

APRIL 29, 2007

MASSACHUSETTS

I. Automatic Restoration of Rights:

Civil Rights: “Persons who are incarcerated in a correctional facility due to a felony conviction” may not vote. Mass. Const. art. III (as amended in 2000). A person sentenced to imprisonment for a federal or state felony forfeits any public office he currently holds. Mass. Gen. Laws ch. 279, § 30. Otherwise, conviction presumably does not affect the right to run for and hold future public office. A person who has been convicted of a felony within the past seven years or who is in the custody of a correctional institution is disqualified from jury service. ch. 234A, § 4(7).

Jury service: Disqualification if convicted of a felony within the past seven years, or in the custody of a correctional institution (including misdemeanants). ch. 234A, § 4(8). The right to serve on a jury is automatically restored seven years after completion of sentence for felony offenders, upon release for misdemeanants. However, a felony may still be challenged on voir dire.

Firearms: A person who has been convicted of a felony, or of a violation of any drug law, may not obtain a license to carry a handgun. Mass. Gen. Laws ch. 140, § 131. A person convicted of a felony or drug law violation may apply for the Firearm Identification Card necessary to possess a rifle or shotgun, five years after conviction or release from confinement, whichever is later. Mass. Gen. Laws ch. 140, § 129B.

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: The pardon power, except in cases of impeachment, is vested in the Governor, who may grant a pardon only with the advice and consent of the Governor’s Council. Mass. Const. pt. 2, ch. II, sec. I, art. VIII. Massachusetts Governor's Council, also known as the Executive Council, is composed of eight individuals elected from districts statewide, and the Lt. Governor who serves ex officio. If the offense is a felony, “the general court shall have power to prescribe the terms and conditions upon which a pardon may be granted.” *Id.* Public reporting: “The governor shall, at the end of each calendar year, transmit to the general court [legislature] a list of pardons granted with the advice and consent of the council during such calendar year, together with action of the advisory board of pardons concerning each such pardon, and together with a list of any revocations of pardons made under this section.” Mass. Gen. Laws ch. 127, § 152. No requirement to give reasons.

- *Administration:* Every petition must be filed with Parole Board, acting as the Advisory Board of Pardons, which makes recommendation to Governor and Council. Mass. Gen. Laws ch. 127, § 152. Advisory Board sends all favorable recommendations to Governor, who may accept them only if Council approves. Advisory Board functions as “gatekeeper,” and effectively also has a veto over pardon cases insofar as it does not send him ones it disapproves. *Id.* Parole Board composed of seven members appointed by the Governor to five-year terms. Full-time salaried employees. Governor chooses chairman. ch. 27, § 4.
- *Eligibility:* 15 years after conviction or release from prison for felonies, 10 years for misdemeanors. Governor’s Executive Clemency Guidelines (April 22, 2003) at 2 (available from the Massachusetts Parole Board/Advisory Board of Pardons). Federal and out-of-state offenders are ineligible for a gubernatorial pardon.
- *Effect:* Pardon “eradicates” a conviction. Guidelines, *supra*, at 1(F). The Governor, upon granting a pardon, orders the records of a state conviction sealed; thereafter, the existence of the conviction is removed for most purposes. Mass. Gen. Laws ch. 127, § 152. “Such sealed records shall not disqualify a person in any examination, appointment or application for employment or other benefit, public or private, including, but not limited to, licenses, credit or housing, nor shall such sealed record be admissible in evidence or used in any way in any court proceeding or hearing before any board, commission or other agency except in imposing sentence in subsequent criminal proceedings” and when a person has subsequently been charged with certain crimes against the person. *Id.* An applicant may deny the existence of the conviction on an application for employment, or in any other circumstance, and licensing authorities are prohibited from disqualifying the application based on his record. “The attorney general and the person so pardoned may enforce the provisions of this paragraph by an action commenced in the superior court department of the trial court.” *Id.*
- *Process:* Hearing, decision by majority, public record. Mass. Regs. Code tit. 120, § 902.02-.12. Guidelines, *supra*, at 8, say Governor will consider where recommendation is unanimous, and may return to Board where by majority only. If Governor disagrees with favorable recommendation of Advisory Board, he may give his reasons and explain what petitioner can do to maximize his chances next time. Favorable and unfavorable recommendations sent to Governor, along with statement of reasons in each case. *Id.* at 9. Under Mass. Gen. Laws ch. 127, § 152, once petition is filed with Parole Board it becomes a public record.

