

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

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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.
- 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 and have been rehabilitated 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 crimes 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, and jobs at seaports restrictions.

Even with so many occupation 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 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., bar tenders, 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 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.
- Good Moral Character and Crimes of Moral Turpitude restrictions.
- 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, 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 bar.

Lifetime bans.

One example of a lifetime ban is concerns 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 instance, 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

Registered Nurse

Licensed practical Nurse

Certified Nursing Assistant

□ Dept. of Agriculture

Pest control operators

□ Highway Safety and Motor Vehicles

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 licenses¹
- Auctioneer²

□ 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

¹ 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).

² In this case, Board minutes, e.g., 3/9/04, indicate civil rights restoration is required.

The requirement that civil rights be restored poses a significant barrier to employment, in part because of the difficulty in securing restoration. Per Parole Commission data provided to the Task Force:

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.

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.

Restoration of Rights Registered Nurse, LPN, CNA Dental Hygienists Optician Mental Health Counselors and Clinical Social Workers Physical and Occupational Therapists & Assistants Hearing Aid Specialists Orthotist & Prosthetist Electrologist	“Case by case” Review + Evidence of Rehab Physicians Assistant Midwifery Optometrist Psychologist; School Psychologist Speech Language Pathologists & Audiologists Acupuncturist Massage Therapists Respiratory Therapist Anesthesiologist Assistants
Ch. 435 Background Check Home Health Aid Unlicensed Nursing Home staff w/ patient contact Child Care Workers Substance Abuse Counselors Psychiatric Aids Owners, CEOs, CFOs of licensed health facilities Early Learning Staff School personnel and vendor employees DOH & DJJ staff	Unrestricted Dental Assistants in dentists’ offices Medical Assistants in doctors’ offices Optometric Assistant Pharmacy Technician Recreational Therapist

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.

Barred for any felony unless civil rights are restored Private investigator, private security and repossession services Alarm system contractor Lawyers & therefore judges, etc.	Barred for life, but <u>only</u> if convicted of perjury or false statements Law enforcement, probation, and correctional officers & bailiffs
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Financial and brokerage services occupations have equally diverse restrictions:

Restoration of rights - by rule 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	Barred for life for any felony- by law Bail bond agents and employees Time-Limited Telemarketers – by rule Pawnshop dealers - law <u>May</u> deny for financial crimes – by law Real Estate
<hr/> Good Moral Character – by law Certified Public Accountants	

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.