



## **Principles for Legislation Restricting Consideration of Criminal Conviction History**

Legislation at the state and federal level would restrict consideration of criminal conviction history by occupational licensing boards and, under some legislation, also by private certification organizations. The Professional Certification Coalition supports expanded opportunities for ex-offenders to earn a living, which advances the important goal of reducing recidivism. This is a worthy objective and an important next step in national efforts to reform the criminal justice system.

**This objective must be balanced against the need to protect the public and the ability of both state licensing boards and private certification organizations to consider relevant conduct for which individuals have been provided full due process.** Therefore, the PCC opposes legislative language that:

- *Restricts the right of private certification organizations to adopt or enforce ethics codes or eligibility requirements in which criminal conviction history is a factor, either by prohibiting consideration of a criminal conviction or by mandating the procedures used for disqualification of an individual with a criminal conviction, or*
- *Prevents licensing boards from requiring current professional certification as a condition of licensure or consistently enforcing such requirements, if the reason an individual does not hold current certification relates to a criminal conviction.*

The PCC's position is grounded on core legal principles, practical considerations, and policy views:

- *Private certification organizations and professional societies have a Constitutional right to establish and enforce ethics codes and codes of conduct for their credential-holders and members. The Supreme Court has held that it violates the First Amendment rights of private organizations for the government to “intru[de] into the internal structure or affairs of an association [through] a regulation that forces the group to accept members it does not desire,” unless the requirements of the law are supported by “compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>1</sup>*
- *Private certifications convey to the public that the credential-holder meets all of the eligibility, qualification, competence, and conduct requirements of that organization's standards and policies. Consumers, employers, and other members of the public legitimately rely on certification standards in selecting which professionals to entrust with their business. Unless the state government has decided that no individual without the private credential may hold a license to practice an occupation, private certifications are voluntary enhancements to an individual's credentials. Individuals are free to practice those professions without the private certification and are not entitled to the endorsement of the certification organization unless they meet that organization's standards and comply with that organization's rules.*
- *To protect the public from unacceptable risks, some criminal convictions permanently and automatically disqualify offenders from holding certain professional certifications, even if the conviction was for a non-violent charge or a number of years have elapsed since the conviction. For example, an organization that certifies individuals who work alone with children may appropriately withhold its professional “seal of approval” from an individual convicted of a crime of child exploitation (sexual abuse, child pornography, etc.). Likewise, an organization that certifies individuals*

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<sup>1</sup> *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

who are provided access to their clients' or employers' financial accounts may appropriately withhold its endorsement from an individual with a record of fraud or embezzlement. In such situations, the desire of ex-offenders to obtain a credential that would advance them in their preferred career does not outweigh the risk of significant and lasting harm to members of the public if the ex-offender engages in similar misconduct again. A contrary rule, prohibiting consideration of that individual's conviction record, would make certification organizations complicit in persuading individuals to place their trust in individuals who have previously violated that trust.

- *Conduct requirements for conforming with the high standards established for private professional certifications often overlap with legal requirements that carry criminal penalties.* Because a criminal conviction necessarily provides the defendant with substantial due process and carries a high burden of proof, private certification organizations should be able to rely on those factual determinations about an individual's conduct.
- *Private certification organizations lack both the legal authority and the resources to engage in a full-fledged independent investigation and fact-finding hearings about violations of ethics and conduct rules.* Unlike licensing boards or criminal and civil courts, private certification organizations cannot compel witnesses to testify or subpoena documents for their internal disciplinary or eligibility reviews. Moreover, most private certification organizations are nonprofit organizations; many operate with few employees and rely heavily on volunteers, including for disciplinary reviews. Requiring individualized review of the context and circumstances of every applicant's criminal conviction history, rather than automatic disqualification for certain convictions, would be an impossible requirement for those organizations to meet.
- *Restricting consideration of criminal convictions based on whether they are felonies or misdemeanors is unwarranted, because the underlying conduct may be the same.* Facts that support a felony charge may be pled down to a misdemeanor conviction, despite the gravity of the underlying conduct. Indeed, the vast majority of convictions are the result of plea bargains.<sup>2</sup> Moreover, the definitions of felonies and misdemeanors vary across jurisdictions; an offense that carries a nine-month sentence may be classed as a felony in one state and as a misdemeanor in another state.
- *Where private certification is a condition of licensure, that requirement reflects the considered judgment of the legislature or the licensure agency that the standards established by the recognized credentialing organization for the profession are necessary to protect the public.* There is no basis to treat ex-offenders more favorably than any other applicant who fails to hold a certification required under licensure laws.

**The PCC supports private certification organizations engaging in self-regulation and careful review of their eligibility standards, ethics codes, and enforcement procedures.** The PCC encourages certification organizations to target disciplinary rules at conduct that is demonstrably relevant to the individual's suitability to hold the credential. In addition, the PCC encourages adoption of enforcement procedures that, where appropriate, provide for individualized review of a certificant's circumstances before imposing disqualifying sanctions. Courts recognize that those holding private certifications have basic common law due process rights, so no legislation is needed to confer those rights on certificants. In addition, the standards for accreditation of private certification programs call for the programs to establish and publish policies for taking disciplinary actions, including allowing reconsideration or appeal of adverse certification decisions under procedures that are appropriate and that promote fairness to the applicant, candidate, or certificants.<sup>3</sup> Whether a certification program is accredited or not, the PCC supports adoption of these best practices.

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<sup>2</sup> See *Missouri v. Frye*, 566 U.S. 134 (2012) (noting that 94% of state convictions are the result of guilty pleas).

<sup>3</sup> See, e.g., the National Commission of Certifying Agency's *Standards for the Accreditation of Certification Programs*.