Breaking Barriers:

How Occupational Licensing Reform Can Help Formerly Incarcerated Individuals Reenter the Workforce

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BIOS

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INTRODUCTION

Nationwide, states regulate a variety of professions, from barbering to interpreters to travel guides with occupational licensing. Under this labor market regulation, aspiring workers must receive a permission slip from the government to work in their chosen occupation. Advocates claim these regulations protect the public, but scholarly research finds that occupational licensing makes it harder for people to work without clearly achieving its stated goals[i] of protecting public health and safety.

Licensure increases the cost[ii] of goods and services and directly burdens those who seek upward economic mobility through meaningful employment by restricting entry into an occupation. Studies have shown that licensing barriers can even have the unintended consequence of increasing crime by making it harder for people to work. As some licensing laws also prohibit people with criminal records, including misdemeanors[1], from working in the occupation at all, licensing can also make it harder for formerly incarcerated individuals to reenter the workforce. Known as collateral consequence laws, these barriers can have pernicious effects on both employment and crime.

Today, thanks to the combined growth of occupational licensing and mass incarceration, thousands of West Virginians are effectively barred from pursuing a renewed sense of hope and prosperity. Seventy years ago, only 5%[iii] of workers required a license in the United States. Today, almost 22%[iv] of all U.S. workers, and 24% of West Virginians, need a license for their job. Meanwhile, the state incarceration rate is 731 per 100,000 people[v], (compared to 531 per 100,000 nationally) including jails, prisons, and juvenile justice facilities. The recidivism rate[vi] is 24%, with 42% of recidivism due to new criminal offenses and the rest from parole violations. Licensing laws that stop people from working – even if they have completed all the requirements and have turned their life around – can make it that much harder for people to make a fresh start. In this policy report, we outline the state of collateral consequences for occupational licensing in West Virginia and provide recommendations for further reform.

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[1] West Virginia's code language does not specify that only felony offenses can be considered. Language used stays at "conviction" with level unspecified. Outside of WV, for example, Vermont allows boards to deny licenses for misdemeanors and other crimes if the offense is "related" to the license sought.

Reforming Collateral Consequence Laws

Instead of protecting the public, higher licensing barriers can actually increase recidivism rates. Economist Steven Slivinski found that recidivism increased over 9%[i] in states with more burdensome licensing laws, while recidivism declined by 4% in states with lower licensing burdens. If state policymakers are concerned about preventing crime, they could increase workforce access by reducing or removing barriers to entry in licensed occupations. Collateral consequence laws that bar people with criminal records from working in licensed occupations can further exacerbate the issue.

Licensing barriers also impact workers of different ages and ethnic groups differently. Using data on licensing and certification status from the U.S. Current Population Survey, about 24% of workers in West Virginia need a license[i]. However, younger workers are less likely to have a license than older workers, potentially due to additional schooling or years of apprenticeship before they can work in a licensed occupation. Licensing can therefore delay their entry into the workforce and reduce their lifetime earnings potential. Even if they earn a license, West Virginia still licenses dozens of lower-income occupations[ii] which may not pay workers back for years of tuition and delayed earnings.

Figure 1. Percent of Licensed West Virginians, by Age Group
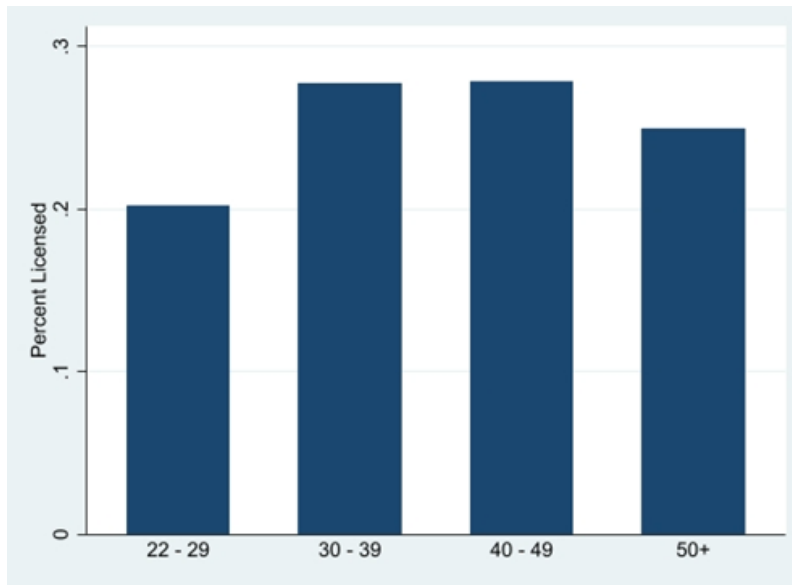
In addition, fewer Black workers in West Virginia are licensed compared to other ethnic groups, consistent with research findings from economists Peter Blair and Bobby Chung[i]. Removing or reducing licensing burdens could expand workforce opportunities across the board, but it could also expand economic opportunity even more for some West Virginians. Further reforms to the state's collateral consequence laws could similarly improve workforce access.

