

Criminal History Record Information

Considerations for Obtaining an Applicant's Criminal History Record Information for Licensure

FSBPT Ethics & Legislation Committee

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The Ethics & Legislation Committee developed this resource for member boards to help understand, handle, and use CHRIs appropriately. The goals of this resource will be to share foundational information, assist the membership, and help boards gain a basic understanding of the CHRI process.

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Considerations for Obtaining an Applicant’s Criminal History Record Information for Licensure

Introduction

Boards have a duty to ensure, to the best of their ability, that physical therapists (PT) and physical therapist assistants (PTA) are safe, competent practitioners who meet certain qualifications for licensure, thus increasing the public’s trust and security in the physical therapy profession and providers. Having a comprehensive report which provides the board with knowledge of incidents from an applicant’s history may help identify appropriate pre-licensure remediation or post-licensure restrictions. More and more jurisdictions are adding a review of an individual’s Federal Bureau of Investigation (FBI) criminal history record information (CHRI) prior to issuing an initial license as a PT or PTA. Pursuant to Public Law 92-544, the FBI may exchange information with officials of state and local governments for noncriminal justice purposes, such as licensing, given that the state has proper statutory authority.

CHRI is typically one piece of a more extensive background investigation completed for employment known collectively as the background check. CHRI, unofficially known as the criminal background check (CBC) and more informally known as a Record of Arrests and Prosecutions (RAP) Sheet, means a search of the FBI’s National Crime Information Center (NCIC) database using an individual’s fingerprints. Throughout the remainder of this document, the term CHRI will be used to refer to the criminal information obtained by the regulatory board regarding a licensure applicant from the FBI.

Goals of the Resource

The Ethics & Legislation Committee developed this resource for member boards to help understand, handle, and use CHRIs appropriately. The goals of this resource will be to share foundational information, assist the membership, and help boards gain a basic understanding of the CHRI process. Additionally, the resource will encourage jurisdictions to think about how CHRI data in aggregate may help inform future research both intra- and inter-jurisdictionally. There are many potential research questions that could be answered such as the most common criminal offense, how often are licenses denied for individuals with a remarkable CHRI, and any connections between criminal history and disciplinary history.

Rationale for Requiring Criminal Record History Information

The basis for any licensure requirement should be to enhance public protection and safety. Regulatory boards are tasked to assure health care providers are safe and competent. The Model Practice Act for Physical Therapy states “this [act] is enacted for the **purpose of protecting the public health, safety, and welfare**, and provides for jurisdiction administrative control, supervision, licensure, and regulation of the practice of physical therapy” (emphasis added).¹ PTs and PTAs offer a hands-on service that frequently requires touching a patient who is often partially disrobed in ways that are uncommon to social norms, but appropriate in a clinical context. . Physical therapy providers work with vulnerable individuals of all ages and walks of life, and may often be alone with an individual when providing services. Treatment may be provided in a variety of settings, including the home, which allows the physical therapy provider access to an individual’s body and private property often without any other

¹ *Model Practice Act*, 6th ed. (Alexandria, VA: Federation of State Boards of Physical Therapy, 2016), https://www.fsbpt.org/Portals/0/documents/free-resources/MPA_6thEdition2016.pdf?ver=2019-03-06-115216-323.

individual on-site. Additionally, as the access to PTs without a physician referral increases, it is especially important that the public have the assurance that PTs are trained appropriately.

Historically, boards have asked for self-disclosure of any criminal activity history on licensure applications. However, self-disclosure is not necessarily a reliable method of obtaining this type of information. According to the Virginia Board of Nursing, in other jurisdictions 15-19 percent of applicants failed to disclose a criminal history record.² However, that may be a significant underestimate. In a study of 1,508 Texas nurses, prior to the fingerprint requirement, 330 (21.8 percent) nurses self-disclosed a criminal history issue on the application for licensure. After the fingerprint requirement went into effect, of the same 1,508 nurses, 1,182 (78.3 percent) had a positive FBI CHRI.³ Requiring a CHRI is a mechanism to ensure that the board is aware of the applicant's full history when determining eligibility for a license.

However, the CHRI cannot be the only item considered in a licensure decision and each case should be evaluated individually. The profession of physical therapy has moved to a higher level of accountability and access; increasing the level of responsibility on the board to screen applicants as appropriate for licensure. However, disqualification lists or automatic denial lists are in disfavor in the era of minimizing regulatory barriers to employment, preferring instead evaluation of the individual circumstances of each situation. The board must consider the aggravating and mitigating circumstances of the situation.

Applicants with a remarkable criminal history have the ability to change and be rehabilitated upon release; the past indiscretion may not disqualify them from a future license. Errors in prosecution and conviction have been well documented as well as various research confirming bias against certain groups in the American justice system.

Use of Criminal History Record Information: Other Professions

A review of health care professions⁴ and CHRI requirements for licensure confirmed that CHRI is being used by many different health care boards:

- Physicians: Sixty medical boards require CHRIs for initial licensure
- Nursing: Forty-nine jurisdictions require a CHRI
- Pharmacy: Thirteen jurisdictions require a CHRI; however, most US pharmacy educational programs require CHRI for initial, conditional acceptance
- Occupational Therapy: Thirteen jurisdictions require some form of CHRI
- Chiropractic: Thirty-one jurisdictions require some form of CHRI
- Massage Therapy: Twenty-one jurisdictions require some form of CHRI

Although many non-health related professions require CHRIs for employment, they may not necessarily require CHRIs for initial licensure. Employment policies may differ from licensing requirements. For instance, hospitals may require a CHRI for all employees even if the application process for the

² <https://www.dhp.virginia.gov/Boards/Nursing/ApplicantResources/CriminalBackgroundChecks/CBCFAQ/>

³ Marina Byrd and Debra Miller, "Nurse Licensure Criminal Background Checks," July 29, 2013, Council of State Governments, <https://knowledgecenter.csg.org/kc/content/nurse-licensure-criminal-background-checks>.

