

# Occupational Restrictions and Inadequate Relief in State-Level *Clean Slate* Efforts

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## INTRODUCTION

The journey back to society after a criminal conviction is filled with legal hurdles that make stable employment difficult to obtain. Only about 40% of those released from prison participate in paid employment, compared with 62.6% of the general population.<sup>1</sup> Even among the employed, formerly incarcerated populations have high rates of segregation in low-wage, temporary, non-union, and precarious work.<sup>2</sup> Some U.S. states have begun passing legislation targeting low levels of employment for this group, based in part on the well-understood relationship between stable employment and reduced recidivism.<sup>3</sup> These laws—often called *Clean Slate* laws—typically require automatic criminal record sealing and other forms of relief after a certain time and under other specific criteria.<sup>4</sup>

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<sup>1</sup> Compare U.S. DEP'T JUST., Employment of Persons Released from Federal Prison, BUREAU OF JUST. STATS. 2 (2021), <https://bjs.ojp.gov/content/pub/pdf/eprfp10.pdf> [<https://perma.cc/D7AA-FKC8>] with U.S. DEP'T OF LAB., The Employment Situation, BUREAU OF LAB. STATS. 4 (2025), <https://www.bls.gov/news.release/pdf/empst.pdf> [<https://perma.cc/4T55-VW22>].

<sup>2</sup> See, e.g., Michelle Lee Maroto, The Absorbing Status of Incarceration and Its Relationship with Wealth Accumulation, 31 J. QUANT. CRIMINOLOGY 207, 223–27 (2015); Noah D. Zatz, Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work, 45 LAW & SOC. INQUIRY 304, 326 (2020).

<sup>3</sup> Christy A. Visher et al., Evaluating the Long-Term Effects of Prisoner Reentry Services on Recidivism: What Types of Services Matter?, 34 JUST. Q. 136, 137–38 (2017).

<sup>4</sup> Some examples include laws in the following states: Pennsylvania, Utah, New Jersey, Michigan, Connecticut, Delaware, Virginia, Oklahoma, Colorado, California, Minnesota, and New York. See, e.g., 18 PA. STAT. AND CONS. STAT. § 9122.2(a)(1)–(4) (West 2024); UTAH CODE ANN. § 77-40a-203(1)(a)–(b) (West 2022) (repealed 2024); N.J. STAT. ANN. § 2C:52-5.1 (West 2024); S. 7551-A, 2023–2024 Reg. Sess. (N.Y. 2023); Assemb. 1029-C, 2023-204 Reg. Sess. (N.Y. 2023); (“Under the Clean Slate Act, New Yorkers will be eligible to have conviction records automatically sealed 3 years from sentencing for misdemeanors and 8 years from sentencing for felonies, not including time incarcerated...”); see also THE CLEAN SLATE INITIATIVE, Clean Slate in States (2024),

While the particulars of state-level *Clean Slate* efforts vary significantly, one common objective of these laws is to curb private employer discrimination by limiting access to certain criminal records.<sup>5</sup> This theoretically increases justice-impacted individuals' access to work and related protective factors.<sup>6</sup> Importantly, one commonality across these lawmaking efforts is the frequent, but misleading, use of the term *expungement*.<sup>7</sup> In its most precise meaning, *expungement* describes the complete “removal of a conviction...from a person’s criminal record,”<sup>8</sup> suggesting that the record has been “destroyed, erased, obliterated, wiped out.”<sup>9</sup> While *Clean Slate* efforts do typically offer expungement in certain specific instances, this is most often true where a formal felony conviction never actually occurred<sup>10</sup> or for a very specific subset of felony offenses (such as controlled substance offenses).<sup>11</sup> More accurately, *record sealing* is the most common type of relief offered to individuals with felony convictions in state *Clean Slate* efforts.<sup>12</sup>

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<https://bit.ly/3wW1zIq> [<https://perma.cc/3B92-E2HA>] (“To date, 12 states have passed laws that meet CSI’s criteria for Clean Slate legislation.”).

<sup>5</sup> See, e.g., UTAH DEP’T PUB. SAFETY, Auto Expungement/Clean Slate Expungement, <https://bit.ly/3IGsYRp> [<https://perma.cc/T277-S35C>]

<sup>6</sup> See, e.g., N.Y. CRIM. PROC. L. § 160.57(2)(d) (Consol.2024); S. 7551-A, 2023–2024 Reg. Sess. (N.Y. 2023); Assemb. 1029-C, 2023–2024 Reg. Sess. (N.Y. 2023).

<sup>7</sup> See, e.g., N.J. CT. R.3:30-2(a)(1) (2023) (“Persons may apply electronically for an expungement of the specific marijuana or hashish offenses pursuant to N.J. STAT. ANN. §. 2C:52-5.1”); UTAH CODE ANN. § 77-40a-201(4)(a) (West 2022) (repealed 2024) (“The process for the automatic expungement of a clean slate eligible case is as described in Subsections (4)(b) through (g) and in accordance with any rules made by the Judicial Council or the Supreme Court.”).

<sup>8</sup> Expungement, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>9</sup> Jamison Koehler, The Difference Between Expunging and Sealing a Criminal Record, KOEHLER L. (Mar. 27, 2019), <https://bit.ly/4a8Yumw> [<https://perma.cc/Y86Y-C6LQ>] (citing BLACK’S LAW DICTIONARY (11th ed. 2019)) (“By contrast, the “sealing of criminal records” is defined as “the act or practice of officially preventing access to particular records in the absence of a court order.” In other words, the records still exist...Sometimes this is the most accurate word to describe what is actually being done.”); see also Brian M. Murray, Retributive Expungement, 169 U. PA. L. REV. 665, 667 (2021) (“The ‘expungement process’ is a disjunctive legal concept. Whereas the term ‘expungement’ promises the hopeful wiping away and creation of a blank slate, ‘process’ conveys time, ordeal, and mechanics.”).

<sup>10</sup> See, e.g., UTAH CODE ANN. § 77-40a-201(1) (West 2024) (allowing for automatic record expungement for cases that resulted in an acquittal on all charges or were dismissed with prejudice).

<sup>11</sup> See, e.g., UTAH CODE ANN. § 77-40a-205(2) (West 2024) (allowing for “clean slate expungement” for misdemeanor convictions, infractions, and Class A controlled substance felonies after a set period of time has lapsed since the conviction, differing based on the category of offense).

<sup>12</sup> There are also issues in making cross-state comparisons related to Clean Slate efforts because states vary significantly in their adjudicative processes and rules of case disposition more generally. For example, in New York State, where we focus our work, arrested charges are automatically sealed

This is significant because it results in *Clean Slate* initiatives often not doing enough to address *public*, government-imposed collateral consequences resulting from statutory and regulatory occupational restrictions.<sup>13</sup> Nationwide, approximately 30,000 federal, state, and local *de jure* statutory and regulatory occupational restrictions exist.<sup>14</sup> In a practical sense, instances where a record still exists—even if it has been sealed from the public—usually do not apply where a background check is required for occupational licensing or employment. For instance, in New York State (NYS)—which is the focus of this paper—the recently passed *Clean Slate* law expressly does not apply where federal or state occupational restrictions require background checks or certification.<sup>15</sup>

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for any incident where a person is not criminally convicted (i.e. misdemeanor or felony). In contrast, other states around the country do not offer automatic sealing in such instances by state justice agencies and/or courts. N.Y. CRIM. PRO. L. § 160.57 (Consol. 2024). For a useful breakdown of the different types of criminal record relief available in each U.S. state; see COLLATERAL CONSEQUENCES RES. CTR, 50-State Comparison: Expungement, Sealing & Other Record Relief, <https://bit.ly/3YkO54K> [<https://perma.cc/UY68-GSJJ>] (last updated July 2024).

<sup>13</sup> For example, in New York State, which is the focus of this paper, under the recently passed Clean Slate law, once sealed, conviction records, including background checks, will not be available for most civil purposes. However, exceptions within the law dictate that sealed records may still be available for use by law enforcement, prosecutors, and courts; for gun licensing; accessing public benefits and programs; and for certain government-regulated jobs, such as: an entity that is required under state or federal law to conduct a fingerprint-based background check, or an entity that is authorized under state or federal law to conduct a fingerprint-based background check where a job applicant would be working with children, the elderly or vulnerable adults. N.Y. CRIM. PROC. L. § 160.57(1)(d)(i)–(xiii) (Consol. 2024). Within these exceptions, specific agencies and employers are also mentioned as exempt, including, for instance, the state education department, Office of Mental Health, and Office of Persons with Developmental Disabilities. *Id.* at § 160.57(1)(d)(xvi)–(xvii). “Transportation network companies” requiring licensure, such as Uber and Lyft, are also specifically exempted. *Id.* at § 160.57(1)(d)(xv).

