

HOUSE BILL 325

54TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2020

INTRODUCED BY

Andrea Romero and Mark Moores

AN ACT

RELATING TO EMPLOYMENT; EXPANDING THE CRIMINAL OFFENDER
EMPLOYMENT ACT LIST OF CRIMINAL RECORDS THAT CANNOT BE
CONSIDERED IN AN APPLICATION FOR PUBLIC EMPLOYMENT OR
LICENSURE; REQUIRING PUBLIC AGENCIES TO PROMULGATE RULES
IDENTIFYING MITIGATING CIRCUMSTANCES AND DISQUALIFYING CRIMINAL
CONVICTIONS; ESTABLISHING EMPLOYMENT OR LICENSURE ELIGIBILITY
CONSIDERATIONS FOR APPLICANTS WITH CRIMINAL RECORDS; REQUIRING
NOTICE OF DISQUALIFYING EVENTS AND AN APPLICANT'S RIGHT TO
CHALLENGE OR PROVIDE JUSTIFICATION OF DISQUALIFYING EVENTS;
REQUIRING ANNUAL REPORTING OF THE NUMBER OF APPLICANTS WITH
POTENTIAL DISQUALIFYING CRIMINAL CONVICTIONS; AMENDING THE
UNIFORM LICENSING ACT TO ALIGN WITH THE CRIMINAL OFFENDER
EMPLOYMENT ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

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1 SECTION 1. A new section of the Criminal Offender
2 Employment Act, Section 28-2-2.1 NMSA 1978, is enacted to read:

3 "28-2-2.1. [NEW MATERIAL] DEFINITIONS.--As used in the
4 Criminal Offender Employment Act:

5 A. "employment or licensing authority" means the
6 state or any of its political subdivisions or a board,
7 commission, council, department or other regulatory agency
8 having jurisdiction over employment, licensing or other
9 authority for an individual to engage in employment or a
10 regulated trade, occupation, profession or business;

11 B. "license" means a certificate, registration,
12 permit or other authorization to engage in the professions or
13 occupations regulated by a licensing authority in this state;

14 C. "occupation" means employment, trade, business
15 or profession; and

16 D. "potential disqualifying criminal conviction"
17 means a criminal conviction that an employment or licensing
18 authority determines through rule promulgation may disqualify
19 an applicant from employment or licensure."

20 SECTION 2. Section 28-2-3 NMSA 1978 (being Laws 1974,
21 Chapter 78, Section 3, as amended) is amended to read:

22 "28-2-3. EMPLOYMENT ELIGIBILITY DETERMINATION.--

23 A. ~~[Subject to the provisions of Subsection B of~~
24 ~~this section and]~~ Except as provided in Sections 28-2-4 and
25 28-2-5 NMSA 1978, in determining eligibility for employment

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1 with the state or any of its political subdivisions or for a
2 license [~~permit, certificate or other authority~~] to engage in
3 any regulated [~~trade, business or profession, the board or~~
4 ~~other department or agency~~] occupation, the employment or
5 licensing authority having jurisdiction may take into
6 consideration a conviction, but the conviction shall not
7 operate as an automatic bar to obtaining public employment or a
8 license [~~or other authority~~] to practice [~~the trade, business~~
9 ~~or profession. A board, department or agency~~] an occupation.
10 An employment or licensing authority of the state or any of its
11 political subdivisions shall not make an inquiry regarding a
12 conviction on an initial application for employment or
13 licensing and shall only take into consideration a conviction
14 after the applicant has been selected as a finalist [~~for the~~
15 ~~position~~].

16 B. The following criminal records shall not be
17 [~~used~~] distributed, [~~or~~] disseminated or used by an employment
18 or licensing authority as a bar to employment or licensure in
19 connection with an application for any public employment or an
20 occupational license [~~or other authority~~]:

21 (1) records of arrest not followed by a valid
22 conviction; [~~and~~

23 ~~(2) misdemeanor convictions not involving~~
24 ~~moral turpitude]~~

25 (2) a conviction that has been sealed,

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1 dismissed, expunged or pardoned;

2 (3) a juvenile adjudication; or

3 (4) a conviction for a crime that is not
4 directly related to the duties or responsibilities of the
5 employment or licensed occupation.