Figure 2. Percent of Licensed West Virginians, by Ethnic Group
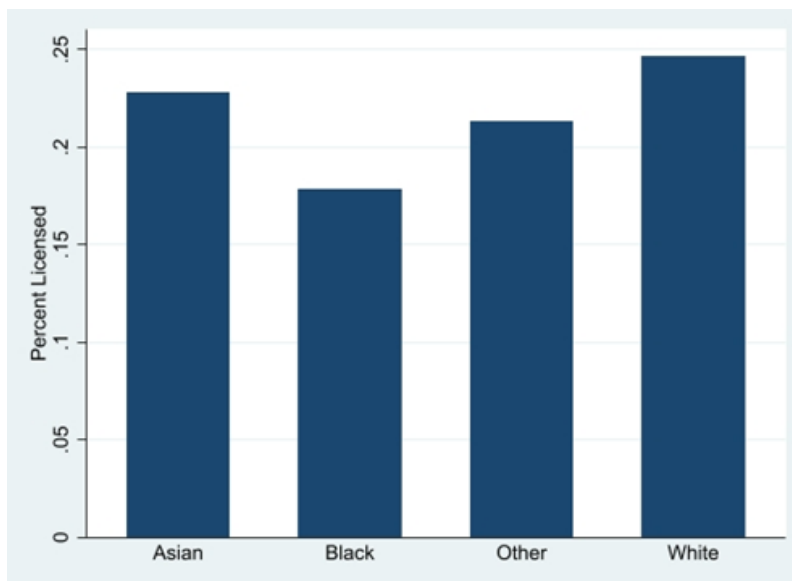
In recent decades, many states have begun reforming collateral consequences. Such laws applied to occupational licensing can take many forms, from bans of applicants with any criminal record to any licensed occupation to vague "good moral character" or "moral turpitude" requirements to due process restrictions. Reforms include removing these requirements and instead requiring that licensing boards only ban applicants whose criminal record is directly related to the occupation, providing more individualized reviews of applicants, imposing time limits for how long a criminal record can be considered relevant, and limiting the types of offenses that can disqualify an applicant from any licensed occupation.

More states are now removing "blanket bans" for occupational licensing, such that they ban licensing boards from automatically disqualifying licensing applicants based solely on an individual having any kind of criminal record. Reforms mean that licensing boards can no longer have a one-size-fits-all approach to considering applicants with criminal records. This is important because blanket bans are overly broad and sweeping. They do not account for the individual circumstances of each applicant's criminal record, including the nature of the offense, the severity of the offense, how long ago the offense occurred, and whether it was related to the occupation. Someone convicted of using marijuana 20 years ago, for example, could be banned from all licensed occupations in a state with strictly applied blanket bans. When states remove blanket bans, licensing boards can instead consider each applicant's qualifications and fitness for a particular profession on a case-by-case basis.

Another growing reform is the removal of good moral character or moral turpitude requirements. When states mandate good moral character requirements, licensing boards have enormous discretion in who gets a second chance to make a fresh start. Vague and discretionary, these requirements bar qualified applicants from working in occupations with no other consideration at play.

Reforms that ban licensing boards from denying applicants unless their criminal record is directly related to the occupation both protect the public and expand workforce opportunity. Instead of a "rational nexus" requirement which may allow extremely loose connections between a criminal record and an occupation, the "directly related" standard mandates that a criminal record cannot be used to bar applicants except in specific, warranted cases.

Overall, these reforms reduce the barriers that individuals with criminal records face when seeking employment in licensed professions. By providing a more individualized review of applicants, licensing boards can assess their qualifications and fitness for a particular occupation on a case-by-case basis. This can help ensure qualified individuals are not unfairly excluded from licensed professions while still protecting the public.

West Virginia's Reforms

West Virginia has enacted three collateral consequence reform laws, first in 2019 and then in 2020. Before 2019, West Virginia's only law related to the consideration of convictions in licensure was for a rule preventing licensing authorities from considering expunged convictions (W. Va Code § 5-1-16a(b)). However, under a new law, House Bill 118, enacted in 2019, a new, detailed set of regulations was imposed on all state boards of examination or registration specified under Chapter 30 of West Virginia Code. The new set of introduced code (W. Va. Code § 30-1-24) stipulates that boards cannot disqualify individuals based on their criminal convictions "unless that conviction is for a crime that bears a rational nexus to the occupation requiring licensure." (§30-1-24(a)).

