



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

November 5, 2020

Scott Parker, Chairman
Mississippi State Board of Massage Therapy
Post Office Box 20
Morton, Mississippi 39117

Re: Fresh Start Act of 2019

Dear Mr. Parker:

The Office of the Attorney General has received your request for an official opinion.

Questions Presented

You ask the following questions related to the impact of the Fresh Start Act of 2019 on the Mississippi State Board of Massage Therapy:

1. Is Mississippi Code Annotated Section 73-77-5 applicable where a Board's enabling statute allows for denial of licensure or the imposition of discipline based on the conviction of any crime or felony?
2. Are licensing boards to interpret Section 73-77-1(1) as "not applicable" or "controlling" when a Board's enabling statute authorizes boards to deny licensure based upon a determination of good moral character or upon a conviction of any crime involving moral turpitude?
3. The Fresh Start Act of 2019 requires implementation of Section 73-77-7(2) within 120 days after its enactment. Does implementation require rule making? Or, will Board action be sufficient (i.e., where the Board's administrative order covers the factors listed in Section 73-77-7(2)?
4. Is Section 73-77-9 applicable to require licensing boards to make a determination as to whether the individual would be disqualified from licensure solely on the basis of the individual's petition and information provided in the petition as to the individual's criminal record? Or, may the Board consider additional information available to the Board (e.g.,

information from a criminal background check)? Based upon a \$25 cap prescribed by this Section, who is going to be responsible for the costs of a criminal background check?

5. If a Board's enabling statute grants authority to a Board to deny a license or impose discipline on the basis of any crime, does the Board have to make a determination at any time prior to the Board obtaining all information, including a criminal background check, to determine whether the individual is disqualified from obtaining a license?
6. Is Section 73-77-9 applicable only when an individual has filed an application for license or may an individual who has not filed an application for license petition at any time (i.e., prior to entering college) for a determination of criminal record disqualification?
7. What type of response is required of the licensing Board within thirty (30) days of receiving the petition regarding the criminal record disqualification? Is it sufficient, for example, if the response is to acknowledge receipt of the petition and to advise that the Board will provide a determination upon completion of its investigation and/or submission of a complete application and/or review of the criminal record?
8. Will the Board be bound by its determination pursuant to Section 73-77-9(1) at the time that a non-licensure applicant files an application for licensure?
9. If Section 73-77-9 is applicable to non-licensure applicants, does Section 73-77-9(2) require a hearing for the non-licensing applicants?
10. Under Section 73-77-9, can the Board make a determination based upon the information provided by an applicant who has not been subject to a Board authorized criminal background check and include a disclaimer?

Response

Your request seeks an interpretation of the Fresh Start Act of 2019, codified at Mississippi Code Annotated Sections 73-77-1 *et seq.* (the "Act"), primarily by reference to a series of hypothetical scenarios. This office cannot issue an opinion with regard to those scenarios which are not specifically addressed by the Act. However, to the extent an opinion may be provided, we offer the following guidance.

In response to your first question, the Act provides as follows:

Absent applicable state law, no person shall be disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime, unless the crime for which an applicant was convicted directly relates to the duties and responsibilities for the licensed occupation.

Miss. Code Ann. § 73-77-5 (emphasis added).

If the Board's enabling statute prohibits the issuance of an appropriate license based upon a prior criminal conviction, then "applicable state law" would exempt the Board from the requirements of Section 73-77-5. However, if no such "applicable state law" exists, then the Board must comply with that section.

Among the requirements set forth by Section 73-67-21, an applicant for licensure must have been successfully cleared through an investigation consisting, in part, of a "verification that the prospective licensee is not guilty of or in violation of any statutory ground for denial of licensure as set forth in Section 73-67-27."

Section 73-67-27 provides that the Board:

may refuse to issue or renew or may deny, suspend or revoke any license held or applied for upon a finding that the holder of a license or applicant:

...

(e) Has been convicted of a crime, or has charges or disciplinary action pending that directly relates to the practice of massage therapy or to the ability to practice massage therapy. Any plea of nolo contendere shall be considered a conviction for the purposes of this section;

...

(j) Has been convicted of any felony, other than a violation of federal or state tax laws.

Based upon the applicable law cited above, it is this office's opinion that "applicable state law" exists which exempts the Board from Section 73-77-5. A determination of whether an applicant has met the requirements of the applicable statute(s) is a factual determination to be made by the Board.

With respect to your second question, the Act states:

(1) *Absent applicable state law*, licensing authorities shall not have in any rulemaking for their qualifications for licensure vague or generic terms including, but not limited to, "moral turpitude," "any felony," and "good character." *Absent applicable state law*, licensing authorities may only consider criminal records that are specific and directly related to the duties and responsibilities for the licensed occupation when evaluating applicants.

Miss. Code Ann. § 73-77-7(1) (emphasis added).

Referencing Sections 73-67-21 and 73-67-27, it is this office's opinion that "applicable state law" exists which exempts the Board from Section 73-77-7(1). A determination of whether an applicant has met the qualifications set forth by the statute(s) is a factual determination to be made by the Board.

Turning to your sixth question, the Act provides as follows:

Absent applicable state law, an individual with a criminal record may petition a licensing authority at any time for a determination of whether the individual's criminal record will disqualify the individual from obtaining a license. This petition shall include details on the individual's criminal records. The licensing authority shall inform the individual of his standing within thirty (30) days of receiving the petition from the applicant. The licensing authority may charge a fee to recoup its costs not to exceed Twenty-Five Dollars (\$25.00) for each petition.

Miss. Code Ann. § 73-77-9(1) (emphasis added). This section does not differentiate between applicants and non-applicants, referring only to "an individual." Thus, the above-cited section applies to both applicants and non-applicants alike.

With respect to your seventh question, Section 73-77-9(1) requires the licensing authority to "inform the individual of his standing within thirty (30) days of receiving the petition." The Act is not specific as to the "type" of required response, requiring only that the individual be informed of his or her "standing" within thirty (30) days.

With respect to your ninth question, as stated above, Section 73-77-9(1) is applicable to both applicants and non-applicants alike. Thus, the remaining provisions of this section would likewise apply to both applicants and non-applicants.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Very truly yours,

LYNN FITCH, ATTORNEY GENERAL

By: /s/ Kyle Williams

Kyle Williams
Special Assistant Attorney General