This policy brief, based in part on the lessons learned form the inventory ordered by Governor Jeb Bush of Florida in 2006, gives states a roadmap for inventorying employment restrictions in a manner that will provide policymakers, employers, agencies and job seekers the critical details of a state’s employment restrictions. An inventory can both inform both compliance with the restrictions and policy reform.

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ainful employment is essential to any strategy to reduce recidivism, and thus to reduce crime and make communities safer. However, among the many hurdles facing people coming home from prisons and jails in successfully reintegration into society, getting a good job is often one of the most daunting.

Equally daunting, for both the person with the record and for workforce staff who might attempt to help him search for jobs, is figuring out what occupations and places of employment are possibly open to people with criminal records.

States increasingly have created hiring restrictions that may turn the fact of criminal record into a bar to employment. These restrictions, imposed on both the public and private sectors, vary widely and can affect the ability of the 71 million people in the U.S. (over 30% of the adult population) whose names are in criminal history databases to secure gainful employment.

Sometimes the restrictions offer the employer a measure of hiring discretion after reviewing a background check. Sometimes they give the employer the right to assess the relevance of the past crime to the job. Sometimes they provide the job seeker with an opportunity to demonstrate their rehabilitation. But often the restrictions offer little flexibility to either employers or people looking for work.

Each restriction has its own nuances. Some restrictions put jobs or places of employment off-limits to anyone with a record of a criminal conviction. Some put them off-limits only for those convicted of certain crimes. Sometimes the restriction creates a lifetime ban. Sometimes the restriction is time-limited. Sometimes the time limits depend on the crime.

For employers, it’s a minefield. Hiring in violation of the restrictions can lead to a loss of a business license and other harsh penalties.

For job seekers with a criminal record, it can be Kafkaesque, with the impact of restrictions often both unknown and unknowable until after incurring the costs of a course of study, tests and fees and the application for a job or license is finally reviewed.

The lack of reliable information about what jobs can be pursued can lead to dead-end efforts and frustrations that impede the self-confidence that is so important to job hunting success. It can also waste precious time during the weeks following release from prison or jail when getting a job is so critical to staying out of trouble. The confusing complexity of the restrictions is due to the fact that criminal history restrictions on employment have proliferated over many years and by many entities and in response to diverse events and shifting policy tides. Adopted by both legislatures and state agencies, typically they are spread over scores of chapters of state laws, buried in agency rules and lost in obscure agency policy memos; and sometimes they exist only on the face of a job or license application.
Most states have not catalogued their restrictions. In the absence of a catalogue making restrictions accessible and transparent, employers, workforce and corrections agencies, and people with criminal records are left to their own devices to figure out what the restrictions are. If they don’t get it right, which is very difficult for any of them, myth and misinformation may prevail and the consequences can be serious and costly.

Just as employers and job seekers need to know what the restrictions are, so, too, do the state and local agencies that administer the restrictions and are charged with understanding and interpreting them correctly.

Some departments of corrections are developing individualized reentry plans that create post-release occupational goals and that assign training programs intended to achieve those goals. Additional training and job placement is then delegated to workforce agencies upon the prisoners’ release. If the occupations for which the training is provided are off-limits to people with criminal convictions, time and tax dollars are wasted and the people being trained can wind-up with useless credentials, leaving them unprepared to find work.

If policymakers want to harmonize the restrictions that have been adopted piecemeal over so many years and develop a coherent policy thread that ties them together, they need to understand their state’s restrictions, too.

Inventorying the existing restrictions is an essential first step for states interested in creating consistent and meaningful employment policies that protect public safety while also reducing recidivism by opening employment opportunity.

Governor Jeb Bush of Florida, concerned about his state’s stubborn recidivism rate, and understanding that gainful employment reduces recidivism, issued an executive order in 2006 requiring his state agencies to inventory the employment restrictions they administer, provide data on their impact and recommend reforms. (The Executive Order is found in Appendix A). Bush was the first governor to order such a review, which was hailed as a “landmark” in the Washington Post.

The Florida inventory revealed a vast, bewildering and unwieldy patchwork of hundreds of state-created restrictions of widely varying severity, often regardless of the trust and responsibility required of the job, affecting over 40% of Florida’s public and private sector jobs.

Florida is in no way unique in adopting such restrictions; most other states have taken a similar route. This guide, based in part on Florida’s experience in inventorying its restrictions on employment (the report on Florida’s restrictions is found in Appendix B), provides states with a framework for conducting an inventory and creating a catalogue that will capture the content and range of their own restrictions.
Chapter One

POLICY CONSIDERATIONS

BALANCING PUBLIC SAFETY CONCERNS.

To reduce recidivism and thus protect public safety, people coming out of prisons and jails need employment opportunities. At the same time, public safety dictates the adoption of employment restrictions to protect vulnerable populations, to prevent the risk of loss and liability, and to minimize the likelihood of harm to the public, fellow employees and customers. These latter concerns have led to the adoption of the restrictions, but often without consideration of their impact on employment opportunity.

Balancing the importance of gainful employment against these other public safety concerns requires an understanding of how a criminal record does and does not predict risk. Research shows that with the passage of time, people with past criminal convictions are no more likely to commit crimes than people who have never been convicted of a crime. Indeed, one study found that “after approximately 7 years there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those without a criminal record.” Moreover, surveys of companies that have hired people fresh out of prison have found employers reporting that these hires make some of their best workers because they are eager for the chance to work and motivated to succeed.

But the opportunities available to demonstrate such success are limited. A recent study found, to no great surprise, that “evidence that use of criminal background checks is negatively related to the hiring of ex-offenders;” but it also found that “This effect is particularly strong for those employers that are legally required to check.” That study looked at the impact of laws requiring that employers conduct background checks.

For every law that merely requires a check, there are numerous others that mandate restrictions on hiring once the check reveals a criminal conviction, leaving employers with little or no discretion but to reject applicants with criminal records.

While researchers have concluded “that lifetime bans for all felony convictions are not consistent with the research about desistance from developmental criminology,” employment restrictions created by both legislatures and state agencies run a broad gamut from lifetime bans upon conviction of any crime or any felony, to bans that are nearly as restrictive, to far more nuanced and flexible approaches that take rehabilitation into account.

Given that employment reduces recidivism and given that we are, as President Bush has said, “the land of the second chance,” restrictions that fail to allow people...
with criminal records to engage in gainful employment need to be reexamined. Public safety requires no less.

Inventorying the employment restrictions that have been created by governmental laws and policies is the necessary predicate to understand the gamut of restrictions and to begin a process of making common sense and tailored restrictions that serve legitimate policy objectives and that are grounded in research on rehabilitation and desistance from crime.

THE IMPACT OF EMPLOYMENT RESTRICTIONS.

Over the last twenty-five years, there has been a four-fold increase in the number of people in prisons, jails and under correctional supervision. In 1980, 1.8 million people in the U.S. were incarcerated or under supervision; today that number exceeds 7 million. In 1980, 503,586 people were incarcerated in the nation’s prisons and jails; by 2005, that number reached 2,193,798.6

As policymakers have come to recognize that over 97% of the people locked–up will eventually be set free and go home, there has been more attention to the issues and challenges of the transition process from confinement to community and to readying people for success upon release. This attention has brought needed light on the impact of employment restrictions on people coming home from prison, but the restrictions do not affect only people who have been to prison because not everyone subject to restrictions has ever been to prison.

Over 71 million Americans’ names are in criminal history databases. – over 31% of the adult U.S. population. Tracking with the explosive growth in the number of incarcerated and supervised people is the growth in the number of people with criminal records. While 5.6 million people in the U.S. have served time in prison, the Department of Justice’s Bureau of Justice Statistics,7 reports that over 71 million Americans’ names are in state and federal criminal history databases. Of the 302,121,699 people in the U.S., 226,591,274 (75 %) are adults 18 years of age or older. Thus, over 31% of the adult U.S. population is potentially affected by restrictions based on criminal records.8

Private companies data mine and add to these databases from records that governmental entities have not yet automated. The National Task Force on the Commercial Sale of Criminal Justice Record Information reported that “several companies compile and manage criminal history databases with well in excess of 100 million criminal history records.” One company, NBD’s National Background Directory “provided, as of spring 2003, real-time access to more than 126 million offense records covering 38 States.”9

5.6 million people have served time in prison and thus have at least a record of a felony conviction. Accordingly to the Bureau of Justice Statistics, nationally, the number of people in the U.S. who served time in a state or federal prison (100% of whom have been convicted of a felony) in 2001 was 5.6 million. That is an over three-fold jump from the 1.8 million who had been in state or federal prisons in 1974.10 Not all people convicted of felonies serve prison time – many are sentenced to jail or probation and are not included in this figure of 5.6 million.
Employment restrictions are based on both felony and misdemeanor convictions – and sometime even arrests. People with felony convictions face the most severe restrictions on employment. But both the public and private sector restrict employment based on misdemeanor convictions as well. And some restrictions are imposed based on arrest records – though some states prohibit employers from considering arrests that do not lead to convictions.

Governmentally-created restrictions affect a significant share of the jobs in the economy – in Florida, at least 39.7% of the jobs in the state's economy are affected by state-created restrictions alone. While it is widely known that new laws and policies are adopted every day creating new employment restrictions, the number of jobs subject to specific federal, state or local legal restrictions has not been quantified nationally. Nor, with the exception of Florida – even in states where employment restrictions have been inventoried – has there been an attempt to calculate the number of jobs affected by restrictions (an Ohio inventory calculated the number of laws it found restricting various types of employment – 291 in all). If Florida is typical, the number of jobs that states, by law and policy, have put off-limits or potentially off-limits to people with criminal records is staggering – and growing.

States create place-based restrictions, too. For instance, under Florida’s 2005 Jessica Lunsford Act, workers who enter upon school grounds in connection with private employment with a school contractor are subject to restrictions. These workers include construction, building and machine installation and repair personnel, photographers, performers and many others. Even if 98% of the person’s job is done on other premises, the restrictions on entering school grounds can put the entire job at risk.

Background checks are increasingly common in both public and private sector employment. Although background checks were growing increasingly common for both public and private sector employment over the past few decades, after the terrorist attacks of September 11, the number of background checks both mandated and voluntarily sought exploded. According to a 2004 survey conducted by the Society for Human Resource Management, 80% percent of employers now conduct criminal background checks in the course of hiring new employees. In 1996, when the Society had last surveyed this issue, the number of employers doing criminal background checks was only 51%.

Another measure of the explosion of background checks for employment comes from the Justice Department. “The FBI’s CJIS Division reported that, between June 1, 2001, and May 31, 2002, more than half the fingerprints submitted for processing were for noncriminal justice background checks. In contrast, a 1993 study found that only around 9 percent of the fingerprint cards received by the FBI from States that year were for noncriminal justice purposes. It is not insignificant that the reporting period includes the ten months immediately following September 11, which significantly increased the demand for checks.

* The explosion of background checks is not limited to checks related to employment. The national task force on commercial criminal records sales also found that background checks were used for screening volunteers, tenants, immigrants, political candidates (both preventive and opposition research), voters, in internal fraud investigations, by the media, for marketing, litigation, due diligence, pre-nuptials and dating. NBD markets its dating background checks as “Screen A Date.”
Because of this explosion in demand for checks, the Bureau of Justice Statistics, U.S. Department of Justice, and SEARCH, The National Consortium for Justice Information and Statistics, established a National Task Force on the Commercial Sale of Criminal Justice Record Information “to examine the role played by commercial vendors in the sale of criminal justice record information.” Composed of state and federal criminal history record managers, commercial vendors of criminal justice record information, court and law enforcement officials, human resource managers and other business leaders who use background checks and policy experts, the Task Force reached consensus recommendations that included expanding the federal Fair Credit Reporting Act of 1970’s protections to “employers and others [that] go directly to the courts or executive branch repositories to obtain criminal history record information for employment and other authorized purposes.” Currently, such background checks are not subject to federal regulation or protections.

OFFICIAL POLICY VERSUS ACTUAL PRACTICE

In 1974, the legislatures of Florida, along with states such as Arizona, Michigan, Minnesota, Washington, and later Kentucky, fashioned a public policy statement on the importance of employment opportunity for people with criminal records. The Florida version states that it is official state policy “to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship.”

This policy further establishes that “the opportunity to secure employment or to pursue, practice or engage in a meaningful and profitable trade, occupation, vocation, profession or business is an essential ingredient to the assumption of the responsibilities of citizenship.”

In these states, the laws reflecting this policy prohibit the state and localities from disqualifying a person for employment or licensure solely because of a prior conviction unless the crime is directly related to the job or license being sought. In Florida and Arizona, these licensure protections are limited to those who have had their civil rights restored.

† The FCRA protections include requiring that people who are subject to a commercial vendor background check receive notice and provide consent to the check and be provided an opportunity to review and correct or contest the accuracy of criminal history information. FCRA also prohibits commercial vendors and employers and other authorized users from redisseminating or reusing a criminal history record report for other purposes. 15 U.S.C. § 1681 et seq.
EXCEPTIONS SWALLOW THE RULE.

Over thirty years have passed since the adoption of such laudable policies intended to open doors of opportunity and to support rehabilitation, but during that time, states have moved to adopt hundreds of new restrictions, many of which appear to be at odds with the 1974 public policy statements and laws implementing the policy. Since that time, for instance, twenty-four states have enacted laws that create a lifetime ban on being a private security guard upon the conviction of a felony. Florida enacted a law creating a lifetime ban on working at a bail bond agency upon the conviction of any felony. Illinois passed laws that create lifetime bans, upon conviction of any of a host of offenses, on park district employment, even in jobs where there would be no chance of contact with the public.

States often adopt new restrictions in reaction to a high-profile incident in the news or to a newly perceived risk to public safety. In the prepared statement of the District Attorney of New York’s Westchester County for her testimony before Congress on private security officer legislation, this approach to adopting restrictions was underscored:

The fact is that our laws in this area are a disjointed hodge-podge of narrow provisions, enacted one at a time on a position-by-position basis, with no attempt to rationalize why one sensitive position is subject to a criminal history check while a different, comparably sensitive position is not. At best, legislatures across this country are constantly closing the barn door after the horse has escaped: enacting legislation in the aftermath of a tragedy, limited to the singular situation that tragedy involved.

Some licensing restrictions (criminal or otherwise) may have less to do with public safety, than, as the Institute for Justice, a libertarian public interest law firm suggests, a means by which “private interests [that] capture a State’s licensing board . . . stifle competition, raise prices and reduce consumer choices.” Still other restrictions seem capricious, such as one particularly severe restriction being put on a license application because the licensing board thought “it looked good.”

