

Testimony of Shayla Thompson

National Employment Law Project

“Removing Barriers to Occupational Licensing for Returning Citizens Amendment Act of 2019”

Committee on the Judiciary & Public Safety

Council of the District of Columbia

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INTRODUCTION

On behalf of the National Employment Law Project (“NELP”), thank you Chairman Allen, the Judiciary and Public Safety committee, and the rest of the council for the opportunity to testify in support of the “Removing Barriers To Occupational Licensing For Returning Citizens Amendment Act of 2019,” which would afford people with arrest and conviction records an equitable chance at a better economic future.

NELP is a non-profit law and policy organization with 50 years of experience advocating for the employment and labor rights of our nation’s workers. Specializing in the employment rights of people with records, NELP has helped to lead a national movement to promote fairness in background checks and occupational licensing laws. Working at the federal, state, and local levels, NELP works to lift the barriers to employment that people with records face.

This legislation, if enacted, would create greater opportunity for people with records who are living and working in the District of Columbia to access good jobs, reach their full potential, support their families, and become thriving members of the community.

The importance of keeping people who are involved in the criminal justice system connected to the workforce cannot be overstated. Across the country, more than 70 million people—or nearly 1 in 3 adults—have an arrest or conviction record, and more than 600,000 people re-enter their communities following a term of incarceration every year.¹ In the District alone, an estimated 67,000 people have a D.C. Code or federal criminal conviction, and more than 30,000 arrests are made each year.² All told, 1 in 22 adults in the District is under some form of correctional control.³ In the employment context, the stigma associated with a conviction record—even for minor offenses—is difficult to wash.

State occupational licensing laws make this bad problem worse when they impose additional barriers to employment for people with records that prevent them from accessing good jobs. More than one in four workers in the United States require a license or certification before they can engage in their occupation, which represents a fivefold increase from the 1950s.⁴ Moreover, a license is a ticket to higher wages and better employment prospects: studies accounting for differences in education, training, and experience find that licensing results in approximately 10 percent to 15 percent higher wages for licensed workers relative to unlicensed workers.⁵ But people with records are too often excluded from accessing these opportunities. In the District of Columbia, nearly 20 percent of the workforce requires a license to practice their chosen career,

¹ Beth Avery, Han Lu, Maurice Emsellem, NELP, *Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions*, Appendix E (December 2019), <https://bit.ly/3aEwFVp>

² Council for Court Excellence, *Beyond Second Chances: Returning Citizens’ Re-Entry Struggles and Successes in the District of Columbia* 4 (Dec. 2016), <http://bit.ly/2jo1X9e>

³ *Id.*

⁴ Morris M. Kleiner, The Hamilton Project and Brookings, *Reforming Occupational Licensing Policies* 5 (March 2015), <http://brook.gs/2x5YINM>; Michelle Natividad Rodriguez & Beth Avery, Nat’l Emp’t Law Project, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records* 5, n. 3 (April 2016), <http://bit.ly/2ka69wZ>

⁵ The White House, *Occupational Licensing: A Framework for Policymakers*, 62-63 (July 2015), <http://bit.ly/2fzDQmj>

and there are over 300 occupational licensing restrictions in the District that apply to people with records.⁶

The proposed legislation is comprehensive and crucial in a society where employment is one of the most significant factors in reducing recidivism⁷. The following testimony will give insight into growing fair chance licensing reform movement taking hold across the nation, further detail how this bill will provide access and opportunity through a transparent and equitable licensing process, and recommendations.

This legislation is integral in healing communities that have been targeted by structural discrimination.