Parole Board must process in accordance with procedures set out in Mass. Gen. Laws ch. 127, § 154, which include referral to concerned officials (Attorney General, District Attorney, sentencing court) for recommendation, and notice to victim. Mass. Regs. Code tit. 120, § 902.05. Notification to victim required by tit. 120, § 400.04. If application has merit under statute and Governor’s Executive Clemency Guidelines, hearing will be scheduled. tit. 120, § 902.06. (Proposed

denials also go to Governor.) Procedures same as in parole hearing. tit. 120, § 902.08, and may be conducted by a panel of Advisory Board (or one member). Panel report to full Board, which in turn sends its recommendations to Governor and Governor's Council. Majority gives reasons, as does any dissenting minority.

Board must make recommendation to Governor within 10 weeks of original submission, unless hearing is held, and in no case more than six months. Mass. Gen. Laws ch. 127, § 154. Sensitive parts of recommendation may be kept confidential, but "in all cases a statement containing the facts of the crime or crimes for which a pardon or commutation is sought, the sentence or sentences received, together with all conclusions and recommendations shall be made public when the report is submitted." *Id.* Then second layer of control in Council. If no action taken within a year, application deemed denied. Mass. Regs. Code tit. 120, § 902.12(2). *See Guidelines, supra*, at 9.

- *Representation*: Payment for assistance in obtaining a pardon prohibited, except for proper legal services. Mass. Gen. Laws ch. 127, § 166. Representatives must register with state secretary, stating that only services are legal, and detailing those services. § 167. Violation is a criminal offense. § 168.
- *Standards for consideration*: Mass. Regs. Code tit. 120, § 902.01: The Advisory Board of Pardons considers favorably where a petitioner establishes, by clear and convincing evidence: "(a) a specific compelling need for such pardon relief; (b) a substantial period of good citizenship subsequent to the criminal offense for which such pardon relief is requested, and (c) that the ends of justice will be served by the granting of such pardon relief."
 "The said board shall not review the proceedings of the trial court, and shall not consider any questions regarding the correctness, regularity or legality of such proceedings, but shall confine itself solely to matters which properly bear upon the propriety of the extension of clemency to the petitioner." Mass. Gen. Laws ch. 127, § 154. Governor's Executive Clemency Guidelines, *supra* at 3, describes pardon as "rare and extraordinary" and "not . . . a routine post-conviction remedy." "Rather, the grant of executive clemency is primary intended to remove barriers that are often associated with a criminal record or sentence, thereby facilitating the reintegration of the petitioner into the community of the law-abiding." *Id.* Applicant must demonstrate rehabilitation and good citizenship. Must also demonstrate a "verified, compelling, and specific need" for a pardon; if there are other legal remedies, won't meet "compelling" standard.
- *Revocation*: Governor may revoke if misstatement of fact in application, or if it was procured by fraud or misrepresentation. Mass. Gen. Laws ch. 127, § 152.
- *Frequency of Grants*: About 100 pardon applications are filed annually, all go forward with Board recommendation for or against. In recent years, few pardons granted: Governor Cellucci granted 20, Governor Swift granted seven. Governor Romney has granted no pardons in three years. Source: Massachusetts Parole