⁴ Not all health care boards were researched.

professional license does not require one. However, a few examples of professions that have imposed a required CHRI for initial licensure include

- Teachers: Teacher background checks, including criminal record history, are legally mandated in all 50 states for non-charter schools.⁵ 15 states require background checks for charter school teachers.⁶
- Plumbers: Georgia requires CHRI for initial licensure⁷
- Barbers, Cosmetology, and Tattooing: Virginia requires CHRI for initial licensure.⁸ Barbers in Mississippi are required to have CHRI; Colorado requires CHRIs for cosmetologist, hair stylists, estheticians and nail technicians; and New York has the requirement for cosmetology and barbering.⁹

Use of Criminal History Record Information: Physical Therapy Community

Internationally, criminal history information is used by physiotherapy regulators as part of the licensing requirements.

1. Canada (Alberta): Criminal record checks are required for physiotherapists for initial registration.¹⁰
2. Australia: The Physiotherapy Board of Australia requires criminal history checks as part of initial registration to practice.¹¹
3. United Kingdom: The Disclosure and Barring Service conducts three different levels of background checks: Basic, Standard, and Enhanced. All health care professionals are required to undergo an enhanced background check if they provide care to vulnerable adults or children.¹²
4. New Zealand: As per Section 2.2 *Criminal conviction record requests* as outlined in the Physiotherapy Board of New Zealand Registration Policy, 2015, criminal conviction requests are required from the New Zealand Ministry of Justice.¹³

Recent graduates of physical therapy education programs in the United States will not be surprised by a requirement for a CHRI for licensure. Physical therapy schools are requiring CHRIs as part of the admission requirements or prior to clinical education experiences. This has been facilitated by clinical education sites requiring CBCs with CHRIs prior to allowing students into clinical experiences. This is not

⁵ "What is a Teacher Background Check?" WiseGeek, <https://www.wisegeek.com/what-is-a-teacher-background-check.htm>.

⁶ Education Commission of the United States, <http://www.ecs.org/wp-content/uploads/Williams-MI-background-checks-charter-teachers-1.pdf>.

⁷ Plumber Application, Georgia State Construction Industry Licensing Board Division of Master Plumbers and Journeyman Plumbers, <https://sos.ga.gov/acrobat/PLB/48%20Plumbers%20Application.pdf>.

⁸ Board for Barbers and Cosmetology, Virginia Department of Professional and Occupational Regulation, <http://www.dpor.virginia.gov/Boards/BarberCosmo/>.

⁹ National Conference of State Legislatures, Licensing by State, http://www.ncsl.org/Portals/1/Documents/Labor/Licensing/Reddy_LicensingbyState_31961.pdf.

¹⁰ *A Guide for Physiotherapists: Protecting Patients from Sexual Abuse or Misconduct*, Physiotherapy Alberta, https://www.physiotherapyalberta.ca/files/bill_21_guide_pt.pdf.

¹¹ "Registration Standards," Physiotherapy Board of Australia, <https://www.physiotherapyboard.gov.au/Registration-Standards.aspx>.

¹² "DBS Checks For Healthcare Professionals," Criminal Record and Barring Service, March 21, 2016, <https://www.criminalrecordandbarringservice.co.uk/dbs-checks-healthcare-professionals/>.

¹³ *Registration Policy*, (Wellington, New Zealand: Physiotherapy Board of New Zealand, 2015) <https://www.physioboard.org.nz/sites/default/files/Registration%20PolicyFeb2015.pdf>.

restricted to physical therapy and has been seen in many medical professions. The Association of American Medical Colleges Criminal Background Check Advisory Committee identified reasons for completing a CHRI on applicants accepted to medical school including

- to ascertain the ability of accepted applicants and enrolled students to eventually become licensed and
- to minimize the liability of schools and their affiliated clinical facilities.¹⁴

Additionally, CBCs, which include CHRIs, are commonly performed for employment, especially in settings such as hospitals, schools, and long-term care facilities. Some payers, including government-based payers, have restrictions based on criminal history.

Thirty-four jurisdictions in the United States currently require a CHRI for PT or PTA licensure. The PT Compact has had a significant impact on the number of jurisdictions requiring CHRI for licensure. Like both the Nurse Licensure Compact and the Interstate Medical Licensure Compact, PT Compact members must require a CHRI for initial licensure. Prior to the first states joining the PT Compact in 2016, only fifteen states required CHRI; of the twenty-six PT Compact members in 2019, only six had an FBI CHRI requirement prior to joining the Compact. With one-third of adults having a criminal record, over fifteen thousand provisions in jurisdiction statutes and regulations that limit occupational licensing opportunities for individuals with criminal records, and so many physical therapy boards new to CHRI, FSBPT membership has communicated that they need resources and assistance regarding the implications of a positive criminal background.

Current Legislative Environment

The United States has experienced significant growth in occupational licensing since the 1950s, up from approximately 5 percent of individuals requiring a license to over 25 percent in 2019. The proliferation of licensing mandates at the federal, state, and local levels have sparked increased study and scrutiny of the impact of occupational licensure on the American labor market. Additionally, the increased unemployment experienced during the Great Recession (December 2007 through June 2009) peaking at 10.0 percent in October 2009 until finally regaining the pre-recession level of 4.7 percent in May 2016, focused attention on factors that may increase barriers to employment and determining the necessity of these requirements.¹⁵

Licensure requirements are suspected to negatively impact the employment of certain populations more than others. Military spouses, immigrants with legal authorization to work, individuals without higher education, and people with criminal records are “affected disproportionately by the requirements and variances of occupational licensing.”¹⁶ The National Council of State Governments, the National Governors Association Center for Best Practices, and The Council of State Governments, in partnership with fourteen jurisdictions are two years into the three-year project, *Occupational Licensing: Assessing State Policy and Practice*, looking at licensure requirements for thirty-four occupations (including physical therapist assistant). The criteria used to select the thirty-four occupations were as follows:

¹⁴ “Group on Student Affairs Recommendations regarding Criminal Background Checks for Medical School Applicants,” (Washington, DC: Association of American Medical Colleges, 2005), https://www.aacp.org/sites/default/files/2017-11/AAMCriminal_background_checks.pdf.