Legislatively created restrictions come out of a multitude of committees – education, public safety, human services, criminal justice, insurance or banking – to name a few. They are then typically placed in the code chapter governing the relevant industry. They are also adopted by a multitude of agencies and boards, some with little or no public accountability. With disparate committees, agencies and boards creating the restrictions, there is little harmony to be found among them. Jobs that seem to require the same kind of trust and responsibility often have radically different restrictions.

DEVELOPMENT OF RELIEF MECHANISMS.

As states have crafted new and stricter restrictions on employment, they have sometimes also created mechanisms of relief from the restrictions (and from other sanctions that are a consequence of, but collateral to, the criminal sentence). Relief mechanisms are intended to provide people who are, by law or policy, restricted or disqualified from jobs or licenses because of their criminal records a means by which they may be able to surmount these obstacles.
Sometimes the relief mechanism is made a part of the statute or policy creating the disqualification. Other relief mechanisms are generic; they are not tied to a specific disability or sanction, but instead are intended to lift a range of sanctions. These mechanisms include by far the oldest form of relief -- the pardon, and newer approaches such as expungement or sealing of records, procedures allowing for the restoration of civil rights, and procedures authorizing court or agency-issued certificates providing relief from disabilities or of good conduct.

One promising mechanism is a scheme that lists the disqualifying offenses (sometimes the offenses are time-limited, i.e., they are no longer disqualifying after the passage of the stated period of time) for a job or place of employment and then creates a waiver or exemption process through which the disqualification can be lifted by the applicant demonstrating his rehabilitation or that he poses no risk.

This is the post-September 11 national security approach that Congress took in enacting the Maritime Transportation Security Act of 2002. This law requires the disqualifying felony offenses to be determined by rule; requires that the conviction must have been within the previous seven years or within five years of release from custody for such a conviction; requires that waivers be allowed to be sought for those found disqualified because of the disqualifying offenses; and requires an appeals process.

The approach of listing disqualifying offenses, establishing time limits on the offenses, and provision for waivers and appeals was also taken by the Transportation Security Administration in implementing the provisions of the USA PATRIOT Act of 2001 governing motor vehicle transport of hazardous materials.

Citing the Maritime Act, the U.S. Attorney General, in a report to Congress on criminal background checks recommended that:

Congress should consider whether guidance should be provided to employers on appropriate time limits that should be observed when specifying disqualifying offenses and on allowing an individual the opportunity to seek a waiver from the disqualification.

States have also been following this approach. The Illinois Health Care Worker Background Check Act, 225 ILCS 46 also creates a waiver mechanism; it lists disqualifying offenses and allows the agencies that supervise health facilities to grant waivers to people seeking work in those facilities.

This is also the approach adopted as a recommendation by the ABA Commission on Effective Criminal Sanctions, which urges providing “for an exemption process and a statement of reasons in the event a person is turned down for employment because of their criminal record.”

A variant on this scheme, as seen in Florida’s Employment Screening Law, Chapter 435, F.S., governing jobs involving vulnerable populations, creates an exemption from the listed disqualifying offenses that is potentially available after a waiting period of three years from the date of conviction.

While the types of states’ generic relief mechanisms have been thoroughly catalogued, the impact of flexible hiring policies that offer candidates the opportunity to demonstrate rehabilitation has not been comprehensively studied. Still, what is known is very promising, especially the waiver laws. These laws appear to protect public safety while also keeping door to employment opportunity open; they have not
been shown to create any risk to public safety even as they provide a way for people with criminal records to enter the labor force.

Relief from disqualifications and other restrictions is critical. If the nation is to realize the promise of the Second Chance, then there must be means by which the promise is delivered.

“Best practices” in developing tailored restrictions.

These laws, though written for different purposes – from national security to patient care – have elements in common that an emerging consensus considers “best practices” in crafting restrictions that are carefully tailored to balance the competing public safety concerns of protecting the workplace and furthering the employment and reintegration prospects of people with criminal records is developing.

Such laws and policies restrictions have the following elements:

- Restrictions are brought together under one chapter broken down by specific industries or occupational classifications. With this structure, the restrictions are more apt to be treated in a similar fashion based on the occupation and more easily identified and compared with one another.

  Putting the restrictions in one chapter serves the purpose of both making the restrictions more transparent and also helps the public and policy makers readily discern the range and type of restrictions without combing through scores of chapters of a state code. As the restrictions are reformed, efforts are made to treat restrictions on similar jobs in a similar fashion

- The restrictions list disqualifying offenses that are relevant to the industry, occupation or place of employment; terms such as “good moral character,” “moral turpitude” or crimes “related to the occupation” are replaced with lists of relevant disqualifying offenses or are specifically defined as including such lists of offenses.

  As discussed earlier in this chapter, listing the specific disqualifying offenses rather than using generic and undefined or ill-defined standards, provides critical transparency and notice to the affected individuals and limits what is often otherwise unfettered discretion reposed in the hands of decision-makers. Listing the specific crimes also forces thoughtful analysis of what convictions are actually relevant to the job or place of employment.

- The restrictions are time limited.

  As the Congress and the Transportation Security Administration has demonstrated in its post-9/11 restrictions designed to protect the public from acts of terror, restrictions, to be effective, do not need to create lifetime bans on even the most
sensitive jobs. Under the federal laws governing airports, seaports and hazardous materials trucking, convictions that are older than five or seven years, depending on the crime, are not disqualifying.

- Applicants may seek waivers of or exemptions to the listed disqualifying offenses and time limits upon a showing of rehabilitation.

The waiver or exemption process that is now employed for both federal (high security occupation) and state (vulnerable population occupations) is the key and most critical element of this enterprise. It opens doors to employment opportunity that would otherwise be shut. It creates a case by case review process – but not of every applicant, just those who put the time and effort into developing a case establishing either that they have been rehabilitated or that the criminal conviction is not as relevant to the crime as it might, at first blush, appear, would be considered for a waiver. The reason relevancy as well as rehabilitation is important to consider is because the name of some crimes, e.g., “kidnapping,” often implies an act far more egregious than the legal elements of the crime require for a conviction. Thus, for instance, a 13-year-old girl who robbed her grandparents while they were home found herself in an adult Florida prison for eight years for “kidnapping” because, during the course of the robbery, one of the older children participating in the robbery ordered the grandparents to the porch with the threat of assault with the knife. But “kidnapping,” in the minds of most lay people implies something far worse than being ordered to a porch (even at knife point); it implies capture, concealment and absconding with a child.

There is no crime called “joyriding;” it is grand theft. Still, many, especially young people, are charged with this serious crime for taking a parent’s or relative’s car out for a ride without permission. To make appropriate case-by-case determinations, it is not enough to know the formal title of the criminal charges – the facts and surrounding circumstances and everything that has happened thereafter are critical to making a wise and fair decision.

The 2005 report of National Task Force on the Criminal Backgrounding of America. Organized by SEARCH, the National Consortium for Justice Information and Statistics and the Bureau of Justice Statistics, the Task Force, composed of representatives from federal agencies, including the FBI, the Department of Justice, the Department of Defense, and the Office of Personnel Management (OPM); volunteer organizations that screen volunteers’ backgrounds; state criminal history record repositories and identification bureaus; private companies that assemble criminal justice information and sell it for background checks; employers; state legislatures; criminal record background check clearinghouses; and scholars and academic experts, made a similar appeal for a mechanism that allows a showing of rehabilitation. Its 2005 report recommended that developing appropriate relevancy criteria:

The Task Force recommends that guidelines be developed to address redemption, forgiveness, and opportunities for individuals after rehabilitation. Whether information from backgrounding results is relevant to a certain position or service is dependent on many factors, such as the type of information (arrest, disposition, or other); the
circumstances surrounding an offense; the age of information; the number and severity of offenses; evidence of rehabilitation; and the age of individuals, including the age at which the offense was committed.29

- The restrictions are transparent: By law, the time limits, disqualifying offenses and waiver / exemption processes and the criteria for evaluating rehabilitation are made clear and understandable at the start of the application process.

The Florida inventory revealed widely varying degrees of transparency among the diverse restrictions. In some case, detailed explanations, application instructions, forms, standards, policies, rules and procedure are neatly organized on the administering agency’s website. In other instance, no more information than the agency will assess one’s “moral character” is supplied. The main reason that this information should be made clear is that people with criminal records need to know what standards will be applied in their cases – before attending school, taking tests and incurring significant and costs – and wasting precious time.

The National Task Force on the Criminal Backgrounding of America also recommended that notice of disqualifying offenses be provided:

> Individuals should have access to information that describes disqualifying offenses at the earliest point in time possible, preferably prior to completing an application for employment, licensure, or other service. The Task Force discussed the need for individuals to receive notification of disqualifying offenses as early as possible when applying for employment, licensure, and other services. It recognized that the earlier applicants receive notice of past events that may disqualify them, the more respectful the process is to applicants, and the more control applicants have over whether to participate in the process and disclose personal information. For example, if certain offenses automatically disqualify a person from obtaining a professional license, notice of such disqualifying offenses should be provided prior to application, examination, or even a pre-requisite course of study. As another example, if an employer has a policy of not hiring an individual with a certain past conviction, applicants should be notified prior to their filling out an application, or even as part of the position posting. Advance notice of disqualifying offenses provides clear benefit to applicants, but does not prevent applicants from moving forward with the application process if they believe a proper case can be made to overcome the disqualification criteria. In addition, advance notice of disqualifying offenses optimizes applicant, end-user, and repository resources. By allowing applicants to self-select out of criminal history record checks, all are spared time and resources that would be otherwise expended toward an unproductive result. The Task Force recommends that individuals have access to information that describes disqualifying offenses at the earliest point in time possible, preferably prior to completing an application for employment, licensure, or other service.30

- Upon a denial of the job or license or waiver or the suspension or termination of employment or licensure, specific reasons are provided, in writing, and there is an impartial, independent appeal process, which is also made transparent.
Criminal record histories are not always accurate; some do not contain the disposition of the case, which may be that the charges were dropped or the person was acquitted. Sometimes, the criminal record belongs to another person, which is particularly common with name-based background checks, due to more than one person having the same name. Sometimes the record is erroneous because of identity theft. Unless reasons are provided, the applicant or employee will not be able to correct such errors.

Beyond review of such errors, it is essential that even in cases where the record is accurate that the applicant or employee is able to obtain a review of the adverse decision and argue that it was decided wrongly.

This set of elements provides a balance of protections for employers, the workplace and vulnerable populations, while also keeping the door to employment opportunity ajar for people with criminal records. Restrictions with these elements have been shown to achieve these dual policy objectives. For instance, a review of Illinois Inspector General reports of people who have been reported to have contributed to the neglect, abuse or theft of patients found that there is no greater harm caused by people with criminal records granted waivers under the Illinois Health Care Worker Background Check Act than those who had no disqualifying criminal history record.31

Why do waivers seem to work so well in balancing competing policy objectives?

It may be that when the reviewing entity is looking for evidence of rehabilitation, which is what such a statutory scheme requires, that it focuses on such evidence rather than the elements of the underlying crime. The Illinois Department of Human Services grants waivers at a rate of 92%32 and people convicted of crimes as serious as murder have been granted waivers with no reports of abuse, neglect or theft. This establishes that people who have once done even the most heinous acts can and do reform and do not continue to put the public safety at risk. Indeed, this is underscored by those who work with people with serious criminal records and have them on their staff; they often say that those with convictions for even very serious crimes can be stellar, safe and reliable employees.33

While the impact of waiver and exemption provisions has not been formally studied, the explanation for the high grant-rate of exemptions and waivers and the lack of incidents thereafter that has been suggested is that the people who are seeking to enter these fields are self-selecting; they have made the choice to turn their lives around. The applications for exemptions and waivers in Illinois and Florida ask for evidence of rehabilitation. It is speculated that the person who has no such evidence likely doesn’t seek to have it weighed.

Measures mitigating the impact of criminal record restrictions.

In addition to the elements of restrictions that comport with best practices listed above, other policies and practices are emerging and are being embraced by states and localities that serve to advance employment opportunity for people with
These policies provide various kinds of protections from the stigma or discrimination that occurs with the disclosure of a criminal record or a means by which the employment restrictions are lifted. Among the practices being adopted are the following:

**“Ban the Box” ordinances.** Hawaii and some cities (e.g., Boston, San Francisco, Minneapolis, St. Paul, Newark, Philadelphia) have adopted “ban the box” policies. The “box” is the spot on the job application that the candidate checks to indicate whether they have a criminal record (or have been convicted of a felony, misdemeanor or the like) – the questions vary from application to application. When the box is removed, the applicant is initially considered on his or her merits, apart from the criminal record. Only after an offer of employment is made is the background check or disclosure of criminal record history required. By this means, applicants are first seen for whom and what they are in the present and only after a judgment has been made based on that presentation is the record revealed. In Hawaii, the ban applies to the private sector; in each of the municipalities, it applies to city hiring; and in Boston, the ordinance also applies to the city’s vendors.

**Anti-discrimination laws.** A handful of states (e.g., Hawaii, New York, Pennsylvania, and Wisconsin) have adopted laws that prohibit employment discrimination against people with criminal records. However, the impact and enforceability of these laws has been questioned as courts have deferred to employers who reject such applicants. This has even been the case in New York, which has the strongest anti-discrimination protections; it prohibits an employer (public and private) from denying an application for license or employment based on a criminal conviction when (1) there is a direct relationship between the criminal conviction and the duties of employment or (2) the applicant’s criminal history indicates that employing her “would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”

A separate provision in this New York law requires employers to consider eight factors related to the conviction in applying the exceptions to the anti-discrimination law. These include consideration of the public policy of this state to encourage the licensure and employment of persons previously convicted of one or more criminal offenses; the duties and responsibilities necessarily related to the license or employment sought; 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 such duties or responsibilities; the time that has passed since the offense or offenses; the age of the person at the time of offense or offense; the seriousness of the offense or offenses; information produced regarding rehabilitation and good conduct;

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1 A comprehensive review of relief mechanisms that serve to mitigate the consequences of employment restrictions has been prepared that outlines, state by state, the states’ laws and practices concerning restoration of rights, pardons, sealing and expunging records, discrimination on the basis of criminal records, certificates of relief from disabilities and certificates of good conduct. Love, Margaret Colgate, *Relief from the Collateral Consequences of a Criminal Conviction A State-By-State Resource Guide*, William S. Hein & Co. (2007).
the legitimate interest of the public agency or private employer in protecting property; and the safety and welfare of specific individuals or the general public.\textsuperscript{29}

This law also requires employers and agencies to “also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.”\textsuperscript{30}

Despite the detail and apparent heft of these protections, New York courts have not insisted on full consideration of the factors or the kind of balancing test the law contemplates. Instead, courts have both allowed employers to decide what an “unreasonable risk” to their enterprises is and what crimes constitute a “direct relationship” with the duties of the job.\textsuperscript{41} Moreover, some New York courts have not insisted that much weight (let alone a presumption of rehabilitation) be given to a certificate of relief from disabilities, although in some more recent decisions, the absurdity of, for instance, of denying a barbers license to a person trained to be a barber in prison has led a court to overrule the denial.\textsuperscript{42}

It should also be noted that, given the stripping of the intent underlying the law by the courts, very few cases alleging this form of discrimination are filed – though this may be changing with the increased attention being given to prisoner reentry and to the challenges of people with criminal records face in finding jobs.

