An Act To Enact the Maine Fair Chance Employment Act

Reference to the Committee on Labor, Commerce, Research and Economic Development suggested and ordered printed.

Presented by Representative TALBOT ROSS of Portland.
Cosponsored by Representative DeCHANT of Bath, Senator VOLK of Cumberland and Representatives: HICKMAN of Winthrop, HYMANSO of York, VACHON of Scarborough, WARREN of Hallowell, Senators: BELLOWS of Kennebec, CHIPMAN of Cumberland, DION of Cumberland, SAVIELLO of Franklin.
Be it enacted by the People of the State of Maine as follows:

PART A

Sec. A-1. 5 MRSA §5301, as amended by PL 2011, c. 286, Pt. O, §1 and PL 2015, c. 429, §23, is further amended to read:

§5301. Eligibility for occupational license, registration or permit

1. Effect of criminal history record information respecting certain convictions. Subject to subsection 2, this section and sections 5302 and 5303, in determining eligibility for the granting of any occupational license, registration or permit issued by the State, the appropriate State licensing agency may take into consideration criminal history record information from Maine or elsewhere relating to certain convictions which have not been set aside, dismissed, sealed or expunged or for which a full and free pardon has not been granted, but the existence of such information shall may not operate as an automatic bar to being licensed, registered or permitted to practice any profession, trade or occupation.

2. Criminal history record information that may be considered. A licensing agency may not inquire into or consider the criminal history of an applicant until after the applicant has been found to be otherwise qualified for the license, registration or permit. A licensing agency may use shall consider only the following in connection with an application for an occupational license, registration or permit criminal history record information pertaining to the following:

A. Convictions for which incarceration for less than one year may be imposed and which involve dishonesty or false statement;

B. Convictions for which incarceration for less than one year may be imposed and which directly relate to the profession, trade or occupation for which the license or permit is sought;

C. Convictions for which no incarceration can be imposed and which directly relate to the trade or occupation for which the license or permit is sought;

D. Convictions for which incarceration for one year or more may be imposed; or

E. Convictions for which incarceration for less than one year may be imposed and that involve sexual misconduct by an applicant for massage therapy licensure or a licensed massage therapist or an applicant or licensee of the Board of Licensure in Medicine, the Board of Osteopathic Licensure, the Board of Dental Practice, the State Board of Examiners of Psychologists, the State Board of Social Worker Licensure, the Board of Chiropractic Licensure, the State Board of Examiners in Physical Therapy, the State Board of Alcohol and Drug Counselors, the Board of Respiratory Care Practitioners, the Board of Counseling Professionals Licensure, the Board of Occupational Therapy Practice, the Board of Speech, Audiology and Hearing, the Radiologic Technology Board of Examiners, the Nursing Home Administrators Licensing Board, the Board of Licensure of Podiatric Medicine, the Board of Complementary Health Care Providers, the Maine Board of Pharmacy, the Board of...
Trustees of the Maine Criminal Justice Academy, the State Board of Nursing and the Emergency Medical Services' Board.

3. Criminal history record information directly related to the profession, trade or occupation. In determining pursuant to subsection 2 whether criminal history record information is directly related to the profession, trade or occupation for which the license, registration or permit is being sought, the licensing agency must consider the following factors:

A. Whether the conviction is directly related to the duties and responsibilities of that position or profession, trade or occupation;

B. Whether the position or profession, trade or occupation offers the opportunity for the same or a similar offense to occur;

C. Whether circumstances leading to the conduct for which the person was convicted will recur in the position or profession, trade or occupation; and

D. The length of time since the offense occurred.

4. Criminal convictions prohibited by statute. Notwithstanding subsection 2, a licensing agency may consider criminal convictions that are explicitly prohibited by statute for the license, registration or permit sought.

Sec. A-2. 5 MRSA §5302, as amended by PL 1989, c. 84, §2, is further amended to read:

§5302. Denial, suspension, revocation or other discipline of licensees because of criminal record

1. Reasons for denial or disciplinary action; process. Licensing agencies may refuse to grant or renew, or may suspend, revoke or take other disciplinary action against any occupational license, registration or permit based in whole or in part on the basis of the criminal history record information relating to convictions denominated in section 5301, subsection 2, but only if the licensing agency determines has complied with the notice requirements of this section and after the licensing agency has properly considered a timely appeal of its preliminary determination, if any, and has determined that the applicant, licensee, registrant or permit holder so convicted has not been sufficiently rehabilitated to warrant the public trust as described in subsection 3. The applicant, licensee, registrant or permit holder shall bear the burden of proof that there exists sufficient rehabilitation to warrant the public trust.