¹⁵ “Civilian Unemployment Rate” US Bureau of Labor Statistics (January 1, 1948), FRED, Federal Reserve Bank of St. Louis, accessed April 25, 2019, <https://fred.stlouisfed.org/series/UNRATE>.

¹⁶ “Occupational Licensing: Assessing State Policy and Practice,” National Conference of State Legislatures, National Governor’s Association, The Council of State Governments, accessed May 31, 2019, http://www.ncsl.org/portals/1/documents/labor/licensing/occupational_licensing.pdf.

- License required in thirty or more states
- Licensure does not require a four-year degree education*
- Above-average projected growth in employment over the next ten years*
- Total national current employment of 10,000 or more¹⁷

**per the United State Bureau of Labor Statistics*

The consortium of states will investigate the licensure requirements in these thirty-four occupations, highlight the discrepancies, and attempt to implement ways to remove barriers to labor market entry and increase the ease of movement between states.

In addition to increased licensure laws as compared to earlier decades, the United States also experienced an increase in the prison population. Although declining since 2016, the prison and jail population had climbed sharply since the 1980s until reaching the peak in 2008.¹⁸ However, “even when adjusting for other factors, such as crime victimization, social service spending and economic development, the United States incarcerates people at a higher rate than other countries.”¹⁹ Approximately one in three adults have a criminal record—however, that does not necessarily mean the individual has been convicted of a crime or was incarcerated.²⁰ “The FBI considers anyone who has been arrested on a felony charge to have a criminal record, even if the arrest did not lead to a conviction.”²¹

Regardless of the path an individual takes post-incarceration, a criminal history is one factor that can greatly reduce the mobility of, or exclude, individuals from certain professions. “The National Inventory of Collateral Consequences of Conviction catalogs over 15,000 provisions of law in both statute and regulatory codes that limit occupational licensing opportunities for individuals with criminal records.”²² Time in prison or jail, a felony arrest, or a felony conviction can have a tremendously negative impact on an individual’s life and ability to find employment and provide for oneself or a family. It’s estimated that the “American economy loses between \$78 billion and \$87 billion in annual gross domestic product every year as a result of the policies and practices that lock people with felony convictions out of the workforce.”²³

Policy recommendations to ease exclusions for those with criminal records, workforce impact, and research suggesting a relationship between higher rates of recidivism and heavy licensing burdens, have led to legislative initiatives to reform occupational licensure laws.²⁴ These occupational licensure

¹⁷ The National Occupational Licensing Database, National Conference of State Legislatures, Accessed May 30, 2019, <http://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx>.

¹⁸ John Gramlich, “America’s incarceration rate is at a two-decade low,” *Fact Tank*, May 2, 2018, <https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/>.

¹⁹ Michelle Ye Hee Lee, “Yes, U.S. locks people up at a higher rate than any other country,” *The Washington Post*, July 7, 2015, https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?noredirect=on&utm_term=.196bb3c86e94.

²⁰ “Barriers to Work: People with Criminal Records,” National Conference of State Legislatures, accessed April 25, 2019, <http://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx>.

²¹ Dan Clark, “How many U.S. adults have a criminal record? Depends on how you define it,” *PolitiFact*, August 18, 2017, <https://www.politifact.com/new-york/statements/2017/aug/18/andrew-cuomo/yes-one-three-us-adults-have-criminal-record/>.

²² “Barriers to Work: People with Criminal Records,” National Conference of State Legislatures.

²³ Cherie Bucknor and Alan Barber, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies* (Washington, DC: The Center for Economic and Policy Research, 2016), <http://cepr.net/publications/reports/the-price-we-pay-economic-costs-of-barriers-to-employment-for-former-prisoners-and-people-convicted-of-felonies>.

²⁴ “Licensing Laws Make It Harder for Former Offenders to Find Work,” *License to Work*, accessed April 23, 2019, <https://ij.org/report/license-work-2/report/recommendations-for-reform/licensing-laws-make-harder-former-offenders-find-work/>.

reforms have been broad (not specific to any level of required education or skill level) and rarely differentiate between occupations. Since the publication of the Obama White House's report on occupational licensing in 2015,²⁵ which included a recommendation to reduce licensure barriers for ex-offenders, a number of state legislative changes have been made:

- Twenty-one states have reformed their occupational licensing laws to make it easier for ex-offenders to find work in state-licensed fields
- Eleven states require that the applicant's criminal record be directly related to the license in order to deny ex-offenders a license
- Eleven states allow ex-offenders to petition a licensing board at any time for a determination if their record would be disqualifying, including before enrolling in any required training
- Six states generally prevent licensing boards from using vague, moral character standards to deny licenses for ex-offenders
- Twelve states make certificates of rehabilitation available through the court system and administrative agencies^{26, 27}

In the 2019 state legislative session, at least twenty-three bills in thirteen different states were introduced regarding reforming how CHRIs are used in occupational licensure decisions. The potential reforms fit into the categories bulleted above.