The anti-discrimination law that has the intended effect of contributing to the rehabilitation of people with criminal records and opening doors of opportunity to them and that does not create exceptions that undermine the intent has not been crafted. This is perhaps why the recent trend is toward the best practices model described above.

\textbf{Certificates of relief from disabilities / certificates of good conduct.} Such certificates are created by law as a means to lift disabilities and disqualifications that are otherwise imposed by law or policy – both employment-related and otherwise. Again, New York (N.Y. Correct. Law §§ 700-705) is considered to be the model, and other states, such as Illinois have their own variations.\textsuperscript{43} The New York certificates are granted either by the sentencing court or the Parole Board and while they may lift one or more specified disabilities, they only remove automatic bars and create a presumption of rehabilitation; they do not establish eligibility for the license or job. The conduct underlying the crime is still deemed relevant. In New York, about 1,000 requests for certificates are made each year and about half of the requests for such certificates are granted.\textsuperscript{44}

\textbf{Limiting access to and the use of criminal records.} The National Task Force on Commercial Sale of Criminal Record Information pointed out the tremendous rise in background checks and in access to criminal records.\textsuperscript{45} Testimony heard in 2006 before the American Bar Association’s Commission on Effective Criminal Sanctions underscored those findings.\textsuperscript{46}

The channels of dissemination are wide; they include information from state repositories of criminal records (generally maintained by state police agencies); corrections databases; the FBI; court house records; police blotters; Internet and microfiche library searches, including news accounts of crimes, arrests and trials; and
private companies that mine data from these sources and sell it to employers (and others).

As the National Task Force noted, all states do not make all their criminal records publicly available. In some instances, the record is closed after a period of years with no intervening criminal incident. In some cases, the records are closed to all but law enforcement, in others, they are closed except to certain kinds of employers and agencies. States that make virtually all criminal records available to the public are referred to as “open records states” (e.g., Florida and Wisconsin); states that impose some limits on access to records are called “intermediate states” (e.g., Washington); and the states with the most stringent limits on access are called “closed record states” (e.g., Massachusetts). Most states have some restrictions on records; open record states such as Florida and Wisconsin are in the minority.

States that want to open doors of opportunity and reduce the stigma and other consequences of a criminal record are looking at enlarging the reach of their sealing and expungement laws; this approach is recommended by the American Bar Association. But this approach is hard to enforce across the board because both data mining companies and newspapers also have records. To truly seal or expunge such records is like trying to get the toothpaste back into the tube.

Some are considering laws such as the United Kingdom’s 1974 Rehabilitation of Offenders Act that would create penalties for the release or use of sealed or expunged (“spent” under the U.K. Law) records; such penalties would apply to both the private data miners and employers and would create a material disincentive for releasing information the state no longer considers appropriate for consideration. In no state, however, has consideration been given to any mechanism that would redact published stories of crimes and convictions, and indeed, the First Amendment makes such a venture impossible to conceive.

Apart from the practical questions of truly closing off a record when so much is available on-line, balancing the public’s “right to know” and the ideal of the “second chance” is challenging. Some policy reformers suggest that it is better for society and for the rehabilitation of the person with the criminal record to own it and acknowledge it. Others suggest that there is no relevance to a crime committed long ago and that we should allow Victor Hugo’s Jean Valjean to escape the stigma of past events and transform to Monsieur Le Mayor.

There is a much stronger consensus that arrests that do not lead to conviction should be sealed and not be considered for employment purposes. Commercial vendors of criminal records are barred from reporting arrests that are more than seven years old under the Fair Credit Reporting Act (10 years in bankruptcy cases). Under the Department of Justice’s regulations governing state and local criminal history repositories, nonconviction information may only be disseminated to criminal justice agencies and entities authorized by official law, policy or agreement to receive the information. However, there are no federal limits on access, use or dissemination of arrest records obtained directly from the police, courthouses, news accounts or Internet searches. A number of states, including e.g., California, Illinois, New York, Utah and Wisconsin, restrict employers’ consideration arrest records; in some states, the restriction is predicated on the sealing of the record, in others, e.g., New York and Wisconsin, sealing is not necessary.

**Assuring accuracy and fair use of criminal records.** Despite the fact that Department of Justice regulations require that state criminal history repositories be
instances of misidentification, errors in identification and stolen identification are legion. In particular, it is not uncommon for name-based background checks to reveal a conviction of a person with the same name but not the same person the check was intended to review. By contrast, as the Attorney General has noted, “FBI records are based on the positive identification of a person to a record through fingerprints. This significantly reduces the twin risks posed by name-based searches of false negatives (missing a record in the database because of false or inaccurate name search criteria) and false positives (incorrectly identifying a person to a record because of similarity in name and other search criteria being used).”

For this reason, the National Task Force on the Commercial Sale of Criminal Justice Record Information recommended that commercial vendors develop protocols for the use of biometric identifiers. States, however, can go further and require that for employment purposes, if a background check is ordered, from whatever the source, that it be confirmed with a fingerprint-based check for accuracy. States can also enact laws that parallel and expand the protections of the Fair Credit Reporting Act, enabling all of those subject to a background check to review the collected information and contest its accuracy.

Apart from Florida, most inventories that have been conducted thus far have been done by bar associations, law schools, legal services offices, and organizations working on behalf of people with criminal records. In contrast to this private approach, an officially sanctioned review requiring agencies to reveal the details of their restrictions will go deeper than these inventories and capture more of the specifics of the restrictions, how they are applied in real cases and data that are essential to getting a full and complete picture of the restrictions, how they are administered and their impact.

A public review can be initiated by an executive order, informal executive action or by the legislature.

An executive order directing the state agencies under the governor’s jurisdiction to provide information and data on their restrictions will secure a wealth of information on the bulk of a state’s restrictions.

However, some agencies and branches of government administering restrictions may not be under the jurisdiction of the chief executive. For instance, the courts,
attorney general, and state treasurer typically are not under the governor’s control. Thus, if the inventory is initiated by executive order, this information would have to be separately retrieved from such entities for the inventory to be complete. Moreover, restrictions that are imposed on the private sector and are not overseen by state agencies would have to be separately reviewed.

**Informal executive action, such as through a governor’s reentry council or commission**, can also secure the necessary information. A growing number of states have prisoner reentry task forces or commissions; some are in formation now in response to the funding requirements under the Second Chance Act now pending in Congress. Often when these task forces are established, whether by governors or legislatures, agencies are charged with cooperating in providing information. Such a task force or commission, with the authority of its appointing entity, could also initiate an inventory and solicit agency cooperation in accomplishing it.

**A state legislature** may also order an inventory of restrictions. It can order the necessary agency cooperation from all governmental entities administering the restrictions, subject to state constitutions’ separation of powers provisions. In Minnesota, many of the state’s restrictions were captured through legislation requiring the revisor of statutes to compile all collateral sanctions into one chapter of the criminal code and to cross-reference its provisions to the Minnesota laws imposing the sanctions and to organize the new chapter by the type of sanction. The American Bar Association’s criminal justice standards also recommends that states’ revisors compile all collateral sanctions into one chapter.

### Key Components of the Order or Legislation and the Inventory

The goals of the inventory are to find all the restrictions, to understand how they are applied, to understand how many people and how many occupations are affected, and to understand the impact of relief mechanisms. To achieve these goals with the inventory, the order or legislation should require:

- That agencies specify the restricted occupations and the substance and nature of the restrictions.
- That agencies supply documents relevant to the restrictions.
- That agencies specify the mechanisms that provide relief from the restrictions.
- That agencies provide baseline data on:
  - The impact of the restrictions as applied.
  - The number of people affected by restrictions.
  - The number of jobs that are restricted.
  - The impact of relief mechanisms.
- Appointment of an independent entity to collect the information, report on it and make recommendations.
- Time frames for submission of information and reporting.
CONDUCTING A PRELIMINARY INVENTORY

It is helpful to do a rough preliminary inventory of restrictions to get a sense of what approaches have been taken to create employment restrictions and the sources of restrictions. This will help identify both the various types of restrictions and the places they are found.

Legislatively-created restrictions are rarely confined to one chapter of the state code, though a single chapter containing licensing qualifications may be misunderstood to contain all the restrictions.

If agencies and boards have been delegated authority to create restrictions or to interpret them with broad grants of authority, it is important to look not just to rules, but to policy guidance, and job and license applications and instructions.

This preliminary work should highlight restrictions as administered by more than one agency for more than one type of job and show the various sources of the restrictions that have been found on those jobs, e.g., statutes, rules, policies and applications. This could be done by the governor’s office, legislative counsel, by committee staff, a reentry task force or private entity.

A preliminary inventory can help to guide the formal inventory. It can illustrate the disparate places the restrictions are found and help the agencies do a thorough job; and it can help form the basis of the findings in the order or legislation requiring the inventory.

OCCUPATIONS TO BE INVENTORIED BY THE AGENCIES.

State-created restrictions affect many kinds of jobs – far more than just the jobs in state government. The inventory should require a review of all policies related to criminal histories affecting:

- Employment within the agency.
- Employment in industries, facilities or places licensed, regulated, supervised, or funded by the agency.
- Employment pursuant to contracts with the agency.
- Employment in occupations that the agency licenses or provides certifications to practice.

INFORMATION TO BE COLLECTED FROM AGENCIES ON EACH RESTRICTED OCCUPATION.

In order to understand the terms of the restrictions, it is not enough to comb statutes and rules; the details of precisely how the restriction is applied must be uncovered. The information to be collected is designed to determine how the restrictions are applied in actual cases. If, for instance, the governing statute is discretionary, is it applied to disqualify everyone the agency has
discretion to disqualify; is it more narrowly tailored; or is it applied more broadly than the discretion granted? Are disqualifying offenses delineated in the law or by policy?

The agencies should supply information on laws, rules and policies governing both applications for employment and licensure and governing current employees’ and licensees’ suspension, termination and dismissal, including:

- The job title, occupation, job classification or restricted place of employment (and the range of occupations affected in such places).
- The source and substance of the restriction (statutory, regulatory, policy and/or practice) and citation for each, if such exists.
- Whether the restriction is mandatory or discretionary, by law and by policy.
- Whether the restriction includes arrests or indictments not leading to conviction.
- Specific disqualifying offenses, if delineated, by law and by policy.
- Time limits, if any, on the disqualifying offenses, by law and policy.
- The year the restriction was adopted and its rationale.
- The criteria for reviewing restrictions based on a conviction of an offense “related to” the practice of a given profession; an offense or act of “moral turpitude;” an offense evincing a lack of “good moral character,” including disqualifying offenses, time limits.
- Whether and how evidence of rehabilitation is considered and the exemption, waiver and / or appeal mechanisms available, if any, to seek relief from the disqualification, based on a showing of rehabilitation or otherwise.
- Appeal rights and procedures.

**DOCUMENTATION TO BE PROVIDED**

The documentation to be submitted will elaborate on the answers supplied by the agencies. They should provide:

- The state law and agency rules governing the restriction, if any.
- Forms, applications and instructions provided to applicants and to those denied or terminated from jobs or licenses based on their criminal record.

It is critical to obtain the documents that are used in the review process and see what the applicant sees.

In Florida, there is no state law requiring or authorizing restoration of civil rights for construction contract licenses, and three appeal courts declared such restrictions beyond the agency's discretion. Yet the front page of the licensing application sets forth, in bold print:

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

An applicant, upon seeing such a statement, will likely be deterred from applying unless his civil rights are restored; the law to the contrary will likely not be known or understood by him.
Florida data reveals a smaller percentage is granted restoration of rights than opportunity through its exemption law.

**Restoration of rights (FY ’01–’06):**
- 324,855 cases processed
- Of those, 65,472 people (20%) granted restoration of civil rights.
- 13,284 who were required to seek a Clemency Board hearing and did so.
- Of those, 1,519 people (11.4%) were granted restoration.

Data collection is a critical component of the inventory. Data, collected from the agencies administering the restrictions, from the agency in charge of the criminal history database, from the agency in charge of the state’s labor market data and from the agencies and courts that administer relief mechanisms, will reveal:
- The impact of the restrictions on people seeking jobs and licenses.
- The number of jobs in the economy subject to state-create restrictions.
- The number of people potentially subject to restrictions.
- The impact of relief mechanisms.

**DATA FROM AGENCIES ADMINISTERING RESTRICTIONS**

The collection of data on how the restrictions are affecting hiring and licensing is important to assess the real-world impact of the restrictions, the variations in treatment among similar jobs, and, for those working in the field with people with criminal records looking for work, to determine where meaningful opportunities exist to secure a job or license. Agencies should be required to provide data over the previous two year period. This baseline data can also be used later to assess the impact of any subsequent reforms that are adopted.

Agencies should provide, at minimum, data on:
- The number of people subject to criminal history disclosure, background checks or restrictions.
- The number disqualified, revoked, dismissed and terminated based on convictions.
- The number disqualified, revoked, dismissed and terminated based on arrests or indictments not leading to conviction.
- The number disqualified revoked, dismissed and terminated who sought waivers or exemptions from the disqualification.
- The number granted waivers or exemptions.
- The number who sought review through an
administrative appeal.
- The number found qualified after such a review.

A more thorough list of suggested data elements is found in the model executive order -- Appendix C.

