relate[s] to . . . the occupation for which the license is sought.”¹⁵⁵

¹⁵⁴ N.J. STAT. ANN. § 2A:168A-2 (2017).

¹⁵⁵ MINN. STAT. ANN. § 364.03(1) (2017).

We propose that D.C. follow the examples of these states and adopt the following standard:

Boards may deny an applicant based on a conviction only if they find that conviction **bears directly on the applicant's ability to perform the occupation** for which the license is sought.

This language more clearly requires boards to focus on how an applicant's criminal conviction relates to the work they would perform with the license, instead of passing judgment on an applicant's history.

Boards should interpret this standard using a new set of clear criteria. These criteria, based on the recommendations from NELP¹⁵⁶ and the existing factors already adopted for certain jobs,¹⁵⁷ are designed to give returning citizens a fair chance in the license application process. Following New York's example,¹⁵⁸ these factors should be read in light of the public policy goal to increase returning citizens' access to professional employment. We propose that the D.C. Code adopt the following language, which would appear beneath the revised standard:

Boards must consider the following factors before denying an application based on a conviction, in light of the District of Columbia's legitimate interest in equal access to employment for people with criminal convictions:

- (a) whether the elements of the offense or offenses are directly related to the specific duties and responsibilities of that occupation;
- (b) whether the occupation reasonably offers the opportunity for the same or a similar offense to occur;
- (c) the relationship of the offense to the purposes of regulating the occupation for which the license is sought;
- (d) the time that has elapsed since the occurrence of the criminal offense or offenses;
- (e) the age of the person at the time of occurrence of the criminal offense or offenses;
- (f) any information produced by the person, or produced on his behalf, concerning his rehabilitation and good conduct.

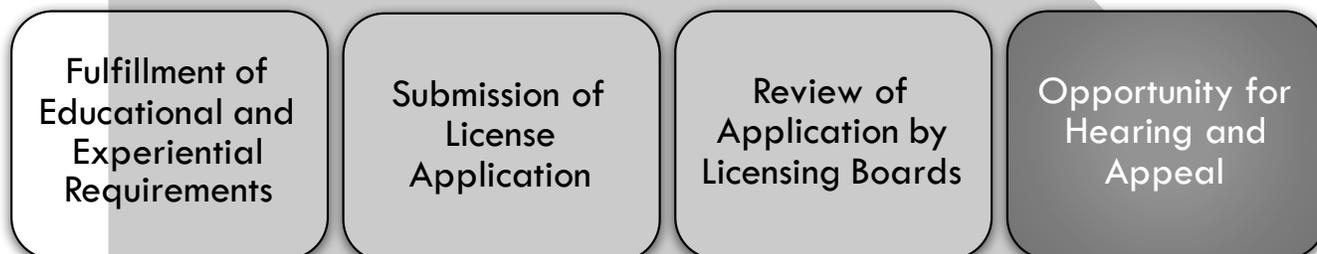
This new standard and the revised criteria will tailor boards discretion to only consider convictions that are truly relevant.

¹⁵⁶ NELP UNLICENSED AND UNTAPPED, *supra* note 106, at 31 - 32 (2016) (The section reads in its entirety: "(1) non-conviction information, including information related to a deferred adjudication, participation in a diversion program, an arrest non followed by a valid conviction, or infraction; [or other state-specific non-criminal offense]; (2) [c]onviction which has been sealed, dismissed, expunged, or pardoned; (3) [j]uvenile adjudication; (4) [m]isdemeanor convictions for which non jail sentence can be imposed; [or other state-specific low level conviction.]").

¹⁵⁷ D.C. CODE ANN. § 47-2853.17 (2012).

¹⁵⁸ N.Y. CORRECT. LAW § 753 (McKinney 2017).

OPPORTUNITY FOR HEARING AND APPEAL



Prior to the denial of a license, an applicant is entitled to a hearing.¹⁵⁹ After a denial, an applicant is entitled to appeal this decision to the D.C. Court of Appeals.¹⁶⁰ However, lack of transparency in this process and data on its outcomes prevents interested advocates from understanding if and how returning citizens avail themselves of this right. Making board opinions easily accessible and strengthening the requirements for their annual reports can fill this data gap and move advocates forward in their efforts to connect returning citizens to employment.