<sup>14</sup> John G. Malcolm & John-Michael Seibler, Collateral Consequences: Protecting Public Safety or Encouraging Recidivism, THE HERITAGE FOUND. (Mar. 7, 2017), <https://www.heritage.org/crime-and-justice/report/collateral-consequences-protecting-public-safety-or-encouraging-recidivism> [<https://perma.cc/M5LB-5Z29>]; John G. Malcolm & John-Michael Seibler, Collateral Consequences: Protecting Public Safety or Encouraging Recidivism, THE HERITAGE FOUND. 1, 4 (2017), <https://www.heritage.org/sites/default/files/2017-03/LM-200.pdf> [<https://perma.cc/M5LB-5Z29>].

<sup>15</sup> N.Y. CRIM. PROC. L. § 160.57(3)(c) (Consol. 2024); S. 7551-A, 2023–2024 Reg. Sess., 2 (N.Y. 2023); Assemb. 1029-C, 2023–204 Reg. Sess., 2 (N.Y. 2023). (“otherwise sealed conviction information will remain accessible for law enforcement and other relevant and necessary purposes. These...include but are not limited to determining suitability for licensing, employment and similar activities where federal or state law requires a criminal background check be performed prior to granting licenses to or employing individuals in certain jobs, such as employment with children, elderly populations, or other vulnerable populations, as well as where federal or state law authorizes a criminal background check to be performed prior to the same type of employment or similar activity.”); see also UTAH CODE ANN. § 77-40a-401(7)(d) (“An expungement order may not. . .prevent an agency from maintaining, sharing, or distributing any record required by law.”).

Work restrictions are one type of *collateral consequence* of justice involvement.<sup>16</sup> Collateral consequences are *de jure* statutory, regulatory, or administrative rules restricting individuals with criminal histories from accessing rights or entitlements, including housing, voting, immigration status, public benefits, driver's licenses, bank accounts, etc.<sup>17</sup> Importantly, these restrictions can, and often do, extend beyond the period of a formal sentence, sometimes persisting for life.<sup>18</sup> Work-related restrictions make up the majority of all collateral consequences.<sup>19</sup>

In the next section, we demonstrate that the number of occupational restrictions in the U.S. grew dramatically during the peak era of mass incarceration.<sup>20</sup> These restrictions presently cover diverse public and private industries (e.g., transportation, finance, and healthcare) as well as countless jobs requiring professional certification, ranging from cosmetologists<sup>21</sup> to public accountants. Many apply to areas of work that bear little relationship to public safety. Using NYS—the most recent state to pass *Clean Slate* legislation at the time of writing—as a case study, we provide evidence that *Clean Slate* initiatives as presently formulated are likely insufficient to counteract unemployment rates for the justice impacted that rival the Great Depression. NYS currently has nearly 500 laws and regulations imposing collateral consequences to employment. 20% of these are *mandatory* and apply to a broad range of convictions—in many cases, *any* felony conviction.<sup>22</sup>

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<sup>16</sup> Caleb Foote, Pardon Policy in the Modern State, 39 PRIS. J. 3, 6 (1959).

<sup>17</sup> Alessandro Corda et al., Collateral Consequences of Criminal Records From the Other Side of the Pond: How Exceptional is American Penal Exceptionalism?, 23 CRIMINOLOGY & CRIM. JUST. 528, 529 (2023).

<sup>18</sup> JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 4 (Harvard Univ. Press 2015).

<sup>19</sup> John G. Malcolm & John-Michael Seibler, *supra* note 14. (noting that 60–70% of the 46,000 state and local collateral consequences in the U.S. apply to employment).

<sup>20</sup> Matt Saleh et al., “Civil Death” and Labor Market Alienation: Comparative Analysis of Legislation Limiting Access to Work for the Justice Impacted in OECD Countries, 2024 HARV. HUM. RTS. J. ONLINE 1, 16.

<sup>21</sup> Occupational Licensing in New York, INST. FOR JUST., <https://bit.ly/3TDgcs3> [<https://perma.cc/J7U5-EXHB>] (“cosmetology is one of the state’s most popular licenses. In New York, it takes at least 1,000 hours of classes to get a license in cosmetology. On average, a cosmetology program in the state costs \$13,381, while the average student takes out \$6,735 in federal student loans. But despite such a hefty investment, many cosmetologists barely earn enough to get by: Half of cosmetologists make less than \$28,220 a year.”).

<sup>22</sup> This mirrors national trends. See COUNCIL STATE GOV’TS JUST. CTR., FAIR CHANCE LICENSING: REGULATORY SUCCESSES AND PERSPECTIVES (2023), <https://csgjusticecenter.org/wp-content/uploads/2023/06/Fair-Chance-Licensing-Regulatory-Succeses-and-and-Perspectives.pdf> [<https://perma.cc/X6X9-CPCG>] (about one-quarter of employment restrictions nationwide are mandatory, meaning that they must be imposed without exception if the person has a disqualifying conviction). [R. 18.2]

In NYS, more than one in five jobs require occupational licenses.<sup>23</sup> Additionally, public sector jobs—which tend to be the subject of significant occupational restriction—are often unaffected by *Clean Slate* laws. In NYS, over 250,000 people were employed by the state government in 2022,<sup>24</sup> while municipal governments and school districts employed another 877,000 full-time workers.<sup>25</sup> “School districts are the largest local government employer,” with 271,611 workers (“over 60% of the total full-time workforce”).<sup>26</sup> Elementary/Secondary Education (290,274), Local Law Enforcement and Corrections (37,292), and Public Welfare and Healthcare (33,852) jobs account for the vast majority of local government jobs.<sup>27</sup>

We estimate that this results in automatic or nearly automatic disqualification from hundreds of thousands of jobs. We situate this artificial labor market narrowing within the context that New Yorkers access forms of relief like expungement, record sealing, certificates of relief and good conduct, etc., at extremely low rates,<sup>28</sup> suggesting that sweeping reform of occupational restrictions is necessary to reverse employment disparities, rather than placing the onus on individuals to pursue relief through arcane, time-intensive legal processes.

## I. EMPLOYMENT RESTRICTIONS RESEARCH

Practices of lifelong punishment have deep civilizational roots in ancient legal systems and the legal statuses of *civil death*, *infamia*, and similar doctrines “which put an end to the person by destroying the basis of legal capacity, as did natural death by destroying physical existence.”<sup>29</sup> Although many governments have recently shifted to criminological frameworks that outwardly accentuate a rehabilitative orientation and collectivist principles (e.g., public safety and deterrence), vestigial lawmaking remains on the books, along with residual attitudes about the retributive

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<sup>23</sup> Occupational Licensing in New York, *supra* note 22 (“[T]he average license for low- and moderate-income jobs in New York takes 275 days of education and experience.”).

<sup>24</sup> All Employees: State Government in New York, U.S. BUREAU LAB. STATS. FED. RESERVE BANK ST. LOUIS, <https://bit.ly/4a9rkTU> [<https://perma.cc/SH44-XAEH>].

<sup>25</sup> Thomas P. DiNapoli, Local Government Workforce Trends in New York State, OFF. N. Y. STATE COMPTROLLER, 1, 1 (Dec. 2023), <https://on.ny.gov/4afZy8e> [<https://perma.cc/853R-3UL2>].

<sup>26</sup> *Id.*

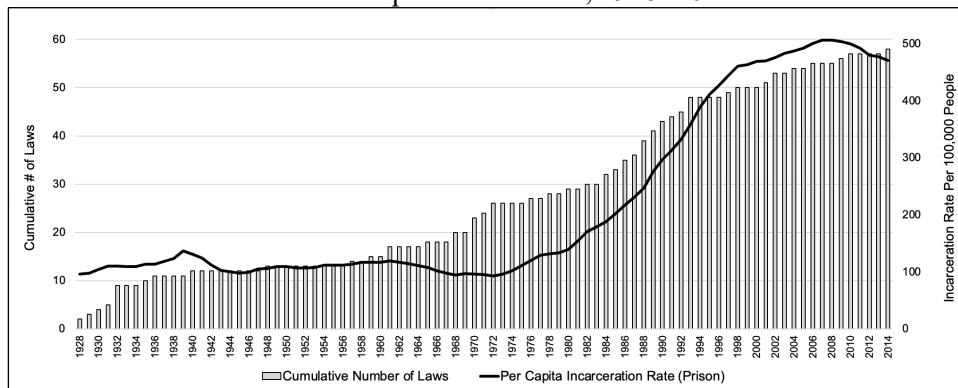
<sup>27</sup> *Id.* at 4–5.

