



CAPPSS Testimony Regarding H.B. 5450, 5451 & 5452

House Law & Justice Committee, January 30, 2018

Good morning. My name is John Cooper;¹ I am the Policy Director at the Citizens Alliance on Prisons and Public Spending (CAPPSS), a criminal justice research and advocacy organization based in Lansing. I appreciate the opportunity to provide testimony today in support of H.B. 5450, 5451 & 5452, which would eliminate overbroad restrictions on the talent pool available to health care providers, and promote employment of individuals with criminal records.

I strongly encourage the Legislature to pass these bills, which will both help meet Michigan's talent needs and promote public safety.

Discussion

Michigan's unemployment rate is at historic lows,² and many businesses in Michigan are suffering from a shortage of qualified workers,³ but the unemployment rate for individuals on parole is ~67%. In spite of this, tens of thousands of people with criminal histories—including many with low-level, non-violent crimes—are legally barred from employment in many health care facilities for years after they have paid their debt to society.

1. The Statutes at Issue

These three bills amend three statutes that impose identical restrictions on when an individual with a criminal history may work in health care facilities that provide residential nursing care or home health care, psychiatric care, or adult foster care.⁴ Among other things, these statutes provide that an individual convicted of any felony may not work in a covered facility within 10 years of completing all the terms and conditions of their sentencing.⁵ Similar years-long restrictions exist for a number of misdemeanors, including property crimes such as larceny and retail fraud (5 years),⁶ and drug possession (3 years).⁷

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² http://www.mlive.com/business/index.ssf/2017/07/michigans_unemployment_rate_no.html.

³ See, e.g., Mike Jandernoa, "Why Hiring People with Criminal Records Benefits All of Us," *Fox News* (Dec. 12, 2017), available at <http://www.foxnews.com/opinion/2017/12/12/why-hiring-people-with-criminal-records-benefits-all-us.html>.

⁴ See MCL 333.20173a (Nursing care), MCL 330.1134a (Psychiatric care), MCL 400.734b (Adult foster care).

⁵ See MCL 333.20173a(c), MCL 330.1134a(c), MCL 400.734b(c).

⁶ See MCL 333.20173a(e)(v)-(vi), MCL 330.1134a(e)(v)-(vi), MCL 400.734b(e)(v)-(vi).

⁷ See MCL 333.20173a(f)(iii), MCL 330.1134a(f)(iii), MCL 400.734b(f)(iii).

2. Why They Should be Repealed

While these laws appear to be well-intentioned—i.e. to protect vulnerable individuals—they are not narrowly tailored to accomplish this goal. To the contrary, they are overbroad, and have negative impacts on both the business environment and public safety.

a. Overbroad

These laws are blanket bans that do not permit employers to make individualized determinations of a person’s suitability, for example, based on the job they will be doing, when they will be working, how they will be supervised, or what they have accomplished since their offense. Rather, they ban everyone with a particular criminal record from employment for years beyond their sentence from any job with ““direct access . . . to a patient or resident or to a patient’s or resident’s property, financial information, medical records, treatment information, or any other identifying information.””⁸ This broad definition encompasses not just care providers and their aides, but administrative staff, laundry and janitorial staff, and security personnel—essentially every job in a facility with residential beds.

Guidance interpreting Title VII of the Civil Rights Act requires employers to show that an exclusion based on criminal conduct is job-related and consistent with business necessity.⁹ To make this showing, the guidance states that an employer must demonstrate that the exclusion is reasonable based on (1) the nature and gravity of the offense, (2) the time elapsed since the offense, and (3) the nature of the job held or sought.¹⁰

H.B. 5450-52 modify these laws to permit employers to better make this kind of an individualized assessment. First and foremost, they eliminate the 10-year ban on employment of a person with any felony; they also remove 3- and 5-year bans for certain common misdemeanors such as shoplifting and drug possession. They leave in place the bans on certain serious crimes, as well as certain misdemeanors that are more directly tied to fitness to work in residential health care, such as abuse and neglect.¹¹

b. Negative Impacts on Business

Michigan has a very tight labor market,¹² and a lack of workers is constraining businesses’ ability to expand.¹³ As numerous prominent observers have noted, people with

⁸ See, e.g., MCL 333.20173a(c), (e)(v), (f)(iii).