Transparency of Board Hearings

When licensing boards deny an application because of a conviction, they are required to issue a written “Notice of Intent to Deny” to the applicant.¹⁶¹ The notice must explain the evidence presented and the reasons for the denial.¹⁶² Additionally, the notice should inform an applicant of their right to request a hearing.¹⁶³ The hearing procedures are complex and differ by board. Some boards conduct hearings using a panel of their own members, while other boards use an administrative law judge at the Office of

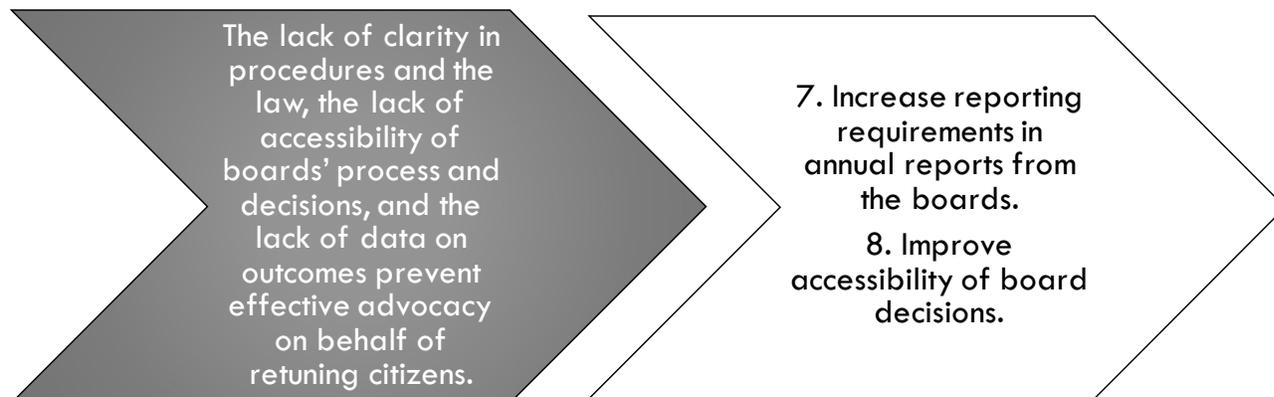
¹⁵⁹ D.C. CODE ANN. § 47-2853.17(a), .22(d) (2012).

¹⁶⁰ D.C. CODE ANN. §§ 3-1205.20, 47-2853.23 (2012).

¹⁶¹ See D.C. CODE ANN. § 47-2853.17(c-2) (2012) (“If a conviction of a criminal offense which bears directly on the fitness of the person to be licensed is the basis for denial of an application for a license or certificate under subsection (c) of this section, the denial shall be in writing and specifically state the evidence presented and reasons for the denial. A copy of the denial shall be provided to the applicant.”); Interview with Clifford Cooks & Staci Mason, *supra* note 84 (referring to the denial notice as a “Notice of Intent to Deny”).

¹⁶² See D.C. CODE ANN. §§ 47-2853.17(c-2), (d) (2012).

¹⁶³ See D.C. CODE ANN. § 47-2853.17(a), .22(d) (2012) (establishing that an applicant has the right to a hearing).



Administrative Hearings to conduct the hearing on their behalf. At the hearing, an applicant is allowed to have a lawyer.¹⁶⁴ All licensing board denials are appealable to the D.C. Court of Appeals.¹⁶⁵

The law requires licensing boards to submit an annual report to the Mayor and the Council detailing their “official acts” during the preceding year.¹⁶⁶ However, the law includes no guidance for what information should be included. In practice, these reports provide little data to elucidate board practices with regard to application and hearing disposition.¹⁶⁷ For example, the Board of Barber and Cosmetology report includes the number of new licenses issued, but no information about the number of denials to put that number in context.¹⁶⁸ The bulk of the report describes board activities other than evaluating license applications, like a list of conferences board members attended and changes to the licensing exams.¹⁶⁹

Barriers at the Hearing and Appeal Stage

Because hearing procedures vary by board and are not clearly described online, advocates are unable to connect with returning citizens who might need representation. We spoke with one clinical educator who was interested in taking these cases.¹⁷⁰ She expressed frustration with the decentralized hearings

¹⁶⁴ D.C. CODE ANN. § 47-2853.22(e) (2012).

