

Criminal Background Check (CBC) Guidelines

Biometric state and federal criminal background checks (CBCs) provide the most comprehensive information available for determining whether a nurse applying for a license has a history of criminal activity. CBCs are relatively inexpensive for the applicant and can readily be performed using various methods allowing a state board of nursing (BON) quick access to information that is vital to protecting the public. While some applicants have violations that are misdemeanors, the result of youthful indiscretions or one-time occurrences, there are cases where criminal history is insight into a pattern of thinking and behavior that might endanger the public. For this reason, NCSBN encourages all BONs to incorporate state and federal biometric CBCs into their requirements for licensure. The following, however, can be used by all jurisdictions, regardless of the means by which they collect CBC information.

In 2012 NCSBN convened a task force to develop a method that would assist BONs in the interpretation of a criminal conviction history. This task force consisted of two BON executive officers, a forensic and police psychologist, a criminologist, a parole officer and NCSBN staff members. The goal of this task force was to provide BONs with an evidenced-based, consistent and fair approach to the interpretation of CBC information that protects the BON and the public.

Anti-discrimination Law Challenges to CBC Policies

BONs have inquired whether the use of CBCs may subject them to claims of violating Title VII. As explained below, the appropriate use of CBCs does not violate Title VII or federal anti-discrimination laws.

Title VII Does Not Apply to Licensure Decisions by BONs

Title VII applies only to discrimination in employment. BONs generally do not employ licensure applicants and, therefore, Title VII does not apply to BON licensure decisions. There have been a few court decisions that expanded Title VII's reach to licensure or other actions (e.g., granting of hospital privileges) on the theory that licensure or privileges is necessary to obtain employment; however, the great majority of decisions have consistently held over time that Title VII does not apply to state licensure decisions. See *Birla v. New Jersey Board of Nursing, et al.*, 2013 WL 2156255 (D.N.J. May 17, 2013), which rejected a Title VII challenge to the BON's use of criminal background checks.

Appropriately Used, CBCs Do Not Violate Equal Protection Rights Under the 14th Amendment

Although BONs are not subject to Title VII, their licensure decisions are subject to challenge as discriminatory under the equal protection clause of the 14th Amendment to the U.S. Constitution. To state a claim under the 14th Amendment however, a licensure applicant would have to demonstrate that a BON used CBCs to intentionally discriminate against protected groups of licensure applicants. Demonstration of disparate impact alone is insufficient to make a claim of denial of equal protection under the 14th Amendment. Rather, an applicant would have to show that the BON used CBCs in a manner intentionally designed to exclude minority applicants and that the use of the CBCs was unrelated to a proper state regulatory interest. This is a very high bar to achieve.

It is self-evident that CBCs serve a legitimate regulatory purpose. Further, a BON can ameliorate any risk of claims of intentional discrimination (or "disparate treatment") by ensuring that the BON applies its CBC policy consistently in a similar manner in similar situations regardless of the

applicant's race, religion, sex or national origin. A BON can further minimize any risk of a legal challenge to the use of CBCs by fashioning its policy to consider such factors as the length of time since any conviction, the nature and gravity of the offense, the relationship of the offense to safe nursing practice, and demonstration of rehabilitation. In this regard, a BON may wish to consult the guidelines published by the Equal Employment Opportunity Commission (EEOC) on the use of conviction background checks (http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VIII). Strictly speaking, these guidelines pertain only to Title VII, but the guidelines provide an indication of the federal government's preference for tailoring the use of CBCs to regulatory needs.

In addition to federal anti-discrimination laws, some states have laws that cover professional licensure.

Licensing an Applicant with a Positive Criminal History

The following guidelines were developed to assist BONs with the interpretation of CBC information.

Step One: The Application

In accordance with the NCSBN Uniform Licensure Requirements (ULRs), all applications for nursing licensure should include a question asking the applicant about any past criminal history. This is in addition to requiring the biometric CBC. The application should state that all applicants must report all misdemeanors, felonies or plea agreements. Any applicants with a positive history should also provide a personal statement describing the nature of any/all offenses. The personal statement should include the following information: date of offense(s), circumstances surrounding the offense(s), court findings, court documents and the current status of the case(s).

