F I S C A L I M P A C T R E P O R T

SPONSOR HLVMC **ORIGINAL DATE** 3/7/19 **LAST UPDATED** **HB** 382/HLVMCS

SHORT TITLE Use of Criminal Records for Employment **SB**

ANALYST Edwards

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		
Unknown	Unknown	Unknown	Recurring	Multiple Funds at the Regulation and Licensing Department

(Parenthesis ( ) Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Minimal	At least $75.2	At least $75.2	At least $150.4	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Regulation and Licensing Department (RLD)
Children, Youth and Families Department (CYFD)

SUMMARY

Synopsis of Bill

House Bill 382 proposes to amend the employment eligibility provision of the Criminal Offender Employment Act, 28-2-3 NMSA 1978. The bill prohibits a board, department, or agency of the state, including its political subdivisions, from inquiring about an arrest or conviction on an initial application for employment.

Current law specifically precludes the use or dissemination of criminal records concerning: 1) arrests not followed by a valid conviction or 2) a misdemeanor conviction not involving moral turpitude in connection with an application for public employment or licensure.

House Bill 382 removes the reference to misdemeanors involving moral turpitude and instead adds additional categories of criminal history that cannot be used or disseminated by an employer or licensing body with regard to an applicant for employment or licensure. House Bill 382 adds the following:

- A conviction that has been sealed, dismissed, expunged, or pardoned;
- A juvenile adjudication; or
- A conviction that occurred more than three years before the date of the application or a conviction for a crime not directly related to the job, except for a conviction of,
    - A felony committed with violence against a person, threatened violence, or a likelihood of serious bodily injury in which the defendant was personally armed with or personally used a deadly weapon in the commission of the crime or in which the defendant personally inflicted great bodily injury in the commission of the crime; or
    - A felony in violation of any sex offenses found at Chapter 30, Article 9, NMSA 1978.

The bill changes the short title of 61-1-1 NMSA 1978 to the "Uniform Licensing Act."

A new section of Chapter 61 NMSA 1978 is enacted to prohibit the denial of professional licenses to individuals previously convicted of a felony, unless the crime was related to the specific licensed profession.

House Bill 382 would allow an individual interested in licensure, even before obtaining training in the practice of the license, to petition the licensing board for a decision of whether the individual's criminal history would disqualify them from obtaining a license. The bill provides for a 30 day timeline in which the licensing board must issue a "decision" determining whether the individual's criminal record "will disqualify the individual from obtaining a license."

House Bill 382 creates a new section of the Uniform Licensing Act (Section 4) that states an applicant with a conviction directly related to an occupation for which a license is sought shall not be automatically disqualified from licensure if the applicant can demonstrate sufficient mitigation or rehabilitation and fitness to perform the duties of the occupation.

FISCAL IMPLICATIONS

RLD explains:

> The bill's petition requirement could have a serious impact on the various boards and commissions because the 30-day written determination requirement for each individual who submits a petition to determine whether their conviction would prevent their licensure would require boards to meet more often. Most licensing boards do not meet monthly, so special board meetings would have to be called to meet the imposed 30-day response time required by the bill. Each time a board meets, per diem and mileage is paid to the board members. Also, with the 30-day turnaround requirement, some of those board meetings could conceivably involve only one individual's petition request. The $25 fee would not cover the costs associated with posting a meeting notice in the proper publication and paying the per diem and mileage costs of a meeting, nor does it compensate for the increased staff hours required to set up and notice the meetings.

RLD, in response to the bill as originally introduced, states the petitions contemplated by House Bill 382 would add an additional step to licensure for the boards and administrative staff. The result will be a need for at least 1 more FTE (the average cost for 1 FTE at RLD is about $75.2 thousand). It is unknown how high the volume of petition requests would be, but because it would guarantee a quick turnaround and would include only a nominal fee, the volume could be high. As noted above, some boards meet only on a quarterly basis. The petition provision would also require board staff to develop procedures for processing and maintaining records of the petitioners.

The bill has an unknown fiscal impact for CYFD. The bill may require a change in civil liability for background clearances issued under CYFD regulations to individuals working with children.

SIGNIFICANT ISSUES

RLD states:

> House Bill 382 would appear to require licensure of registered sex offenders unless the board can prove by clear and convincing evidence that the profession for which the sex offender seeks licensure involves a responsibility specifically related to the sex offense for which the offender was convicted. The same would be the case for other violent offenders.
>
> Currently, under the Uniform Licensing Act at NMSA 1978 Section 61-1-33, a licensee may request a declaratory ruling from a board concerning the applicability of the statute, decision, order or regulation to a particular set of facts concerning that licensee. In such cases, the board is required to respond in writing within 120 days. So, a person already licensed who therefore has a property right in their license must wait up to 120 days for a response, while under House Bill 382, an unlicensed person considering licensure would receive a board's decision within 30 days, thereby affording an individual without a property right a priority response.
>
> Most licensing boards in New Mexico are already subject to the Criminal Offender Employment Act, NMSA 1978 Section 28-2-1 et seq. which precludes denying licensure to convicted felons with certain exceptions.
>
> House Bill 382, as written, is somewhat confusing. Section 3(H) provides a mechanism for an individual, not necessarily an applicant, to petition the board for a written finding of whether a conviction would result in the individual's disqualification for licensure. However, the petition shall include "details of the individual's felony conviction". It is unclear what "details" will be required. Currently, board administrative staff require court documents. In the course of regular application processing, if an applicant fails to provide all the necessary documentation for licensure, the application process is stalled until the documents are provided. However, under House Bill 382, the 30-day turnaround time requirement starts upon the board's receipt of the petition. If the petition does not include "details' adequate to support a decision, it could present problems in meeting the 30-day deadline.
>
> Currently, the burden to prove that an applicant is qualified for licensure rests on the applicant. House Bill 382 switches that burden to the licensing board, and at the same time, raises the burden of proof to "clear and convincing" standard. Currently the burden is on the

applicant and is a preponderance of the evidence. This higher burden is atypical of administrative proceedings and will require the board member's to be trained accordingly.

Clarification is needed for business entities licensed under Chapter 61 NMSA 1978:
The Financial Institutions Division (FID) licenses Collection Agencies and Repossessors under provisions of the Collection Agency Regulatory Act (CARA) §61-18A-1 et seq. The bill repeatedly uses the term "board" when specifying the changes in law under the bill. This creates some lack of clarity as to whether these business entities would be subject to the provisions outlined in the bill.

Conflicts with CARA §61-18A-11 (C) NMSA 1978
If the bill does apply to licenses issued under the Collection Agency Regulatory Act, the CARA establishes licensing requirements for Collection Agency Managers actively in charge of a collection agency that directly conflicts with the provisions outlined in the bill. Pursuant to §61-18A-11 (C) NMSA a Collection Agency Manager applicant is disqualified from licensure if that individual has "been convicted of a felony or crime involving moral turpitude".

Conflicts with CARA §61-18A-13 (C) NMSA 1978
The CARA establishes licensing requirements for Collection Agencies and Repossesors that directly conflicts the provisions outlined in the bill. Pursuant to §61-18A-13 (C) NMSA 1978, the applicant is disqualified for licensure if such applicant, or any partner, officer, director, trustee, stockholder or employee of the applicant has "been convicted of a felony or any crime involving moral turpitude".

CYFD explains:

This bill significantly reduces CYFD's discretion for making background check determinations under NMSA 1978 §28-2-4 and applicable New Mexico Administrative Code regulations.

For example, 8.8.3.13(A)(3) NMAC provides that a trafficking in controlled substances conviction, regardless of the degree of the crime or date of conviction, shall result in a determination of unreasonable risk and is an automatic bar to background check eligibility. This is the case regardless of whether the offense directly relates to the duties or responsibilities of the licensed occupation.

Also, 8.8.3.13 (C) provides that an arrest without a disposition, or pending charges without a conviction, for a felony offense, any misdemeanor offense involving domestic violence, child abuse, any other misdemeanor offense of moral turpitude, also bar background check eligibility if a conviction as charged would result in a determination of unreasonable risk. CYFD regulations also cite other circumstances where a determination of unreasonable risk shall be made.

For an offense that does not fit into one of the cited categories mandating a finding of unreasonable risk, CYFD has discretion to determine whether an applicant has been sufficiently rehabilitated. Section 1 of this bill bars CYFD from considering a felony conviction occurring more than three years prior to the petition, or a conviction for a crime not directly related to the duties or responsibilities of the licensed occupation, except in the limited circumstances provided. This is contrary to 8.8.3.13(A)(2).

Section 1 does, however, allow CYFD to use a felony sex offense as set forth in NMSA 1978, Chapter 30, Article 9. This appears to be consistent with 8.8.3.13 (A)(3), as sex offenses are included in the regulation and result in a conclusion of unreasonable risk.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to Senate Bill 385.

TECHNICAL ISSUES

RLD explained, in response to the original bill, "This bill allows for board to charge a minimal fee for processing the petition, however some board's enabling and practice acts may not have a provision to charge a fee."

As an example, under the specific provision of §61-18A-11(C), the Director of the [Fiscal Institutions Division] FID may deny a license "if the applicant or a partner, officer, director, trustee, stockholder or employee of the applicant has been convicted of a felony or any crime involving moral turpitude." As the most specific statutory language dealing with this particular industry and licensees, this provision is presumed to continue to apply despite the changes proposed by House Bill 382, the non-consideration of felony convictions over three years old.

RLD also states, "It is unclear what actual impact the clear and convincing standard of proof requirement may have. But, it could conceivably result in more litigation from applicants asserting that the board did not follow the standard of proof or abused its discretion."

TE/gb/sb/al