The law also explicitly discourages use of the term moral turpitude unless the underlying crime meets the rational nexus standard (§ 30-1-24(b)). As such, standards to determine rational nexus consider factors such as the seriousness of the crime, the passage of time since the crime was committed, and evidence of rehabilitation. However, the law does not mandate the board to provide specific reasons for denial of licensure, but it does allow a candidate who has been denied to reapply after a five-year period, with some exceptions for violent and sexual crimes.

Additionally, the law allows individuals with criminal records who have not previously applied for a license to petition the relevant board for a determination whether the criminal record will disqualify the individual from obtaining licensure. The board is required to provide a determination within 60 days of receiving the petition and is allowed to charge a fee to recover costs for processing the petition.

In 2020, West Virginia enacted two more reforms: House Bill 4352 (2020) and House Bill 4353 (2020). HB 4352 extends the same stipulations laid out by HB 118 (2019) for certain licenses that can be issued by the State Fire Marshall. HB 4353 (2020) does the same for a number of other licensed occupations in West Virginia. The legislation, complementary to the law enacted in 2019, required occupational boards to more fairly decide whether to revoke someone's license based upon criminal history.

Evaluating West Virginia's reforms

In 2020, the Institute of Justice released [Barred from Working](), a comprehensive report which grades U.S. states on collateral consequences for occupational licensing[i]. According to the report, West Virginia's law succeeds by banning many boards from using vague standards like good moral character or moral turpitude to disqualify applicants, and by imposing a five-year time limit for considering old convictions.

The report also identifies areas for improvement in the state, including extending these protections to medical and security licenses and raising the standard for whether a crime is related to an occupation from the rational nexus standard to a directly related standard. West Virginia also still permits licensing boards to consider applicants' arrest records and post-conviction relief records, which could further restrict qualified applicants from licensure.

In addition, the Collateral Consequences Resources Center (CCRC) publishes the [Reintegration Report Card](), which grades states on their collateral consequence laws, including occupational licensing. The 2022 CCRC report commends the 2019 reform for clarifying that licensing boards cannot consider expunged convictions. The CCRC [Restoration of Rights Project]() also highlights the 2019 reform's rational nexus requirement and ban of moral turpitude requirements, even though West Virginia still ranks in the bottom 10 states for collateral consequence laws overall.

Comparisons with Other States

West Virginia ranks similarly to its neighboring states of Kentucky, Maryland, Ohio, Pennsylvania, and Virginia in both Barred from Working and the Reintegration Report Card. This suggests that improvements in West Virginia could potentially expand economic opportunities in both the state and region for workers and their families.

In *Barred from Working*, West Virginia earns a C+ grade, while Kentucky (C+), Maryland (D+), Pennsylvania (C), and Virginia (C) all earn similar grades. However, Ohio earns an A-grade and could provide a model for legislative reform in the Mountain State. West Virginia is graded particularly poorly on its exclusion criteria, such as no bans on considering arrest records, while it earns points for its rational nexus criteria and due process protections for applicants.

The *Reintegration Report Card* includes factors beyond collateral consequences for licensing but also provides grades for each component. West Virginia earns a B for its licensing laws, while Kentucky (B), Maryland (C), Pennsylvania (C), and Virginia (C) fare either the same or worse in comparison. Meanwhile, Ohio once again stands out from its neighbors with an A grade for its occupational licensing collateral consequence reforms.

The grades across the two independent reports indicate that there is still room for improvement in how the Mountain State handles licensing for ex-offenders. To that end, Indiana provides another potential template for reform. In 2018, the Indiana General Assembly passed legislation in House Bill 1245, which specifies that licensing or certifying entities may not use vague language such as good moral character or moral turpitude as a requirement or consider an arrest that does not result in a conviction. Additionally, the law grants applicants the right to petition the licensing entity for a determination if the applicant's criminal history will disqualify them from licensure for a nominal fee of $25.

In addition, the state requires licensing or certifying entities to publish a list of crimes that would disqualify an applicant from licensure and limits those disqualifying convictions to crimes that are specifically and directly related to the occupation. If the applicant does have a disqualifying conviction, the licensing or certifying entity must consider the nature and seriousness of the crime, time since criminal occurrence, relationship of the crime to the occupation, and evidence of rehabilitation, and present a clear and convincing case for licensing denial. Moreover, the time limit for a disqualifying conviction is capped at five years with the exceptions of violent or sexual crimes, or if the applicant is convicted again during that period.

Accompanying the licensing entities' requirements of a thorough review of circumstances is written notification of the decision. Within this notification, the entity is required to notify the applicant of the grounds and reasons for licensure denial or disqualification, the applicant's right to a hearing to challenge that decision, the earliest date the applicant may reapply for licensure, and that evidence of rehabilitation may be considered upon reapplication.