2. Preliminary determination. Before a licensing agency may make a final decision, the licensing agency shall explicitly state in writing the reasons for a decision which prohibits preliminary determination that the applicant, licensee, registrant or permit holder should be prohibited from practicing the profession, trade or occupation if that decision is based in whole or in part on conviction of any crime described in that may be considered pursuant to section 5301, subsection 2. The licensing agency shall issue a notice containing the written preliminary determination to the applicant, licensee, registrant or permit holder. The written notice required by this subsection must include the following information:
A. The criminal conviction or convictions that are the basis for the preliminary
denial;

B. A copy of the criminal history record information, if any;

C. Information about the applicant's, licensee's, registrant's or permit holder's right to
appeal the preliminary determination; and

D. Any examples of mitigation or rehabilitation evidence that the applicant, licensee,
registrant or permit holder may voluntarily provide.

3. Appeal of preliminary determination. An applicant, licensee, registrant or
permit holder may appeal a preliminary determination of a licensing agency made
pursuant to subsection 2 by challenging the accuracy of the criminal history record
information or by demonstrating that the applicant, licensee, registrant or permit holder is
sufficiently rehabilitated to warrant the public trust. An applicant, licensee, registrant or
permit holder may demonstrate sufficient rehabilitation to warrant the public trust by
providing the licensing agency:

A. Evidence demonstrating that at least one year has elapsed since the applicant's,
licensee's, registrant's or permit holder's release from any correctional institution
without criminal conviction or arrest; or

B. Any other information or evidence of mitigation or rehabilitation and present
fitness to practice the profession, trade or occupation for which the license,
registration or permit is being sought, including, but not limited to, letters of
reference.

If the applicant, licensee, registrant or permit holder demonstrates sufficient rehabilitation
to warrant the public trust, the licensing agency may not deny the applicant, licensee,
registrant or permit holder the license, registration or permit based in whole or in part on
the applicant's, licensee's, registrant's or permit holder's prior criminal conviction.

After receiving notice of the preliminary denial issued pursuant to subsection 2, the
applicant, licensee, registrant or permit holder must send or hand deliver the appeal
within 30 business days.

4. Final determination. If the licensing agency has made a final determination that
the applicant, licensee, registrant or permit holder should be prohibited from practicing
the profession, trade or occupation because the applicant, licensee, registrant or permit
holder has not been sufficiently rehabilitated to warrant the public trust as described in
subsection 3, the licensing agency must notify the applicant, licensee, registrant or permit
holder in writing of the following:

A. The final determination;

B. Information about the right to appeal pursuant to section 5304 the licensing
agency's decision;

C. A statement that the applicant, licensee, registrant or permit holder may be
eligible for a different license, registration or permit; and

D. The earliest date on which the applicant, licensee, registrant or permit holder may
reapply with the licensing agency, if applicable.
Sec. A-3. 5 MRSA §5303, as amended by PL 2007, c. 369, Pt. A, §2 and affected by Pt. C, §5 and amended by PL 2015, c. 429, §23, is further amended to read:

§5303. Time limit on consideration of prior criminal conviction

1. Three-year limits. Except as set forth in this subsection and subsection 2, the procedures outlined in sections 5301 and 5302 for the consideration of prior criminal conviction as an element of fitness to practice a licensed profession, trade or occupation shall require a license, registration or permit apply within 3 years of the applicant's or licensee's final discharge, if any, from the correctional system, registrant's or permit holder's criminal conviction. Beyond the 3-year period, ex-offender applicants or licensees, registrants or permit holders with no additional convictions are to be considered in the same manner as applicants or licensee's, registrants or permit holders possessing no prior criminal record for the purposes of licensing decisions. There is no time limitation for consideration of an applicant's or licensee's, registrant's or permit holder's conduct that gave rise to the criminal conviction if that conduct is otherwise a ground for disciplinary action against a licensee, registrant or permit holder.