**INFORMATION AND DATA ON RELIEF MECHANISMS.**

The responses from the agencies administering the restrictions will identify relief mechanisms such as waivers, exemptions or appeal processes that allow an individual otherwise disqualified to have the disqualification lifted. These relief mechanisms will generally be directly tied to and a part of the policy creating the disqualification and thus under the jurisdiction of the agency administering the restriction.

However, there are other relief mechanisms that may lift a restriction but is not directly tied to the restrictions. These include pardons, restoration of civil rights, expungement, records sealing, certificates of relief from collateral sanctions and certificates of good conduct.

The order or legislation that requires the inventory should also seek to obtain from the agencies and courts that administer these mechanisms of relief a description of each such mechanism, how and under what requirements may it be obtained and the relief it affords, particularly as to employment restrictions. It should also require the provision of data for the previous two year period on the number of applications for each such form of relief, the number granted and the results of appeals, if any.

**CRIMINAL HISTORY DATABASE.**

Every state has a criminal history repository. It is usually maintained by the state police agency. The database will reveal how many people in the state are potentially subject to restrictions based on criminal records.

It is helpful to get this data broken down and provided according to type of conviction (felony / misdemeanor) and disposition.

**FLORIDA CRIMINAL HISTORY DATABASE**

The breakdown of criminal history records is illustrated by the Florida Department of Law Enforcement Computerized Criminal History database, which contains records on 5,104,618 individuals, representing 28.7% of the 17.8 million people currently residing in Florida. The database, which began being built in 1971, however, does not include people convicted of federal crimes, crimes committed out-of-state or outside the U.S.; and it does not exclude people who have left the state or died.

- 1,673,797 individuals in the database have criminal convictions identified as either a felony or misdemeanors, broken down as follows:
  - 804,554 people with felony convictions, including people with both felony and misdemeanor convictions.
  - 869,243 people with misdemeanor convictions and no felony convictions.
  - The convictions of 261,228 individuals in the database are for an "Unknown Charge Level" only; these cannot be identified as felonies or misdemeanors.

- The remaining 3,169,593 people have a disposition other than conviction (e.g., adjudication withheld, acquitted), a mixture of unknown levels and misdemeanor convictions; or no disposition reflected in the criminal history file.

**OCCUPATIONAL LABOR MARKET DATA**

Quantifying the number of jobs affected by government restrictions and background checks is challenging, but it is important to understand how many jobs are
Calculating the jobs Florida restricts

To make a rough calculation of the number of jobs in the Florida economy affected by restrictions, the Florida task force focused on restricted occupations in some of the larger employment sectors and used a combination of labor market and active license data to count the number of jobs in the economy for those occupations. Through this means it calculated 2.9 million state-restricted jobs out of the 7.6 million non-farm jobs in the Florida economy. This calculation excluded numerous restricted occupations with fewer employees and jobs subject to place-based restrictions.

Health care professionals and support 89,400
K-12 employees 402,776
Law enforcement, corrections/firefighting 20,310
Security guards 102,328
Lawyers 75,000
State government 60,923
Financial 57,060
Telemarketers 47,499
Child Care workers 35,943
Bartenders 28,667
Pest control 12,077
Car repair shop owners 10,753
Travel sales 7,422
Funeral 3,317
Professional licensees not above 1,329,809
Partial estimate 2,983,284

Materials supplied to the Florida agencies

In Florida, the task force developed the template and instructions for the agencies; the Governor's office supplied these materials along with the Executive Order and the preliminary inventory to the agencies.

The purpose of providing the preliminary inventory was to give the agencies a sense of what had already been discovered and what kinds of information was vital to the agencies' inventories. The preliminary inventory, for instance, illuminated some contradictions between state laws and license applications.
turpitude” with ease, or cull all health care restrictions.

**DESIGNATING A POINTPERSON TO ANSWER AGENCY QUESTIONS**

Even with clear instructions and a template for the responses, agency staff are bound to have questions about how they are to respond. A person with an understanding of the purpose and intent of the inventory should be designated to answer the agencies’ questions as they arise. This could be a person in the governor’s office, a legislative staffer or, if there is a reentry council, the chair or staff to the council.

**CONVENING AN AGENCY WORKSHOP**

To engage the state agencies in the importance of the inventory, to clarify what is expected of them and answer their questions, a workshop of the agency officials in charge with administering the restrictions should be held. The appointed point person, staff from the governor’s office or legislative leaders that ordered the inventory can explain in why the inventory was ordered and what is sought to be achieved by it. The workshop can also encourage agency officials to think about the reforms they could make to increase employment opportunities for people with criminal records.

**Chapter Three**

**INDEPENDENT FOLLOW-UP, REVIEW AND RECOMMENDATIONS**

An independent entity, such as a state reentry council or bar association should be appointed (in the executive order or legislation) and given authority to seek clarification and additional information from the agencies. This entity should also be charged with collating the responses, assessing the completeness and accuracy of the responses, reporting the findings, making recommendations for reform and working with state agencies to implement reforms.

The review for completeness and accuracy is critical to getting a solid and reliable description of the restrictions. For instance, sometimes the governing statute vests an agency with discretion to apply the restriction, if so, this review must discern the criteria used to apply it. Has the agency supplied the criteria? Do the supplied criteria align with the instructions and applications provided applicants? If not, which governs?

Because the inventory is designed both to catalogue the current restrictions so that users -- employers, job seekers, workforce personnel, administering agencies and corrections -- have reliable information about them and to reveal the range of restrictions to policymakers, two kinds of products should be developed: A catalogue and a policy report and recommendations.

**THE CATALOGUE AND THE ROLE OF THE STATE WORKFORCE AGENCY**

The independent entity should work with the workforce agency in developing an on-line catalogue of all restrictions with links to the relevant applications, instructions, laws, rules, forms and procedures. When the inventory
The range of severity of Florida’s restrictions

The Florida Task Force listed the range of restrictions by order of severity and found nine kinds of restrictions:

- Lifetime bans for any felony.
- Lifetime bans unless civil rights are restored for any felony.
- Lifetime bans for certain felonies.
- Good Moral Character and Crimes of Moral Turpitude bans.
- Lifetime bans -- unless civil rights are restored for certain felonies.
- Time-limited bans for any felony.
- Time-limited bans for certain felonies.
- Lifetime bans for certain felonies, and may seek an exemption after 3 years from the date of offense.
- Time-limited bans for certain felonies, and may seek waiver of the bar.

has been assessed and completed, the database created as the agencies supplied their responses could be migrated to the workforce agency’s public website to provide users with this detailed information on the restrictions.

The information on the restrictions also should also be distilled into an easy-to-understand pamphlet that can be used by job seekers. Both the website and pamphlet should be organized by industry sectors, and both restricted and unrestricted jobs should be illuminated.

The workforce agency can also conduct a private sector survey of restrictions. A very substantial number of state-created restrictions are imposed on the private sector – both as to certain kinds of jobs, e.g., telemarketers and bartenders and cashiers selling liquor at retail outlets, and as to certain places of employment, e.g., nursing homes and race tracks. Most of these will be identified through the official inventory.

But that will not identify all private sector restrictions – those imposed on employers by themselves. Nor will it illuminate what kinds of jobs are not restricted. The fact that no state-created restriction is identified does not mean the job is not restricted.

Partnering with local workforce boards and agencies and with chambers of commerce, workforce agencies may help to reveal what jobs are largely unrestricted and what jobs are self-restricted.

Employers and their associations are often reluctant to reveal that they have open or somewhat-open-door policies on hiring people with criminal records, but a survey of who such employers are and what industries are open can be invaluable to job developers and other workforce providers who work at finding jobs for people with records.

It is also helpful to identify the employers that feel comfortable identifying themselves as companies embracing “the second chance.” Such companies can influence others in the same or similar industries and can assert a leadership role in chambers of commerce and other business associations to advance the reform effort.

REPORTING THE FINDINGS: POLICY REPORT AND RECOMMENDATIONS

The second product is directed to policy makers. It need not specify every restriction; instead, it should be a distillation of the key findings, broken down into manageable components. The findings might include:

- The data on the application of the restrictions.
- The number and percentage of jobs in the state that are affected by the restrictions.
- The number of people in the state with criminal records, broken down as to type of record.
- Data on the impact of relief mechanisms.
- Restrictions on high-demand occupations.
- The range of approaches in restricting employment.
- The range of severity of the restrictions.
- The variations in treatment among similar occupations or occupations that require equivalent types of trust and responsibility.
- Restrictions that have been created by the legislature versus those created by agencies (thus indicating who can modify them).
- Comparison of restrictions across jurisdictional lines, e.g., state versus federal, for similar jobs.
- Examples of existing restrictions that comport with “best practices” models.
- Illumination of the kinds of relief mechanisms that are available and their efficacy.

**Highlighting Items in the Report**

**The numbers**

The report should present the four sets of data obtained from the agencies:
(1) the agency data on the application of the restrictions; (2) the data on the number of jobs in the economy that are restricted; (3) the data on the number of people in the state criminal history database; and (4) the data on the relief mechanisms.

**The range of severity of the restrictions.**

For purposes of providing an overview of the restrictions, it is helpful to chart the various types in order of severity.

**Contrasting restrictions**

Because the restrictions have been adopted, in most jurisdictions, piecemeal and over many years, the inventory is likely to reveal widely varying restrictions on very similar jobs. For instance there may be mandatory restrictions for some jobs and discretionary restrictions for other jobs; restrictions that are discretionary under the law and treated as mandatory in practice; time-limited restrictions for some jobs and lifetime bans for similar jobs; and restrictions that can lifted through waivers or exemptions for some jobs and restrictions that can never be lifted for similar jobs.

<table>
<thead>
<tr>
<th>Variations in Florida’s security / law enforcement positions</th>
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<tbody>
<tr>
<td>Barred for any felony unless civil rights are restored</td>
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<tr>
<td>Private investigator, private security and repossession services</td>
</tr>
<tr>
<td>Alarm system contractor</td>
</tr>
<tr>
<td>Lawyers &amp; therefore judges, etc.</td>
</tr>
<tr>
<td>Barred for life, but only if convicted of perjury or false statements</td>
</tr>
<tr>
<td>Law enforcement, probation, and correctional officers &amp; bailiffs</td>
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<tr>
<th>Variations in Florida’s restrictions on finance-related positions</th>
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<tr>
<td>Restoration of rights required by rule</td>
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<tr>
<td>Licensure for mortgage broker</td>
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<tr>
<td>Mortgage broker business</td>
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<tr>
<td>Mortgage lender</td>
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<tr>
<td>Correspondent mortgage lender</td>
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<tr>
<td>Title loan lender</td>
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<tr>
<td>Motor vehicle retail installment seller</td>
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<tr>
<td>Retailer installment seller</td>
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<tr>
<td>Sales finance company</td>
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<tr>
<td>Home improvement finance seller</td>
</tr>
<tr>
<td>Consumer finance</td>
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<tr>
<td>Good Moral Character required by law</td>
</tr>
<tr>
<td>Certified Public Accountants</td>
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<tr>
<td>Barred for life for any felony- by law</td>
</tr>
<tr>
<td>Bail bond agents and employees</td>
</tr>
<tr>
<td>Time-Limited</td>
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<tr>
<td>Telemarketers – by rule</td>
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<tr>
<td>Pawnshop dealers - law</td>
</tr>
<tr>
<td>May deny for financial crimes – by law</td>
</tr>
<tr>
<td>Real Estate</td>
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</tbody>
</table>
What Is Moral Turpitude?

It is not defined in Florida laws and crimes of moral turpitude are not listed, but 66 Florida employment-related laws create restrictions or penalties based on acts or crimes of moral turpitude.

“Moral turpitude” is an elusive, vague and troublesome concept in the law, incapable of precise definition; such is evidenced by the myriad of definitions and interpretations in judicial opinions.” Wilson, The Definitional Problems with “Moral Turpitude,” 16 J. Legal Prof. 261 (1991).

“Time has only confirmed Justice Jackson’s powerful dissent in the De George case, in which he called “moral turpitude” an “undefined and undefinable standard.” 341 U.S. at 235. The term may well have outlived its usefulness.” Mei v. United States, 393 F.3d 737, 741 (7th Cir. 2005).

It is also instructive to contrast state restrictions with federal restrictions. Why, one might ask, is a person with a 10-year-old drug conviction barred from a job consisting of riding on a park district truck at night watering the flowers in boulevard planters, especially when, even after 9/11, such a person is not barred from trucking hazardous materials or from work at airports and seaports?

Jobs in growth industries with significant demand.

Restrictions will be found on jobs that are in great demand as well as on obscure jobs. The report should emphasize jobs that are in-demand, where real employment opportunities exist. In most states, the health care industry is growing and has created a significant demand for workers.

Jobs that do not require higher education.

Because many people with criminal records do not have college educations or advanced degrees, and often have not completed high school, the report should highlight restricted jobs that can be obtained without a degree or higher education.

Florida’s various health care restriction

Transparency and accountability.

Policymakers are increasingly concerned that the laws they pass and the work of government be both transparent and accountable. It is important to highlight whether the restriction is transparent to agency administrators, employers and job seekers.

Some restrictions – by their very terms – lack transparency. Courts have struggled to define and still failed to discern what a crime of “moral turpitude” is, yet many restrictions put jobs off-limits to people convicted of crimes (or acts) of moral turpitude. The same problem exists with “good moral character” and laws that say one cannot have been convicted of a crime “related to” a particular occupation. Restrictions

<table>
<thead>
<tr>
<th>Restoration of Rights Required</th>
<th>“Case by case” Review + Evidence of Rehab</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registered Nurse, LPN, CNA</td>
<td>Physicians Assistant</td>
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<tr>
<td>Dental Hygienists</td>
<td>Midwifery</td>
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<tr>
<td>Optician</td>
<td>Optometrist</td>
</tr>
<tr>
<td>Mental Health Counselors and Clinical Social Workers</td>
<td>Psychologist; School Psychologist</td>
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<tr>
<td>Physical and Occupational Therapists &amp; Assistants</td>
<td>Speech Language Pathologists &amp; Audiologists</td>
</tr>
<tr>
<td>Hearing Aid Specialists</td>
<td>Acupuncturist</td>
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<td>Electrologist</td>
<td>Respiratory Therapist</td>
</tr>
<tr>
<td></td>
<td>Anesthesiologist Assistants</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Listed Disqualifying Offenses / Exemptions Authorized</th>
<th>Unrestricted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Home Health Aid</td>
<td>Dental Assistants in dentists’ offices</td>
</tr>
<tr>
<td>Unlicensed Nursing Home staff w/ patient contact</td>
<td>Medical Assistants in doctors’ offices</td>
</tr>
<tr>
<td>Child Care Workers</td>
<td>Optometric Assistant</td>
</tr>
<tr>
<td>Substance Abuse Counselors</td>
<td>Pharmacy Technician</td>
</tr>
<tr>
<td>Psychiatric Aids</td>
<td>Recreational Therapist</td>
</tr>
<tr>
<td>Owners, CEOs, CFOs of licensed health facilities</td>
<td>Early Learning Staff</td>
</tr>
<tr>
<td>Early Learning Staff</td>
<td>School personnel and vendor employees</td>
</tr>
<tr>
<td>DOH &amp; DJJ staff</td>
<td>DOH &amp; DJJ staff</td>
</tr>
</tbody>
</table>
using these terms make it impossible for candidates to know if their crimes are disqualifying or not, thus causing them to incur the costs of schooling and testing for certification before they find out if they are qualified.

