

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF RULE-MAKING : ORDER OF THE
PROCEEDINGS BEFORE THE : DEPARTMENT OF REGULATION
DEPARTMENT OF REGULATION : AND LICENSING ADOPTING RULES
AND LICENSING : (CLEARINGHOUSE RULE 04-097)

ORDER

An order of the Department of Regulation and Licensing to repeal RL 31.035 (1m) and 31.036 (1m); and to create RL 4.02 (3e), (3m), (3s) and (5m), 4.07, 4.08 and 4.09 relating to criminal background investigations and fingerprinting of applicants.

Analysis prepared by the Department of Regulation and Licensing.

ANALYSIS

Statutes interpreted:

Section 440.03 (13) (a), (b) and (c), Stats.

Statutory authority:

Section 227.11 (2), Stats., s. 440.03 (13) (a), Stats., as renumbered and amended by 2003 Wisconsin Act 151, and s. 440.03 (13) (b) and (c), Stats., as created by 2003 Wisconsin Act 151.

Explanation of agency authority:

This proposed rule-making order is being promulgated pursuant to 2003 Wisconsin Act 151. 2003 Wisconsin Act 151 was created in response to federal Public Law 92-544, which required authorization by state statute to continue the Federal Bureau of Investigation's policy of honoring state requests for criminal background reports.

2003 Wisconsin Act 151 modifies the authority of the Department of Regulation and Licensing to conduct criminal background checks of applicants and requires rule-making by the Department to conduct investigations to determine whether an applicant for or holder of any credential issued by the Department has been charged with or convicted of a crime.

Related statute or rule:

There are no related statutes or rules other than those listed above.

Plain language analysis:

SECTION 1 creates definitions for “arrest record,” “conviction record,” “credential,” “credentialing authority” and “investigate.”

SECTION 2 creates s. RL 4.07 to authorize the department to conduct investigations to determine whether an applicant for a credential issued by the department, an attached examining board, affiliated credentialing board or board having authority to issue or deny a credential has been charged with or convicted of a crime.

SECTION 2 creates s. RL 4.08 to allow the department to require that an applicant be photographed and fingerprinted as part of the credentialing process, if there exists reason to believe that the applicant has failed to accurately describe his or her conviction record.

SECTION 2 also creates s. RL 4.09 to authorize the department to conduct investigations to determine whether a holder of a credential issued by the department, an attached examining board, affiliated credentialing board or board having authority to issue or deny a credential has been charged with or convicted of a crime. In addition, s. RL 4.09 establishes that credential holders are required to self-report convictions to the department.

SECTIONS 3 and 4 repeal ss. RL 31.035 (1m) and 31.036 (1m) to conform to the requirements of 2003 Wisconsin Act 151, which eliminates the ability of the department to exempt peace officers from the fingerprinting requirement for credentialing as a private detective or private security person.

Summary of, and comparison with, existing or proposed federal regulation:

Comparison of federal law. Generally, the federal government does not involve itself in licensure of professions. However, criminal background checks are required pursuant to federal law in related areas. See, for example: P.L. 108-173, Background checks on prospective direct patient access employees for long term care facilities or providers; 42 USCS § 13041 Child care worker employee background checks; and 42 USCS § 5119, Child abuse crime information reporting; See also: 15 USCS § 5902, which requires a criminal record background check for states issuing an initial weapons license to an armored car crew member [referenced by Wis. Stat. § 440.26 (3m) Rules concerning dangerous weapons for private detectives and security personnel.]

Comparison with rules in adjacent states:

Comparisons of similar rules in adjacent states. For the purposes of this analysis, the statutes and regulations of Illinois, Indiana, Iowa, Michigan and Minnesota were examined to compare criminal background checks requirements associated with licensing for the representative professions of physicians, nurses, real estate appraisers and accountants. In addition, licensing agencies (or boards) in each state were contacted by phone and asked whether their state had any background check requirements.

While in practice applicants routinely have to respond to questions regarding conviction history on an application form for a professional license, requirements for criminal background checks

in adjacent states are not generally codified in statutes or administrative codes. Illinois [225 ILCS 54/5-23] requires criminal background checks for nurses with the state police and FBI. If a name check reveals a criminal history, a fingerprint check is required. Via rulemaking, [Illinois Section 1300.20] all initial nurse applicants in Illinois are subject to fingerprint processing. Illinois also has a statute [Section 225 ILCS 60/9.7] requiring criminal background checks for physicians. The rule [1285.80(e)] implementing this section requires that the Illinois Department of Professional Regulation check criminal backgrounds of endorsement candidates through the Federation of State Medical Boards or Chiropractic Information Network – Board Action Database. In Minnesota and Michigan, application forms for real estate appraisers require the applicants to authorize criminal background checks, although no statute or rule specifically mandates this practice.

Anticipated costs incurred by private sector:

The department has determined that this rule has no significant fiscal effect on the private sector.

Effect on small business:

These proposed rules will have no significant economic impact on a substantial number of small businesses, as defined in s. 227.114 (1) (a), Stats.

Agency contact person:

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Place where comments are to be submitted and deadline for submission:

Department of Regulation and Licensing, Office of Legal Counsel, Room 171, 1400 East Washington Avenue, P.O. Box 8935, Madison, WI 53708. E-mail: pamela.haack@drl.state.wi.us. Comments must be received no later than October 11, 2004.

TEXT OF RULE

SECTION 1. RL 4.02 (1g), (3e), (3m), (3s) and (5m) are created to read:

RL 4.02 (1g) "Arrest record" means information indicating that an individual has been apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority.

(3e) "Conviction record" means information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has

been less than honorably discharged, or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled pursuant to any law enforcement or military authority.