Board. The trend toward fewer grants started in the 1990s. See Jason B. Grosky, "Critics: Pardons Are Too Political," Eagle-Tribune (October 13, 2002), http://www.eagletribune.com/news/stories/20021013/LN_001.htm: "Through the 1970s, Democratic governors oversaw the handing out of 1,527 pardons, including a high of 477 pardons in 1970 under Gov. Francis W. Sargent. Through the 1990s, Republican governors pardoned just 90 people, a 95 percent drop from two decades earlier. . . Stricter guidelines written into effect by Gov. William F. Weld in 1992 also led to pardon numbers dropping No longer could people get pardoned to erase a 'black mark' from a criminal record. Now, they must show a 'compelling need' for a pardon -- whether it's for employment considerations or the right to carry a gun."

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- B. Judicial sealing of adult felony convictions: A state felony offender is entitled to have his record of conviction sealed by the department of probation 15 years after completion of sentence, provided he has no subsequent conviction; a misdemeanor is entitled to have his conviction sealed after 10 years, provided he has no subsequent conviction. Mass. Gen. Laws ch. 276, § 100A.

Effect of sealing: "Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public service in the service of the commonwealth or of any political subdivision thereof; nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any boards or commissions, except in imposing sentence in subsequent criminal proceedings." Mass. Gen. Laws ch. 276, § 100A. Sealing does not expunge record, however, and it remains available to law enforcement authorities and may be taken into account for the purposes of state firearm disabilities. *Rzeznik v. Chief of Police*, 373 N.E.2d 1128 (Mass. 1978). Purpose of the statute is rehabilitative, to ensure privacy after a period of time, not to defeat law enforcement interests. The records of conviction of public officials and employees may not be sealed. ch. 276, § 100A.

Applications for employment shall include the following statement: "An applicant for employment with a sealed record on file with the commissioner of probation may answer "no record" with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a sealed record on file with the commissioner of probation may answer "no record" to an inquiry herein

relative to prior arrests or criminal court appearances. In addition, any applicant for employment may answer “no record” with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution.’ The attorney general may enforce the provisions of this paragraph by a suit in equity commenced in the superior court.” Mass. Gen. Laws ch. 276, § 100A.

Non-conviction records: Records that do not result in conviction may be sealed if the defendant is found not guilty, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court. Mass. Gen. Laws ch. 276, § 100C.* Sealing is also available by court order where a case is nol prossed or dismissed (except in cases in which an order of probation has been terminated) if “it appears to the court that substantial justice would best be served.” *See Comm. v. Gavin G*, 772 N.E. 2d 1067 (Mass. 2002) *citing Commonwealth v. Doe*, 648 N.E. 2d 1255 (1995)(court may order immediate sealing only if it appears that substantial justice would best be served, and the interests of confidentiality and avoiding harm have specific application to the defendant; otherwise, a defendant denied request for immediate sealing may still request sealing after requisite waiting period specified in § 100A). Sealed non-conviction records shall not operate to disqualify a person in any examination, appointment or application for public employment in the service of the commonwealth or of any political subdivision thereof. An application for employment used by an employer which seeks information concerning prior arrests or convictions of the applicant shall include the following statement: "An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests or criminal court appearances."

Effect of pardon: Conviction automatically sealed by pardon. Mass. Gen. Laws ch. 127, § 152 (see *supra*).

III. Nondiscrimination in Licensing and Employment:

Rather than limiting consideration of conviction in employment and licensing decisions, Massachusetts limits the availability of conviction-related information through the Criminal Offender Record Information System (CORI). Mass. Gen. Laws ch. 6, §§ 168, 172. Employers can obtain information through a “public access record check” only if 1) an individual has been convicted of a crime punishable by a term of five years in prison; or 2) the offender is incarcerated, or has been recently released (one year for misdemeanants, two for felony offenders, three for persons ineligible for parole). Otherwise must apply for “special certification” from the Criminal History Systems Board to receive an offender’s complete record, which will be granted only Board