2. Ten-year limits. For applicants to and licensees and registrants of the Board of Licensure in Medicine, the Board of Osteopathic Licensure, the Board of Dental Practice, the State Board of Examiners of Psychologists, the State Board of Social Worker Licensure, the State Board of Nursing, the Board of Chiropractic Licensure, the Board of Trustees of the Maine Criminal Justice Academy, the State Board of Examiners in Physical Therapy, the State Board of Alcohol and Drug Counselors, the Board of Respiratory Care Practitioners, the Board of Counseling Professionals Licensure, the Board of Occupational Therapy Practice, the Board on Speech-language Pathology, Audiology and Hearing Aid Dealing and Fitting, the Radiologic Technology Board of Examiners, the Nursing Home Administrators Licensing Board, the Board of Licensure of Podiatric Medicine, the Board of Complementary Health Care Providers, the Maine Board of Pharmacy, and the Emergency Medical Services' Board and applicants for massage therapy licensure or licensed massage therapists, the following apply:

A. The procedures outlined in sections 5301 and 5302 for the consideration of prior criminal conviction as an element of fitness to practice a licensed profession, trade or occupation apply within 10 years of the applicant's or licensee's final discharge, if any, from the correctional system.

B. Beyond the 10-year period, ex-offender applicants or licensees with no additional convictions must be considered in the same manner as applicants or licensees possessing no prior criminal record for the purposes of licensing decisions.

C. There is no time limitation for consideration of a registrant's, an applicant's or licensee's conduct that gave rise to the criminal conviction if that conduct is otherwise a ground for disciplinary action.

Sec. A-4. 5 MRSA §5305 is enacted to read:
§5305. Confidential

Criminal history record information, and any other information pertaining to an applicant's, licensee's, registrant's or permit holder's background check obtained in conjunction with a screening, in the possession of a licensing agency is confidential and may not be disclosed if the information is being requested for use in connection with any application for employment or a license, registration or permit.

Sec. A-5. 5 MRSA §5306 is enacted to read:

§5306. Application

The provisions of this chapter apply notwithstanding any provision of law to the contrary, except to the extent the provision of law contains additional limitations on the consideration of criminal history record information by licensing agencies.

PART B

Sec. B-1. 5 MRSA §4611, as amended by PL 2011, c. 613, §18 and affected by §29, is further amended to read:

§4611. Complaint

Any aggrieved person, or any employee of the commission, may file a complaint under oath with the commission stating the facts concerning the alleged discrimination, except that a complaint must be filed with the commission not more than 300 days after the alleged act of unlawful discrimination. In addition, any person may file a complaint pursuant to section 4632 or section 4635.

Sec. B-2. 5 MRSA §4635 is enacted to read:

§4635. Use of criminal history information

Any person aggrieved by an employer's or prospective employer's violation of section 4724, 4725 or 4726 may file a complaint with the commission. The commission shall investigate and review such complaints and shall keep a record of all complaints or other contact concerning reports of problems, concerns or suggestions regarding the implementation, compliance and impact of chapter 337-D. The commission shall also conduct periodic reviews with private employers to assess compliance with that chapter.

1. Civil action by commission. If the commission finds that a private employer has violated section 4725 or section 4726, the employer is subject to:

   A. For the first violation, a civil penalty not to exceed $1,000; and
   B. For each subsequent violation, a civil penalty not to exceed $2,000.

Penalties are collected by the commission in a civil action and must be paid to the Treasurer of State for deposit to the General Fund.

There is a rebuttable presumption that an employer has violated section 4725 or section 4726 if the employer does not maintain records in compliance with section 4728, or does
not allow the commission reasonable access to such records, absent clear and convincing
evidence that the employer has not violated section 4725 or 4726.

2. Compliance counseling. The commission shall provide counseling to a private
employer if it has found to be in violation of chapter 337-D to ensure future compliance
with that chapter.

Sec. B-3. 5 MRSA c. 337-D is enacted to read:

CHAPTER 337-D

MAINE FAIR CHANCE EMPLOYMENT ACT

§4721. Short title

This chapter may be known and cited as "the Maine Fair Chance Employment Act."

§4722. Declaration of policy

It is the declared public policy of the State to encourage the rehabilitation of criminal
offenders and to assist them in the resumption of the responsibilities of citizenship by
increasing opportunities for this population to secure employment and secure licensure in
order to engage in a meaningful and profitable occupation.

§4723. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms
have the following meanings.

1. Applicant. "Applicant" means any person requesting consideration or otherwise
under consideration for a position of employment by an employer or requesting
consideration of licensure from a licensing authority. "Applicant" includes any current
employee requesting consideration for another position of employment with the
employer.

2. Criminal history information. "Criminal history information" includes criminal
history record information as defined in Title 16, section 703, subsection 3 and other
information regarding the criminal history of an applicant, from whatever source.

3. Employer. "Employer" means any person, partnership, firm, association,
corporation, organization or other legal entity that is located in the State that employs one
or more individuals, acts directly or indirectly in the interest of an employer or that
proctors employees or opportunities for employment in exchange for compensation.
"Employer" includes the State and its political subdivisions.