6 C. No later than July 1, 2021, an employment or
7 licensing authority shall promulgate rules for compliance with
8 the provisions of the Criminal Offender Employment Act and
9 shall specifically promulgate rules that identify mitigating
10 factors, such as rehabilitation, the passage of time without
11 offending or an applicant's fitness to perform employment or
12 occupational duties and shall additionally include a
13 comprehensive list of the specific potential disqualifying
14 criminal convictions relating to employment or licensure that
15 could disqualify an applicant from employment or licensure.
16 The list of all potential disqualifying criminal convictions
17 shall be posted on each employment or licensing authority's
18 website and a link to the list provided for use on the sunshine
19 portal. In developing a list of potential disqualifying
20 criminal convictions, an employment or licensing authority
21 shall:

22 (1) not use vague, generic or subjective
23 terms, including "moral turpitude" or "good character";

24 (2) only list specific potential disqualifying
25 criminal convictions that are directly related to the duties

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1 and responsibilities of the employment or license sought;

2 (3) not include lifetime disqualifying
3 criminal convictions absent articulating convincing evidence
4 that employment or licensure in the specific occupation
5 substantially increases the likelihood of reoffending; and

6 (4) provide a reasonable time limit for
7 applicability of a listed potential disqualifying criminal
8 conviction based on research documenting the reduced likelihood
9 of reoffending over time.

10 D. In determining an applicant's eligibility for
11 employment or licensure, the employment or licensing authority
12 shall consider:

13 (1) the public policy of this state, as
14 provided in the Criminal Offender Employment Act, to encourage
15 the licensure of individuals with arrest and conviction
16 records;

17 (2) whether the elements of an applicant's
18 potential disqualifying criminal conviction are directly
19 related to the specific duties and responsibilities of the
20 employment or license sought;

21 (3) whether the employment or license sought
22 by an applicant offers an unwarranted opportunity for the same
23 or a similar crime as that of the applicant's prior conviction
24 to occur; and

25 (4) the relationship, if any, of the

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1 applicant's potential disqualifying criminal conviction to the
2 public safety purposes of regulating the employment or licensed
3 occupation sought.

4 E. If an employment or licensing authority intends
5 to disqualify an applicant for employment or licensure based
6 solely or in part on the applicant's potential disqualifying
7 criminal conviction, prior to issuing a notice of contemplated
8 action pursuant to rules issued by the personnel board or to
9 Subsection B of Section 61-1-4 NMSA 1978 or a similar document
10 that initiates disciplinary action, the employment or licensing
11 authority shall provide the applicant with a written notice
12 that informs the applicant of:

13 (1) each potential disqualifying criminal
14 conviction that forms the basis of the pending denial and the
15 reason each conviction is directly related to the duties and
16 responsibilities of the employment or license sought and
17 include a copy of the applicant's criminal history report on
18 which the employment or licensing authority relies;

19 (2) the applicant's right to provide a written
20 challenge of the accuracy of each conviction;

21 (3) the applicant's right to provide a written
22 justification demonstrating that the applicant's prior
23 potential disqualifying criminal conviction should not bar
24 employment or licensure;

25 (4) the deadline upon which the employment or

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1 licensing authority must receive the applicant's written
2 challenge or justification; the deadline to be thirty calendar
3 days from the date of the written notice; and

4 (5) the rules adopted by the employment or
5 licensing authority outlining the attributes of a justification
6 that demonstrates rehabilitation, mitigating circumstances or
7 an applicant's fitness to perform the duties and
8 responsibilities of the employment or licensed occupation,
9 including a list of possible mitigating factors that may be
10 presented in the justification.

11 F. No later than October 31 of each year, while
12 ensuring the confidentiality of individual applicants, each
13 employment or licensing authority shall make available to the
14 public an annual report containing the following:

15 (1) the number of applicants for licensure
16 and, of that number, the number granted a license;

17 (2) the number of applicants for employment,
18 licensure or license renewal with a potential disqualifying
19 criminal conviction record who received notice of potential
20 disqualification;

21 (3) the number of applicants for employment,
22 licensure or license renewal with a potential disqualifying
23 criminal conviction who provided a written justification with
24 evidence of mitigation or rehabilitation; and

25 (4) the number of applicants for employment,

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1 licensure or license renewal with a potential disqualifying
2 criminal conviction that were employed, granted a license,
3 denied employment or a license for any reason or denied
4 employment or a license because of a conviction."