Starting Out: CHRI as a Licensure Requirement for PTs and PTAs

Obtaining Statutory Authority

Physical therapy licensing boards must enact specific statutory authority that clearly states the requirement of an FBI CHRI for all initial licensees. The FBI CHRI is a legislative change that cannot be accomplished through rule promulgation. The FBI has communicated guidance that in order to be considered for FBI CHRI approval, in compliance with the requirements of federal statute P.L. 92-544, the statute must:

- exist as a result of a legislative enactment;
- require the fingerprinting of applicants who are to be subjected to a national criminal history background check;
- expressly or by implication authorize the use of FBI records for the screening of applicants;
- identify the specific category of applicants/licensees falling within its purview, thereby avoiding over breadth;
- not be against public policy; and
- not authorize receipt of the CHRI by a private entity.²⁸

Jurisdictions should consult their State Identification (ID) Bureaus regarding the recommended language in order to meet the requirements of P.L. 92-544. A list of the ID Bureaus can be found at <https://www.fbi.gov/services/cjis/identity-history-summary-checks/state-identification-bureau-listing>.

²⁵ *Occupational Licensing: A Framework for Policymakers*, (Washington, DC: The White House, the Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor, . . July 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf

²⁶ "State Occupational Licensing Reforms for Workers with Criminal Records," Institute for Justice, accessed April 24, 2019, <https://ij.org/activism/legislation/state-occupational-licensing-reforms-for-people-with-criminal-records/>.

²⁷ "Barriers to Work: People with Criminal Records," National Conference of State Legislatures.

²⁸ PT Compact website, www.ptcompact.org.

Jurisdictions seeking FBI CHRIs have received differing guidance from various State ID Bureaus regarding the necessary statutory requirements from each jurisdiction before processing CHRI requests can be granted. Because of these jurisdictional experiences, FSBPT currently recommends amending statutes to explicitly grant the board both the 1) authority to ask for fingerprints and 2) ability to receive national criminal history checks for use in decision making regarding licensure. Additionally, the statute should amend the licensure requirements to explicitly state that CHRI is required for initial licensure for both PTs and PTAs. The language should specify fingerprints should be initially submitted to the State ID Bureau and CHRI information cannot be shared with any other agency or entity or transported across state lines. Because of the variation in FBI requirements, it is highly recommended each jurisdiction involve both the local FBI field office and State ID Bureau for guidance on required statutory language.

Submitting and Receiving CHRI Requests

The FBI Regional office must recognize the jurisdiction's legal authority to receive CHRIs before an Originating Agency Identifier number (ORI) can be issued. Once recognition of statutory authority is received from the FBI, the board must request an ORI number, a nine-digit code accompanying any CHRI submissions to the FBI to identify which entity is making the request. A board may decide to enroll in the FBI's Next Generation Identification Record of Arrests and Prosecutions Back (NGI RAP Back or RAP Back) system once an ORI number has been assigned.

RAP Back Service

The RAP Back is an optional service allowing authorized government agencies to receive notification of subsequent activity on a licensee who was previously fingerprinted with the board as the applicant agency. With RAP Back, authorized agencies will receive ongoing updates of any criminal history information or "triggering event" reported to the FBI rather than just the one snapshot view of an individual's criminal history status at a moment in time. The board may choose to customize its "triggering events" list beyond arrests including criminal dispositions, expungements, warrants, sex offender entries, and death notifications.²⁹ The cost of the RAP Back program can vary depending on the features requested; inquiry or subscription options are available. As the majority of jurisdictions require a CHRI only for initial licensure, having a RAP Back subscription may decrease a board's fear that criminal activity may be missed at renewal if a repeat CHRI is not requested; RAP Back potentially eliminates the need for repeated background checks for renewal.

To participate in the RAP Back program, you must choose between one of the following [five risk mitigation strategies](#) required by the FBI.

- (1) *Pre-Notification with Validation or Mandatory Expiration within Five Years.*
This ensures that an individual's information is not provided to an agency that no longer has authority to receive such information.
- (2) *Authority for the Duration of License.*
Applicable laws or regulations may assign a certain time limit for the duration of a license.
- (3) *Statutory or Regulatory Authority for Set Term*
Applicable laws or regulations may provide authority for set terms.
- (4) *One-Year Validation or Expiration*

²⁹ "FBI NGI Rap Back Service Overview," National Council of State Boards of Nursing, May 21, 2014, https://www.ncsbn.org/NGI_Rap_Back_Overview_Presentation_for_National_Council_of_State_Boards_of_Nursing_2014_05_21.pdf.

For any subscription, a one-year validation or one-year mandatory expiration date is sufficient and may serve in lieu of pre-notification.

(5) *Subscription Synchronization through Automated or Formalized Procedures*

Rather than validation or expiration at certain points in time, subscribing agencies maintain synchronized records with NGI on an ongoing basis to ensure current and accurate RAP Back subscriptions. Formal validation is still conducted at a minimum of every five years to ensure RAP Back subscriptions accurately reflect the current status of the individual.³⁰

With potential to have continued access to protected criminal history information beyond the initial use, these strategies help to protect the individual privacy rights while using the RAP Back service. Jurisdictions may consider writing their statute to accommodate receiving future criminal history updates. If the board initially does not request a subscription to RAP Back, there are subsequent opportunities to enroll.

Site Audits

To ensure compliance with federal statutes and regulations, the board (authorized agency) is subject to on-site audits focusing on access, use, storage, and destruction of the Criminal Justice Information Services (CJIS) material such as the CHRI. The audits will examine both [physical](#) and [information technology](#) procedures of the authorized agency. The board may also be subject to an on-site inspection by the state's criminal records repository, normally a division of the state police force, as all FBI CHRI requests are funneled through the jurisdiction's criminal records repository.