* The automatic sealing provisions of § 100C were held unconstitutional in *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 506-07)(1st Cir., 1989)(sealed records must be made available to media unless there has been an individualized finding that sealing necessary to effectuate compelling governmental interest). In *Comm. v. Doe*, 420 Mass. 142 (Mass. 1995), the Massachusetts Supreme Court extended the holding of the *Pokaski* case to judicial sealing of closed criminal cases.

determines by a two-thirds vote that “the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy.” § 172(c). There are exceptions for those who work with vulnerable populations such as health care patients, the elderly and children, and others who are required by statute to conduct a background check on all employees and applicants for employment. § 172C through I.**

Employers limited in what they may ask: Massachusetts’ general fair employment practices law makes it unlawful for any covered employer, public or private, to request any information from an employee or applicant for employment about: (1) an arrest without conviction; (2) a first conviction for misdemeanors such as simple assault or minor traffic violations; and (3) any conviction of a misdemeanor that occurred five or more years before the application date. Mass. Gen. Laws ch. 151B, § 4(9) (“any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information”).

Where felony convictions are concerned, licensing authorities are prohibited from disqualifying the applicant based on the record of conviction alone only if the conviction has been pardoned. Mass. Gen. Laws ch. 127, § 152.

While Massachusetts’ comprehensive nondiscrimination law applies only to misdemeanors and pardoned felony convictions, it does apply a “direct relationship” test to consideration of felony convictions in some specific licensing schemes. *See, e.g.*, Mass. Gen. Laws ch. 112 § 52D (“The board . . . may [discipline] any dentist convicted . . . of a felony related to the practice of dentistry”); ch.112, § 61 (board may discipline holder of medical license for “a criminal offense which is reasonably related to the practice of the profession”); ch. 112, § 189 (real estate appraisers may be disciplined based upon conviction of “a crime which is substantially related to the qualifications, functions, and duties of a person developing appraisals and communicating appraisals to others, or convicted of any felony).

The City of Boston and several other Massachusetts jurisdictions have adopted even more stringent policies for their vendors and other private contractors, requiring them to determine whether particular positions are sufficiently sensitive to warrant a backgrounds check, and obligating them to give reasons to people who are turned down for employment because of their conviction record. Of special significance, Boston's City Council ordinance, effective July 1, 2006, applies not only to hiring in city jobs, but also

** The CORI system has been criticized recently because of the increasing number of exceptions carved out for employers, landlords, and other private users. *See* Boston Foundation, *CORI: Balancing Individual Rights and Public Access*, available at <http://www.tbf.org/uploadedFiles/CORI%20Report.pdf>. (“CORI Report”).

to the hiring decisions of an estimated 50,000 private vendors who do business with the City. The successful campaign to reform Boston's hiring policy was backed by broad community coalition called the Massachusetts Alliance to Reform CORI (MARC). According to the ordinance, the City of Boston and its vendors cannot conduct a criminal background check as part of their hiring process until the job applicant is found to be "otherwise qualified" for the position. This critical protection ensures that everyone is first considered for employment based on their actual skills and experience before the employer takes into account the presence or absence of a criminal record. The ordinance also requires that the final employment decision, which includes information about the individual's criminal record, also considers the age and seriousness of the crime and the "occurrences in the life of the Applicant since the crime(s)." In addition, the Boston ordinance creates important appeals rights for those denied employment based on a criminal record and the right to present information related to the "accuracy and/or relevancy" of the criminal record. See www.nelp.org

State Employment Bars: Sweeping bar on employment of people with convictions in state and state-funded human service jobs, issued by Governor Weld in 1996, disqualified certain offenders for life, and others for periods of 10 and 5 years. Modified by Governor Swift in 2001, and further limited by *Cronin v. O'Leary*, 13 Mass. L. Rptr. 405, no reported in N.E. 2d, 2001 WL 919969 (2001)(striking down lifetime bar on due process grounds).