<sup>28</sup> See Alec C. Ewald, Rights Restoration and the Entanglement of US Criminal and Civil Law: A Study of New York’s “Certificates of Relief”, 41 *LAW & SOC. INQUIRY* 5, 15 (2016).

<sup>29</sup> Alec C. Ewald, “Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States, 2002 *WIS. L. REV.* 1045, 1059–60; see also ABEL HENDY JONES GREENIDGE, *INFAMIA: ITS PLACE IN ROMAN PUBLIC AND PRIVATE LAW* 37–38 (Oxford Univ. Press 1894) (discussing *Infamia* as it relates to the disqualification of rights in public (censorian *infamia*) and private (justinian *infamia*) law).

need for perpetual punishment as a form of *civil disability*.<sup>30</sup> In the U.S., tens of thousands of laws restrict access to work for people with convictions.<sup>31</sup> Research by the authors found that the number of federal laws restricting work access for people with convictions grew dramatically during the peak era of mass incarceration (*see* Figure 1).<sup>32</sup> This indicates that such lawmaking might be tied to punitive ideologies rather than public safety and rehabilitation efforts.

**Figure 1. Cumulative Federal Work Restriction Laws & Imprisonment Rate, 1928–2014**



Spearman's Rho ( $\rho$ ) = 0.783  $p = .0000$

**Incarceration Data:** U.S. Department of Justice, Bureau of Justice Statistics (BJS), *Prisoners, 1925–81* (1982); BJS, *Correctional Populations in the United States, 1994* (1995); BJS, *Prisoners in 2014* (2015).

Some laws broadly restrict access to highly regulated industries like finance and healthcare. Others restrict jobs more narrowly requiring professional certification, such as lawyers, public accountants, private investigators, or real estate agents. Still others restrict access to licenses or permits required for various businesses or occupations in many sectors.<sup>33</sup> Policymakers should explore modifying or repealing overly punitive restrictions, thereby avoiding outright bans

<sup>30</sup> Gabriel J. Chin, *Collateral Consequences*, in *Academy for Justice, A Report on Scholarship and Criminal Justice Reform* 393 (Erik Luna ed., 2017); See Matt Saleh, *Falling Away into Disease: Disability-Deviance Narratives in American Crime Control*, 95 ST. JOHN'S L. REV. 1037, 1042–49 (2021); See Matt Saleh et al., *Law's Body*, 74 MERCER L. REV. 1023, 1031–32, 1035–36 (2023).

<sup>31</sup> Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment> [<https://perma.cc/A76M-7NMU>].

<sup>32</sup> Matt Saleh et al., *supra* note 21, at 17.

<sup>33</sup> See, e.g., Federal Alcohol Administration Act of 1935, 27 U.S.C. § 204(a)(1)–(2).

except where the conviction is sufficiently recent and related to policy objectives like public safety. They should encourage individualized assessments wherever possible.

## II. NEW YORK STATE CASE STUDY

Legal restrictions to work often exist in sector- and industry-specific rules. They are often a minor provision within broader workplace regulations. Many restrictions create mandatory bans, while others allow discretion for employers or regulators.<sup>34</sup> Some merely impose background checks or notification requirements.<sup>35</sup> Many discretionary restrictions still result in denials—which may be overturned by a state Certificate of Relief from Disabilities (CRD) or Certificate of Good Conduct (CGC).<sup>36</sup> Mandatory rules result in automatic disqualification. The trend in NYS is to move towards discretionary provisions. However, there are often competing mandatory and discretionary provisions, even within the same industry.<sup>37</sup> Additionally, while Article 23-A protections<sup>38</sup> are often mentioned within these

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<sup>34</sup> See, e.g., N.Y. PUB. HEALTH LAW § 230 (McKinney 2023) (medical practitioner license); N.Y. COMP. CODES R. & REGS. tit. 9, § 6190.6 (2019) (forensic laboratory); N.Y. COMP. CODES R. & REGS. tit. 18, § 417.2 (2020) (family day care); N.Y. AGRIC. & MKTS. LAW § 96-f (McKinney 2010) (slaughterhouse license); N.Y. COMP. CODES R. & REGS. tit. 3, § 403.4 (2013) (sales finance company); N.Y. AGRIC. & MKTS. LAW § 129 (McKinney 2010) (commercial feed registration)

<sup>35</sup> See, e.g., N.Y. Comp Codes R. & Regs. tit. 15, § 6.17(a) (2017) (requiring bus drivers to notify an employer of any motor vehicle conviction).

<sup>36</sup> Certificate of Relief from Disabilities - Certificate of Good Conduct Application and Instructions, DEP'T OF CORR. AND CMTY. SUPERVISION, at 1, <https://doccs.ny.gov/system/files/documents/2024/10/doccs-crd-cgc-application-revised-10-2-2024.pdf> [<https://perma.cc/E4H3-4WGT>]; Certificate of Relief / Good Conduct & Restoration of Rights, DEP'T OF CORR. AND CMTY. SUPERVISION, <https://doccs.ny.gov/certificate-relief-good-conduct-restoration-rights> [<https://perma.cc/9V3X-SN97>].

<sup>37</sup> Compare N.Y. ENV'T CONSERV. LAW § 71-2703 (McKinney 2003) (solid waste management and resource recovery facilities) and N.Y. ENV'T CONSERV. LAW § 71-2703 (McKinney 2003) (waste transporting) with N.Y. UNCONSOL. LAW Ch. 139 § 34 (McKinney 1934) (garbage, metal, and refuse disposal); compare N.Y. RAC. PARI-MUT. WAG. & BREED LAW § 220 (McKinney 2024) (horse racing license) with N.Y. COMP. CODES R. & REGS. tit. 9, § 4404.1 (2013) (regional off-track betting corporation); compare N.Y. COMP. CODES R. & REGS. tit. 6, § 325.23 (2000) (pesticide application business) with N.Y. LAB. LAW § 459 (McKinney 2021) (asbestos handling business).

<sup>38</sup> N.Y. CORRECT. LAW Art. 23-A (McKinney 1977). Article 23-A requires employers to walk through this eight-step analysis in order to determine whether or not to hire an applicant with a prior conviction: (1) New York State's public policy of encouraging the employment of persons with prior convictions. (2) "The specific duties and responsibilities necessarily related to the employment sought. (3) "The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have" on his/her ability to "perform one or more such duties or responsibilities." (4) "The time which has elapsed since the occurrence of the criminal offense or offenses." (5) "The age of the person at the time of the occurrence of the criminal offense or offenses." (6) "The seriousness of the offense or offenses." (7) "Any information produced by the person, or produced on his/her behalf, in regard to

laws, significant contradictions exist within the legal frameworks. These contradictions lead to practical denials of licensure and certification, often in violation of the factors outlined in 23-A. Moreover, there are instances where departmental regulations are erroneously applied rather than 23-A.<sup>39</sup>

In NYS, most job sectors are subject to some restrictions. Using the National Inventory of Collateral Consequences of Conviction (NICCC),<sup>40</sup> we identified the sectors which are subject to broad *mandatory* restrictions based on any felony conviction—or a broad category of convictions—in NYS. We found significant restrictions in:

Human Health & Social Work	Manufacturing
Professional, Scientific, & Technical Activities	Transportation
Arts, Entertainment, & Recreation	Construction
Financial & Insurance Activities	Public Administration
Agriculture, Forestry, & Fishing	Wholesale & Retail

**Table 1** samples NYS mandatory restrictions for a broad category of convictions. Many of these require review. Sometimes, a rule applies to multiple sectors simultaneously (e.g., Education/Childcare/Arts & Entertainment; Agriculture/Retail; Professional Activities/Public Administration).

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his/her rehabilitation and good conduct.” (8) “The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.” N.Y. CORRECT. LAW § 753 (1) (McKinney 2007).