⁹ People of color are disproportionately impacted by criminal records when seeking employment; because of this, these laws have a disparate impact upon racial minorities. See Kimberly Buddin-Crawford, *Supporting Black Labor: Ending Criminal Record Exclusions in the Workforce* (Jan. 19, 2017), available at <http://www.aclumich.org/article/supporting-black-labor-ending-criminal-record-exclusions-workforce>. This disparate impact triggers the Title VII analysis.

¹⁰ See *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq., No. 915.002 (April 25, 2012), citing *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975), available at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

¹¹ See MCL 333.20173a(d)(v).

¹² See, e.g., Paula Gardner, “Michigan’s Unemployment Rate Now Under 4 Percent,” *MLive* (July 19, 2017), available at http://www.mlive.com/business/index.ssf/2017/07/michigans_unemployment_rate_no.html.

criminal records can help meet this demand,¹⁴ which would help make our communities safer and more prosperous in the process.

The statutes at issue here prevent that from happening. They arbitrarily restrict the talent pool available to many health care providers by tens of thousands of people,¹⁵ which restricts their ability to grow and to fill vacancies. They also *create* job needs by requiring employers to fire employees that are convicted of any of the relevant offenses, and barring them from rehiring the employee within the statutory period regardless of whether the conduct was at work or relevant to their suitability to do their job.

c. Negative Impacts on Public Safety

Finally, while the desire to protect vulnerable populations from harm is laudable, policies changes that are not implemented in a targeted way can have significant unintended consequences; there is good reason to believe this policy does. It is well-established that stable employment is a key factor in post-conviction success for those with criminal-justice involvement,¹⁶ and this policy cuts off access to potentially life-changing jobs in health care from tens of thousands of people.

Limiting access to employment for individuals with criminal records in this way is misguided policy that contributes to recidivism, and thus negatively impacts public safety. Michigan's recidivism rate within three years of release currently stands at 31.1%,¹⁷ which leaves significant room for improvement.

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For all these reasons, I urge you to support these bills and repeal restrictions on employment of people with criminal histories that do not pose a demonstrable threat to public safety.

¹³ See, e.g., Mike Jandernoa, "Why Hiring People with Criminal Records Benefits All of Us," *Fox News* (Dec. 12, 2017), available at <http://www.foxnews.com/opinion/2017/12/12/why-hiring-people-with-criminal-records-benefits-all-us.html>.

¹⁴ See, e.g., Mike Jandernoa, "Why Hiring People with Criminal Records Benefits All of Us," *Fox News* (Dec. 12, 2017), available at <http://www.foxnews.com/opinion/2017/12/12/why-hiring-people-with-criminal-records-benefits-all-us.html>; Nolan Finley, "Returning Citizens Can Fill Skilled Trades Gap," *The Detroit News* (May 31, 2017), available at <http://www.detroitnews.com/story/opinion/2017/05/31/inmate-training/102371864/>; Dick DeVos, "Smart Justice Reforms Find Unlikely Ally in Business Community," *Detroit Free Press* (Dec. 1, 2016), available at <https://www.freep.com/story/opinion/contributors/2016/12/01/michigan-parole-reform/94075318/>. I have included these op-eds for your convenience as attachments to my testimony.

¹⁵ 47,347 people were convicted of felonies in 2016 (see *Michigan Department of Corrections 2016 Statistical Report* (Sept. 5, 2017) at A-2); tens of thousands more were convicted of relevant misdemeanors such as retail fraud and drug possession. Over a ten-year period (the statutory exclusion period for a felony), these laws likely impact hundreds of thousands of potential workers.

¹⁶ See, e.g., Berg, M. T., & Huebner, B. M. (2011). Reentry and the ties that bind: An examination of social ties, employment, and recidivism. *Justice Quarterly*, 28(1), at 398 (finding unemployed offenders are 18% more likely to be rearrested than employed offenders within 600 days of release).

¹⁷ See *Michigan Department of Corrections 2016 Statistical Report* (Sept. 5, 2017) at Chart D3, available at http://www.michigan.gov/documents/corrections/MDOC_2016_Statistical_Report_599836_7.pdf.

