

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of)
ARM 24.101.402 definitions and the)
adoption of New Rule I applicants with)
criminal convictions)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT AND
ADOPTION

TO: All Concerned Persons

1. On November 5, 2020, at 10:00 a.m., a public hearing will be held via remote conferencing to consider the proposed amendment and adoption of the above-stated rules. Because there currently exists a state of emergency in Montana due to the public health crisis caused by the coronavirus, there will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting, <https://mt-gov.zoom.us/j/96560520996?pwd=N3BmRkZrUnFqUGlrR0EyNy9XeDZDZz09>
Meeting ID: 965 6052 0996
Password: 857546

OR

(b) Dial by telephone, +1 406 444 9999 or +1 646 558 8656,
Meeting ID: 965 6052 0996
Password: 857546

The hearing will begin with a brief introduction by department staff to explain the use of the videoconference and telephonic platform. All participants will be muted except when it is their time to speak.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., on October 29, 2020, to advise us of the nature of the accommodation that you need. Please contact Debra Morrell, Business Standards Division, Department of Labor and Industry, 301 South Park Avenue, P.O. Box 200514, Helena, Montana 59620-0514; telephone (406) 841-2367; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2313; or dmorrell@mt.gov.

3. The rule proposed to be amended is as follows, stricken matter interlined, new matter underlined:

24.101.402 DEFINITIONS As used in conjunction with Title 37, MCA, the following definitions apply:

(1) through (11) remain the same.

(12) "Nonroutine application" means an application that staff has determined requires board review, because it involves:

~~(a) a pending complaint or pending or final disciplinary action, in any jurisdiction, against a current or previously held professional or occupational license of any type;~~

(b) remains the same but is renumbered (a).

~~(c) (b) materials that require evaluation by the professional members of the board to determine compliance with qualifications for licensure;~~

(d) through (f) remain the same but are renumbered (c) through (e).

(13) through (17) remain the same.

(18) "Routine application" means an application that staff has determined does not require board review because:

(a) the application does not meet the definition of nonroutine; or

(b) all issues qualifying the application as nonroutine have already been decided by the board, e.g. in a prior application, and no additional relevant information is presented that suggests the need to reconsider that decision as determined in the discretion of licensing staff and by board rule.

(19) and (20) remain the same.

AUTH: 2-4-201, 37-1-101, MCA

IMP: 2-4-201, 37-1-101, 37-1-130, 37-1-131, 37-1-141, 37-1-321, MCA

REASON: The department determined it is reasonably necessary to amend this rule to align with the provisions proposed in NEW RULE I. Because the new rule contains further clarifying standards for staff to assist boards in issuing licenses for routine applications, the department is refining the definitions of both "routine" and "nonroutine" for consistency with current standardized processes.

The department is striking (12)(a) as the basis for nonroutine applications is adequately addressed in (12)(b) since all unprofessional conduct allegations must be premised on a violation of board law or rule. While a "pending complaint" is not itself a violation, the conduct underlying the complaint may be. In those instances, it is preferable to identify the violation of board law or rule under which the board would have authority to deny the application.

The department is amending (18) to authorize staff to issue licenses where potential violations or issues that would otherwise require the application to be board-reviewed have already been reviewed and decided. The department is also amending (18) to parallel the format of (12) by relocating staff's discretion to determine no board review. It is reasonably necessary to strike the reference to "board rule" because (12) addresses a board's ability to make rules to determine what is nonroutine since determining nonroutine is more feasible than delineating every "routine" situation in rule.

Authority and implementation citations are being amended to accurately reflect all statutes implemented through the rule and provide the complete sources of the department's rulemaking authority.

4. The rule proposed to be adopted is as follows:

NEW RULE I APPLICANTS WITH CRIMINAL CONVICTIONS (1) The following criteria shall apply to determine whether an applicant's criminal conviction is related to the public health, welfare, and safety as it applies to the occupation:

(a) whether the occupation would offer the opportunity for the commission of the offense or similar offense;

(b) the vulnerability of the population served by the occupation to become victims of the offense or similar offense;

(c) the facts and circumstances of the conduct surrounding the offense; or

(d) other reasonable demonstration of relatedness.

(2) The following criteria shall apply to determine if the applicant, even while serving supervised release, is insufficiently rehabilitated to warrant the public trust:

(a) commission of multiple offenses;

(b) revocation or correctional intervention of the applicant's probation, parole, or conditional release;

(c) unsatisfied court-ordered conditions;

(d) lack of candor, misrepresentation, or omission in disclosing the offense or circumstances of the offense;

(e) statements that demonstrate lack of remorse or accountability for the conduct;

(f) unless good cause exists, failure to maintain education, training, or employment on at least a part-time basis; or

(g) other credible evidence of insufficient rehabilitation.

(3) The board shall, unless the conviction is exempt from board review as provided by this rule, determine whether enough time has passed since the applicant's conviction, release from incarceration, or discharge of sentence to evaluate rehabilitation given the nature and circumstances of the offense.