<sup>39</sup> For example, the state Department of Health statute lists the automatic and mandatory disqualifications, which, in essence, contradict the purpose of Article 23-A. See N.Y. EXEC. LAW § 845-b(5)(b) (McKinney 2013) (allowing exceptions and disqualifications where “criminal history information concerning a subject individual reveals a conviction for a crime other than one set forth in paragraph (a) of this subdivision, the authorized agency may deny the application or renewal, or direct the provider to deny employment of the subject individual, or approve or disapprove the prospective employee’s eligibility for employment by the provider, consistent with article twenty-three-A of the correction law”). Different agencies around the state are tasked with fingerprinting and vetting candidates; for instance, the state education department’s criminal history record checks are conducted by the Office of School Personnel Review and Accountability. See Fingerprint Frequently Asked Questions (FAQs), N.Y. STATE EDUC. DEP’T, <https://www.nysed.gov/educator-integrity/fingerprint-frequently-asked-questions-faqs> [<https://perma.cc/4C2H-V3NH>].

<sup>40</sup> National Inventory of Collateral Consequences of Conviction, NAT’L REENTRY RES. CTR., <https://nationalreentryresourcecenter.org/national-inventory-collateral-consequences-conviction> [<https://perma.cc/X78R-DYJJ>] (click the hyperlink National Inventory of Collateral Consequences of Conviction (NICCC); then click the box that says, “find consequences in your state”; finally, in the box labeled “description”, type “New York” and click “search”).

**Table 1.** Sample Industry and Sector Mandatory Restrictions in New York State

<b>Industry</b>	<b>Sector</b>	<b>Sample Rules &amp; Regulations</b>
Residential Care	Health & Social Work	N.Y. COMP. CODES R. & REGS. tit. 10, § 402.7 (2009) (employment in home/long-term care agency).
Disability Services	Health & Social Work	N.Y. COMP. CODES R. & REGS. tit. 14, § 633.22 (2020) (disability services); N.Y. COMP. CODES R. & REGS. tit. 14, § 687.4 (2023) (disability services); N.Y. COMP. CODES R. & REGS. tit. 14, § 701.6 (2018) (disability services); N.Y. COMP. CODES R. & REGS. tit. 14, §550.6 (2015); N.Y. COMP. CODES R. & REGS. tit. 14, §595.6 (2000) (mental health services provider); N.Y. EXEC. LAW § 845-b (McKinney 2013) (health services provider).
Eldercare	Health & Social Work	N.Y. COMP. CODES R. & REGS. tit. 9, § 6654.18 (1990) (respite services).
Childcare	Health & Social Work	N.Y. COMP. CODES R. & REGS. tit. 10, §7-2.5 (2015) (children’s camp director); N.Y. COMP. CODES R. & REGS. tit. 18, § 418-1.13 (2020) (child daycare center); N.Y. COMP. CODES R. & REGS. tit. 18, § 414.13 (2020) (school-aged childcare); N.Y. COMP. CODES R. & REGS. tit. 14, § 594.6 (2013) (housing programs for children and adolescents).
Education	Health & Social Work	N.Y. COMP. CODES R. & REGS. tit. 8, § 83.6 (2001) (teacher certification or suspension); N.Y. EDUC. LAW § 3035 (2007) (district/charter/private school staff); N.Y. EDUC. LAW § 305 (2024) (commissioner of education).
Healthcare	Health & Social Work	N.Y. PUB. HEALTH LAW § 3510 (McKinney 2013) (radiation therapy license).
Commercial Driver	Transportation	N.Y. VEH. & TRAF. LAW § 401 (McKinney 2024) (motor vehicle registration); N.Y. VEH. & TRAF. LAW § 509-f (Consol. 1994) (bus drivers); N.Y. VEH. & TRAF. LAW § 514-a (McKinney 2015) (motor vehicle suspension and revocation); N.Y. COMP. CODES R. & REGS. tit. 15, § 138.7-9 (Consol. 2000) (accident prevention instructor).

Shipping	Transportation	N.Y. COMP. CODES R. & REGS. tit. 21, § 3.2 (1993) (stevedore); N.Y. UNCONSOL. LAW Ch. 307 § 1 (Consol. 2024) (Waterfront commission).
Public Accountant	Professional Activities	N.Y. COMP. CODES R. & REGS. tit. 10, §98-3.6 (2015) (certified public accountant); N.Y. COMP. CODES R. & REGS. tit. 11, § 89.5 (2011) (certified public accountant).
Lobbying	Professional Activities	N.Y. LEGIS. LAW § 1-c (McKinney 2022) (lobbyist).
Attorney	Professional Activities	N.Y. JUD. LAW § 90 (McKinney 2013) (attorney and counselor at law); N.Y. JUD. LAW § 499-f (McKinney 2021) (prosecutor).
Notary Public	Professional Activities	N.Y. EXEC. LAW § 130 (McKinney 2023) (notaries public).
Private Security	Professional Activities	N.Y. GEN. BUS. LAW § 89-g (McKinney 1994) (security guard).
Auctioneer	Professional Activities	N.Y. GEN. BUS. LAW § 24 (McKinney 1967) (auctioneer license).
Alarm Technician	Professional Activities	N.Y. COMP. CODES R. & REGS. tit. 19, § 195.15 (McKinney 2018) (security/fire alarms); N.Y. GEN. BUS. LAW § 69-q (McKinney 1998) (security/fire alarms).
Insurance	Financial Services	N.Y. INS. LAW § 2108 (McKinney 2023) (insurance adjuster).
Stocks, Bonds, & Securities	Financial Services	N.Y. GEN. BUS. LAW § 359-g (McKinney 1982) (securities or commodity transactions); N.Y. COMP. CODES R. & REGS. tit. 13, § 10.4 (McKinney 2020) (brokers, dealers, and salespersons); N.Y. COMP. CODES R. & REGS. tit. 3, §403.5 (2013) (sales finance company); N.Y. COMP. CODES R. & REGS. tit. 3, § 405.5 (2013) (premium finance agencies); N.Y. COMP. CODES R. & REGS. tit. 3, § 420.19 (2024) (mortgage loans).
Public Works	Construction	N.Y. LAB. LAW § 861-e (McKinney 2010) (officer of construction contractor); N.Y. COMP. CODES R. & REGS. tit. 21, § 9602.3 (1993) (general contractor for NYC schools).
Civil Office	Public Administration	N.Y. PUB. OFF. LAW § 3 (McKinney 2024) (civil office).

Public Order & Safety	Public Administration	N.Y. PUB. AUTH. LAW § 1204 (McKinney 2018) (transit authority patrolman); N.Y. COMP. CODES R. & REGS. tit. 22, § 36.2 (2018) (court personnel); N.Y. CORRECT. LAW § 22-a (McKinney 1984) (corrections officer); N.Y. PUB. AUTH. LAW § 1266-h (McKinney 2022) (metropolitan commuter transit authority); N.Y. TOWN LAW § 151 (McKinney 1991) (police); N.Y. VILLAGE LAW § 10-1010 (McKinney 2015) (fire department officers/staff); N.Y. VILLAGE LAW § 10-1012 (McKinney 2024) (fire department officers/staff).
Election Staff	Public Administration	N.Y. ELEC. LAW § 3-418 (McKinney 1978) (election monitor/inspector/poll clerk); N.Y. Elec. Law § 5-206 (McKinney 1991) (watchers).
Social Security	Public Administration	N.Y. INS. LAW § 4413 (McKinney 2010) (trustees of employee welfare funds).
Land Use	Public Administration	N.Y. ENV'T CONSERV. LAW § 21-0701 (Consol. 1983) (river basin commissions); N.Y. ENV'T CONSERV. LAW § 21-1301 (Consol. 1984) (river basin compact); N.Y. COMP. CODES R. & REGS. tit. 21, § 4.6 (1993) (emergency employment at waterfront commission).
Gambling & Betting	Arts, Entertainment, & Recreation	N.Y. COMP. CODES R. & REGS. tit. 9, § 4607.8 (2013); N.Y. COMP. CODES R. & REGS. tit. 9, § 4820.35 (2021) (games of chance); N.Y. Comp. Codes R. & Regs. tit. 9 § 4820.35 (McKinney 2013) (bingo); N.Y. GEN. MUN. LAW § 481 (McKinney 2019) (bingo); N.Y. RAC. PARI-MUT. WAG. & BREED. § 1318-1323 (McKinney 2014) (casinos).
Chemical Products	Manufacturing	N.Y. LAB. LAW § 459 (McKinney 2021) (explosives company); N.Y. LAB. LAW § 909 (McKinney 2008) (asbestos handling); N.Y. COMP. CODES R. & REGS. tit. 10, § 80.11 (McKinney 2016) (controlled substances manufacture/distribution).