Fingerprinting

The individual on whom the CHRI is being completed must provide fingerprints to run through the NCIC database. Fingerprints can be required by a jurisdiction on either a traditional finger printing hardcopy ink card (FBI Form FD-258) or the LiveScan digital fingerprint system.

Although use of the FD-258 is an option, this process is both cumbersome and lengthy. National Background Information, a third party authorized to electronically forward fingerprint submissions to the FBI, known as a "channeler," suggests multiple sets of prints be sent on separate FD-258 cards as the prints can often smudge and become unusable in the FBI's CHRI process.³¹ This process also uses traditional parcel delivery services and can take up to two months before the requesting agency receives the relevant results.

LiveScan has several advantages over the ink card process. As compared to the several weeks it may take to use the traditional FD-258 Fingerprinting Card, the processing time can be as little as one day. Using LiveScan technology is also a simpler process. It is inkless and typically only requires submission one time; there are no smudged or illegible prints to deal with. Jurisdictions may opt to contract with a federally approved channeler nationwide to produce fingerprints and submit them to the state criminal records repository on the requesting agency's behalf. This is either mailed or uploaded to the jurisdiction's central record repository (normally the state police force), and, from there, the state law enforcement will send the data to the FBI for processing. The FBI publishes a list of [approved channelers](#).

³⁰ [Privacy Impact Assessment for the Next Generation Identification \(NGI\) Rap Back Service](https://www.fbi.gov/file-repository/pia-ngi-rap-back-service.pdf/view) (Washington, DC: Department of Justice, 2016), <https://www.fbi.gov/file-repository/pia-ngi-rap-back-service.pdf/view>.

³¹ "Fingerprinting," National Background Information, accessed October 18, 2019, <https://www.nbinformation.com/locations/index.php>.

Requiring CHRI: Implications for Board

Requiring CHRIs comes with new responsibilities and a number of requirements with which the jurisdictions must comply. “Criminal Justice Information (CJI) is the term used to refer to all of the FBI criminal justice information provided data necessary for law enforcement and civil agencies to perform their missions including, but not limited to biometric, identity history, biographic, property, and case/incident history data.”³² CHRI or “restricted data” is a subset of CJI that requires additional controls for access, use, and dissemination “due to its comparatively sensitive nature.”³³ In an effort to ensure protection of CJI, the FBI developed the National Instant Criminal Background Check System database (NICS index) created specifically for maintaining information such as an individual's name, sex, race, full date of birth, state of residence, and unique identifying numbers such as a social security number, a military number, or a number assigned by the federal, state, or local law enforcement authorities.^{34, 35}

The board should first review and revise the applications for initial licensure and renewal. The board should consult with legal counsel to ensure the application contains the appropriate questions regarding the applicant’s criminal background to capture relevant activities, including arrests and convictions. Understanding that more serious crimes can be pled down to a lesser plea, the language used in the application questions must be intentional in order to capture nolo contendere pleas, Alford pleas, or other plea arrangements in lieu of convictions. Below are examples of application questions to capture criminal history from the Ohio and Texas Boards of Nursing:

1) Texas Board of Nursing Endorsement Application³⁶

For any criminal offense, including those pending appeal, have you:

- 1) been arrested and have a pending criminal charge?
- 2) been convicted of a misdemeanor?
- 3) been convicted of a felony?
- 4) pled nolo contendere, no contest, or guilty?
- 5) received deferred adjudication?
- 6) been placed on community supervision or court-ordered probation, whether or not adjudicated guilty?
- 7) been sentenced to serve jail time, prison time, or court-ordered confinement?
- 8) been granted pre-trial diversion?
- 9) been cited or charged with any violation of the law?
- 10) been subject of a court-martial; Article 15 violation; or received any form of military judgment/punishment/action?

2) Ohio Nursing Board, New License Application³⁷

³² Criminal Justice Information Services (CJIS) Security Policy Version 5.8. CJISD-ITS-DOC-08140-5.8 (Washington, DC: Department of Justice, 2019),

³³ Criminal Justice Information Services (CJIS) Security Policy Version 5.8. CJISD-ITS-DOC-08140-5.8 (Washington, DC: Department of Justice, 2019),

³⁴ Criminal Justice Information Services (CJIS) Security Policy (Washington, DC: Department of Justice, 2018), https://www.fbi.gov/file-repository/cjis-security-policy_v5-7_20180816.pdf/view.

³⁵ Criminal Justice Information Services (CJIS) Security Policy (Washington, DC: Department of Justice, 2018).

³⁶ Texas Board of Nursing: Endorsement Application for Registered Nurses, Section B: Eligibility Questions, https://www.bon.texas.gov/pdfs/forms_pdfs/endorsement_pdfs/RN%20END%202-2018.pdf,

³⁷ <http://nursing.ohio.gov/wp-content/uploads/2019/10/NursingLicenseByExaminationApp.pdf>

A) Have you EVER been convicted of, found guilty of, pled guilty to, pled no contest to, pled not guilty by reason of insanity to, entered an Alford plea, received treatment or intervention in lieu of conviction, or been found eligible for pretrial diversion or a similar program for any of the following crimes. This includes crimes that have been expunged IF there is a direct and substantial relationship to nursing practice? A felony in Ohio, another state, commonwealth, territory, province, or country?

B) Have you EVER been convicted of, found guilty of, pled guilty to, pled no contest to, pled not guilty by reason of insanity to, entered an Alford plea, received treatment or intervention in lieu of conviction, or been found eligible for pretrial diversion or a similar program for any of the following crimes. This includes crimes that have been expunged IF there is a direct and substantial relationship to nursing practice? A misdemeanor in Ohio, another state, commonwealth, territory, province, or country? This does not include traffic violations unless they are DUI/OVI or Physical Control While Under the Influence.

