

# Employment Consequences of a Criminal Conviction in North Carolina

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*Sally Roberts is graduating from college this year. She is twenty-two years old and, like many young people, is not certain what she wants to do in the future. Last weekend, Sally was stopped by a police officer and cited for consuming a mixed drink on a public street, a violation of Section 18B-301(f) of the North Carolina General Statutes. Sally has never been in trouble with the law. A friend tells her that she can avoid appearing in court by going to the magistrate's office and paying a fine. If Sally follows this advice, will she have a criminal conviction on her record? Will the incident prevent her from working in certain occupations? Can she ever have the records of the incident sealed or destroyed? This article examines these and other issues concerning the impact of a criminal conviction on employment.*

The most obvious consequences of a criminal conviction are the immediate ones: imprisonment, probation, and other sanctions made part of a sentence in a criminal case. Often hidden, but potentially more serious and long lasting, are a diverse set of “collateral consequences” that flow from the conviction but usually are not part of the sentence in the criminal case. For example, someone convicted of a crime may lose the right to vote, to hold public office, or to serve as a juror or may have his or her property subject to forfeiture. He or she also may be barred from a broad range of public and private employment. These potential consequences usually are not contained in the criminal law but are scattered throughout civil statutes, regulations, and case law.[\[1\]](#)

The impact of a conviction on employment, the focus of this article, derives from two specialized areas of law: criminal law and employment law. In deciding how to proceed, people who face criminal charges should understand the potential impact of their decision in both the criminal case and the job market. Furthermore, in dealing with employees and job applicants, employers need to understand the nature of criminal proceedings and their effects. And those concerned with criminal justice issues must consider the impact of employment barriers on recidivism. Not surprisingly, studies show that people with criminal records often have difficulty obtaining employment, both in government and in the private sector. While some individuals may lack the job skills or work habits to obtain or hold employment, others cannot overcome the barriers that are permitted or required by the law.[\[2\]](#)

In considering the potential impact of a criminal conviction on employment, two fundamental questions usually arise. First, may an employer either refuse to hire an individual or discharge a current employee because of a conviction? Second, must the employer refuse to hire or discharge because of a conviction? (For a discussion of other ways in which criminal law and employment law intersect, see “Other Issues in Criminal and Employment Law,” page 18.)

There are no simple answers to these questions. As so often happens, the answers depend on the circumstances. The nature of the conviction may be important, of course, but often even more significant is the type of employment involved. Most workers fall into one of three broad groups of employees or job applicants, and their legal rights depend largely on the group into which they fall. The largest group is made up of those who work or seek to work in the private sector and do not have the protection of either an individual contract or a collective-bargaining agreement. The next-largest group is composed of those who work or seek to work for the government, whether federal, state, or local. The smallest group contains those who are protected by an individual employment contract or a collective-bargaining agreement. In general, those in the first group enjoy the least legal protection in the area at issue here, as in most employment matters; those in the third typically enjoy the most.

This article has three main sections. The first outlines the impact of a criminal conviction for each of the above categories. The discussion assumes that the employee or potential employee is physically able to perform the work—he or she is not incarcerated, has not lost his or her driving privileges, and is not otherwise unable to be at the work site. The second section briefly touches on ramifications of a conviction in three other areas of concern: unemployment benefits, workers' compensation benefits, and health insurance benefits. The review in these two sections is a general one. It would be impossible to explain here all of the employment consequences of a criminal conviction, particularly for those in the public sector. Provisions affecting employment have been inserted throughout the law—in statutes, administrative regulations, and even executive orders.<sup>[3]</sup> Readers interested in particular kinds of work should therefore check any employment statutes, regulations, or other provisions governing the type of employment at issue.

The third section focuses on the meaning of “criminal conviction,” the event that triggers the employment consequences reviewed here. (Simply stated, a conviction is a final judgment of a court that finds a person guilty of a criminal offense.) This part of the article considers several issues, including whether the type of plea entered in a criminal case changes the impact of a conviction, when a conviction becomes final, what sorts of proceedings may not result in a conviction, and how a person may remove a conviction from his or her record.

## **Potential Employment Restrictions**

### **Private-Sector Employment**

#### *General Considerations*

Unless a worker is protected by a contract or a collective-bargaining agreement, an employer can usually refuse to hire that person or can discharge him or her as it wishes. North Carolina law calls this kind of arrangement “employment at will.”