Wildlife	Agriculture	N.Y. COMP. CODES R. & REGS. tit. 6, § 183.2 (McKinney 2016) (license issuing officer); N.Y. COMP. CODES R. & REGS. tit. 6, § 184.3 (McKinney 2016) (wildlife rehabilitator).
Retail	Wholesale & Retail	N.Y. COMP. CODES R. & REGS. tit. 13, § 200.2 (McKinney 2018) (prospective franchisee); N.Y. GEN. BUS. LAW § 64 (McKinney 1909) (second-hand junk dealers); N.Y. TAX. LAW § 480 (McKinney 2011) (tobacco wholesaler); N.Y. PUB. HEALTH LAW § 3365 (McKinney 2014) (medical marijuana grower/dispensary); N.Y. ALCO. BEV. CONT. LAW § 102 (McKinney 2022) (regulation of alcoholic beverages); N.Y. ALCO. BEV. CONT. LAW § 126 (McKinney 2022) (alcoholic beverages license).
Other Services	Other Services	N.Y. UNCONSOL. LAW Ch. 139 § 34 (McKinney 1934) (garbage, metal, and refuse disposal); N.Y. GEN. BUS. LAW § 750-e (McKinney 1993) (pet cemetery/crematorium license); N.Y. INS. LAW § 6802 (McKinney 2012) (bail bonds).

Most restrictions are indefinite, meaning they do not specify when they will be lifted.<sup>41</sup> Others are time-limited.<sup>42</sup> While the intentions of these restrictions may try to protect vulnerable populations and uphold public trust, they frequently lack subtlety.<sup>43</sup> They end up automatically disqualifying people based on any felony

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<sup>41</sup> See, e.g., N.Y. VEH. & TRAF. LAW § 514-a (McKinney 2015) (driver's license suspension and revocation); N.Y. COMP. CODES R. & REGS. tit. 18, § 402.2(e)(1)–(4) (2015) (social services); N.Y. COMP. CODES R. & REGS. tit. 10, § 98-3.6(d)–(f) (2015) (CPA); N.Y. VEH. & TRAF. LAW § 509-f (McKinney 1994) (bus drivers); N.Y. COMP. CODES R. & REGS. tit. 3, § 403.4(b)(1)–(6) (2013) (sales finance company); N.Y. COMP. CODES R. & REGS. tit. 21, § 4.6(b)–(d) (1993) (emergency use persons).

<sup>42</sup> See, e.g., N.Y. LAB. LAW § 909(2), (5) (McKinney 2008).

<sup>43</sup> Despite the requirement for state agencies to apply all of the factors in N.Y. CORRECT. LAW Art. 23-A, we have observed, based on our professional experience (as such, please take this claim as personal/experiential commentary), that in practice, the state agency denials will have pro forma or boilerplate language that does not actually apply the law and factors. See, e.g., *Black v. New York State Off. of Mental Retardation & Dev. Disabilities*, 858 N.Y.S.2d 859, 863 (Sup. Ct. 2008) (determining that the Office's finding that the applicant has applied for a position that "would involve regular and substantial unsupervised or unrestricted physical contact with consumers" was "a general catchall statement without any attempt to address the specific employment duties involved in the employment sought by petitioner"). In practice, we find time and time again that relevant state agencies do not apply the factors as required.

conviction, regardless of the relevance to job duties. Some rules in NYS are, in fact, narrowly tailored and contain a rational basis for the restriction. For example:

- Auctioneer license restrictions for offenses of fraudulent misrepresentation of goods at auction;<sup>44</sup>
- Rules restricting lobbying because of crimes related to political corruption;<sup>45</sup> and
- Rules restricting access to childcare positions because of youth endangerment offenses.<sup>46</sup>

The objective of this article is not to recommend that rationally-based, narrowly tailored restrictions be repealed but rather to identify areas where restrictions do not meet those criteria. Next, we turn to examples of restrictions that range from confusing to unduly punitive.

### III. ANALYSIS AND POLICY RECOMMENDATIONS

In this section, we provide examples of overly burdensome NYS restrictions and provide five recommendations for reform. Even within a single sector, the rulemaking is often inconsistent. As noted above, the Health and Social Work sector is heavily regulated for policy reasons like: (1) patient vulnerability; (2) public safety; and (3) job-related access to regulated items like pharmaceuticals. This sector contains restrictions that range from simple reporting and background check requirements<sup>47</sup> to a combination of discretionary and mandatory restrictions

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<sup>44</sup> N.Y. GEN. BUS. LAW § 24 (McKinney 1967).

<sup>45</sup> N.Y. LEGIS. LAW § 1-c(a)(i)–(ii) (McKinney 2022).

<sup>46</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 10, § 7-2.5(a)(3)–(4), (l) (2015) (children’s camp); N.Y. COMP. CODES R. & REGS. tit. 18, § 418-1.13(b)–(c) (2020) (child day care centers); N.Y. COMP. CODES R. & REGS. tit. 18, § 414.13(b)–(c) (2020) (school-age childcare programs); N.Y. COMP. CODES R. & REGS. tit. 14, § 594.6(b)(7)(ii)–(iii), (b)(7), (ix) (2013) (licensed housing program for children and adolescents).

<sup>47</sup> N.Y. COMP. CODES R. & REGS. tit. 10, § 405.3(1)(d)–(1)(e) (2023) (hospital administration); N.Y. PUB. HEALTH LAW § 2803-e (McKinney 2000) (healthcare professionals); N.Y. COMP. CODES R. & REGS. tit. 14, § 633.5(b)(6)–(7), (c) (2016) (employment/volunteer position at entity affiliated/contracting with Office of Persons with Developmental Disabilities).

narrowed to only person-based and relevant offenses.<sup>48</sup> Some impose outright, mandatory restrictions based on any felony conviction ever.<sup>49</sup>

Let's review examples. NYS Public Health Law allows for the *denial*, *suspension*, or *revocation* of radiation therapy licenses based on a felony conviction. The statutory language reads:

“No person convicted of a felony shall . . . hold a license to practice radiologic technology, unless he or she has been granted an executive pardon, a certificate of relief from disabilities or a certificate of good conduct . . . and, the commissioner, at his or her discretion, restores the license after determining that the individual does not pose a threat to patient health and safety.”<sup>50</sup>

First, the positives. This restriction allows for some discretion, and the policy objective is clearly stated. However, the discretion only applies to license *restoration*. Importantly, some restrictions apply only to felonies committed *during* employment,<sup>51</sup> while others are retroactive. The restriction itself, which also applies to license refusals,<sup>52</sup> favors blanket denials for all felonies. Although the rule earlier

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<sup>48</sup> N.Y. COMP. CODES R. & REGS. tit. 10, § 402.7(a)(2)–(5) (2021) (limiting mandatory restrictions in long-term care settings to individuals with felony convictions related to sexual offenses, violent crimes, and welfare endangerment offenses committed within the prior 10 years; For other felonies and misdemeanors, require discretionary administrative review to determine eligibility); N.Y. COMP. CODES R. & REGS. tit. 14, § 550.6(a)(1)(ii)(a)–(d), (a)(2)(ii)(a)–(d) (2021) (similar in disability services context); N.Y. EXEC. LAW § 845-b(5)(a)–(d) (McKinney 2013) (similar; many mandatory bars in the healthcare sector are both overly specific and very vague at the same time. For example, under N.Y. EXEC. LAW § 845-b (McKinney 2013), the Criminal History Record Check (CHRC) system is used to process all applications for unlicensed staff with patients or patient property contact at all regulated health care facilities. While this impacts a huge swath of workers in regulated facilities—including those in Nursing Homes, Hospice, Adult Care Facilities, and Home Health Care—it also includes all non-licensed staff, such as Certified Nurse Aides, Home Health Care Aides, cooks, janitors, cleaners, drivers and other non-licensed staff at these facilities)).

<sup>49</sup> N.Y. PUB. HEALTH LAW § 3510(2)(a)–(b) (McKinney 2013).

<sup>50</sup> *Id.* at § 3510(2)(a).