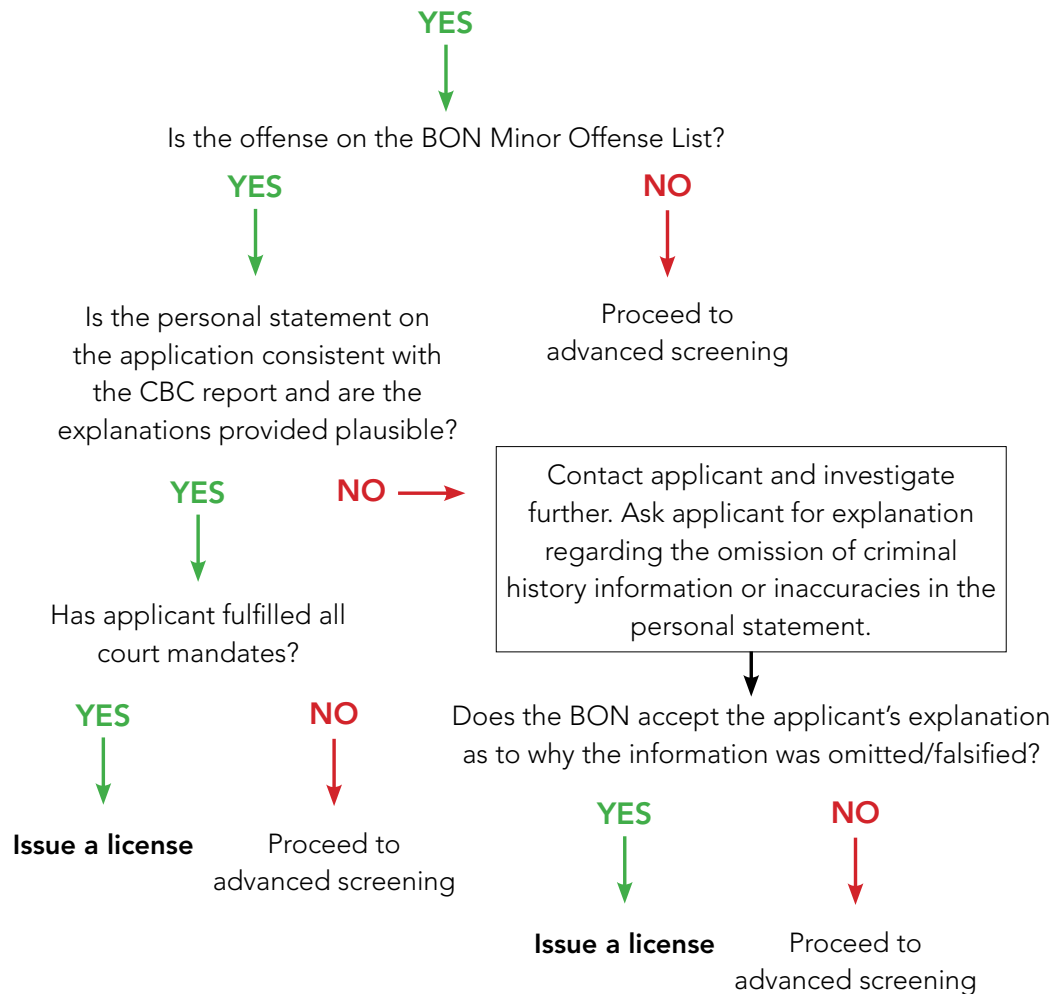
Step Two: Minor Offense List

The BON should create a Minor Offense List, which should consist of misdemeanors that are not applicable or relevant to safe nursing practice. Examples of these may include loud noise violations, a minor in possession of tobacco, littering or fishing without a permit.

Step Three: Initial Screening

Take applications through the following steps:

DOES THE CBC REVEAL A POSITIVE CRIMINAL HISTORY?



Step Four: Advanced Screening

While minor offenses can be addressed by BON staff, the BON or special CBC committee/task force designated by the BON should review applicants that go on to advanced screening. Advanced screening is for:

1. Minor offenses with a lack of honest disclosure; explanation on personal statement is incongruent with the CBC report or other documents;
2. Serious offenses (including a series of misdemeanors or those that suggest that the individual has a pattern of behavior, or any misdemeanor that the BON feels warrants further investigation);
3. Crimes of a sexual nature; and
4. A history of substance use.

Crimes of a Sexual Nature

Is the crime of a sexual nature?

If so, require a psychological evaluation for all individuals convicted of a sexual offense involving a minor or performing a sexual act against the will of another person. This evaluation should be performed by a qualified expert approved by the BON. If the BON identifies sexual behavior of a predatory nature, deny licensure.

Substance Use

Does the crime involve substance use?

If so, require a substance use disorder evaluation and proceed with the board's routine policies and procedures for handling individuals with substance use disorder.