4. License. "License" means any license, permit, certificate, registration or other
authorization required to engage in an occupation that is granted or issued by the State or
its political subdivisions.

5. Licensing authority. "Licensing authority" means the person, board, commission
or department of the State or its political subdivisions with authority to issue a license.

7. Occupation. "Occupation" means any occupation, trade, vocation, profession, business or employment of any kind for which a license is required to be issued by the State or its political subdivisions.

8. Political subdivision. "Political subdivision" has the same meaning as in Title 30-A, section 2252.

9. State. "State" means the State, or any office, department, agency, authority, commission, board, institution, hospital or other instrumentality of the State, including the Maine Turnpike Authority, the Maine Port Authority, the Northern New England Passenger Rail Authority, the Maine Community College System, the University of Maine System, the Maine Veterans' Homes, the Maine Public Employees Retirement System, the Maine Military Authority and all such other state entities.

§4724. Limitations on State use and disclosure of criminal history information

1. Prohibition. The State and its political subdivisions may not use the following criminal history information in connection with an application for employment:

   A. Information related to a deferred criminal adjudication, participation in a diversion program, an arrest not followed by a criminal conviction or an infraction;
   B. A criminal conviction that has been dismissed or expunged or for which the records have been sealed or for which the individual was pardoned;
   C. Juvenile adjudications;
   D. Civil violations;
   E. Convictions for Class D or Class E crimes for which no sentence of incarceration can be imposed;
   F. Convictions for Class D or Class E crimes that were adjudicated more than one year prior, excluding any period of incarceration or custody; or
   G. Convictions for Class A, Class B or Class C crimes that were adjudicated more than 3 years prior, excluding any period of incarceration or custody.

The State may not discriminate in any way, for the purposes of hiring decisions, between applicants with criminal convictions that occurred more than 3 years from the date of application and applicants with no prior criminal history information.

2. Confidential. Criminal history information described in subsection 1 that is in the possession of the State or its political subdivisions is confidential and may not be disclosed if the information is being requested for use in connection with any application for employment. Any information that pertains to an applicant's criminal background check obtained in conjunction with an employment decision by the State or its political subdivisions is confidential and may not be disclosed unless specifically required by law.
§4725. Consideration of criminal history information

1. Inquiry only after conditional offer of employment. An employer may not inquire into or consider an applicant's criminal history information until the applicant has received a conditional offer of employment. A person may not be denied employment when such denial is based in whole or in part on criminal history information unless that criminal history information is directly related to the position of employment or includes a criminal conviction that is explicitly prohibited by statute for the position of employment.

2. Criminal history information directly related. In determining whether criminal history information directly relates to the position of employment pursuant to subsection 1, the employer shall consider the following factors:
   A. Whether the criminal history information is directly related to the duties and responsibilities of that position or occupation;
   B. Whether the position or occupation offers the opportunity for the same or a similar offense to occur;
   C. Whether circumstances that is the subject of the conduct that is the subject of the criminal history information will recur in the position or occupation; and
   D. The length of time since the offense occurred.

§4726. Employer use of criminal history information

1. Preliminary denial of employment. Before an employer may make a final decision to deny an applicant a position of employment based in whole or in part on the applicant's prior conviction of a crime, the employer must notify the applicant of its intent to deny the employment in writing, including the following information:
   A. The criminal history information that is the basis for the preliminary denial;
   B. A copy of the entire criminal history information report, if any;
   C. Information about the applicant's right to appeal the preliminary denial; and
   D. Any evidence of mitigation or rehabilitation that the applicant may voluntarily provide.

2. Appeal of preliminary denial. An applicant may appeal a preliminary denial of employment with the employer by demonstrating mitigation or rehabilitation or by challenging the accuracy of the criminal history information. Mitigation or rehabilitation may be demonstrated by providing the employer:
   A. Evidence demonstrating that at least one year has elapsed since the applicant's release from any correctional institution without criminal conviction or arrest; or
   B. Any other information or evidence of mitigation or rehabilitation and present fitness to perform the duties of the position of employment, including, but not limited to, letters of reference.
If the applicant demonstrates mitigation or rehabilitation to the employer, the employer may not deny the applicant the position of employment based in whole or in part on the applicant's criminal history information. The employer may not hire another individual for the position of employment until after it has made a final employment decision pursuant to subsection 3.