<sup>51</sup> See, e.g., N.Y. JUD. LAW § 90(4)(a), (d)–(e) (McKinney 2013) (“any person being an attorney and counsellor-at-law who shall be convicted of a felony. . . shall. . . cease to be an attorney. . . for the purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state. . . or. . . any other state, district, or territory. . . .”); N.Y. JUD. LAW § 499-f(1) (McKinney 2021) (similar rule for prosecutors); N.Y. PUB. HEALTH LAW § 230(12)(b) (McKinney 2023) (medical practitioner license suspension).

<sup>52</sup> N.Y. PUB. HEALTH LAW § 3510(1)(p) (McKinney 2013).

specifies certain crimes that have “a direct relationship to the employment or licensure at issue,”<sup>53</sup> this requirement is subsequently undone.<sup>54</sup>

Contradictory language is a common problem. While in theory the relationship between certain felonies and patient safety is rational, the vast majority of felonies do not involve person-based or violent offenses,<sup>55</sup> so the relationship of most felonies to positions such as a “radiation technologist” is at best, unclear. A review of relevant New York job postings for radiation technologists confirms that regular job duties do not apply to all felonies.<sup>56</sup> While radiologist is not necessarily a highly common profession (31,960 nationwide and 1,890 in New York),<sup>57</sup> these upwardly mobile job categories offer crucial access to the middle class.<sup>58</sup> And the above restriction is just one example of a single job category. Such rules require review to ensure coverage of only relevant convictions.

**Recommendation #1:** All 500 New York restrictions should be reviewed for language covering all felonies. By definition, such language is not narrowly tailored to actual job duties.

One example of state-level reforms is requiring that restrictions only cover offenses that are “substantially related” to job duties, rather than merely “related.”<sup>59</sup>

**Recommendation #2:** New York should adopt uniform requirements across all restrictions, requiring that only convictions “substantially related to actual job duties” are covered.

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<sup>53</sup> See *id.* § 3510(1)(m).

<sup>54</sup> See *id.* § 3510(2)(b) (“A conviction of a felony shall include the conviction of a felony by any court in this state or by any court of the United States or by any court of any other state of the United States. . .”).

<sup>55</sup> See Uniform Crime Report: Crime in the United States, 2019, U.S. DEP’T OF JUST. FED. BUREAU OF INVESTIGATIONS (2020), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested.pdf> [<https://perma.cc/CJJ9-K5C9>].

<sup>56</sup> See, e.g., Radiologic Technologist-Full Time Days - Delancey Street, MOUNT SINAI (Apr. 20, 2024), <https://web.archive.org/web/20240420015817/https://careers.mountsinai.org/jobs/2717292?lang=en-us> [<https://perma.cc/KPF2-CHM9>].

<sup>57</sup> U.S. BUREAU LAB. STATS., Occupational Employment and Wages, May 2023: 29-1224 Radiologists, <https://www.bls.gov/oes/current/oes291224.htm> [<https://perma.cc/NJ52-3CA5>] (last modified April 3, 2024).

<sup>58</sup> *Id.*

<sup>59</sup> See Chidi Umez & Joshua Gaines, After the Sentence, More Consequences: A National Report of Barriers to Work, COUNCIL STATE GOV’TS JUST. CTR. 1, 9, 29 n.27, 30 n. 35 (Jan. 2021). [T. 6, R. 3.2]

Other rules in the same sector are more artful and ensure that restrictions only apply to offenses directly related to a public policy objective, such as client safety. Consider this example from respite care:

“Respite consisting of paid supervision shall . . . utilize only workers who have been screened for any history of client abuse and any history of conviction for a related felony.”<sup>60</sup>

The language above is more narrowly tailored. It requires denials based solely on histories of “client abuse” or related felonies. It is also more discretionary in that the employer—and regulating bodies—have leeway in deciding what counts as a “related felony.” While the introduction of discretion wherever possible is a progressive practice, evidence from New York indicates that even administrative discretion is often inappropriately *set to reject*, even when rules *are* appropriately discretionary and narrowly tailored.<sup>61</sup> Statewide, residential and in-home healthcare is estimated to be the State’s third largest occupational grouping, with over 160,000 jobs in nursing home and residential care facilities, and an additional 230,000 jobs in home healthcare contexts.<sup>62</sup> Despite this scope, these professions have experienced significant labor *shortages* in the recent past.<sup>63</sup>

Neither of the rules mentioned so far contain *duration limits*. While certificates of relief and other pathways to removing the restriction are present, time is not explicitly a factor in the ban. These are common issues. Even where rules *do* allow covered individuals to pursue relief, the responsibility lies with the job or license seeker, and there is no automatic time limit. Getting CRDs and CDGs can be a difficult, time-intensive process, and evidence from New York suggests that access

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<sup>60</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 6654.18(d)(1) (1990).

<sup>61</sup> For instance, according to the authors’ own analysis of administrative data on discretionary denials for positions, which was obtained with reporting permission from one New York State social services agency from 2021, more than half of the pre-hire letters sent to employers and providers for that year (excluding instances where there was no background hit, abeyances, and pending charges), resulted in final or pending denials of employment.

<sup>62</sup> See, e.g., Robert Martiniano & Kristen Stiegler, Current Health Care Employment in New York State by Setting and Region, CTR. HEALTH WORKFORCE STUD., SCH. PUB. HEALTH, UNIV. ALBANY (2020), [https://www.chwsny.org/wp-content/uploads/2020/07/2020\\_AcademyHealth\\_Poster\\_Kris\\_FINAL.pdf](https://www.chwsny.org/wp-content/uploads/2020/07/2020_AcademyHealth_Poster_Kris_FINAL.pdf) [<https://perma.cc/VB69-9BMX>]; see also Bureau of Budget, Spotlight: Care Workers and the New York City Economy, N.Y.C. COMPTROLLER BRAD LANDER 2 (Mar. 2023), <https://comptroller.nyc.gov/wp-content/uploads/documents/Spotlight-Care-Workers.pdf> [<https://perma.cc/BUS7-VBWU>]

<sup>63</sup> State of the Sector: Nursing Home Labor Staffing Shortages Persist Despite Unprecedented Efforts to Attract More Staff, AM. HEALTH CARE ASS’N & NAT’L CTR. FOR ASSISTED LIVING (Mar. 5, 2024), <https://www.ahcancal.org/News-and-Communications/Press-Releases/Pages/State-Of-The-Sector-Nursing-Home-Staffing-Shortages-Persist-Despite-Unprecedented-Efforts-To-Attract-More-Staff.aspx> [<https://perma.cc/CCT7-X2PQ>].

rates of these and similar options are low.<sup>64</sup> Making it the responsibility of the individuals to seek relief is likely not the most effective approach. One best practice is the use of *automatic duration limits*. We can call such limits a “best practice” because empirical research literature shows that *time* is one of the strongest predictors of reoffending for people convicted of low- and mid-level offenses.<sup>65</sup> So, restrictions should reflect that age and time since the last offense are two of the strongest predictors of reduced likelihood of reoffending.

**Recommendation #3:** All restrictions, except for the most serious, job-related offenses, should contain automatic duration limits.

As we will see, almost all New York employment restrictions require some correction to align with progressive lawmaking efforts. Let’s turn to a new sector, transportation, and a rule covering “accident prevention instructors”:

“An instructor of a motor vehicle accident prevention course must . . . have not been convicted within 10 years prior to becoming an instructor of a felony or crime involving violence, dishonesty, degeneracy, moral turpitude, deceit . . . theft, forgery, making false written statements, rape, perjury, fraud or bribery.”<sup>66</sup>

This example *does* introduce an automatic duration limit (10 years) and specifies felonies covered by the rule. However, the list of felonies sounds nearly random. It is also difficult for many of them to identify any substantial relationship to the job duties of an accident prevention instructor. Further, it is odd that there is no mention of driving or safety-related felonies. This illustrates a lack of narrow tailoring.

Ten years is also a long limit for most felonies and can counteract policy efforts that attempt to quickly reconnect returning citizens to employment. Let’s review another transportation example that contains a shorter duration limit (5 years). However, this one is also not narrowly tailored to actual job duties. State law on stevedore licenses requires that a prospective licensee organization:

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<sup>64</sup> See, e.g., Alec C. Ewald, *supra* note 29; Sealing of Criminal Records and Expansion of Youthful Offender Status: Public Hearing Before the N.Y. State Assemb. Standing Comm. on Codes & Corr. 12 (2019) (noting that only 1% of eligible New Yorkers applied for record sealing, which is a much more powerful form of relief) (statement of Eric Gonzalez, District Attorney, Kings County).