All Other Serious Offenses/Minor Offenses with Incongruent Explanations

The BON (or a designated committee/task force) should gather all information regarding the applicant's criminal history and consider the following:

- The nature and seriousness of the crime;
- The relationship of the crime to the type of activity the applicant will be engaged in (nursing care);
- The extent to which the license might further the opportunity to engage in the criminal activity;
- Time lapse since the last offense;
- Conduct and activity of the applicant since the offense; and
- Any additional information regarding the crime:
 - Multiple or repeat violations/patterns of related offenses;
 - Criminal mistreatment of children or vulnerable adults;
 - Murder, felonious assault, kidnapping or other crimes of violence; and/or
 - Demonstrated lack of rehabilitation.

After evaluating these criteria, the decision to issue a license may be evident. However, if the BON or CBC committee/task force is still uncertain about whether to license a particular applicant, a further evaluation should be done to determine if the applicant demonstrates criminal thinking and would pose a threat to public safety if licensed as a nurse.

Step Five: Risk Assessment

Does this person demonstrate criminal thinking and thereby pose a threat to public safety if hired as a nurse?

If the BON is uncertain about the decision to license an applicant, a psychological evaluation/risk assessment is recommended. The purpose of this is to systematically and objectively assess risk to public safety and use data to make an informed and fair decision about licensure. By including risk assessment in the licensure evaluation process, the profile of the applicant becomes multidimensional and more in-depth. BONs will be better equipped to determine risk to public safety and avoid potential bias against an applicant.

Referral/Resources for Risk Assessment

The BON or CBC committee/task force should refer the applicant to a psychologist trained in forensics and/or risk assessment. These psychologists are available in every state and BONs should consider building relationships with a psychologist or group practice in their state. Below are websites that will be useful in locating an appropriate professional:

American Psychological Association: www.apa.org

- Click on "Find a Psychologist"
- Type in your city or zip code
- Select "Forensics" from pull-down menu
- Specify distance reasonable for the applicant to travel

American Academy of Forensic Psychology: www.aafp.com

- Click on "Diplomat Directory"
- Then "Locate a Board Certified Forensic Expert"
- Search by name or state

American Academy of Clinical Psychology: www.aacpsy.org

- Click on "Resources"
- Then "Member Directory"
- Search by name or by state

Sample Referral Questions

The BON should help guide the assessment by supplying the psychologist with a statement or referral question. For example:

"Conduct a brief risk assessment using a personality and psychopathology measure to assess risk to patient safety."

"Is this applicant a risk to patient safety if licensed to be a nurse?"

"What level of risk does this applicant pose to patient safety – high, medium or low?"

Additional Information

It is very important for a psychologist to have as much relevant information about the applicant as possible. Provide background information, including criminal history and court mandates. Also include notes from conversations with the applicant and any letters of recommendation.

Testing

A two-test battery is recommended along with a clinical interview:

- One measure of personality; and
- One measure of psychopathology.

Ensure tests/assessment instruments comply with any applicable state constitutional and statutory privacy rights protections. Below are a number of tests/assessments that measure personality and psychopathology. They are psychometrically sound and EEOC and ADA compliant. It is recommended that you review the websites and discuss with the forensic psychologist the best test to use for the evaluation you are requesting.

Measures of Personality

16 Personality Factors (16-PF): www.ipat.com

- Assesses traits that describe and predict behavior in a variety of contexts.

California Psychological Inventory (CPI): www.cpp.com

- Leading nonclinical personality inventory test.
- Evaluates interpersonal behavior and social interaction.

Measures of Psychopathology

Personality Assessment Inventory (PAI): www4.parinc.com

- Screens for levels of psychological distress, including impulse control problems.

- Has two indicators of potential harm to self or others.
- Interpersonal scales assess relationships and interactions.

Minnesota Multiphasic Personality Inventory-2 (MMPI-2)/MMPI-2RF: www.pearsonclinical.com

- Identifies suitable candidates for high-risk public safety positions.
- Evaluates substance use disorder.
- Reports can be tailored to present information for specific settings.

PsychEval Personality Questionnaire (PEPQ): www.ipat.com

- In-depth normal personality assessment and a quick screen for psychopathology-related patterns of behavior.
- Screening of applicants for high-risk positions.
- Fitness-for-duty evaluations.

Other tests are available and may be used as well. It is important to have a relationship with a psychologist that the BON trusts to choose the appropriate tests. The tests herein are considered extremely accurate and can provide the BON with valuable insight into the applicant that they would not otherwise have.

The Decision to License

The results of the assessments and the recommendation of the psychologist should be considered by the BON or designated committee/task force and integrated with the information from the BON investigation, including:

- Applicant explanation of criminal history;
- Arrest records;
- Court documents; and
- Letters of recommendation.

A decision can now be made about licensure.

The Cost of Risk Assessments

The cost of undergoing a risk assessment can range anywhere between \$150 and \$400, depending on the number of tests deemed necessary and the overall extent of the evaluation.

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