Such nebulous restrictions also provide little accountability because they give unfettered discretion to administering officials.

Developing a Set of Recommendations for Reform

Circle back to the policy statements some states have adopted:

It is official state policy to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship. The opportunity to secure employment or to pursue, practice or engage in a meaningful and profitable trade, occupation, vocation, profession or business is an essential ingredient to the assumption of the responsibilities of citizenship. States and localities may not disqualify a person for employment or licensure solely because of a prior conviction unless the crime is directly related to the job or license being sought.

This guide has discussed the lack of transparency and accountability in laws and policies that merely state that the disqualifying offense must be “directly related” to the position sought. However, the principle that the offense relate to the position still has great merit and should guide the development of policies that are carefully tailored to protect the public while also keeping open doors to employment opportunity. “Directly related” is the starting point, not the last word or the definition; from there the disqualifying offenses that actually are directly related need to be defined.

The report should highlight restrictions that contain one or more of the elements of the best practices outlined in Chapter One; they can then be built upon as model policies that more carefully tailor restrictions to the harms to be prevented and that allow consideration of rehabilitation and the relevance, or lack thereof, of the crime to the position sought. The report should also contrast restrictions that contain these elements against inflexible restrictions that create lifetime bans on employment, that provide for no opportunity to demonstrate rehabilitation or the relevance of the crime to the job or that lack transparency.

The recommendations for reform will be aimed at developing a clear and cogent set of policies. Consistency in the treatment of jobs with similar kinds of trust and responsibility will be evident. The policy will fairly balance policy concerns related to public safety. As the U.S. Attorney General pointed out:

**THE SIX KEY ELEMENTS OF CAREFULLY TAILORED RESTRICTIONS**

- Restrictions are brought together under one chapter broken down by specific industries or occupational classifications. With this structure, the restrictions are more apt to be treated in a similar fashion based on the occupation and more easily identified and compared with one another.
- The restrictions list disqualifying offenses that are relevant to the industry, occupation or place of employment; terms such as “good moral character,” “moral turpitude” or crimes “related to the occupation” are replaced with lists of relevant disqualifying offenses or are specifically defined as including such lists of offenses.
- The restrictions are time limited.
- Applicants may seek waivers of or exemptions to the listed disqualifying offenses and time limits upon a showing of rehabilitation.
- The restrictions are transparent: By law, the time limits, disqualifying offenses and waiver / exemption processes and the criteria for evaluating rehabilitation are made clear and understandable at the start of the application process.
- Upon a denial of the job or license or waiver or the suspension or termination of employment or licensure, specific reasons are provided, in writing, and there is an impartial, independent appeal process, which is also made transparent.
The individual’s interest in the fair use of criminal history information is mirrored by the broader social policy of facilitating the reentry of ex-offenders into the workforce. Steady gainful employment is a leading factor in preventing recidivism. The unfair use of or discrimination based upon criminal records can raise barriers to employment by ex-offenders and, as a result, undermine the reentry that makes us all safer.59

And he recommended:

The new rules should provide access in a way that is both controlled and accountable and that respects the privacy interests of individuals in accurate information and the social interests in encouraging reentry and preventing unlawful discrimination in employment60.

In addition to reporting on restrictions and suggesting reforms of the restrictions, the recommendations should also address the existing relief mechanisms (e.g., restrictions with waivers or exemptions, anti-discrimination laws or policies, certificates of relief from disabilities or of good conduct, privacy protections, Fair Credit reporting Act-type protections to insure accuracy and the ability to correct erroneous records) and their efficacy in opening doors of opportunity and should make suggestions for the adoption of new mechanisms of relief.

Adoption of new restrictions.

The report should also address how new restrictions should be adopted. As has been noted, the great range of restrictions and radically different restrictions on similar jobs have come about because they are adopted in such diverse forums. Going forward, new restrictions that are developed through legislation should be directed to a single legislative committee so that they are harmonized with existing (and revised) restrictions. Restrictions adopted by state agencies should be vetted through an entity appointed by the governor for this purpose and given the responsibility of developing consistent and fair policies across occupational and industry groups.

The New York State Bar Association’s report on the collateral consequences of a criminal record recommends the filing of a “Reentry Impact Statement” (like a fiscal note, a corrections impact statement or a local government or unfunded mandate impact statement, each of which legislatures commonly require) for legislation that would create a new collateral consequence to a conviction, including, of course, new employment restrictions. The report notes, “statutes affecting collateral consequences are scattered throughout our laws. As that process continues, there is no way to measure the effect of these statutes independently or collectively. Requiring a statement that considers the impact of such legislation may lead to reconsideration of its passage or a more informed discussion as to its purpose and intended effect.61 That said, the course suggested herein would mitigate one of the problems the New York Bar report identifies – the
current scattering of restrictions throughout the laws would be eliminated by bringing them together into one chapter.

The Civil Action Project of the Bronx Defenders elaborates on this recommendation and suggests that since the comprehensive review of employment restrictions suggested by this guide will review the labor market impacts of restrictions; such an approach provides “the tools to craft a Reentry Impact Statement for any proposed new restriction. A proposed bill adding new licensing restrictions, for example, should have to state how many people in the state criminal history repository have convictions for that offense, and also how many relevant convictions per year there are. It should also state the number of jobs affected by the new restriction, and the number of current employees affected.”

MEASURING RESULTS

It is important to track results over time as reforms are adopted. The baseline for the measurement of the results of reforms would be based on the data provided in connection with the inventory. Since it would be an overwhelming task to track outcomes consequent to each reform, if many are adopted, it would be helpful to focus on outcomes where the reform substantially changed restrictions, e.g., restrictions causing jobs to be off-limits for life reformed to being time-limited and subject to a showing of rehabilitation; reforms impacting many jobs and many people; and reforms that make the restriction more transparent and its administration more accountable. These measured results will then help to make the case for further reforms in the state and in other states that are considering them. Lastly, to counter the fear that reform puts the public safety at risk, it is helpful to track whether opening up employment opportunities to people with public records has led to any harm. All states, for instance, must have a nurse aide register and protocols for reporting patient abuse, neglect and theft. Such a database could be used to track the progress of nurse aids that have been granting waivers or exemptions allowing them to work.

The many people who want to work and to desist from crime are more than capable of establishing that they deserve a second chance. They just need the opportunity to make the case.
STATE OF FLORIDA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER NUMBER 06-89

WHEREAS, on February 7, 2005, I issued Executive Order 05-28 establishing the Governor’s Ex-Offender Task Force (Task Force) to improve the effectiveness of the State of Florida in facilitating the reentry of ex-offenders into our communities and reduce the incidence of recidivism; and

WHEREAS, the Task Force has found that gainful employment after release from prison is one of the critical elements necessary to achieve successful reentry after prison and that employment has been shown to reduce recidivism and, thus, to make our communities safer; and

WHEREAS, the Task Force has found many state laws and policies that impose restrictions on the employment of people who have been to prison and has estimated that these restrictions may affect more than one-third of Florida’s 7.9 million non-farm jobs, including state and local government jobs, jobs in state-licensed, regulated and funded entities, and jobs requiring state certification; and

WHEREAS, the Task Force has further found that no comprehensive review of these restrictions has been undertaken to evaluate whether the restrictions are related to the safety, trust and responsibility required of the job or to determine whether a less restrictive approach could protect the public while preserving employment opportunities; and

WHEREAS, the Task Force has further found that the disqualifications for many kinds of jobs can be lifted through exemptions and other mechanisms that allow a case-by-case showing of rehabilitation, yet the disqualifications for many other jobs requiring a similar level of safety, trust and responsibility cannot be lifted, exempted or relieved; and

WHEREAS, the State’s executive agencies can assume a leadership role in providing employment opportunities to ex-offenders by reviewing their employment policies and practices and identifying barriers to employment that can safely be removed to enable ex-offenders to demonstrate their rehabilitation;

NOW THEREFORE, I, JEB BUSH, as Governor of the State of Florida, by virtue of the authority vested in me by the Constitution and Laws of the State of Florida, do hereby promulgate the following Executive Order, effective immediately:

Section 1. Terms of Employment Disqualifications.
A. All executive agencies shall produce a report for the Task Force that describes the employment restrictions and disqualifications that are based on criminal records for each occupation under the agency’s jurisdiction and that of its boards, if any, including, but not limited to, employment within the agency; employment in facilities licensed, regulated, supervised, or funded by the agency; employment pursuant to contracts with the agency; and employment in occupations that the agency licenses or provides certifications to practice. For each occupation subject to an ex-offender restriction or disqualification, the agency shall set forth the following:

1. The job title, occupation or job classification;

2. The cause of the disqualification (statutory, regulatory, policy or practice) and the substance and terms of the disqualification, including a listing of the disqualifying offenses, the recency of the disqualifying offenses, and the duration of the disqualification;

3. The year the disqualification was adopted and its rationale;

4. In instances where the disqualification is based upon conviction of any offense “related to” the practice of a given profession, the criteria the agency has adopted to apply the disqualification to individual cases;

   5. The source of any requirement (statute, rule, policy, or practice) for an individual convicted of a felony to have his civil rights restored to become qualified for the job; and

   6. The exemption, waiver, or review mechanisms available to seek relief from the disqualification, based on a showing of rehabilitation or otherwise. This should include the terms of the exemption, waiver or review, the nature of the relief it affords, and whether an administrative and judicial appeal is authorized.

B. The agency shall also describe, for each occupation subject to ex-offender disqualification, the procedures used to determine and review the disqualification, and shall provide to the Executive Office of the Governor copies of the forms, rules, and procedures that it employs to provide notice of disqualification, to review applications subject to disqualification, and to provide for exemptions and appeals of disqualification.

C. Agencies are strongly encouraged to adopt such policy reforms and changes as will achieve the goals of this Order. Agencies shall report to the Executive Office of the Governor reform efforts including eliminated or modified ex-offender employment disqualifications, draft legislation for a case-by-case exemption or review mechanism, and modified criteria and procedures used in relation to ex-offender employment restrictions.

Section 2. Data.
The second part of the review involves the collection of data to determine the impact of the disqualifications on employment opportunities for ex-offenders in Florida and the effectiveness of existing case-by-case review mechanisms that list the disqualifications. For each occupation under the jurisdiction of the agency for which there are employment disqualifications based on criminal records, the agency must provide, for the previous two-year period, the number and percentage of individuals who underwent a criminal history background check, the number who were merely required to disclose their criminal history without a criminal history background check, the number and percentage found disqualified based on criminal records; the number and percentage found disqualified because their civil rights had not been restored; the number and percentage who sought review and exemption from or reversal of the disqualification, the number and percentage that were found qualified for the initial review, and the number and percentage that were found qualified for any subsequent level of review. If the agency maintains records of active licenses or certifications, the agency shall provide the total number of employees in occupations subject to criminal history restrictions.

Section 3. Time Frame for Provision of Information.

The terms of each of the agency’s employment disqualifications described in Section 1 of this Order shall be provided to the Executive Office of the Governor no later than 60 days from the issuance of this Order. The data described in Section 2 shall be provided no later than 90 days from the issuance of this Order.

Section 4. Other State Agencies and Private Sector.

I strongly encourage all other state agencies, counties, municipalities and political subdivisions of the State to likewise conduct an inventory of employment disqualifications as described herein, to eliminate or modify such disqualifications that are not tailored to protect the public safety, and to create case-by-case review mechanisms to provide individuals the opportunity to make a showing of their rehabilitation and their qualifications for employment. I encourage private employers, to the extent they are able, to take similar actions to review their own employment policies and provide employment opportunities to individuals with criminal records.

IN TESTIMONY WHEREOF, I have hereunto set my hand and have caused the

Great Seal of the State of Florida to be affixed at Tallahassee, the Capitol, this

25th of April, 2006.

______________________________
GOVERNOR

ATTEST: __________________________
SECRETARY OF STATE
Appendix B

Key Findings and Recommendations
Based on the Task Force’s Analysis of the
State Agency Responses to Executive Order 06-89
Governor’s Ex-Offender Task Force
Vicki Lopez Lukis, Chairman
January 18, 2007

KEY FINDINGS

- A complete and accurate inventory of all restrictions may be impossible because the restrictions are found not just in the laws, but in rules, formal and informal policies and on applications.

- The restrictions, adopted over time, vary widely – from lifetime restrictions to restrictions that can be lifted upon a showing of rehabilitation.

- Jobs with similar characteristics and types of trust and responsibility often have very different restrictions.

- Some restrictions, like those requiring good moral character or not having committed crimes of moral turpitude, are not clear to either applicants or administering officials.

REFORM RECOMMENDATIONS

Preemptions and Repeals:

- Enacting a law that repeals / preempts existing statutory requirements and authority for imposing restoration of rights requirements for employment and licensing and that prohibits state agencies and boards from requiring the restoration of rights for employment or licensing. (Task Force Recommendation in Final Report).

- Enacting a law that preempts and repeals statutory, regulatory and policy-based bans that do not allow a showing of rehabilitation to lift the ban.

4 See Appendix A.
• Enacting a law that, for purposes of weighing criminal backgrounds, preempts and repeals laws and policies using standards of “good moral character,” crimes or acts of “moral turpitude,” and crimes “related to” the occupation.

In Lieu of Such Laws:
• Require agencies that employ and license people who deal with vulnerable populations to use the Chapter 435 Background Screening Act as their review mechanism for past crimes.

• Create, for other agencies and occupational classifications, additional chapters in the Florida Labor Law that mirror Chapter 435, with each such chapter listing disqualifying offenses related to particular occupational groups (e.g. finance, consumer, law enforcement).