<sup>65</sup> Anna Bindler & Randi Hjalmarsson, Prisons, Recidivism and the Age-Crime Profile, 152 *ECON. LETTERS* 46, 49 (2017); William Rhodes, American Prisons are not a Revolving Door: Most Released Offenders Never Return, *THE LONDON SCH. ECON. & POL. SCI.* (Oct. 17, 2014), <https://blogs.lse.ac.uk/usappblog/2014/10/17/american-prisons-are-not-a-revolving-door-most-released-offenders-never-return/> [<https://perma.cc/7ALP-UQ84>] (describing the relationship between “time from release” as a variable and likelihood of successful re-entry).

<sup>66</sup> N.Y. COMP. CODES R. & REGS. tit. 15, § 138.7(b)(7) (2000).

“Does not have . . . any individual [under employment] who has been convicted of a felony within the preceding five years.”<sup>67</sup>

While this provision goes on to list specific felonies—such as racketeering and association with organized crime, terrorist groups, or drug cartels—read literally, the law constitutes a blanket restriction based on any felony conviction and a mandate on organizations pursuing stevedore licensing.

Now let’s turn to two other highly regulated sectors: financial services and professional services. Historically, the financial sector has been one of the most highly regulated.<sup>68</sup> Financial employment is hard to navigate because of differently applied rules, retroactive and proactive reporting rules, and other factors. While only some of these rules are unreasonable, the array of restrictions is highly difficult to navigate and, in practice (if not literally), can functionally exclude people with criminal convictions from a large swath of jobs. As an example, let’s review a rule covering insurance adjusters:

“No such license shall be issued to any person who has ever been convicted of a felony, or of any crime or offense involving fraudulent or dishonest practices; nor shall a licensee under this section employ any person who has ever been convicted of a felony or such a crime or offense.”<sup>69</sup>

This example is highly restrictive and, in fact, was finally repealed by the state legislature in 2019 after decades of existence.<sup>70</sup> Deceptively, the statutory language does mention specific, narrowly tailored felony offenses (“fraudulent or dishonest practices”). However, this follows the coordinating conjunction “or” and a prior statement that essentially restricts access to the profession for “any person who has ever been convicted of a felony.”<sup>71</sup> This is broad, mandatory, and contains no durational limit. Additionally, the rational relationship of many felonies to the profession of “insurance adjuster” is highly tenuous.<sup>72</sup> This adds to the potential need

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<sup>67</sup> N.Y. COMP. CODES R. & REGS. tit. 21, § 3.2(b)(3) (1993).

<sup>68</sup> See Matt Saleh et al., *supra* note 21, at 1.

<sup>69</sup> N.Y. INS. LAW § 2108(d)(3) (McKinney 2018) (repealed 2019) (Note that this provision was repealed in 2019. Nevertheless, the example is instructive of common wording in occupational restrictions).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., U.S. BUREAU OF LAB. STAT., Claims Adjusters, Appraisers, Examiners, and Investigators, <https://www.bls.gov/ooh/business-and-financial/claims-adjusters-appraisers-examiners-and->

for scrutiny in rules like this, especially those that ban access to professions that offer upward mobility and pose comparatively minimal societal risk. By contrast, mandatory rules covering certified public accountants are more narrowly tailored to a rational public policy basis, specifying that the restriction applies only to crimes such as fraud, bribery, or racketeering.<sup>73</sup>

Another example from the professional services sector can be found in New York’s restrictions on fire and security alarm technicians. Different parts of the state code contain competing rules—one of these attempts aimed to tailor the restriction to specific offenses like theft and fraud.<sup>74</sup> Another appears to institute a blanket restriction where “it is determined that such employee has been convicted of such a felony or has a criminal action pending.”<sup>75</sup> Neither provision states a duration limit. Many professional activities vaguely involve the public trust, but related restrictions are not tailored to actual job duties in any way. Consider this discretionary rule covering employment as a private security guard:

“No security guard company shall knowingly employ to perform security guard functions, any individual . . . who has been convicted of a serious offense, or of a misdemeanor in the state or of any offense in any other jurisdiction which, if committed in this state, would constitute a misdemeanor, and which, in the discretion of the secretary, bears such a relationship to the performance of the duties of a security guard, as to constitute a bar to employment.”<sup>76</sup>

This example appears to be discretionary but confusing “or” statements create uncertainty about whether “serious offense[s]” are subject to blanket restriction. Nevertheless, the proviso contains language requiring that the offenses “bear [] . . . a relationship to the performance of the duties of a security guard.”<sup>77</sup> Again, we recommend updating this language to require a “substantial relationship” to work duties. We would also recommend clarifying whether that condition applies to the felonies and misdemeanors mentioned in the restriction. And, we recommend removing misdemeanors from coverage.

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investigators.htm#:~:text=Adjusters%20inspect%20property%20damage%20or,as%20look%20at%20police%20reports [https://perma.cc/P4JH-88KC] (last modified Aug. 29, 2024).

<sup>73</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 10, § 98-3.6(d)(1) (2015) (public accountant); See, e.g., N.Y. COMP. CODES R. & REGS. tit. 11, § 89.5(d) (2011) (certified public accountant).

<sup>74</sup> N.Y. COMP. CODES R. & REGS. tit. 19, § 195.15(b)(3)–(4) (2018) (requiring fingerprinting and background checks to ascertain whether or not an employee working as an alarm technician “has ever been convicted of an offense (other than a minor motor vehicle offense). . . .”).

<sup>75</sup> N.Y. GEN. BUS. LAW § 69-q(5) (McKinney 1998).

<sup>76</sup> N.Y. GEN. BUS. LAW § 89-g(3)(a) (McKinney 1994).

<sup>77</sup> *Id.*

**Recommendation #4:** “Or” coordinating conjunctions that apply coverage to an overbroad array of felonies should be removed from all restrictions. Except in instances where there is a “substantial relationship” to actual job duties, all misdemeanor offenses should be removed from restrictions.

A final recommendation involves the need for as many of the restrictions on the books to be made discretionary, as possible. Discretionary restrictions can still pose significant barriers. Mandatory restrictions—about 20% of all restrictions—should only be used in severe offenses that bear a substantial relationship to actual job duties. It is also important that these rules specify which *types* of jobs within a sector and industry are prohibited. For example, certain offenses might affect a person’s ability to work in direct service/client roles but not in maintenance or other roles. All laws and regulations should tailor the types of jobs covered as much as possible to reduce the artificial narrowing of the labor market for returning citizens.

**Recommendation #5:** All mandatory restrictions should be reviewed to ensure automatic denials only for severe, recent, and substantially job-related offenses. Robust, uniform due process and transparency protections should cover discretionary rules.

To close, let’s return to the Healthcare sector, which illustrates many of the above points. This sector exemplifies the importance of also reviewing discretionary restrictions, which can be as much a source of *artificial labor market narrowing* as mandatory bans. According to the U.S. Bureau of Labor Statistics, employment in healthcare occupations is projected to grow much faster than the average for all other occupations during the next decade, with about 1.9 million openings projected each year.<sup>78</sup> Healthcare support jobs are essential entry-level employment positions providing access to the middle class. New York, like the rest of the nation, is facing a labor shortage crisis related to healthcare and disability service provision.<sup>79</sup>

State law requires that all healthcare support workers—including certified nurses’ aides, home healthcare aides, and a host of other positions such as cooks, janitors, and cleaners—have their criminal histories reviewed by the Department of

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<sup>78</sup> Occupational Outlook Handbook: Healthcare Occupations, U.S. BUREAU OF LAB. STATS.: U.S. DEP’T OF LAB., <https://www.bls.gov/ooh/healthcare/home.htm>, [<https://perma.cc/EQ7N-7NCW>] (last modified Aug. 29, 2024).

<sup>79</sup> GOVERNOR KATHY HOCHUL, Governor Hochul Announces Direct Payments to Healthcare Workers as Part of \$10 Billion Healthcare Plan (Jan. 5, 2022), <https://www.governor.ny.gov/news/governor-hochul-announces-direct-payments-healthcare-workers-part-10-billion-healthcare-plan> [<https://perma.cc/BF7V-VU6Q>] (“The pandemic has dramatically exacerbated healthcare workforce concerns. . .As of June 2021, New York’s healthcare workforce was still 3 percent below pre-pandemic levels, and 11 percent below where it would need to be. . .to keep up with. . .projected demand”).