This bill provides equity to marginalized communities that have historically been denied fair access to gainful careers in living wage jobs that provide growth and advancement opportunities. A study revealed that the effect of a criminal record on employment is 40% more damaging for Black men than white men.⁸ Another study found that formerly incarcerated white women were 93% more likely to be contacted by employers for an interview or offered a job than formerly incarcerated Black women.⁹

Women and communities of color deserve fair access to occupational licenses not only to open up new pathways to employment, but also to promote long-term career advancement. This is why it is critical that healthcare occupations are included in occupational licensing reform. A recent analysis by the Bureau of Labor Statistics¹⁰ shows that the fastest-growing occupations are in the healthcare industry – a sector that is heavily licensed and overwhelmingly comprised of women. Again, studies support the fact that not all groups have equal access to employment when reentering or trying to advance in society. Whereas nearly 6 in 10 men with a prison record would have been called back for a job interview, only 3 in 10 women with the same record would have received an invitation to interview.¹¹

This legislation aids in ending harmful practices of racial and gender bias in the hiring and licensing process by implementing measures that ensure applicants are reviewed, first and foremost, on their job skills and qualifications.

This legislation builds upon the movement to reform occupational licensing not only among state and local legislatures, but also at the federal level.

⁶ Office of the D.C. Auditor, The Impact of “Ban the Box” in the District of Columbia at 16, (June 10, 2016), <http://bit.ly/2x5Nm7I>; Avery, Lu, Emsellem, *supra* at Appendix E

⁷ Mark T. Berg & Beth Huebner, Justice Quarterly, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism* (April 2011) <https://bit.ly/36jy00j>

⁸ Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. of Sociology at 959, (2003), <http://bit.ly/1vNQBJk>

⁹ Scott Decker, Cassia Spohn, Natalie Ortiz, Eric Hedberg, “*Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment*” (January 2014) <http://bit.ly/2w3mVT1>

¹⁰ United States Department of Labor, Bureau of Labor Statistics, *Fastest Growing Occupations*, (September 4, 2019), <https://www.bls.gov/ooh/fastest-growing.htm>

¹¹ Decker, Spohn, Ortiz, Hedberg, *supra* at 57.

In recent years, over twenty state laws have enacted positive fair chance licensing reforms. NELP’s comprehensive analysis of fair chance licensing laws across the country is captured in our report, “Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions.”¹² In 2019 alone, nine states – Arkansas, Iowa, Maryland, Mississippi, Oklahoma, Nevada, North Carolina, Texas and Utah – adopted helpful laws backed by strong bi-partisan coalition.¹³ The following are a few noteworthy examples of recent state reforms that can help inform the deliberations here in D.C.:

- **Illinois:** In 2016, Governor Bruce Rauner signed two licensing laws, HB 5973 and SB 42.¹⁴ SB 42 applies to health care professionals and allows applicants to petition the department if a license is automatically denied/revoked due to certain felony convictions. When reviewing a petition for license, the department must consider fifteen specific factors, including the time elapsed since the conviction and any evidence of rehabilitation.
- **Indiana:** In 2018, Governor Eric Holcomb signed HB 1245 into law. The law requires that disqualifying offenses be “directly related” to the occupation and that licensing boards consider evidence of rehabilitation, but not most offenses dating back more than five years.
- **Massachusetts:** In 2018, Governor Charlie Baker signed S. 2371, a major criminal justice reform legislation, with an overwhelming majority, which included a provision allowing people with sealed records to deny that they have a record for licensing and housing purposes – this previously only applied to people applying for employment. The law precludes employers from accessing misdemeanor records that are more than three years old and felonies that are more than seven years old (reduced from 5 years for misdemeanors and 10 years for felonies).¹⁵
- **Texas:** In 2019, Governor Greg Abbott signed HB 1342, with unanimous support in the House and Senate, which prohibits disqualification based on a conviction that does not “directly relate” to the occupation’s duties and responsibilities. The law also provides the applicant with strong procedural protections, including the applicant’s right to written notice and explanation of an intended disqualification and the opportunity to respond with mitigating information prior to a Board’s final decision.¹⁶

There have also been bipartisan efforts to reform occupational licensing by federal lawmakers in both chambers of Congress. For example, the Record Expungement Designed to Enhance Employment (REDEEM) Act¹⁷ includes multiple reentry reforms, such as the automatic sealing and expungement of juvenile adjudications, and the sealing of non-violent criminal records, which