The application instructions should also contain important information for the applicant regarding the CHRI.

- 1) How to submit fingerprints and the processes for completing submission
 - a. Locations of fingerprint facilities
 - b. Recommendation to complete fingerprints immediately—there could be a delay in the board receiving the official fingerprints from the FBI due to various reasons
 - c. Civil Applicant Waiver signed and attached to the fingerprint request
 - i. Contains processes that provide the required privacy rights notifications to applicants
 - ii. Applicants must be notified in writing that fingerprints will be used to check the criminal history records of the FBI in a handout format that can be read by the applicant
 - iii. Applicants must be informed they are allowed a reasonable opportunity to complete and challenge the accuracy of the criminal history record; the board will need to define “reasonable opportunity”
 - iv. Agencies must provide applicants with instructions on how to obtain a copy of the FBI record and explain that the guidelines for these procedures are contained in 28 CFR 16.34.³⁸
- 2) Information on temporary license and timing with results of CHRI
- 3) Statement regarding the board’s process of application review including implications for answering “yes” regarding criminal history or a “no” answer that conflicts with the CHRI. The applicant should be made aware that any questions regarding the laws, regulations, or policies regarding an application with a criminal conviction should go to the board.
- 4) Statement that explains that expunged, sealed, dismissed, or dropped charges or convictions may still show up on the fingerprint report.

The board will need to develop policies and procedures regarding the implementation of CHRI’s in the licensing process. Most jurisdictions will likely have a department, usually a branch of the Department of Public Safety, that assists agencies to ensure CHRI is used only for the purpose for which it was

³⁸ Agency Privacy Requirements for Noncriminal Justice Applicants, Federal Bureau of Investigation, <https://www.fbi.gov/services/cjis/compact-council/guiding-principles-agency-privacy-requirements-for-noncriminal-justice-applicants>.

requested. The local FBI office may also serve as a resource for information about specifics to comply with CHRI fingerprint requirements. There should be a step-by-step process that documents the procedure starting when the CHRI is received and ending at the point of the destruction of the data. At minimum, policies and procedures should cover “processes which provide the required privacy rights notifications to applicants (28 CFR 50.12b)” and “policies/procedures for access, use, handling, dissemination, and destruction of CHRI.”³⁹

There are several FBI requirements for the jurisdictional office to handle fingerprints and CHRIs:

- The requesting agency
 - is solely responsible for the proper use and handling of the report,
 - is not allowed to share the report with any other agency or entity,
 - may use the report only for purposes of licensure,
 - should appoint an individual as the point of contact for CHRI compliance,
 - must have quality assurance in place to verify the identity of the applicant, and
 - must submit a list of authorized personnel who will come in to contact with the CHRI information. (It is recommended that each individual sign an acknowledgement statement that at minimum states the individual has received information regarding the “consequences for misuse of criminal history.”⁴⁰)
- The authorized personnel requires and documents appropriate training.
- The contents of each report must be kept strictly confidential.
- The jurisdiction/agency is also subject to Confidentiality Quality Controls. These include but may not be limited to FBI audit/visit, physical security, and technology security.^{41, 42}

Certain requirements must be followed if an applicant’s CHRI is going to be discussed during a public hearing. When the board is able to demonstrate the following, then sharing the information in the public forum is an approved use of the CHRI:

- The public hearing is a formally established requirement
- The applicant is made aware prior to the public hearing that the CHRI may be disclosed
- The applicant may be present at the public hearing
- CHRI cannot be disclosed during the public hearing if the applicant withdraws from the application process⁴³

The physical location for storing CHRI information should be a designated area, room/rooms, or a storage container within a facility. Physical and personnel security controls should be sufficient to protect CJ and associated information systems. The agency’s security controls should do the following:

- (a) Limit access to the control area to only personnel authorized to have access or view CJ, on a need-to-know or need-to-share basis. The agency should use the most restrictive set of right/privileges or access required by users for the performance of specified tasks.

³⁹ Noncriminal Justice Compliance Program Compliance Overview, Arizona Department of Public Safety, <http://www.azdps.gov/sites/default/files/media/Compliance%20Overview%20Summary.pdf>.

⁴⁰ Noncriminal Justice Compliance Program Compliance Overview, Arizona Department of Public Safety.

⁴¹ Noncriminal Justice Compliance Program Compliance Overview, Arizona Department of Public Safety.

⁴² Fred Olmstead, General Counsel Nevada State Board of Nursing, “Obtaining and Evaluating an Applicant’s Criminal History for Licensure Purposes.” November 1, 2018. <https://www.fsbpt.org/Free-Resources/FSBPT-Forum/Forum-Spring-2019/Applicant-Criminal-History>

⁴³ Criminal History Record Checks for Non-Criminal Justice Purposes Policy and Manual, Version 2.1, Hawaii Criminal Justice Data Center, 20, August 2019, <https://ag.hawaii.gov/hcidc/files/2017/11/CHRC-for-NJ-Purposes-Policy-Manual-2019-08.pdf>.

- (b) Be secure—the area used for storage of CJ material should be locked when unattended and visitors to the designated area should be escorted and monitored at all times.
- (c) Prevent unauthorized individuals for access and view by using secure information system devices..
- (d) Use encryption when required.⁴⁴

Because of the confidential nature of the information involved, agencies should establish procedures in the event of a security incident. If an incident should occur, the agency should report it promptly to the appropriate authorities.