Due Process / Transparency
• Add a section to the Background Screening Act (and the new / additional Labor Law chapters) that requires agencies to provide people, at the time of initial application for employment and licensure, and to post on their websites:
  • A list of the disqualifying offenses;
  • An explanation of the exemption process, including the fact that an exemption may be sought after three years have passed from the date of the offense;
  • A statement explaining the criteria used to grant an exemption;
  • A list of the materials that should be included with an exemption application; and
  • A statement that an appeal of a denial of the exemption may be filed.

OVERVIEW OF THE EXECUTIVE ORDER AND THE FINDINGS

The Governor’s Ex-Offender Task Force recommended that the Governor “issue an Executive Order for a justification review of state agencies’ laws, policies and practices that disqualify individuals from employment.” Underlying this recommendation were certain key findings and goals:

• Recidivism can be reduced and the public safety enhanced by increasing employment opportunity for ex-offenders.

• Sound state policies can set an example for the private sector, thus further increasing employment opportunities.
• No comprehensive inventory of employment restrictions had ever been undertaken.

• No evaluation of the restrictions had ever been undertaken to determine whether the restrictions are closely related to the safety, trust and responsibility required of the job or whether a less restrictive approach could protect the public while also creating employment opportunities.

• Opening up employment opportunities to ex-offenders who can establish that they are living law-abiding lives, have been rehabilitated, and thus are appropriate candidates for employment, provides an incentive to succeed after release from prison.

All Executive Agencies responded to the Executive Order and the Task Force independently inventoried the restrictions administered by Agriculture and Consumer Services, Financial Services, and Highway Safety and Motor Vehicles.

**The Scope of the Impact of Employment Restrictions on Floridians**

The Florida Department of Law Enforcement reported that its Computerized Criminal History database contains records on 5,104,618 individuals, representing 28.7% of the 17.8 million people currently residing in Florida. The database, which began being built in 1971, however, does not include people convicted of federal crimes, crimes committed out-of-state or outside the U.S.; and it does not exclude people who have left the state or died.

- 1,673,797 individuals in the database have criminal convictions identified as either a felony or misdemeanors, broken down as follows:
  - 804,554 people with felony convictions, including people with both felony and misdemeanor convictions.
  - 869,243 people with misdemeanor convictions and no felony convictions.
  - The convictions of 261,228 individuals in the database are for an “Unknown Charge Level” only; these cannot be identified as felonies or misdemeanors.

- The remaining 3,169,593 people have a disposition other than conviction (e.g., adjudication withheld, acquitted), a mixture of unknown levels and misdemeanor convictions; or no disposition reflected in the criminal history file.

**Number of Jobs Affected by State-created Restrictions**
The Task Force attempted a rough count of restricted jobs. Rather than look at all restricted jobs, this effort concentrated on certain occupational groups that have large numbers of jobs in Florida. However, it could not count the occupations with place-based restrictions, e.g., unlicensed direct-patient-contact positions at, e.g., health facilities, Jessica Lunsford school vendor jobs, or jobs at seaports.

Even with so many occupations excluded from the count, the Task Force has estimated that of the 7.6 million jobs in the Florida economy, at least 39.2% of the jobs in Florida appear to be subject to state-created criminal background checks or restrictions based on criminal history.

Official State Employment Policy

It is the policy of the State of Florida to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship.

The opportunity to secure employment or to pursue, practice or engage in a meaningful and profitable trade, occupation, vocation, profession or business is an essential ingredient to the assumption of the responsibilities of citizenship.

Preamble to Ch. 71-115, at 304, Laws of Fla., now Section 112.011, F.S.

Findings

Three types of job restrictions:

- Based on the occupation -- both licensed and unlicensed occupations, e.g., bartenders, security guards, real estate agents.
- Based on the place of employment – e.g., seaports, schools, nursing homes.
- Based on both, e.g., nurses, teachers.

Source of the restrictions.

- The Legislature:
  - Enacted as state statutes (both mandatory and providing discretionary authority)
- State agencies and state licensing boards:
  - Promulgated through rulemaking
  - Adopted as a matter of agency / board policy
  - Adopted by putting them on application forms and instructions

Range of severity of the restrictions:

- Lifetime bans for any felony.
- Lifetime bans unless civil rights are restored for any felony.
• Lifetime bans for certain felonies.
• Lifetime bans -- unless civil rights are restored for certain felonies.
• Good Moral Character and Crimes of Moral Turpitude restrictions.
• Time-limited bans for any felony.
• Time-limited bans for certain felonies.
• Lifetime bans for certain felonies, but may seek an exemption after 3 years from the date of offense.
• Time-limited bans for certain felonies, but may seek waiver of the ban.

**Lifetime bans.**

One example of a lifetime ban applies to pilots of watercraft. If the person has ever been convicted of felony drug sales or trafficking, he is barred from piloting certification for life. By contrast, even after the federal Aviation & Transportation Security Act amendments enacted by Congress and signed on November 19, 2001, just two months after September 11, airline pilots and airport personnel are only prohibited from employment if the disqualifying offense (including drug trafficking) occurred within the prior ten years.

**Occupations requiring restoration of civil rights for employment or licensing.**

The Task Force found quite a few license applications that state:

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

Sometimes, but not often, this requirement has been mandated by the Legislature. Some examples are as follows:

• Private investigator, private security and repossession services
• Notary Public
• Labor union business agent license
• Horseracing or dog racing permit or jai alai fronton permit holders and employees
• Permit for ether distribution or manufacture

In other instances, the Legislature has given state agencies and licensing boards the authority and discretion to impose this requirement, and the agencies or boards have chosen to impose it. Some examples are as follows:

☐ Dept of Health
☐ Dept. of Agriculture
Registered Nurse
Pest control operators
Licensed practical Nurse

Vehicles

Certified Nursing Assistant

Dealers of motor vehicles, mobile homes, recreational vehicles

In still other instances, agencies, without legislative authority, impose the restoration of rights requirement on certain occupations.

□ DBPR
  ■ Construction, electrical and asbestos abatement contractor licenses
  ■ Auctioneer

□ Department of Highway Safety & MV
  ■ Wrecker Operators

□ Dept. of Financial Services
  ■ Licensure for mortgage broker
  ■ Mortgage broker business Mortgage lender
  ■ Correspondent mortgage lender
  ■ Title loan lender
  ■ Motor vehicle retail installment seller
  ■ Retailer installment seller
  ■ Sales finance company
  ■ Home improvement finance seller
  ■ Consumer finance
  ■ Fire Equipment and Protection System Contractors
  ■ Explosives License

The requirement that civil rights be restored poses a significant barrier to employment, in part because of the difficulty in securing restoration. The Parole Commission provided data to the Task Force on the disposition of restoration of rights cases over the last five years:

Restoration of rights (FY ’01 – ’06):
  • 324,855 cases processed

5 Despite recent court rulings requiring the boards’ rescission of this policy, the applications for licensure, as of 1/16/07, “If you have been convicted of a felony, you must submit proof of reinstatement of civil rights”. See, e.g., Yeoman v. Construction Industry Licensing Board, State of Florida Department of Business and Professional Regulation, 919 So. 2d 542 (Fla. 1st DCA 2005); Vetter v. Department of Business and Professional Regulation, Electrical Contractors Licensing Board, 920 So. 2d 44 (Fla. 1st DCA 2005); Daniel Scherer v. Department of Business and Professional, Etc., 919 So. 2d 662 (Fla. 5th DCA 2006).

6 In this case, Board minutes, e.g., 3/9/04, indicate civil rights restoration is required.
• Of those, 65,472 people (20%) granted restoration of civil rights.
• 13,284 who were required to seek a Clemency Board hearing and did so.
• Of those, 1,519 people (11.4%) were granted restoration.

Proven less restrictive approaches

The Background Check Act, Chapter 435, F.S.:

- Lists disqualifying offenses relevant to care of vulnerable populations;
- 2 levels of screening; (Level 1 – fewer offenses, FDLE check only; Level 2 – More offenses, FDLE and FBI check);
- After 3 years have passed since the disqualifying offense, allows a disqualified person to seek an exemption based on rehabilitation; and
- Authorizes appeals of denials of exemptions.

Examples of Chapter 435 Implementation:
- Employees of DJJ and their providers’ staff
- School personnel
- Direct care workers at health care facilities
- Child care workers

However, agencies do not always use the Background Check Act, even when the occupation involves the vulnerable populations that the Act seeks to protect, especially for licensing of professions.

Thus while policies and licensing applications for some health care occupations use Level One or Level Two background checks under the Act, and allow applications for exemption from disqualification, others require restoration of civil rights; still others are subject to case-by-case reviews without requiring restoration; and some are not subject to any state-created restrictions because the neither the jobs nor the facilities are licensed.

<table>
<thead>
<tr>
<th>Restoration of Rights</th>
<th>“Case by case” Review + Evidence of Rehab</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registered Nurse, LPN, CNA</td>
<td>Physicians Assistant</td>
</tr>
<tr>
<td>Dental Hygienists</td>
<td>Midwifery</td>
</tr>
<tr>
<td>Optician</td>
<td>Optometrist</td>
</tr>
<tr>
<td>Mental Health Counselors and Clinical Social Workers</td>
<td>Psychologist; School Psychologist</td>
</tr>
<tr>
<td>Physical and Occupational Therapists &amp; Assistants</td>
<td>Speech Language Pathologists &amp; Audiologists</td>
</tr>
<tr>
<td>Hearing Aid Specialists</td>
<td>Acupuncturist</td>
</tr>
<tr>
<td>Orthotist &amp; Prosthetist</td>
<td>Massage Therapists</td>
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<tr>
<td>Electrologist</td>
<td>Respiratory Therapist</td>
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<tr>
<td></td>
<td>Anesthesiologist Assistants</td>
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<tr>
<td></td>
<td>Ch. 435 Background Check</td>
</tr>
<tr>
<td></td>
<td>Unrestricted</td>
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</tbody>
</table>
Widely varying restrictions for similar occupations.

Other occupational groups have varying approaches similar to those in the health care field. For example, law enforcement and security-related positions are also subject to very different requirements.

<table>
<thead>
<tr>
<th>Widely varying restrictions for similar occupations.</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Barred for any felony unless civil rights are restored</strong></td>
<td><strong>Barred for life, but only if convicted of perjury or false statements</strong></td>
</tr>
<tr>
<td>Private investigator, private security and repossession services</td>
<td>Law enforcement, probation, and correctional officers &amp; bailiffs</td>
</tr>
<tr>
<td>Alarm system contractor</td>
<td></td>
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<tr>
<td>Lawyers &amp; therefore judges, etc.</td>
<td></td>
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</tbody>
</table>

Financial and brokerage services occupations have equally diverse restrictions:

<table>
<thead>
<tr>
<th>Financial and brokerage services occupations have equally diverse restrictions:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Restoration of rights - by rule</strong></td>
<td><strong>Barred for life for any felony - by law</strong></td>
</tr>
<tr>
<td>Licensure for mortgage broker</td>
<td>Bail bond agents and employees</td>
</tr>
<tr>
<td>Mortgage broker business Mortgage lender</td>
<td></td>
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<tr>
<td>Correspondent mortgage lender</td>
<td></td>
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<tr>
<td>Title loan lender</td>
<td></td>
</tr>
<tr>
<td>Motor vehicle retail installment seller</td>
<td><strong>Time-Limited</strong></td>
</tr>
<tr>
<td>Retailer installment seller</td>
<td>Telemarketers – by rule</td>
</tr>
<tr>
<td>Sales finance company</td>
<td>Pawnshop dealers - law</td>
</tr>
<tr>
<td>Home improvement finance seller</td>
<td><strong>May deny for financial crimes – by law</strong></td>
</tr>
<tr>
<td>Consumer finance</td>
<td>Real Estate</td>
</tr>
<tr>
<td><strong>Good Moral Character – by law</strong></td>
<td></td>
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<tr>
<td>Certified Public Accountants</td>
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</tbody>
</table>

Other Less Restrictive Approaches.

Time-limited restrictions.

The Legislature listed offenses that may disqualify a person from being a telemarketer. Administered by the Dept. of Agriculture and Consumer Services, the agency put *time limits* on the disqualifications:
Must complete sentence and supervision if convicted of listed crime, then, disqualification lifted after:

- **5 years** for racketeering, fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property, or any other crime involving moral turpitude.
- **7 years** for felony racketeering, etc.– above.
- **10 years** for a capital offense.

Other time-limited restrictions – by law.

**These restrictions apply to any felony:**

- Beverage law licenses – 15 years
- People who serve or sell liquor (e.g., hotels, restaurants, bars, convenience stores) – 5 years
- Florida Lottery employees, vendors and retailers – 10 years (Can be lifted with restoration of civil rights)
- Boxing-related jobs – 10 years

**These restrictions apply only to some felonies – by law:**

- Electrical or Alarm System Employee – 3 years
- Lodging and Restaurant Licenses – 5 years
- Seaport employment – 7 years
- Pawnshop Dealers – 10 years

**Restrictions based on “Good Moral Character” or acts or crimes of “Moral Turpitude.”**

Often, Florida laws state, in addition to other restrictions, that one must have “good moral character” or not have committed crimes of “moral turpitude.”

**What is “good moral character?”**

- Not defined by statute.
- Up to agencies and courts to determine case-by-case.
- Florida courts’ attempts to define:
  - “Not only the ability to distinguish between right and wrong, but the character to observe the difference; the observance of the rules of right conduct, and conduct which indicates and establishes the qualities generally acceptable to the populace for positions of trust and confidence.”
“Lack of good moral character requires an inclusion of acts and conduct which would cause a reasonable man to have substantial doubts about an individual’s honesty, fairness, and respect for the rights of others and for the laws of the state and nation.”

Prior criminal act is not proof of lack of good moral character but one factor to be considered.

Factors considered:

- Circumstances surrounding the criminal offense;
- Time elapsed since the commission of the crime;
- Nexus between the offense and the occupation sought.
- History of the applicant since the criminal offense.
- Disclosure of details of past offense(s) to character witnesses.

Can a lack of “good moral character” be used to deny a license when the crime is not disqualifying?

Not according to the Attorney General. The Florida employment law (112.011, F.S.) says that once one’s civil rights have been restored, the person can only be denied a license when the crime is “related to” the licensed occupation.