¹² Beth Avery, Han Lu, Maurice Emsellem, NELP, *Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions* (December 2019), <https://bit.ly/3aEwFVp>

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Rep. Elijah Cummings, *Record Expungement Designed to Enhance Act, H.R. 2410*, (introduced April 30, 2019), Full bill text: <https://bit.ly/2RpVKeY>

would apply to employment licensing decisions. And the Next Step Act,¹⁸ introduced by Senator Cory Booker (D-NJ), includes a comprehensive federal scheme of fair chance licensing protections (Title VIII, entitled the “Fair Chance Licensing Act”) that apply to federal, state and local licensing agencies that rely on FBI criminal records. Both of these pieces of federal legislation include provisions modeled in D.C. bill 23-0440 that ensure applicants are given a transparent and impartial process when applying for employment and licensing.

Removing Barriers to Occupational Licensing for Returning Citizens Amendment Act of 2019

To create an equitable licensing process that affords employment opportunities to people with records, this legislation advances the following key reforms:

- 1. Provides applicants with a fair chance at licensing by providing a process that streamlines the type of record information that can be considered by licensing boards and when.**

This bill not only provides policy solutions that will give second or fair chances at employment, but also helps to reduce stigmas and misconceptions that are unfairly cast upon applicants with records. This is critical because studies show that even minor involvement with the criminal justice system—such as a single arrest—casts a long shadow and dims employment prospects more than any other factor.¹⁹ By placing restrictions on the types of record information that can be considered by employers this bill provides safeguards from bias and ensures that record information that may be obsolete, insignificant, or even dismissed in some cases is not impacting the decision of a licensing authority.

- 2. Provides a set of standards that systematize how record information may be correlated to job duties or responsibilities by licensing boards when making licensing decisions.**

This bill outlines to licensing boards the way in which an applicant’s criminal history must be assessed, in those circumstances when it is permitted. To determine whether a record is “directly related,” the bill enumerates several factors for the licensing board to consider, including, for example, the nature of the offense, how long ago the offense occurred, whether the applicant has additional convictions, any evidence of rehabilitation, among other key considerations.

These factors are sound policy not only because they require a careful and holistic review of applicants, or because they will promote greater consistency in decision-making within and across licensing boards, but also because they are rooted in a well-established legal context. Indeed, many of the factors mirror those found in the Equal Employment Opportunity Commission’s 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment, which explains how an employer’s use of criminal history may violate federal anti-discrimination

¹⁸ Sen. Cory Booker, *Next Step Act of 2019*, S. 697, (introduced March 7, 2019), Full bill text: <https://bit.ly/3aDdQ4V>

¹⁹ Decker, Spohn, Ortiz, Hedberg, *supra*

law, namely Title VII of the Civil Rights Act of 1964.²⁰ Notably, the 2012 guidance—which was adopted by the EEOC in bipartisan fashion in a 4 to 1 vote—builds on long standing court decisions interpreting Title VII and agency policy statements that have existed for several decades.²¹

3. Guarantees due process both for applicants seeking a license and individuals whose license is at risk of revocation or suspension.

This legislation incorporates important due process protections, including a strong two-step decision making process that ensures that the applicant has an opportunity to produce mitigating evidence. When a licensing board or employer intends to deny, suspend, or revoke a license because of an applicant’s criminal history, they must follow certain steps. These include first notifying the applicant in writing, providing a copy of the applicant’s record and a statement that inaccuracies can be challenged, information about the opportunity to present evidence of rehabilitation, and notice of the right to request a hearing. After the applicant has been provided an opportunity to challenge the initial determination, if the licensing board issues a final determination denying the license, it must explain why the criminal history is directly related to the occupation and share information about the process for judicial review.