(3m) “Credential” means a license, permit, or certificate of certification or registration that is issued under chs. 440 to 480, Stats.

(3s) “Credentialing authority” means the department or an attached examining board, affiliated credentialing board or board having authority to issue or deny a credential.

(5m) “Investigate” means to determine the arrest and conviction record of an applicant or holder of a credential, including but not limited to:

(a) Determining whether an applicant or holder of a credential has been charged with or convicted of a crime.

(b) Determining the facts and circumstances surrounding an arrest, criminal charge, or conviction.

(c) Determining the outcome and status of an arrest, criminal charges or conviction record, including completion of sentence imposed, probationary terms or parole.

(d) Requiring disclosure of arrest or conviction record by an applicant.

SECTION 2. RL 4.07, 4.08 and 4.09 are created to read:

RL 4.07 Investigation. The department shall investigate whether an applicant for any of the following credentials has been charged with or convicted of a crime:

- (1) Accountant, certified public.
- (2) Acupuncturist.
- (3) Advanced practice nurse prescriber.
- (4) Aesthetician.
- (5) Aesthetics instructor.
- (6) Appraiser, real estate, certified general.
- (7) Appraiser, real estate, certified residential.
- (8) Appraiser, real estate, licensed.
- (9) Architect.

- (10) Athlete agent.
- (11) Athletic trainer.
- (12) Auctioneer.
- (13) Audiologist.
- (14) Barber or cosmetologist.
- (15) Barbering or cosmetology instructor.
- (16) Barbering or cosmetology manager.
- (17) Boxer.
- (18) Cemetery preneed seller.
- (19) Cemetery salesperson.
- (20) Chiropractor.
- (21) Dental hygienist.
- (22) Dentist.
- (23) Designer of engineering systems.
- (24) Dietitian.
- (25) Drug distributor.
- (26) Drug manufacturer.
- (27) Electrologist.
- (28) Electrology instructor.
- (29) Engineer, professional.
- (30) Fund-raising counsel.
- (31) Funeral director.
- (32) Hearing instrument specialist.

- (33) Home inspector.
- (34) Landscape architect.
- (35) Land surveyor.
- (36) Manicuring instructor.
- (37) Manicurist.
- (38) Marriage and family therapist.
- (39) Massage therapist or bodyworker.
- (40) Music, art or dance therapist.
- (41) Nurse, licensed practical.
- (42) Nurse, registered.
- (43) Nurse-midwife.
- (44) Nursing home administrator.
- (45) Occupational therapist.
- (46) Occupational therapy assistant.
- (47) Optometrist.
- (48) Perfusionist.
- (49) Pharmacist.
- (50) Physical therapist.
- (51) Physical therapist assistant.
- (52) Physician.
- (53) Physician assistant.
- (54) Podiatrist.
- (55) Private detective.

- (56) Private practice school psychologist.
- (57) Private security person.
- (58) Professional counselor.
- (59) Professional fund-raiser.
- (60) Professional geologist.
- (61) Professional hydrologist.
- (62) Professional soil scientist.
- (63) Psychologist.
- (64) Real estate broker.
- (65) Real estate salesperson.
- (66) Registered interior designer.
- (67) Respiratory care practitioner.
- (68) Social worker.
- (69) Social worker, advanced practice.
- (70) Social worker, independent.
- (71) Social worker, independent clinical.
- (72) Speech-language pathologist.
- (73) Time-share salesperson.
- (74) Veterinarian.
- (75) Veterinary technician.

RL 4.08 Photographs and fingerprints. The department may require an applicant for any of the credentials set forth in s. RL 4.07 to be photographed and fingerprinted as a part of the credentialing process, if there exists reason to believe that the applicant has failed to accurately describe his or her conviction record. The department may refer photographs and fingerprints so obtained to the department of justice for internal analysis or submission to the federal bureau of

investigation for the purpose of verifying the identity of the persons fingerprinted and obtaining records of their criminal arrests and convictions.

RL 4.09 Credential holder charges or convictions. (1) Pursuant to the procedures set forth in ch. RL 2 for the screening of informal complaints, the department may investigate whether a holder of any of the credentials set forth in s. RL 4.07 has been arrested, charged with or convicted of a crime for the purposes of determining whether the circumstances of the arrest, charge or conviction substantially relate to the circumstances of the credentialed activity.

(2) A holder of any of the credentials set forth in s. RL 4.07 who is convicted of a felony or misdemeanor in this state or elsewhere shall notify the department in writing of the date, place and nature of the conviction or finding within 48 hours after the entry of the judgment of conviction. Notice shall be made by mail and shall be proven by showing proof of the date of mailing the notice. Notice shall include a copy of the judgment of conviction and a copy of the complaint or other information which describes the nature of the crime and the judgment of conviction in order that the department may determine whether the circumstances of the crime of which the credential holder was convicted are substantially related to the practice of the credential holder.

(3) As a part of an investigation the department may require a holder of any of the credentials set forth in s. RL 4.07 to be photographed and fingerprinted, if the credential holder's arrest or conviction record is relevant to the investigation and a search based solely upon the credential holder's name is unlikely to provide complete and accurate information. The department may refer photographs and fingerprints so obtained to the department of justice for internal analysis or submission of the fingerprint cards to the federal bureau of investigation for the purpose of verifying the identity of the persons fingerprinted and obtaining records of their criminal arrests and convictions.

SECTION 3. RL 31.035 (1m) is repealed.

SECTION 4. RL 31.036 (1m) is repealed.

(END OF TEXT OF RULE)

These proposed rules shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

Dated _____

Agency _____

Deputy Secretary Sandra M. Rowe
Department of Regulation and Licensing