5 SECTION 3. Section 28-2-4 NMSA 1978 (being Laws 1974,
6 Chapter 78, Section 4, as amended by Laws 1997, Chapter 238,
7 Section 5 and also by Laws 1997, Chapter 251, Section 1) is
8 amended to read:

9 "28-2-4. POWER TO REFUSE, RENEW, SUSPEND OR REVOKE PUBLIC
10 EMPLOYMENT OR LICENSE.--

11 A. ~~[Any board or other agency]~~ An employment or
12 licensing authority having jurisdiction over employment by the
13 state or any of its political subdivisions or the practice of
14 any trade, business or profession may refuse to grant or renew
15 or may suspend or revoke any public employment or license or
16 other authority to engage in the public employment, trade,
17 business or profession for any one or any combination of the
18 following causes:

19 (1) where the applicant, employee or licensee
20 has been convicted of a felony ~~[or a misdemeanor involving~~
21 ~~moral turpitude]~~ and the criminal conviction directly relates
22 to the particular employment, trade, business or profession;

23 ~~[(2) where the applicant, employee or licensee~~
24 ~~has been convicted of a felony or a misdemeanor involving moral~~
25 ~~turpitude and the criminal conviction does not directly relate~~

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1 to the particular employment, trade, business or profession, if
2 the board or other agency determines after investigation that
3 the person so convicted has not been sufficiently rehabilitated
4 to warrant the public trust;] or

5 [(-3)] (2) where the applicant, employee or
6 licensee has been convicted of homicide, kidnapping,
7 trafficking in controlled substances, criminal sexual
8 penetration or related sexual offenses or child abuse and the
9 applicant, employee or licensee has applied for reinstatement,
10 renewal or issuance of a teaching certificate, a license to
11 operate a child-care facility or employment at a child-care
12 facility, regardless of rehabilitation.

13 B. The [board or other agency] employment or
14 licensing authority shall explicitly state in writing the
15 reasons for a decision [which] that prohibits the person from
16 engaging in the employment, trade, business, occupation or
17 profession if the decision is based in whole or in part on
18 conviction of any crime described in [Paragraphs] Paragraph (1)
19 [and (-3)] or (2) of Subsection A of this section. [Completion
20 of probation or parole supervision or expiration of a period of
21 three years after final discharge or release from any term of
22 imprisonment without any subsequent conviction shall create a
23 presumption of sufficient rehabilitation for purposes of
24 Paragraph (-2) of Subsection A of this section.]"

25 SECTION 4. Section 28-2-6 NMSA 1978 (being Laws 1974,

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1 Chapter 78, Section 6) is amended to read:

2 "28-2-6. APPLICABILITY.--The provisions of the Criminal
3 Offender Employment Act relating to ~~[any board or other agency~~
4 ~~which]~~ an employment or licensing authority that has
5 jurisdiction over the practice of any trade, business,
6 occupation or profession apply to authorities made subject to
7 its coverage by law or ~~[by any such]~~ by those authorities'
8 rules ~~[or regulations]~~ if permitted by law."

9 SECTION 5. Section 61-1-1 NMSA 1978 (being Laws 1957,
10 Chapter 247, Section 1, as amended) is amended to read:

11 "61-1-1. SHORT TITLE.--~~[Sections 67-26-1 through 67-26-31~~
12 ~~NMSA 1953]~~ Chapter 61, Article 1 NMSA 1978 may be cited as the
13 "Uniform Licensing Act".

14 SECTION 6. Section 61-1-2 NMSA 1978 (being Laws 1957,
15 Chapter 247, Section 2, as amended) is amended to read:

16 "61-1-2. DEFINITIONS.--As used in the Uniform Licensing
17 Act:

18 A. "board" means:

19 (1) the construction industries commission,
20 the construction industries division and the electrical bureau,
21 mechanical bureau and general construction bureau of the
22 construction industries division of the regulation and
23 licensing department;

24 (2) the manufactured housing committee and
25 manufactured housing division of the regulation and licensing

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1 department;

2 (3) a board, commission or agency that
3 administers a profession or occupation licensed pursuant to
4 Chapter 61 NMSA 1978; ~~and~~

5 (4) an employment or licensing authority
6 pursuant to the provisions of the Criminal Offender Employment
7 Act; and

8 [~~4~~] (5) any other state agency to which the
9 Uniform Licensing Act is applied by law;

10 B. "applicant" means a person who has applied for a
11 license;

12 C. "license" means a certificate, permit or other
13 authorization to engage in each of the professions and
14 occupations regulated by the boards enumerated in Subsection A
15 of this section;

16 D. "revoke a license" means to prohibit the conduct
17 authorized by the license;

18 E. "suspend a license" means to prohibit, for a
19 stated period of time, the conduct authorized by the license.
20 "Suspend a license" also means to allow, for a stated period of
21 time, the conduct authorized by the license, subject to
22 conditions that are reasonably related to the grounds for
23 suspension; and

24 F. "emergency" includes any man-made or natural
25 disaster causing or threatening widespread physical or economic

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1 harm that is beyond local control and requires the resources of
2 the state."