¹⁶⁵ D.C. CODE ANN. §§ 3-1205.20, 47-2853.23 (2012).

¹⁶⁶ D.C. CODE ANN. §§ 3-1205.11, 47-2853.10(e) (2012).

¹⁶⁷ See, e.g., D.C. OCCUPATIONAL & PROF'L LICENSING BDS. & COMM., *supra* note 9, at 2.

¹⁶⁸ *Id.* at 19.

¹⁶⁹ *Id.* at 22.

¹⁷⁰ Interview with Jessica Steinberg, *supra* note 104.

process, which made it difficult to set up a referral pipeline connecting indigent clients to her services.¹⁷¹ The clinical educator also expressed that she found it difficult to systemically review a high volume of opinions.¹⁷² This is important to obtaining meaningful data on how boards consider convictions during the decision-making process.

Other potential sources of useful data, the boards' annual reports, are lacking in the depth and detail that advocates need to assess how returning citizens interact with the licensing process in D.C. As discussed above, the reports do not disclose the number of denials relative to the total number of applications. They are also silent on the number of applicants with a criminal record and the outcomes for those applicants relative to non-justice-involved applicants. Their reports do not explicitly describe any outreach to returning citizens dedicated to that end, although board members have said that they are passionate about connecting returning citizens to licenses.¹⁷³ Without this data, it is harder to test theories on how a criminal record affects an applicant's ability to get licensed.

Recommendations for Increased Access

Licensing boards should provide easy access to the public by publishing them online in a centralized repository. Increasing access to these opinions will help advocates assess how they can best serve returning citizens and indigent clients.

Additionally, licensing boards' annual reports should include data providing insight into how successful justice-involved applicants are at obtaining a license. We recommend that the D.C. Code be amended to require the disclosure of this data across all licensed professions:

Each board, before March 1 of each year, shall submit a report to the Mayor and the Council of its official acts during the preceding fiscal year.¹⁷⁴ This report shall include:

- (1) the number of applications received for each type of license;
- (2) the number of successful applications for each type of license;
- (3) the number of applications including criminal background information;
- (4) the number of successful applications including criminal background information;
- (5) the number of notices of intent to deny issued;
- (6) the number of hearings following a notice of intent to deny;

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Telephone Interview with Clifford Cooks & Staci Mason, *supra* note 83.

¹⁷⁴ D.C. CODE ANN. § 47-2853.10(e) (2012).

(7) a statement on the boards' efforts to facilitate equal access for applicants with criminal backgrounds, in light of the District of Columbia's public policy to encourage equal access to employment for people with criminal convictions.

These recommendations will help fill the informational gaps in the license denial hearing process.

CONCLUSION

We hope that this report clears the pathway **From Prisons to Professions** by describing the occupational and professional licensing process in D.C., providing an analysis of the legal and practical barriers returning citizens face in this process, and offering recommendations to increase access to licenses among returning citizens. The groundwork for a movement toward reforming the licensure system in D.C. is already in place among the many local stakeholders whose work informs our findings. We encourage them to use this report as they move forward.

APPENDIX

Department of Health Licensing Boards	
Accupuncture	Pharmaceutical Control Division
Addiction Counselors	Physical Therapy
Anesthesiologist Assistants	Physical Therapy Assistants
Audiology and Speech-Language Pathology	Pharmacy
Chiropractors	Physician Assistants
Controlled Substance (Registration only)	Podiatry
Dance Therapy (Registration only)	Polysomnography
Dentistry	Professional Counseling
Dietetics and Nutrition	Psychology
Marriage and Family Therapy	Psychology Associates
Massage Therapy	Recreation Therapy (Registration only)
Medicine	Respiratory Care
Naturopathic Physicians	SafeRX Pharmaceutical Detailers
Nursing	Social Work
Nursing Home Administration	Surgical Assistants
Occupational Therapy	Trauma Technologists
Optometry	Veterinarians

OPLA License Administration Boards and Commissions	
Board of Accountancy	Board of Industrial Trades
Board of Architecture and Interior Design	Board of Professional Engineers
Board of Barber and Cosmetology	Real Estate Commission
Boxing & Wrestling Commission	Board of Real Estate Appraisers
Board of Funeral Directors	

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