There are two groups of exceptions to this rule, aside from employment contracts. The primary one is that federal and state law protects against certain types of job discrimination. For example, federal statutes prohibit discrimination based on race, color, religion, sex, or national origin;<sup>[4]</sup> on age;<sup>[5]</sup> on mental or physical disabilities;<sup>[6]</sup> and on union activity.<sup>[7]</sup> State antidiscrimination laws include, for example, protection against discrimination based on pursuit of rights under workers' compensation, wage-and-hour, and OSHA (Occupational Safety and Health Act) laws;<sup>[8]</sup> on the lawful use of lawful

products during nonworking hours;<sup>[9]</sup> and on the carrying of the sickle-cell trait or the hemoglobin C trait.<sup>[10]</sup> None of the federal antidiscrimination employment statutes (more than two dozen) and none of the North Carolina antidiscrimination statutes (nearly a dozen) specifically protect applicants or workers in the private sector against discrimination based on a criminal record or even an arrest record. The second exception is the common-law protection against discharges that violate public policy—an exception that has not been read, and is not likely to be read, as prohibiting employment decisions based on criminal convictions.

While no statute by its terms prohibits discrimination against those with convictions, an employer's policy that prohibits the hiring of all applicants who have an arrest record, or even all applicants with a criminal record, may be suspect under Title VII of the Civil Rights Act of 1964 if that policy has an adverse impact on minority applicants and is not job related. By contrast, an employer that considers criminal convictions but does not use them as an absolute bar to all positions will not likely be in violation of the statute.<sup>[11]</sup> Of course, an employer cannot rely on a criminal conviction as a pretext to mask a motive prohibited by federal or state law.

On the other hand, an employer in the private sector also is generally free to hire whomever it wishes—but not always, as the discussion below indicates. Under certain circumstances an employer may not be able to hire or continue to employ a person convicted of a crime even if it wishes to do so.

### *License Restrictions*

For many private-sector jobs in North Carolina, the employee must hold the license mandated for his or her specific job. For example, animal dealers, motor vehicle dealers, precious-metal dealers, employees of private protection services, boat pilots, stock salespersons, architects, attorneys, auctioneers, bail bondsmen or runners, barbers, cosmetologists, physicians, dentists, pharmacists, optometrists, chiropractors, nurses, midwives, veterinarians, podiatrists, embalmers, dental hygienists, psychologists, physical therapists, social workers, public accountants, real estate brokers, hearing-aid dealers, pest-control applicators, animal inspectors, meat inspectors, and poultry inspectors all must be licensed.<sup>[12]</sup> A license may—and in some cases must—be revoked if the licensee has been convicted of any of certain crimes. Such a denial or revocation can effectively bar employment in the field at issue.

Statutes and regulations vary in the types of convictions that allow or require a license to be denied or revoked. The actual practices of licensing boards also vary widely.<sup>[13]</sup> For example, the North Carolina Private Protection Services Board may suspend, revoke, or deny a firearms-registration permit, necessary for employment as an armed security guard, if the applicant has been convicted of any crime involving moral turpitude or illegal use or possession of a weapon.<sup>[14]</sup> An applicant for the license required for bail bondsmen or runners can be denied the license for conviction of a felony,<sup>[15]</sup> and applicants for a barber's license may be refused the license for conviction of a felony or misdemeanor related to barbering.<sup>[16]</sup>

The law often provides that crimes involving “moral turpitude” constitute grounds for denying or revoking a license (and for terminating public employment, discussed below).<sup>[17]</sup> The North Carolina Supreme Court has stated generally that a crime of moral turpitude is one that involves “an act of inherent baseness in the private, social, or public duties which one owes to his fellowmen or to

society, or to his country, her institutions and her government.”[\[18\]](#) But there is no ready list of “moral turpitude crimes,” and one commentator, critical of the term’s subjectivity, has observed that “[t]hus does the serpent of uncertainty crawl into the Eden of trial administration.”[\[19\]](#)