Boards may find the [compliance self-check](#) worksheet developed by the Arizona Noncriminal Justice Agency (NCJA) helpful as a tool to assess the board's readiness for an audit and a compliance overview.⁴⁵

It is important that the board establishes a uniform, but individual case-by-case review process when using CHRI's to inform licensure decisions. When considering an applicant's criminal history, it is recommended that the board consider the following factors:

- 1) Relation of the arrest or conviction to the licensee's ability to safely practice physical therapy
- 2) Seriousness and the nature of the crime
- 3) Length of time passed since the offense and number of convictions
- 4) Circumstances and relationships between convictions

The board should also be prepared for applicants that might appeal the board's decision on licensure decisions, challenge the accuracy of the fingerprint records, or for applicants with a discrepancy between the application and the CHRI.

Limitations of FBI CHRI

The NCIC was designed to assist law enforcement and provide leads in criminal investigations as opposed to serving as a background screening tool.⁴⁶ Although the FBI CHRI is the most common check used to uncover criminal record history and considered the "gold standard" by many organizations, the NCIC was never intended as a means to report an individual's criminal history and there are some limitations. The NCIC is not an all-inclusive, complete database for criminal history. The FBI NCIC relies on law enforcement agencies reporting their criminal data to the database. However, "some law enforcement agencies do not have NCIC certification and other states do not send all of their criminal data."⁴⁷ The FBI does not do additional investigation on the records received, the NCIC is merely a repository of the information reported to it by federal, state, and local law enforcement agencies. Because not all law enforcement agencies send criminal record information to the FBI NCIC, and the accuracy of the database is reliant on a passive collection system of arrest and court records, the records are incomplete.⁴⁸ Reporting frequency is not dictated by the FBI—it is updated irregularly and may be

⁴⁴ Criminal Justice Information Services (CJIS) Security Policy (Washington, DC: Department of Justice, 2019), <https://www.fbi.gov/services/cjis/cjis-security-policy-resource-center>.

⁴⁵ Noncriminal Justice (NCJ) Compliance Program, Arizona Department of Public Safety, <https://www.azdps.gov/services/government/ncja>.

⁴⁶ Angela Preston, "Fingerprint vs. Name-Based: Which Background Screening Solution Is Best for Employers?" June 20, 2016, Talent Management and HR, <https://www.tlnt.com/fingerprint-vs-name-based-which-background-screening-solution-is-best-for-employers/>.

⁴⁷ "Resources," Safe Hiring Solutions, accessed October 17, 2019, <https://www.safehiringsolutions.com/blog/5-limitations-of-fbi-background-checks>.

⁴⁸ Bryan Barajas, "6 Misconceptions About the FBI Fingerprint Background Check," March 2, 2016, *PreCheck Blog*, <https://www.precheck.com/blog/6-misconceptions-about-the-fbi-fingerprint-background-check>.

out of date. Additionally, the database does not include the final disposition of the arrest. Board members should be cognizant that the CHRI report will often include arrests that resulted in either no adjudication or no conviction.

Liability of the Board Member

The liability of the state regulatory board member when considering criminal history information in a licensure decision is not explored or defined in the literature. Board members may want to inquire with the state or the board attorney as to whether the jurisdiction has taken any action to provide immunity (exempting individuals from lawsuits for certain actions) or indemnification (coverage of legal costs associated with lawsuits) for board members.

Although specific to the ability of members of a state regulatory board to claim immunity from antitrust laws, the larger themes and guidance following the *North Carolina State Board of Dental Examiners v. Federal Trade Commission* Supreme Court ruling may help decrease a board member's overall liability. To stem the threat of lawsuits against the state, jurisdictions are taking action to demonstrate active supervision by the state or change the composition of the board. Typically, regulatory boards have predominately been made up of members from within the regulated profession. Evaluating the selection and appointment process for board members in order to create more diversity in the board and place some limits on active market participants may actually be the easier option than demonstrating state supervision. "The biggest disadvantage ... is that the court has been unclear about what constitutes 'adequate supervision.' Supervision is therefore a risky route to immunity, and for that reason alone states may prefer immunizing boards by altering their composition."⁴⁹ Given the new exposure to lawsuits under federal antitrust laws and the possibility of treble damages, more jurisdictions are putting new restrictions into place. Individual board members should stay abreast of developments within the jurisdiction to address the liability of volunteers sharing their insights and making recommendations in the course of board business.

There is a significant information base regarding employment law and the use of CHRI, which may have some limited applicability; additionally, there may be some relevance in the laws regarding the liability of members of a nonprofit board. The United States Equal Employment Opportunity Commission (EEOC) does not include having a criminal record as one of the various factors of employment discrimination prohibited by Title VII of the Civil Rights Act of 1964 (Title VII). Under Title VII, "it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information."⁵⁰ Individuals with similar criminal histories must be treated similarly in order to avoid accusations of disparate treatment and discrimination. "For example, there is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record."⁵¹ Title VII also does not preempt federal statutes and regulations that govern eligibility for occupational licenses and registrations. However, boards should ensure processes to make decisions regarding licensure are fair, unbiased, and neutral.

⁴⁹ Heidi Hall, "Ruling on occupational licensing boards could open floodgates to lawsuits," January 9, 2018, *Research News @ Vanderbilt*, quote by Rebecca Haw Allensworth, <https://news.vanderbilt.edu/2018/01/09/ruling-on-occupational-licensing-boards-could-open-floodgates-to-lawsuits/>.

⁵⁰ "Prohibited Employment Policies/Practices," US Equal Employment Opportunity Commission, accessed September 4, 2019, <https://www.eeoc.gov/laws/practices/index.cfm>.

⁵¹ "EEOC Enforcement Guidance," US Equal Employment Opportunity Commission, accessed August 24, 2019, https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

Personal liability is the exception, not the rule, with both state and federal volunteer protection acts granting immunity in many instances.⁵² The main source of personal liability exposure when serving on the board of a nonprofit organization stems from a director's fiduciary duties.⁵³ Members of nonprofit boards are held to a duty of care, duty of loyalty, and a duty of obedience to the organization.