Therefore, “licensing agencies may not disqualify such an applicant due to a lack of moral character and base such disqualification solely upon such prior conviction. To decide otherwise would allow licensing authorities to do indirectly what they are clearly prohibited by the statute, Ch. 73-109, from doing directly.” 1973 Op. Atty Gen. Fla. 596.

What Is Moral Turpitude?

It is not defined in Florida laws and crimes of moral turpitude are not listed, but 66 Florida employment-related laws create restrictions or penalties based on acts or crimes of moral turpitude.

“Moral turpitude’ is an elusive, vague and troublesome concept in the law, incapable of precise definition; such is evidenced by the myriad of definitions and interpretations in judicial opinions.” Wilson, The Definitional Problems with “Moral Turpitude,” 16 J. Legal Prof. 261 (1991).

“Time has only confirmed Justice Jackson’s powerful dissent in the De George case, in which he called “moral turpitude” an “undefined and undefinable standard.” 341 U.S. at 235. The term may well have outlived its usefulness.” Mei v. United States, 393 F.3d 737, 741 (7th Cir. 2005).
Still many have tried to define it:

“Moral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved.” Omagah v. Ashcroft, 288 F. 3d 254, 259 (CA5 2002)

“Unless the offense is one which its very commission implies a base and depraved nature, the question of moral turpitude depends not only on the nature of the offense, but also on the attendant circumstances; the standard is public sentiment, which changes as the moral opinions of the public change.” Opinion of the Florida Attorney General, AGO 75-201.

**What crimes involve moral turpitude?**

Examples of crimes of moral turpitude per Florida courts:
- Sale by a physician of fraudulent licenses and diplomas
- Bookmaking (gambling),
- Manslaughter by culpable negligence
- Aggravated battery
- Aggravated sexual abuse
- Embezzlement

**Not** moral turpitude per Florida courts:
- Issuing a worthless check without the intent to defraud
- Possession of a controlled substance,
- Misdemeanor battery
- Criminal mischief
- Possession of lottery tickets
- Setting off a smoke bomb as part of a political protest

**Crimes “related to” an occupation.**

Quite a number of occupations have restrictions that prohibit employment if the person has been convicted of a crime “related to” that occupation. Typically, the related crimes are not enumerated. Some of the occupations with statutory restrictions of this nature are architecture, funeral directing, and fire protection equipment dealers.

These restrictions are, like those requiring no convictions of crimes evincing a lack of good moral character or crimes of moral turpitude, give the potential applicant little notice of what is and is not a bar to employment.
Appendix C:  
Model Executive Order Requiring an Inventory of Employment Restrictions

WHEREAS, the [State of ] is committed to facilitating the successful reentry of people coming home from jails and prisons into our communities, to reducing the incidence of recidivism and to a policy of equal and open employment opportunity; and

WHEREAS, gainful employment after release from jail or prison is one of the critical elements necessary to achieve successful reentry and has been shown to reduce recidivism and, thus, to make our communities safer; and

WHEREAS, many state laws and policies impose restrictions on the employment of people who have been to jail or prison or otherwise have criminal history records, affecting jobs in both the public and private sector, including jobs in government; in state-licensed, regulated and funded facilities; jobs pursuant to state contracts; and jobs requiring state licensure and certification; and

WHEREAS, no comprehensive review of these restrictions has been undertaken to evaluate whether the restrictions are related to the safety, trust and responsibility required of the job or to determine whether a less restrictive approach could protect the public while preserving employment opportunities; and

WHEREAS, the State’s executive agencies can assume a leadership role in providing employment opportunities to people with criminal records by reviewing their employment policies and practices and identifying barriers to employment that can safely be removed to enable people with criminal records to demonstrate their suitability for the job or occupation and, where relevant, their rehabilitation;

NOW THEREFORE, I, [____], as Governor of the [State / Commonwealth of ____], by virtue of the authority vested in me by the Constitution and Laws of the [State / Commonwealth of ____], do hereby promulgate the following Executive Order, effective immediately:

Section 1. Definitions.

A. “Applicant” means a person, including a corporate entity, that is seeking employment, certification or licensure, and includes persons who have already obtained employment, certification or licensure.

B. “Restriction” means any policy or practice, regardless of the source of authority authorizing it, if any, and regardless of whether it is mandatory or discretionary, in which a criminal record, whether disclosed by the applicant or
through a background check, is taken into consideration for purposes of employment, certification or licensure.

C. “Disqualifying offenses” are those offenses that are considered by the decision-maker to be either mandatorily disqualifying or potentially disqualifying.

Section 2. Agency Reporting on Terms of Employment Restrictions.

A. Each executive agency\(^7\) shall produce a report that describes the restrictions for each occupation under the agency’s jurisdiction and that of its boards, if any, including, but not limited to, (a) employment within the agency; (b) employment in places or facilities licensed, regulated, supervised, or funded by the agency; (c) employment pursuant to contracts with the agency; and (d) employment in occupations that the agency licenses or provides certifications to practice.

B. For each occupation subject to a restriction, the agency shall set forth the following, both for applicants for employment and licensure and governing the termination and suspension of current employees and the suspension and revocation of active licenses:

1. The job title, occupation or job classification;
2. The legal source of the restriction (the statutory, regulatory, policy and/or practice) and the substance and terms of the restriction;
3. Whether the restriction is mandatory or discretionary by law, by rule and by policy;
4. A list of the disqualifying offenses, if any, by statute, rule and policy;
5. The time limits on the disqualifying offenses, if any, and the point in time when the time limits begin (e.g., date of conviction, release from incarceration, termination of probation / parole) by statute, rule and policy;
6. Each type of criminal disposition that is considered, e.g., arrests, pleas of \textit{nolo contendere}, and convictions; by statute, rule and policy;
7. Such other criteria as used to apply the restriction, including evidence of rehabilitation, if it considered; by statute, rule and policy;
8. The year the restriction was adopted and the rationale for its adoption;

\(^7\) This order will not apply to state entities that administer employment restrictions over which the governor has no jurisdiction, including, e.g., the offices of other statewide elected officials, the state attorney general and the courts. Section 8 “encourages” them to undertake inventories as well, but the independent reviewing entity, appointed in Section 5, should seek their cooperation as well.
9. If the disqualifying offenses are not specified in the law or rules, and the restriction is based on offenses characterized as “related to” the practice of a given profession, crimes of “moral turpitude” or evincing a lack of “good moral character,” in addition to the information required under paragraphs 2 through 8 of this section; the definitions adopted to interpret such terms and the criteria the agency has adopted or uses to apply the restriction to individual cases.

10. If the restriction is not based on a particular occupation, but on a place or facility of employment, the job titles that are believed to be affected by the restriction. Indicate, for each such job title, whether it is otherwise or elsewhere regulated by the state. For each such restricted place or facility, set forth each of the items required under paragraph 2 – 8 of this section;

11. The exemption, waiver and review mechanisms available to seek relief from the restriction, if any, based on a showing of error in the criminal history record, rehabilitation, relevance of the offense to the occupation, or otherwise, including the source of authority for the relief; the terms of the exemption, waiver or review; the process and criteria used to determine eligibility for such relief; the nature of the relief it affords; and whether an administrative and judicial appeal is authorized if the relief is denied.

12. The agency shall also provide, for each occupation subject a restriction, copies of the materials developed by the agency to review criminal histories in connection with an application, including but not limited to, the application, the instructions to the applicant, policy guidance, policy memos, scoring sheets and form letters used to determine and review the restriction, and to provide for exemptions and appeals of disqualification.

C. Data to be provided by the agencies. For each occupation under the jurisdiction of the agency for which there are employment disqualifications based on criminal records, the agency shall provide, for the previous two-year period:

1. The total number of people in currently employed in the occupation whose employment or licensure required criminal history disclosure, background checks or restrictions.
2. The number and percentage of individuals who underwent a criminal history background check.
3. The number who were only required to disclose their criminal history without a criminal history background check.
4. The number and percentage found disqualified based on criminal history background checks.
5. The number and percentage found disqualified based on criminal history disclosure by the applicant.

6. The number of employees and licenses disqualified, revoked, dismissed and terminated based on criminal convictions (including guilty pleas, pleas of nolo contendere).

7. The number of employees and licenses disqualified, revoked, dismissed and terminated based on arrests or indictments not leading to conviction (including charges dropped, dismissals, acquittals, reversal on appeal).

8. The number of employees and licenses disqualified, revoked, dismissed and terminated and percentage of those who sought waivers or exemptions from the disqualification.

9. The number and percentage of those who sought exemptions or waivers who were granted waivers or exemptions at the first level of agency review (if multiple levels of review are available).

10. The number and percentage of those who sought exemptions or waivers who were granted waivers or exemptions at the next level of agency (if multiple levels of review are available) or if there is only one level of agency review.

11. The number and percentage of those who were denied waivers or exemptions at the final level of agency determination, and then sought review through an administrative appeal.

12. The number and percentage of those who were denied waivers or exemptions at the final level of agency determination, and then sought review through an administrative appeal and were then found qualified after such a review.

13. The number and percentage of those found disqualified where no waiver or exemption process is available.

14. The number and percentage of those found disqualified where no waiver or exemption process is available and who sought administrative review and were then found qualified.

15. The number and percentage of those found disqualified (at any level of review, and whether exemptions or waiver were available or not) who sought review by the courts and were (a) found qualified, and (b) the number and percentage then found disqualified at the final stage of the legal proceedings.

D. Agencies shall cooperate with the [reporting entity] appointed under Section 5 of this order in providing further information and in clarifying their responses to this order and are strongly encouraged to work with the [reporting entity] to adopt such policy reforms and changes as will achieve the goals of this Order. Agencies shall report to the [reporting entity] their reform efforts including eliminated or modified employment restrictions, draft legislation for a case-by-case exemption or review mechanism, and modified criteria and procedures used in relation employment restrictions.

Section 3. Criminal history data.
A. The [state criminal history repository] shall provide to the [reporting entity] the following data:

1. The total number of persons in the criminal history database.
2. The number of individuals with criminal convictions identified as either a felony or misdemeanors.
3. The number of individuals with felony convictions, including people with both felony and misdemeanor convictions.
4. The number of individuals with misdemeanor convictions and no felony convictions.
5. The number of individuals with convictions for an unknown charge level only; i.e., those that cannot be identified as felonies or misdemeanors.
6. The number of individuals with a disposition other than conviction, including the number with no disposition reflected in the criminal history file, the number with a mixture of unknown levels and misdemeanor convictions, the number with the adjudication withheld, the number acquitted, the number reversed on appeal, the number expunged, the number sealed, and the number pardoned.

B. The [state criminal history repository] shall also report on when the database began to be developed, how and whether it removes the names of the deceased, and how accurately the database represents the number of people living in the state with criminal history records.

Section 4. Information and data on relief mechanisms.

A. Each of the following entities are [charged with / encouraged to] cooperate with the [reporting entity] and report on mechanisms of relief they administer and provide data from the previous two year period on the use and impact of current relief mechanisms, including but not limited to [expungement of records, sealing of records, pardons, certificates of relief from disabilities, certificates of good conduct], and excluding such relief mechanisms as are administered by the entity responsible for administering the restrictions:

[office of court administration, bureau of pardons]

B. The data shall include, for each mechanism of relief, the nature of the relief afforded, the legal authority for the relief, the number of applicants reviewed and for which a determination was made, the number of applications currently pending, the number of applications acted upon favorably.

Section 5. Coordination, review and reporting.

A. [Governor’s counsel, chairman or staff of the reentry task force, workforce or criminal justice commissioner8] is hereby appointed to develop

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8 It is critical to appoint a person to coordinate and manage the agencies’ responses. This person must have an understanding of what is expected under the Order and what is required of the agencies.
instructions and a template for the agencies to use in providing their responses, to coordinate the receipt of the agencies’ responses and to answer agencies’ questions about their duties under this Order.

A. The reporting entity, e.g., bar association or governor’s reentry task force, is appointed and charged with receiving and reviewing the agencies’ responses to this Order, following up with the agencies for additional information and clarification of the responses, securing information and data on restrictions administered by officials and agencies not covered by this Order, reporting on the responses, working with the agencies to develop reform recommendations and making reform recommendations.

B. The report shall include, but not be limited to:

1. A summary of the data provided by the agencies under Section 2 on the application of the restrictions.
2. The number and percentage of jobs in the state that are affected by the restrictions.
3. The number of people in the state with criminal records, broken down as to type of record.
4. Data on the impact of relief mechanisms.
5. Restrictions on high-demand occupations.
6. The range of approaches in restricting employment.
7. The range of severity of the restrictions.
8. The variations in treatment among similar occupations or occupations that require equivalent types of trust and responsibility.
9. Restrictions that have been created by the legislature versus those created by agencies.
10. Comparison of restrictions across jurisdictional lines, e.g., state versus federal, for similar jobs.
11. Examples of existing restrictions that comport with “best practices” models.

Section 6. [state workforce agency]

A. The [state workforce agency] is charged with working with the [reporting entity] to develop data that determines how many job in the state’s economy are affected by employment restrictions.

B. After the [reporting entity] has completed its review of the state’s restrictions, the [state workforce agency] shall:

1. Compile all such restrictions on pages of its website. The information on restricted occupations and places of employment shall be organized by industry.

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9 The reporting entity should be independent of the responding agencies.
sectors and shall link to governing laws and rules and to relevant state-created policies, applications and instructions; shall note related relief mechanisms and appeal rights; and shall include information on and links to the state’s generic relief mechanisms that are separate from the restrictions. The compilation shall also include, where possible, the types of jobs within such sectors that are not subject to state-created restrictions or private sector restrictions, which may be based on a survey of employers; and

2. Develop a handbook directed toward job seekers with criminal records that illuminates, by industry sector, the nature of the restrictions, mechanisms of relief (both tied to specific occupational restrictions and generic), as well as unrestricted occupations and places of employment.

Section 7. Time Frames for Provision of Information.

All information and reports required under Sections 2, 3, 4 and 6 (A) of this Order shall be provided to the Executive Office of the Governor and to the [reporting entity] no later than 90 days from the issuance of this Order. The report and recommendations under Section 5 shall be provided to the Executive Office of the Governor within 120 days thereafter.

Section 8. Other State Agencies and Private Sector.

I strongly encourage all other state officers, agencies, counties, municipalities and political subdivisions of the State to likewise conduct an inventory of employment restrictions as described herein, to eliminate or modify such disqualifications that are not tailored to protect the public safety, and to create case-by-case review mechanisms to provide individuals the opportunity to make a showing of their rehabilitation and their qualifications for employment. I encourage private employers, to the extent they are able, to take similar actions to review their own employment policies and provide employment opportunities to individuals with criminal records.