The uncertainty about the term’s meaning is magnified by the different contexts in which it is used. Thus one who falsely accuses another of a crime of moral turpitude may be sued for slander.[\[20\]](#) In a criminal prosecution, a misdemeanor may be elevated to a felony if the crime is “infamous”—that is, if it involves moral turpitude.[\[21\]](#) At one time a witness’s credibility could be impeached by conviction of a crime involving moral turpitude, though not by other criminal convictions.[\[22\]](#) Finally, several court cases have interpreted occupational licensing statutes that authorize revocation or denial of a license for conviction of a crime of moral turpitude.[\[23\]](#) The results vary with each context. For example, in a slander case the court held that to accuse someone of writing a worthless check was to accuse that person of a crime of moral turpitude. Still, such a minor offense might not be viewed as a crime of moral turpitude for purposes of license revocation.

The potential reach of license-disqualification statutes is narrower if they require that the criminal conviction bear some relationship to the person’s fitness to pursue the particular occupation—a “nexus” (or connection) requirement. This requirement may come from the licensing statute itself, from implementing regulations, or from case law.[\[24\]](#)

#### *Other Restrictions on Private-Sector Employment*

Conviction may create obstacles to private-sector employment in other ways. Some jobs require a fidelity bond.[\[25\]](#) Fidelity insurance companies often refuse to bond ex-convicts, and this effectively bars them from employment in those jobs.[\[26\]](#)

Also, a few federal statutes bar employment of some people in certain fields regulated by the federal government. For example, one law provides that certain felons are ineligible to serve as officers or directors of labor organizations for a specified period.[\[27\]](#) Another provides that, absent consent of the Federal Deposit Insurance Corporation, banks insured by that corporation cannot employ persons who have been convicted of an offense involving dishonesty or breach of trust or who agreed to enter into a pretrial diversion program.[\[28\]](#)

### **Public Employment**

For public employees, the legal consequences of a conviction may depend on whether the employment is with the federal, state, or local government or with the public schools.

#### *Federal Government Employment*

Federal law bars certain types of offenders from federal positions. As examples, persons convicted of either advocating the overthrow of the government or promoting insubordination in the armed forces are disqualified from employment by the United States government or any of its departments or agencies for five years.[\[29\]](#) The Omnibus Crime Control and Safe Streets Act of 1968 prevents a person convicted of inciting a riot or civil disorder and sentenced to imprisonment for more than one year from holding federal employment for five years.[\[30\]](#) And an employee convicted of bribery or

disclosure of a tax return to an unauthorized person will be dismissed from the Internal Revenue Service.<sup>[31]</sup> Moreover, one convicted of a felony may not enlist in any branch of the armed services.<sup>[32]</sup>

Generally, however, a conviction does not automatically disqualify a person from securing federal employment; rather, the conviction is considered in determining suitability.<sup>[33]</sup> Further, most nonprobationary federal employees can be dismissed from their jobs only for “such cause as will promote the efficiency of the service,” and an employee removed from his or her job usually may appeal to the Merit Systems Protection Board.<sup>[34]</sup> A federal employer that relies on a criminal conviction must demonstrate a nexus, or connection, between the misconduct and the efficiency of the service.<sup>[35]</sup>

### *State Government Employment*

Except when a conviction prevents a person with a criminal conviction from obtaining a license necessary for public employment, a conviction does not usually constitute an absolute bar to state employment. Further, most career state employees who have “tenure” under the State Personnel Act can be dismissed only for “just cause.”<sup>[36]</sup> In cases involving off-duty criminal conduct, a state agency need not show actual harm to its interest in order to demonstrate “just cause” to support a discharge, but it still must show that “the dismissal is supported by the existence of a rational nexus between the type of criminal conduct committed and the potential adverse impact on the employee’s future ability to perform for the agency.”<sup>[37]</sup> The factors considered in determining whether a rational nexus exists include the effect of the conduct on clients or colleagues; the relationship between the type of work and the type of criminal conduct; the likelihood of recurrence; the degree to which the conduct may affect work performance and quality and the agency’s goodwill and interests; the proximity of the conduct to the commencement of the disciplinary proceedings; extenuating or aggravating circumstances; the blameworthiness or praise-worthiness of the motives behind the conduct; and the presence or absence of any relevant mitigating factors.<sup>[38]</sup>