3 SECTION 7. Section 61-1-4 NMSA 1978 (being Laws 1957,
4 Chapter 247, Section 4, as amended) is amended to read:

5 "61-1-4. NOTICE OF CONTEMPLATED BOARD ACTION--REQUEST FOR
6 HEARING--NOTICE OF HEARING.--

7 A. For the purpose of investigating complaints
8 against licensees, the board may issue investigative subpoenas
9 prior to the issuance of a notice of contemplated action as
10 provided in this section.

11 B. When a board contemplates taking [~~any~~] an action
12 of a type specified in Subsection A, B or C of Section 61-1-3
13 NMSA 1978, [~~it~~] after meeting the requirements of Subsection E
14 of Section 28-2-3 NMSA 1978, if applicable, the board shall
15 serve upon the applicant a written notice containing a
16 statement:

17 (1) that the applicant has failed to satisfy
18 the board of [~~his~~] the applicant's qualifications to be
19 examined or to be issued a license, as the case may be;

20 (2) indicating in what respects the applicant
21 has failed to satisfy the board;

22 (3) that the applicant may secure a hearing
23 before the board by depositing in the mail within twenty days
24 after service of the notice a certified return receipt
25 requested letter addressed to the board and containing a

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1 request for a hearing; and

2 (4) calling the applicant's attention to [~~his~~]
3 the applicant's rights under Section 61-1-8 NMSA 1978.

4 C. In [~~any~~] a board proceeding to take [~~any~~] an
5 action of a type specified in Subsection A, B or C of Section
6 61-1-3 NMSA 1978, the burden of satisfying the board of the
7 applicant's qualifications shall be upon the applicant.

8 D. When a board contemplates taking [~~any~~] an action
9 of a type specified in Subsections D through N of Section
10 61-1-3 NMSA 1978, it shall serve upon the licensee a written
11 notice containing a statement:

12 (1) that the board has sufficient evidence
13 that, if not rebutted or explained, will justify the board in
14 taking the contemplated action;

15 (2) indicating the general nature of the
16 evidence;

17 (3) that unless the licensee within twenty
18 days after service of the notice deposits in the mail a
19 certified return receipt requested letter addressed to the
20 board and containing a request for a hearing, the board will
21 take the contemplated action; and

22 (4) calling the licensee's attention to [~~his~~]
23 the licensee's rights as provided in Section 61-1-8 NMSA 1978.

24 E. If the licensee or applicant does not mail a
25 request for a hearing within the time and in the manner

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1 required by this section, the board may take the action
2 contemplated in the notice and such action shall be final and
3 not subject to judicial review.

4 F. If the licensee or applicant does mail a request
5 for a hearing as required by this section, the board shall,
6 within twenty days of receipt of the request, notify the
7 licensee or applicant of the time and place of hearing, the
8 name of the person who shall conduct the hearing for the board
9 and the statutes and regulations authorizing the board to take
10 the contemplated action. The hearing shall be held not more
11 than sixty nor less than fifteen days from the date of service
12 of the notice of hearing.

13 G. Licensees shall bear all costs of disciplinary
14 proceedings unless they are excused by the board from paying
15 all or part of the fees or if they prevail at the hearing and
16 an action specified in Section 61-1-3 NMSA 1978 is not taken by
17 the board."

18 SECTION 8. Section 61-1-33 NMSA 1978 (being Laws 1981,
19 Chapter 349, Section 23) is amended to read:

20 "61-1-33. DECLARATORY RULINGS.--

21 A. ~~[Any]~~ An applicant before a board or licensee of
22 a board whose rights may be affected by the application of any
23 statute enforced or administered by that board or by any
24 decision, order or regulation of that board may request in
25 writing a declaratory ruling from the board concerning the

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1 applicability of the statute, decision, order or regulation to
2 a particular set of facts. The board shall respond in writing
3 to such a written request within [~~one hundred twenty days~~]
4 ninety days from receipt of the request.

5 B. The board may also issue declaratory rulings on
6 its own motion.

7 C. The effect of a declaratory ruling shall be
8 limited to the board and to the licensee, if any, who requested
9 the declaratory ruling."