IN TESTIMONY WHEREOF, I have hereunto set my hand and have caused the Great Seal of the State of [ ] to be affixed at [ ], this [ ] of [ ] , 200[ ].

GOVERNOR

ATTEST:

SECRETARY OF STATE
CONTACTS: For further information . . . 

The author of this guide, Linda Mills, working as a consultant to the Annie. E. Casey Foundation, drafted the Florida executive orders and reports for the Governor’s Ex-Offender Task Force and supervised the work of Florida’s employment restrictions inventory. She can be reached at: LMillsEsq@comcast.net or by calling 773-832-9952.

The website of the American Bar Association’s Commission on Effective Criminal Sanctions has a wealth of relevant information and links to many of the reports and documents cited herein.  http://www.abanet.org/dch/committee.cfm?com=CR209800


The Council of State Government’s Reentry Policy Council has produced a 600+ page report of recommendations to make reentry from prison to the community more successful and continues to support and track promising reentry strategies.  http://www.reentrypolicy.org/reentry

The National Employment Law Project has a Second Chance Labor Project that tracks and advocates for reforms that provide employment opportunities for people with criminal records.  http://www.nelp.org/nwp/second_chance_labor_project/index.cfm

Inventorizing employment restrictions may take place through a governor’s reentry task force or council. The National Governor’s Association works to support such task forces and their planning and reform efforts, http://www.nga.org/portal/site/nga/menuitem.1f41d49be2d3d3ecdceeb501010a0/?vgnextoid=6c239286d9de1010VgnVCM1000001a01010aRCRD


Reentry Net, a project of The Bronx Defenders and Pro Bono Net, is a collaborative education and resource center for people that advocate for people with criminal records, http://www.reentry.net/


The Sentencing Project’s website has the catalogue of relief from collateral sanctions written by Margaret Colgate Love, http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486
Endnotes

1 “Finding and maintaining a job is a critical dimension of successful prisoner reentry. Research has shown that employment is associated with lower rates of reoffending, and higher wages are associated with lower rates of criminal activity. However, former prisoners face tremendous challenges in finding and maintaining legitimate job opportunities…” Baer, et al. Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute’s Prisoner Reentry Portfolio, Urban Institute, January 2006, citing, Jared Bernstein and Ellen Houston, Crime and Work: What We Can Learn from the Low-wage Labor Market (Washington, DC: Economic Policy Institute, 2000); Bruce Western and Becky Petit, “Incarceration and Racial Inequality in Men’s Employment,” Industrial and Labor Relations Review 54, no.3 (2000): 3–16. A Canadian study found that “Offenders who were employed were convicted of less than half the convictions (22.2% versus 42.9%) and one quarter of the new violent convictions (5.6% versus 20.6%) of offenders who did not obtain employment in the first six months of release.” Gillis, et al., Prison Work Program (CORCAN) Participation: Post-Release Employment And Recidivism, Research Branch, Correctional Service Canada, March 1998.


5 Kurlychek, supra at 1103.


8 This percentage may be imprecise; some people have records in more than one state but some people with records are not in these databases because not all states have brought them up-to-date or included all criminal histories. However, the Attorney General’s Report on Criminal History Background Checks, June 2006, notes that: “In 2001, BJS estimated that
over 64 million people in the United States had a state rap sheet, or about 30 percent of the Nation’s adult population,” at 51.


11 For example, the application to be a Fish and Wildlife law enforcement officer in Florida states: “List any arrests, traffic citations, boating citations, wildlife citations, or any other similar violations for which you may have been cited. This includes any arrest regardless of the disposition of the case or whether the records of your arrest or case was sealed, expunged (Ch. 943.0585(4)(a) 1 F.S.) or otherwise stricken from the court record. Do not include parking tickets.”

12 The Attorney General’s Report on Criminal History Background Checks, June 2006, found that eleven states “have statutes explicitly prohibiting arrest record inquiries,” at 49; Alaska (ALASKA STAT. § 12.62.160(b)(8); Arkansas (ARK. CODE ANN. § 12-12-1009(c)); California (CAL. LAB. CODE § 432.7(a)); Illinois (775 ILL. COMP. STAT. 5/2-103(A)); Massachusetts (MASS. GEN.LAWS ch. 151B § 4(9)(I)); Michigan — but for misdemeanor offenses only (MICH COMP. LAWS § 37.2205a(1)); Mississippi — if the arrest is more than a year old (MISS. CODE ANN. § 45-27-12(1)); Nebraska — if the arrest is more than a year old (NEB. REV. STAT. § 29-3523(1)); New York (N.Y. EXEC. LAW § 296(16)); North Dakota (N.D. CENT.CODE § 12-60-16.6)); and Rhode Island (R.I. GEN. LAWS § 28-5-7(7)).

13 Inventories of employment restrictions (sometimes in connection with inventories of all forms of collateral sanctions) have been conducted, for instance, in Arizona, “Collateral Consequences of Criminal Conviction in Arizona,” The Law, Criminal Justice and Security Program, University of Arizona; Ohio, “Ohio Collateral Sanctions Project,” University of Toledo School of Law; Maryland, “A Report on Collateral Consequences of Criminal Convictions in Maryland,” The Re-Entry of Ex-Offenders Clinic University of Maryland School of Law; Pennsylvania Legal Limitations on the Employment of Ex-Offenders in Pennsylvania, Community Legal Services, Inc.


17 Id. at vii.

19 Preamble to Ch. 71-115, at 304, Laws of Fla., now Section 112.011, F.S.


21 See, e.g., Chicago Park District Act, 70 ILCS 1505/16a-5.


23 Pub. L. 107-295 (November 25, 2002) requires that a transportation security card for access to secure areas must issue unless the person has been convicted of a felony considered by the Secretary to cause the person to be a terrorism risk within the previous seven years since conviction or five years since release from custody for such a felony. This law also requires waivers and an appeal process:

   The Secretary shall prescribe regulations that establish a waiver process for issuing a transportation security card to an individual found to be otherwise ineligible for such a card under paragraph (1). In deciding to issue a card to such an individual, the Secretary shall —
   
   “(A) give consideration to the circumstances of any disqualifying act or offense, restitution made by the individual, Federal and State mitigation remedies, and other factors from which it may be concluded that the individual does not pose a terrorism risk warranting denial of the card;
   
   “(B) issue a waiver to an individual without regard to whether that individual would otherwise be disqualified if the individual’s employer establishes alternate security arrangements acceptable to the Secretary.
   
   “(3) The Secretary shall establish an appeals process under this section for individuals found to be ineligible for a transportation security card that includes notice and an opportunity for a hearing. 46 U.S.C. § 70105 (c).

The Department of Homeland Security Transportation Security Administration rules create a handful of permanently disqualifying offenses and the remainder are subject to the five / seven year time limits:

a) Permanent disqualifying criminal offenses. An applicant has a permanent disqualifying offense if convicted, or found not guilty by reason of insanity, in a civilian or military jurisdiction of any of the following felonies:

   (1) Espionage or conspiracy to commit espionage.
   
   (2) Sedition, or conspiracy to commit sedition.
(3) Treason, or conspiracy to commit treason.
(4) A federal crime of terrorism as defined in 18 U.S.C. 2332b(g), or comparable State law, or conspiracy to commit such crime.
(5) A crime involving a transportation security incident. A transportation security incident is a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area, as defined in 46 U.S.C. 70101. The term “economic disruption” does not include a work stoppage or other employee-related action not related to terrorism and resulting from an employer-employee dispute.
(6) Improper transportation of a hazardous material under 49 U.S.C. 5124, or a State law that is comparable.
(7) Unlawful possession, use, sale, distribution, manufacture, purchase, receipt, transfer, shipping, transporting, import, export, storage of, or dealing in an explosive or explosive device. An explosive or explosive device includes, but is not limited to, an explosive or explosive material as defined in 18 U.S.C. 232(5), 841(c) through 841(f), and 844(j); and a destructive device, as defined in 18 U.S.C. 921(a)(4) and 26 U.S.C. 5845(f).
(8) Murder.
(9) Making any threat, or maliciously conveying false information knowing the same to be false, concerning the deliverance, placement, or detonation of an explosive or other lethal device in or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility.
(10) Violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, et seq., or a comparable State law, where one of the predicate acts found by a jury or admitted by the defendant, consists of one of the crimes listed in paragraph (a) of this section.
(11) Attempt to commit the crimes in paragraphs (a)(1) through (a)(4).
(12) Conspiracy or attempt to commit the crimes in paragraphs (a)(5) through (a)(10).
(b) Interim disqualifying criminal offenses. (1) The felonies listed in paragraphs (b)(2) of this section are disqualifying, if either:
(i) the applicant was convicted, or found not guilty by reason of insanity, of the crime in a civilian or military jurisdiction, within seven years of the date of the application; or
(ii) the applicant was incarcerated for that crime and released from incarceration within five years of the date of the TWIC application.
(2) The interim disqualifying felonies are:
(i) Unlawful possession, use, sale, manufacture, purchase, distribution, receipt, transfer, shipping, transporting, delivery, import, export of, or dealing in a firearm or other weapon. A firearm or other weapon includes, but is not limited to, firearms as defined in 18 U.S.C. 921(a)(3) or 26 U.S.C. 5 845(a), or items contained on the U.S. Munitions Import List at 27 CFR 447.21.
(ii) Extortion.
(iii) Dishonesty, fraud, or misrepresentation, including identity fraud and money laundering where the money laundering is related to a crime described in paragraphs (a) or (b) of this section. Welfare fraud and passing bad checks do not constitute dishonesty, fraud, or misrepresentation for purposes of this paragraph.
(iv) Bribery.
(v) Smuggling.
(vi) Immigration violations.
(vii) Distribution of, possession with intent to distribute, or importation of a controlled substance.
(viii) Arson.
(ix) Kidnapping or hostage taking.
(x) Rape or aggravated sexual abuse.
(xi) Assault with intent to kill.
(xii) Robbery.
(xiii) Fraudulent entry into a seaport as described in 18 U.S.C. 1036, or a comparable State law.
(xiv) Violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, et seq., or a comparable State law, other than the violations listed in paragraph (a)(10) of this section.
(xv) Conspiracy or attempt to commit the crimes in this paragraph (b).

49 C.F.R. § 1572.103.

24 49 U.S.C. § 5103a(a); the same regulations governing maritime workers (fn 23), which were later adopted, first applied to HAZMAT truckers.


26 American Bar Association, Commission On Effective Criminal Sanctions, Criminal Justice Section, National Legal Aid And Defender Association, Report To The House Of Delegates, Adopted by The House Of Delegates, February 12, 2007


28 See fn’s 23 and 24.


30 Id. at 17-18.

31 The Lewin Group, “Ensuring a Qualified Long-Term Care Workforce: From Pre-Employment Screens to On-the-Job Monitoring DRAFT Final Report Submitted to: Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation, April 2006 at 28.

32 Email communication with the author from Cathy Cumpston, Bureau of Accreditation, Licensure and Certification, Illinois Department of Human Services, 5/9/07: Here are the statistics for DHS reviews of requests for waivers per the Healthcare Worker Background Check Act.
FY05: 43 granted; 2 denied
FY06: 36 granted; 4 denied
FY07 (to date): 42 granted; 4 denied
33 This is the view of Bernie Curran, the founder of the nationally renown Safer Foundation, which works to find employment opportunities for people coming out of prison; conversation with the author.

34 HAW. REV. STAT. § 378-2.5(a)-(b). The Hawaii statute contains a number of exceptions for instances where state or federal law imposes specific employment restrictions that must be honored.

35 The National Employment Law Project has compiled a list of such ordinances and policies with links to the relevant text.
http://www.nelp.org/nwp/second_chance_labor_project/citypolicies.cfm


38 N.Y. Correction Law § 752.

39 N.Y. Correction Law § 753.

40 N.Y. Correction Law § 753 (2).

41 Simonson, supra fn 37, at 300.

42 Id. at 304.

43 See Love, supra at fn 27.

44 Id.


48 15 U.S.C § 1681c(a).

49 28 C.F.R. § 20.21(b).

28 C.F.R 20.21(a).


**National overview**: "Re-Entry and Reintegration: The Road To Public Safety," Legal Action Center [this report illustrates some types of restrictions but does not inventory them]; **Maryland**: A Report on the Collateral Consequences of Criminal Convictions In Maryland, 2005, [illustrating four kinds of restrictions]; **Arizona**: Collateral Consequences of Criminal Conviction in Arizona, The Law, Criminal Justice and Security Program [inventories statutory and regulatory collateral consequences, organized by laws / rules chapters]; **Ohio**: Kimberly R. Mossony and Cara A. Roecker, Ohio Collateral Consequences Project [inventories statutory and regulatory collateral consequences, organized by laws / rules chapters]; **Pennsylvania**: Legal Limitations on the Employment off Ex-Offenders in Pennsylvania [inventories state statutory restrictions and some federal restrictions, organized by job title]; **New York**: New York State Occupational Licensing Survey [statutory restrictions organized by job title]; **Illinois**: A Review of the State of Illinois Professional and Occupational Licensure Policies As Related to Employment for Ex-Offenders [surveys the professions and occupations chapter of the state code].

**Second Chance Act Grant conditions / predicates.** For a state or locality to apply for grant funds, it must submit an application that contains:

- The endorsement of the chief executive officer of the jurisdiction (e.g., governor or mayor).
- Evidence of the creation of a Reentry Task Force made up of state or local leaders, agencies, service providers, nonprofit organizations, and stakeholders that pools resources, collects data and best practices information.
- Provision for 25% of project costs (waivable).
- Provision for assumption of program costs after the Federal funding is discontinued.
- A strategic reentry plan with an evidence-based methodology, a detailed implementation schedule, including 5-year performance outcomes, including reduced recidivism, increased employment, education and housing opportunities, reduction of supervision violations, increased child support, reduced drug and alcohol abuse.
- The collaborative role of government agencies, local government and nonprofits.
- A plan for the analysis of statutory, regulatory, rules-based, and practice-based hurdles to reintegration of offenders into the community.

Minnesota Laws, 2005 c 136 art 14 s 18; the chapter created is 609B, Minnesota Statutes.


58 49 U.S.C. § 5103a(a).


60 Id. at 9.


62 Email to the author from McGregor Smyth, Director of the Civil Action Project of the Bronx defenders, June 14, 2007.