(4) An applicant will not be required to report:

(a) arrests that did not result in the above outcomes;

(b) convictions (juvenile adjudications) received when under 18, unless convicted as an adult; or

(c) misdemeanor driving violations, including driving under the influence, if sentenced more than five years before the submission date of the application.

(5) Unless board rule provides otherwise, authorized staff may determine there is no evidence of lack of rehabilitation and issue a license to an otherwise qualified applicant who meets the following criteria:

(a) Nonviolent misdemeanor convictions if the conviction date is more than two years before the application date, unless the applicant is still in custody due to the conviction.

(b) Nonviolent felony convictions if the conviction date is more than five years before the application date, unless the applicant is still in custody due to the conviction.

(6) Unless board rule provides otherwise, all violent misdemeanor or felony convictions and any nonviolent misdemeanor and nonviolent felony convictions not included in (5) must be reviewed by the board as nonroutine applications.

(7) Notwithstanding the screening criteria in (5)(a) and (b), staff may require board review of applicants who engaged in egregious conduct implicating risks to public safety.

AUTH: 2-4-201, MCA

IMP: 2-4-201, 37-1-101, 37-1-104, 37-1-203, 37-1-205, 37-1-316, MCA

REASON: Recently, some states have passed legislation prohibiting "blanket bans" on criminal convictions and imposing relevancy and rehabilitation criteria for professional licensing agencies to apply to applicants with criminal convictions. The department has concluded that legislative reform is not necessary in Montana because Mont. Const. Art. II, Sec. 28 Criminal Justice Policy – Rights of the Convicted and Title 37, Ch. 1, part 2, MCA, regarding the licensure of criminal offenders already prohibits blanket bans on criminal convictions and requires boards to apply relevancy and rehabilitation to their licensing decisions. The department determined it is reasonably necessary to adopt NEW RULE I to formally establish in rule the informal processes currently followed by the Business Standards Division and the administratively attached licensing boards to uniformly and consistently inform potential applicants, the public, and future board members and staff.

The rule will also limit the reporting of driving violations of a certain age because while driving may be incidental to the practice of a profession, driving is not within the statutorily defined scope of practice of any profession regulated within the department. The Montana Department of Justice, Division of Motor Vehicles, prosecuting offices and courts have jurisdiction over the competent operation of motor vehicles through the issuance or limitation of driving privileges. Only recent driving violations are potentially relevant to exclude current mental or chemical dependency impairment that may adversely impact an applicant's ability to practice safely. The department is proposing to adopt a five-year period to account for potential relapse cycles but reduce the time and cost to process driving violations older than five years.

The department is also adopting this new rule to create a standard formula for boards, should they adopt the division rule by reference, to exclude consideration of convictions that are older and less serious where the applicant appears to be rehabilitated. Where boards have adopted rules to limit the type or age of conviction required for board review, unintentional variations in licensing approaches have negatively impacted the uniform standards that license processing staff follow and apply. For example, some utilize the date of sentence discharge to measure the elapsed time and others use the date of conviction.

The rule will authorize and guide staff to issue licenses where there is no evidence contradicting the applicant's rehabilitation, but still provide staff with the ability to identify egregious cases that should have board review. While boards retain the discretion to adopt different time elapse limitations than in this rule, or give more scrutiny to specific convictions of concern to the board (ex. drugs for pharmacists, fraud and theft for fiduciary license types, fish and game for outfitters), the division rule will provide a consistent framework and terminology to standardize and increase efficiency in licensure operations, reduce costs, and reduce processing time of applications that should be considered as routine.

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be

submitted to the Business Standards Division, Department of Labor and Industry, 301 South Park Avenue, P.O. Box 200514, Helena, Montana 59620-0514, by facsimile to (406) 841-2313, or e-mail to damoe@mt.gov, and must be received no later than 5:00 p.m., November 6, 2020.

6. An electronic copy of this notice of public hearing is available at <http://bsd.dli.mt.gov> (department's web site). Although the department strives to keep its web site accessible at all times, concerned persons should be aware that web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing a web site do not excuse late submission of comments.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding Business Standards Division administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to Debra Morrell, Business Standards Division, Department of Labor and Industry, 301 South Park Avenue, P.O. Box 200514, Helena, Montana 59620-0514; faxed to the office at (406) 841-2313; e-mailed to dmorrell@mt.gov; or made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. Regarding the requirements of 2-4-111, MCA, the department has determined that the amendment of ARM 24.101.402 will not significantly and directly impact small businesses.

Regarding the requirements of 2-4-111, MCA, the department has determined that the adoption of NEW RULE I will not significantly and directly impact small businesses.

Documentation of the department's above-stated determinations is available upon request to the Business Standards Division, Department of Labor and Industry, 301 South Park Avenue, P.O. Box 200514, Helena, Montana 59620-0514; telephone (406) 841-2327; facsimile (406) 841-2313; or to damoe@mt.gov.

10. Darcee L. Moe, Legal Counsel, has been designated to preside over and conduct this hearing.

/s/ DARCEE L. MOE
Darcee L. Moe
Rule Reviewer

/s/ BRENDA NORDLUND
Brenda Nordlund, Acting Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State September 29, 2020.