Next Steps

Comparatively, West Virginia's occupational licensure regime for former offenders has improved in recent years, but both Indiana and Ohio provide models for further reforms.

Extend ban on blanket bans to medical and security licenses

West Virginia has already banned blanket bans for most licensed occupations, but many medical and security occupations have been left out. Extending reforms to medical and security licenses could expand workforce access to medical fields with critical shortages, such as nursing, while still protecting the public through bans for applicants with criminal records that are directly related to the occupation and individualized assessments of an applicant's criminal record that include considerations of the nature and severity of the offense, the time elapsed since the offense, and the individual's rehabilitation efforts.

Similarly, for security licenses, blanket bans can prevent individuals with criminal records from obtaining licenses to work in security or law enforcement professions, potentially limiting the pool of qualified and diverse candidates for these important roles. Instead of blanket bans, security and law enforcement agencies could, again, use the directly related to the occupation standard and consider individualized assessments of an applicant's criminal record.

Overall, extending bans on blanket bans to medical and security licenses could promote fairness and equity in licensing while still ensuring public safety and protecting the integrity of these professions.

Raise relatedness test from "rational nexus" to "directly related"

When used for occupational licensing, the rational nexus standard is vague and provides licensing boards with vast discretion over an applicant. Instead, a standard requiring that the criminal record be directly related to the occupation in order for the applicant to be denied a license provides a clear test for whether an applicant's criminal record is disqualifying or not. West Virginia could also require licensing boards to publish a list of disqualifying crimes and clarify the burden of proof to be on licensing boards to demonstrate whether an applicant is unfit for the license, instead of the burden of proof being on the applicant.

Ban consideration of arrest records and post-conviction relief records

Licensing boards in West Virginia can still consider both arrest records and post-conviction relief records when considering an applicant. When arrests that did not lead to a conviction can still be used to ban someone from working in a licensed occupation, licensing boards have more power over an individual's life than the judicial system. Similarly, post-conviction relief records are designed to give people with criminal records a fresh start at employment. West Virginia could ban consideration of both arrest records and post-conviction relief records in order to expand workforce access to its citizens.

Overall, West Virginia has made promising steps but could further reform its collateral consequence laws and reduce licensing barriers to expand opportunities for all West Virginians. Such reforms could also increase workforce access, enable workers to earn an honest living, and expand economic opportunity in both the state and region.

NOTES

[i] Kleiner, Morris M., and Marie Koumenta, eds., Grease or Grit: International Case Studies of Occupational Licensing and Effects on Efficiency and Quality. (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2022).

[ii] Mitchell, Matthew D., Policy Spotlight: Occupational Licensing and the Poor and Disadvantaged. (Arlington, VA: Mercatus Center, 2017). https://www.mercatus.org/research/policy-briefs/policy-spotlight-occupational-licensing-and-poor-and-disadvantaged.

[iii] Brookings. "Occupational licensing and American workers." Accessed September 14, 2023. https://www.brookings.edu/articles/occupational-licensing-and-the-american-worker/.

[iv] U.S. Bureau of Labor Statistics. "Certification and licensing status of the civilian noninstitutional population 16 years and over by employment status, 2022 annual averages." Last modified January 25, 2023. https://www.bls.gov/cps/cpsaat49.htm

[v] Prison Policy Initiative. "West Virginia profile." Accessed September 16, 2023. https://www.prisonpolicy.org/profiles/WV.html#:~:text=West%20Virginia%20has%20an%20incarceration,in%20West%20Virginia%20and%20why.

[vi] WV Department of Homeland Security. "W.Va. re-offense rate remains low amid opioid crisis, COVID-19." Last modified October 23, 2020. https://dhs.wv.gov/News-Announcements/Pages/WV-re-offense-rate-remains-low-amid-opioid-crisis,-COVID-19.aspx

[vii] Slivinski, Stephen. Turning Shackles Into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform. (Tempe, AZ: Center for the Study of Economic Liberty at Arizona State University, 2016).

[viii] U.S Bureau of Labor Statistics. "Data on certifications and licenses." Last modified January 25, 2023. https://www.bls.gov/cps/certifications-and-licenses.htm

[ix] Institute for Justice. "West Virginia Occupational Licensing." Accessed September 19, 2023. https://ij.org/report/license-to-work-3/ltw-state-profile/west%20virginia/

[x] Blair, Peter Q, and Bobby W. Chung. "How Much of Barrier to Entry is Occupational Licensing?" British Journal of Industrial Relations 54, no. 4 (May 2019): 919-943. https://doi.org/10.1111/bjir.12470

[xi] Sibilla, Nick, Barred from Working: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders. (Arlington, VA: Institute for Justice, 2020).

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