After receiving notice of the preliminary denial issued pursuant to subsection 1, the applicant must send or deliver the preliminary appeal within 10 business days.


If the employer decides to make a final denial of employment, the employer must notify the applicant in writing of the following:

A. The final denial;
B. The appeal process, if any;
C. A statement that the applicant may be eligible for other employment; and
D. The earliest date on which the applicant may reapply for a position of employment.

§4727. State contractors; policy

It is the policy of the State to do business with only contractors that have adopted and comply with written policies, practices and standards that are consistent with the requirements of this Act. State agencies shall review all potential contractors' criminal background check policies for consistency with this Act and shall consider criminal background check policies and practices among the performance criteria in evaluating whether to award a contract to a contractor.

§4728. Records

1. Retention and creation. An employer shall retain all application forms, records of employment and other pertinent records and information related to compliance with this Act for a minimum of 3 years, including, but not limited to, the following records:

A. The number of positions of employment requiring criminal background checks;
B. For positions of employment requiring criminal background checks, the number of applicants and the number of applicants who were provided a conditional offer of employment;
C. The number of applicants regarding whom the employer was aware of criminal history information and:
(1) To whom the employer provided a preliminary denial notice pursuant to section 4726, subsection 1;

(2) Who provided the employer with evidence of mitigation or rehabilitation pursuant to section 4726, subsection 2;

(3) To whom the employer provided a final denial notice pursuant to section 4726, subsection 3; and

(4) Who were hired;

D. Communications with applicants for employment; and

E. For the State and its political subdivisions, records of the number of employees in positions for which a preemployment criminal background check is not conducted who have a criminal conviction. The State shall create these records through regularly conducted confidential and anonymous surveys of its employees.

2. Commission access; presumption. An employer shall allow the Maine Human Rights Commission access to all pertinent records and information for the purpose of monitoring compliance with this Act. There is a rebuttable presumption that an employer has not complied with this Act if the employer does not maintain records in compliance with this section, or does not allow the Maine Human Rights Commission reasonable access to such records, absent clear and convincing evidence of compliance with this Act.

§4729. Violation by a private employer

1. Maine Human Rights Commission. An individual who is aggrieved by a private employer's violation of this chapter may file a complaint with the Maine Human Rights Commission pursuant to section 4635. A private employer who violates section 4725 or section 4726 is subject to the penalties in section 4635, including a civil penalty of up to $1,000 for the first violation and $2,000 for each subsequent violation.

2. Civil action. An aggrieved individual may bring a civil action in a court of competent jurisdiction against a private employer that has violated section 4725 or section 4726 and, upon prevailing, is entitled to such legal or equitable relief as the court may determine appropriate and reasonable attorney's fees and costs.

§4730. Violation by a public employer

An individual who is aggrieved by a violation of section 4724, section 4725 or section 4726 by the State or its political subdivisions may file a complaint with the Maine Human Rights Commission pursuant to section 4635, but such public employers are not subject to civil penalties pursuant to that section. An individual may not bring a civil action pursuant to section 4729, subsection 2 against the State or its political subdivisions.

The Director of Human Resources shall conduct a periodic audit to review the State's hiring practices in an effort to ensure that individuals with criminal convictions are not unreasonably denied employment with the State.
§4731. Application

The provisions of this Act apply notwithstanding any provision of law to the contrary, except to the extent the provision of law contains additional limitations on the consideration of criminal history information of applicants for employment.

SUMMARY

This bill enacts the Maine Fair Chance Employment Act and adds restrictions to the use of criminal history information in the context of employment decisions by private employers and the State and its political subdivisions and of licensing decisions by licensing agencies.

It prohibits an employer from asking an applicant for employment to disclose information concerning the applicant's criminal history, or considering such information, until after the applicant has received a conditional offer of employment. It restricts the way a private employer, or the State and its political subdivisions, may use criminal history information in the course of making employment decisions and adds similar restrictions to the existing restrictions applicable to licensing agencies' consideration of criminal history information. It also makes certain criminal history information in the possession of the State and its political subdivisions confidential and makes all criminal background check information obtained by the State in connection with an employment decision confidential.

The Maine Human Rights Commission is charged with enforcement of the Maine Fair Chance Employment Act and may seek civil penalties against a private employer for a violation of $1,000 for the first violation and $2,000 for each subsequent violation.

The bill also creates a private right of action that may be brought by an affected individual against a private employer that has violated the Maine Fair Chance Employment Act and, upon prevailing, the affected individual is entitled to such legal or equitable relief as the court may determine appropriate and reasonable attorney's fees and costs.