Health (DOH).<sup>80</sup> N.Y. Executive Law § 845-b provides examples of criminal history employment clearance restrictions that are both hyper-specific and grossly overbroad. To begin with, the DOH employment clearance review is overbroad in that clearance review is not tailored to employment position or job role. So, by definition, these are not “substantially related” to the “actual job role.” Under this provision, jobs requiring personal contact with patients are reviewed in the same capacity as the cooks and cleaners in nursing homes, who likely do not have significant direct contact with patients. For example, individuals who work in the cleaning department of a nursing home may be denied employment because of a misdemeanor Drinking While Driving (DWI) offense, even though their role does not involve any driving responsibilities.

Regarding the offenses covered, the statute specifically restricts individuals with convictions for endangering the welfare of people with disabilities and vulnerable elderly populations.<sup>81</sup> This, of course, makes perfect sense. No critic would argue that these specific crimes are not “substantially related” to the “actual job role” of providing healthcare to elderly or disabled groups. The statute also restricts access based on crimes related to stealing prescription medications, with a ten-year restriction.<sup>82</sup> Again, this appears rational, narrowly tailored, and imposes an arguably reasonable duration limit. However, the statute also contains extremely broad presumptive disqualifications of any Class A felony (without durational limit).

The rights of people with Class A felonies may not immediately draw sympathy from the general public. However, upon closer review, it is easy to see how bias against people with these types of convictions, as well as a failure to ensure public safety, are significant factors at play. For example, this presumptive disqualification would cover someone convicted at the height of the War on Drugs for a Controlled Substance offense. Presumptive disqualification for Class A felonies also has impacts on individuals’ ability to be caretakers for their own elderly or disabled relatives.

Similarly, broad restrictions cover personal offenses (with a 10-year durational limit). In other words, crimes where the victim is an individual. While, again, these are unsavory, the statutory language risks going too far by including Class B or C felonies that are not substantially related to actual jobs. While sex crimes and violent crimes are understandably covered, so too are crimes like First-Degree Welfare Fraud, Criminal Mischief, Computer Tampering, and other Class B and C felonies that disproportionately penalize poorer communities.<sup>83</sup> This rule highlights the fact

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<sup>80</sup> N.Y. EXEC. LAW § 845-b(4)(b) (McKinney 2013).

<sup>81</sup> N.Y. EXEC. LAW § 845-b(5)(a) (McKinney 2013) (citing N.Y. PENAL LAW § 260.25 (McKinney 2013); N.Y. PENAL LAW § 260.32 (McKinney 2010); N.Y. PENAL LAW § 260.34 (McKinney 2010)).

<sup>82</sup> N.Y. EXEC. LAW § 845-b(5)(a) (McKinney 2013) (citing N.Y. PENAL LAW § 178.00 (McKinney 1995)).

<sup>83</sup> N.Y. PENAL LAW § 145.12 (McKinney 1971); N.Y. PENAL LAW § 158.25 (McKinney 1995).

that even well-intentioned, discretionary rules can be overbroad and create issues of fairness and due process.

CONCLUSION

The collective effect of these restrictions substantially limits job markets for individuals with criminal records. This results in sky-high unemployment levels reminiscent of the Great Depression. Against this backdrop, the role of state legislators and policymakers in modernizing this rulemaking becomes crucial to prevent the perpetuation of punitive measures. New York has made commendable strides in this regard, but efforts have been uneven and mostly sector specific. There is an urgent need to shift from broad, automatic, punitive restrictions to more narrowly tailored, discretionary ones. Emphasis should be placed on advocating for individualized assessments, with outright bans being a last resort and applicable only when the conviction is recent and aligns with policy objectives like public safety. It is also crucial to underscore the value of public sector employment, with the government setting the standard as a “model employer.”

*N.Y. currently has 500 laws and regulations restricting employment, five examples of specific laws that need updating.*

N.Y. PUB. HEALTH LAW § 3510(2)(a)–(b) (McKinney 2013)		
Current Language	Recommended Language	Why
“No person convicted of a felony shall . . . .hold a license to practice radiologic technology, unless he or she has been granted an executive pardon, a certificate of relief from disabilities or a certificate of good conduct . . . .and, the commissioner at his or her discretion, restores the license after determining that the individual does not pose a threat to patient health and safety.”	“No person convicted <b>within 8 years prior</b> of a felony <b>that is substantially related to the actual job duties of a radiation technologist</b> shall . . . .hold a license to practice radiologic technology, unless he or she has been granted an executive pardon, a certificate of relief from disabilities or a certificate of good conduct, <b>and, or</b> , the commissioner at his or her discretion, restores the license after determining that the individual does not pose a threat to patient health and safety.”	-Restrictions should only apply if the felony is “substantially related to actual job duties.” -8-year duration limit for related felonies is modeled after the new <i>Clean Slate</i> law. -Reinstatement of rights should be automatic if conditions are met (e.g., pardon or time limit).

N.Y. GEN. LAW § 89-g(3)(a) (McKinney 1994)		
Current Language	Recommended Language	Why
<p>“No security guard company shall knowingly employ to perform security guard functions, any individual . . . .who has been convicted of a serious offense, or of a misdemeanor in the state or of any offense in any other jurisdiction which, if committed in this state, would constitute a misdemeanor, and which, in the discretion of the secretary, bears such a relationship to the performance of the duties of a security guard, as to constitute a bar to employment.”</p>	<p>“No security guard company shall knowingly employ to perform security guard functions, any individual . . . .who has been convicted <b>within 8 years prior of a felony serious offense, or of a misdemeanor in the state or of any offense in any other jurisdiction which, if committed in this state, would constitute a misdemeanor, and</b> which, in the discretion of the secretary, bears <del>such</del> <b>a substantial</b> relationship to the performance of the <b>actual job</b> duties of a security guard, as to constitute a bar to employment.</p>	<p>-This language is <i>much</i> too broad and misdemeanors should never be covered. This restriction applies to any misdemeanor, committed in any state.</p>

N.Y. COMP. CODES R. & REGS. tit. 9 § 6654.18(d)(1) (2024)		
Current Language	Recommended Language	Why
<p>“Respite consisting of paid supervision shall . . . .utilize only workers who have been screened for any history of client abuse and any history of conviction for a related felony.”</p>	<p>“Respite consisting of paid supervision shall . . . .utilize only workers who have been screened for any history of client abuse <del>and any history of conviction for a related</del> <b>felony or other felony conviction that is substantially related to the actual job duties of performing respite care.”.</b></p>	<p>-Current language is too broad, regulations should define what “substantially related” means in a given context.</p>

N.Y. 15 § 138.7(b)(7) (2024)		
Current Language	Recommended Language	Why
<p>“An instructor of a motor vehicle accident prevention course must . . . .have not been convicted within 10 years prior to becoming an instructor of a felony or crime involving violence, dishonesty, degeneracy, moral turpitude, deceit . . . .theft, forgery, making false written statements, rape, perjury, fraud or bribery.”</p>	<p>“An instructor of a motor vehicle accident prevention course must . . . .have not been convicted within <b>10 8</b> years prior to becoming an instructor of a <b>felony or crime that is substantially related to the actual job duties of accident prevention instructor.</b>”  <del>involving violence, dishonesty, degeneracy, moral turpitude, deceit...theft, forgery, making false written statements, rape, perjury, fraud or bribery.</del></p>	<p>-Current language “felony or crime” is too broad, only substantially related felonies should be covered.                      -This list of felonies seems almost random and bears no rational relationship to the job duties.</p>

N.Y. COMP. CODES R. & REG. tit. 21 § 3.2(b)(3) (2024)		
Current Language	Recommended Language	Why
<p>“[Stevedore licensee entities may] not have . . . .any individual [under employment] who has been convicted of a felony within the preceding five years.”</p>	<p>“[Stevedore licensee entities may] not have . . . .any individual [under employment] who has been convicted of a felony <b>that is substantially related to the actual job duties</b> within the preceding five years.”</p>	<p>-Laws should never apply to any felony. There are simply too many felonies that are irrelevant to working as a stevedore.                      -Restrictions that pose minimal risk to public safety should have even shorter duration limits (e.g., 5 years).</p>