The duty of care requires directors to stay reasonably informed of the organization's activities, to exercise oversight, to attend and to prepare for board meetings, to ensure the organization's records are accurate, and to generally act in good faith and with the care an ordinarily prudent person would exercise in comparable circumstances. The duty of loyalty requires directors to act in the interest of the organization rather than in their personal interest. Finally, the duty of obedience requires directors to adhere to the organization's mission and comply with applicable laws and with the organization's governing documents. Directors can be held personally liable for breach of these fiduciary duties.⁵⁴

Nonprofits and nonprofit volunteers are rarely the targets of a lawsuit. A 1988 Gallup survey concluded that "while there is a great deal of concern for the risk of liability, only one in twenty organizations report being sued on a directors and officers liability questions in the past five years."⁵⁵ Recently, as part of tort reform in Oklahoma, volunteers were granted immunity from personal liability as long as they act in good faith, within the scope of their official functions and duties, and do not cause damage or injury by gross negligence or willful and wanton misconduct.⁵⁶

Creating an Evidence Base

With the advance approval of the FBI State ID Bureau to use CHRI in this manner, jurisdictions have a unique opportunity to capture invaluable information through the collection of aggregate CHRI data. Data may be used in a variety of ways to inform decisions at both state and national levels, including an assessment of current trends across disciplines in jurisdictions where CHRI data is collected from multiple health professions. It is important to note that evidence-based decision making is to be conducted on aggregate data sets versus individual records. For general data use and research purposes, anonymity and confidentiality of individual records must be maintained at all times.

Recommendations for the type of data to collect and assess from CHRIs:

- Total number of convictions
- Gender difference associated with convictions
- Age at time of conviction and generalized age range occurrences
- Types of violations (substance abuse, probation, civil penalty, conviction, etc.)
- Categorizing violations as being directly versus indirectly related to professional practice
- Types of disciplinary actions (probation, suspension, sanction, revocation, etc.)

⁵² "Directors and officer's duty of care – pay attention and take responsibility," September 8, 2017, Webmaker & Oberly Blog, <https://wagenmakerlaw.com/blog/directors%E2%80%99-and-officers%E2%80%99-duty-care-%E2%80%93-pay-attention-and-take-responsibility>.

⁵³ Benjamin Takis, "Personal liability exposure from serving on nonprofit boards," March 26, 2015, Nonprofit Accounting Basics, <https://www.nonprofitaccountingbasics.org/board-directors/personal-liability-exposure-serving-nonprofit-board>.

⁵⁴ Benjamin Takis, "Personal liability exposure from serving on nonprofit boards."

⁵⁵ Brenda Kimery, "Tort Liability of Nonprofit Corporations and Their Volunteers, Directors, and Officers: Focus on Oklahoma," *Tulsa Law Review* 33, no. 2 683 (2013), <https://digitalcommons.law.utulsa.edu/tlr/vol33/iss2/9/>.

⁵⁶ Brenda Kimery, "Tort Liability of Nonprofit Corporations and Their Volunteers, Directors, and Officers: Focus on Oklahoma."

- Average length of time for various disciplinary actions
- Incidences of re-offense (recidivism)

Data collected at the jurisdictional level may be used to compare with other disciplines in the same jurisdiction as well as national data sources.

Implications for use of aggregate data:

- Assess Board effectiveness with respect to disciplinary decision making
- Develop “at-risk” categories to educate new licensees and students enrolled in PT/PTA programs
- Create evidence-based educational materials to help reduce or limit adverse practice in PT
- Augment quality assurance programs to assess trends in both violations and disciplinary action

Conclusion

The FBI CHRI is an opportunity for a licensing board to evaluate an applicant’s background for criminal activity. Boards must remember that CHRI must be handled in compliance with FBI requirements. Many jurisdictions have [policy manuals](#) for criminal history records checks for non-criminal justice purposes that are available for state agencies to understand and implement the requirements. CHRIs must not be shared with any unauthorized agencies or individuals and boards must ensure physical and system security measures are in place to protect and store CHRIs appropriately. Boards should establish and document procedures and all authorized individuals must receive training on those procedures.

While extremely important to consider, the information contained in the CHRI cannot be the sole determinant of whether or not to grant a license. The CHRI has limitations that must be considered and the entirety of the applicant must be evaluated for qualifications to provide physical therapy services safely and competently.

Appendix 1: Acronyms & Glossary

Alford Plea: plea of guilty made by the accused person while still maintaining his innocence

CBC: criminal background check

CHRI: criminal history record information

CJI: Criminal Justice Information

CJIS: Criminal Justice Information Services

EEOC: United States Equal Employment Opportunity Commission

Expungement: sealing of records of an earlier process, making the records unavailable through state or federal repositories

FBI- Federal Bureau of Investigation

NCIC: National Crime Information Center database

NICS: National Instant Criminal Background Check System

Nolo Contender Plea: (aka plea of no contest) rarely entered plea made by a defendant to a criminal charge, allowing the defendant to avoid trial and for the judge to then find him/her guilty and move directly to sentencing. Nolo contender pleas may not be used against the defendant as an admission in a related civil case.

ORA number: originating case agency number. The OCA number is a field for the requesting agency to use for internal needs. The request for live scan service form may have this field listed as “your number” or “facility number.”

ORI number: originating agency identification number. This is a nine-character identifier assigned to an agency. Agencies must identify their ORI number on the requisition forms in order to receive fingerprint supplies and training aids.

Public Law 92-544 authorizes the FBI to exchange CHRI with officials of governmental agencies for licensing (and employment) purposes.

RAP: Record of Arrests and Prosecutions

RAP Back: FBI’s Next Generation Identification Record of Arrests and Prosecutions Back