These critical protections have proven extremely successful, both in protecting against inaccurate criminal history determinations and in rewarding applicants who have produced convincing evidence of rehabilitation. Additionally, real-world examples demonstrate that these kinds of individualized assessments of people with records are not only feasible but produce positive results. In the aftermath of September 11th, 2001, Congress imposed significant new background checks on the 1.5 million people employed in the nation’s ports.²² Critically, that program allowed port workers—via waiver and appeal procedures—to make the case to the government that their past arrest or conviction record was inaccurate or did not render them a security risk so as to disqualify them from employment.²³ Based on data collected by NELP, about 96% of the waiver and appeal applications were granted by the Transportation Security Administration (benefiting about 20,000 people who received waivers based on evidence of rehabilitation and about 70,000 people who successfully challenged the accuracy of the record), which was particularly beneficial to workers of color, who are disproportionately impacted by the “War on Drugs.”²⁴ As such, this experience presents a convincing case for these kinds of basic worker protections and assessments, which can be done in a fashion that also meets employer needs.

²⁰ See generally Equal Employment Opportunity Commission, *Questions and Answers About the EEOC’s Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII* (2012), <http://bit.ly/2wForHC>

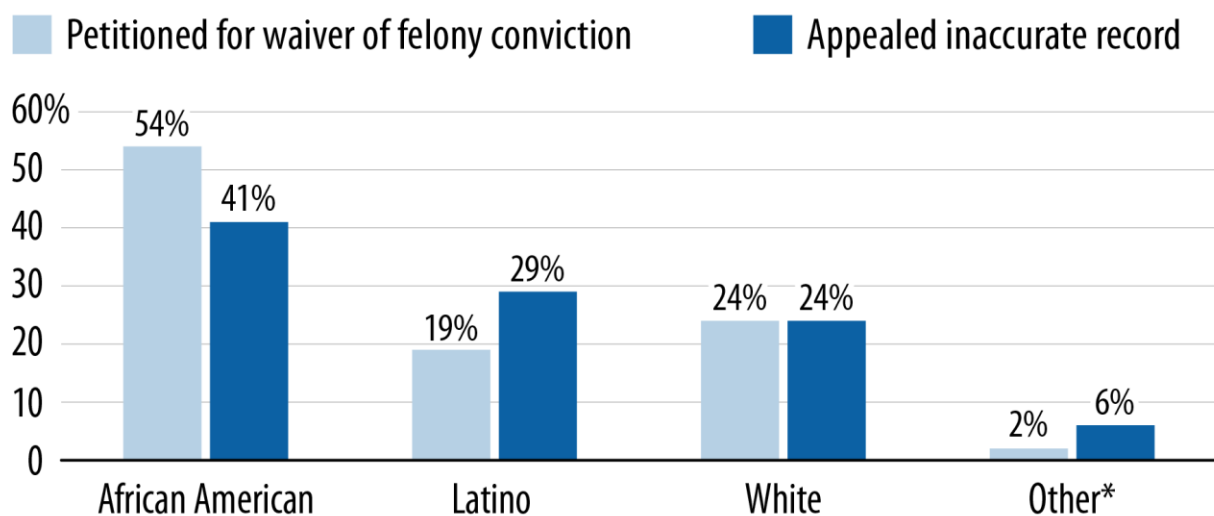
²¹ *Id.*

²² Maurice Emsellem, Nat’l Emp’t Law Project, A Scorecard on the Post-9/11 Port Worker Background Checks: Model Worker Protections a Lifeline for People of Color, While Major TSA Delays Leave Thousands Jobless During the Recession 1 (July 2009), <https://bit.ly/2v1VOUL>

²³ *Id.* at 3-4.

²⁴ *Id.*

Racial Impact of TSA's Port Worker Criminal Background Check Protections



*Primarily immigrants.

Source: National Employment Law Project analysis of Transportation Security Administration data.

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4. Promotes accountability and transparency of licensing board decisions.

Finally, this legislation requires licensing boards to submit annual reports to the Mayor and the City Council with information concerning the overall assessment and treatment of applicants with criminal history. This reform—and the data that would be collected as a result—would put the District ahead of the curve in terms of accountability and transparency. The information could also serve as a basis for future policy improvements.

Recommendations

While the bill includes many of the best practices in federal and state fair chance licensing laws, NELP recommends the following improvements to this legislation:

- First, NELP suggests further clarifying the definition of “directly related” as it pertains to how an applicant’s conviction is related to the license, registration, or certification being sought. In an effort to eliminate expositions that are too general or convoluting, some states have required licensing boards to consider conviction information that is “substantially related” to the occupation. In Texas, HB 1342 includes a refining standard that requires that licensing boards

analyze the relation between the legal elements of the offense and the job’s duties and responsibilities.²⁵ This legislation also includes additional measures to ensure that any conviction information that is being considered is completely relevant and related to the occupation’s duties. After a Board has determined that an applicant’s conviction information is directly related to the job’s duties or responsibilities, there is an additional set of factors that must be still considered before a final decision is made. These factors include “the conduct and work activity of the person before and after the criminal activity,” and “the extent and nature of the person’s past criminal activity.”²⁶

- Second, NELP suggests establishing some limitations on the consideration of pending criminal accusations. As the committee is no doubt aware, charges can remain pending for years, *appear* to be pending if the disposition is not properly recorded. In these situations, a qualified individual’s application could be held up indefinitely. Other jurisdictions, when considering similar legislation, have established specific timelines. For example, the latest “ban-the-box” legislation in Nevada limits employers to considering “criminal charges pending against [the applicant] *that were filed within the previous 6 months.*”²⁷ NELP would support a similar limitation in the context of this legislation.
- Third, NELP suggests adopting a “washout” period modeled on other federal and state laws that recognize that formerly incarcerated individuals are not more likely to re-committing a crime than someone without a criminal record after the passage of time. A leading study found that three to seven years after offending, nearly all people who have been convicted of a felony are no more at risk of being arrested for a new offense than anyone in the general population.²⁸ The “desistance” period varies depending on the offense. In the states studied, the period was four to seven years for someone previously arrested or convicted of a violent felony, four years for someone previously arrested or convicted of drug felony, and three to four years for someone previously arrested or convicted of a felony property crime. Under the federal Maritime Security Act, which has successfully screened nearly two million port workers, the Transportation Security Administration (TSA) does not consider most felony offenses older than seven years,²⁹ and under the Massachusetts law, the state does not report misdemeanors older than three years and felonies older than seven years from the date of the conviction or five years from the date of release from incarceration.³⁰

²⁵ The full text of Texas’s law, HB1342 (2019), can be found here: <https://bit.ly/2uu1Dz3>

²⁶ *Id.*

²⁷ The full text of Nevada’s law, AB 384 (2017), can be found here: <http://bit.ly/2AdtW3r>

²⁸ Alfred Blumstein and Kiminori Nakamura, “Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences, submitted to the Nat’l Institute of Justice (November 2012), at page 89.

²⁹ 246 U.S.C. Section (c)(1)(B), 49 C.F.R. Section 1572.103(b).

³⁰ The federal Fair Chance Licensing Act introduced by Senator Cory Booker (S. 697, Title VII, Section 802) similar includes a one-year washout period for misdemeanors and a five-year period for felonies “excluding any period of incarceration or custody,” and other state occupational licensing laws have similarly included washout periods.; full text of Massachusetts law, S.2371 (2018) can be found here: <https://bit.ly/2GufKXS> ; California’s regulations implementing the state’s civil rights law (the Fair Employment and Housing Act, CA Gov’t Code, §§ 12940-12952) provide a helpful standard to further refine the “job related” standard. According to the regulations, the “criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job and in the workplace and measure the person’s fitness for the specific position(s), not merely to evaluate the

Thank you for affording me the opportunity to testify in support of this imperative legislation impacting tens of thousands of people living and working in the District of Columbia.

person in the abstract.” (Cal. Code Regs, tit. 2, § 111017.1(f)(1) (emphasis added)). Full text can be found here: <https://bit.ly/30Wqli2>