### *Local Government Employment*

Some local government employees, such as sheriffs and police officers, are subject by statute to removal for conviction of a felony.<sup>[39]</sup> Generally, however, there is no automatic bar to employment in local government for those convicted of a crime, but neither are there the “efficiency of the service” or the “just cause” protections that federal and state employees enjoy.<sup>[40]</sup>

However, county employees in health departments, in social services departments, in substance-abuse authorities, and in the mental health, developmental disabilities, and emergency-management agencies are protected by the State Personnel Act.<sup>[41]</sup> Most others have little protection except for that offered by a local grievance procedure or the minimal due process hearing required by the United States Constitution.<sup>[42]</sup>

### *Public School Employment*

Employment in the public schools is regulated by a specific set of statutes. Three points about these statutes are particularly important for this discussion. First, in general, a conviction does not automatically disqualify a person from public school employment; but special legislation gives the

schools access to otherwise confidential records of criminal history maintained by the Federal Bureau of Investigation and the State Bureau of Investigation.[\[43\]](#)

Second, only some public school employees—those classified as teachers or administrators—are protected under the statutes. Many—maintenance workers, bus drivers, and other noninstructional personnel—are employed at will. The statutes governing teachers and those governing administrators differ in the job security they afford, but they are similar in permitting (although not requiring) a public school employer to dismiss a teacher or an administrator for conviction of a felony or crime of moral turpitude.[\[44\]](#) Although the statutes do not explicitly require a connection between a criminal conviction and the employee’s fitness to continue work, the courts may require such a connection before they allow dismissal.[\[45\]](#)

Third, teachers, administrators, and other instructional personnel must obtain a certificate, or license, to teach in the public schools. The State Board of Education may deny an application for a license or may suspend or revoke a license for “conviction or entry of a plea of no contest, as an adult, of a crime if there is a reasonable and adverse relationship between the underlying crime and the continuing ability of the person to perform any of his/her professional functions in an effective manner.”[\[46\]](#)

### **Collective-Bargaining Agreements and Individual Employment Contracts**

A substantial number of employees in North Carolina are covered by collective-bargaining agreements and a very few by individual employment contracts. Usually, such agreements do not deal directly with criminal convictions but allow the employer to discharge for “just cause.” There is now a body of decisions by arbitrators, who are generally called on to interpret such “just cause” provisions. The majority view is, first, that neither a criminal conviction nor even a guilty plea will normally have a binding, or preclusive, effect in an arbitration involving the same set of facts.[\[47\]](#) Further, off-duty illegal conduct subjects the employee to discharge only if (1) the conviction is known in the community and damages the employer’s business or reputation, (2) fellow employees would refuse to work with the individual, or (3) the nature of the offense makes the individual unsuitable for his or her job.[\[48\]](#)

### **Restrictions Imposed by the Sentencing Court**

Usually the employment consequences of a criminal conviction occur after the criminal proceedings end, but the sentencing court does have limited authority to restrict a convicted person’s employment.

The North Carolina Constitution sets the outer limits on a court’s power to sentence a person—to punish that person—for a criminal offense. The state supreme court has observed that the constitutional limitations, in effect since 1868, were “intended to stop the use of degrading punishments theretofore inflicted.”[\[49\]](#) The constitution allows the sentencing court to impose, among other things, imprisonment, fines, restitution, and removal from public office. The court may not impose a punishment greater than what the constitution allows.[\[50\]](#)

The constitution explicitly authorizes restrictions on employment only when the convicted person holds public office, allowing removal from office in some circumstances.[\[51\]](#) In that context, “public

office” refers not to all public employees but only to a relatively narrow class of higher-level positions, such as judges or school board members.[\[52\]](#)

Through its power to suspend a sentence and impose probation, however, a sentencing court may affect a broader range of employment. Probation may include any conditions reasonably related to a person’s offense and reasonably necessary to his or her rehabilitation, including restrictions on employment.[\[53\]](#) For example, the supreme court held that an attorney convicted of illegally posting a bail bond and interfering with a witness could be required as a condition of probation not to practice law for eighteen months.[\[54\]](#) As with any conditions of probation, an employment restriction may not last longer than the period of probation itself, a maximum of five years.[\[55\]](#)

In some circumstances a court also may have the authority to *regulate* a particular field of employment. The legal profession is the prime example: either the State Bar or the court may, following appropriate procedure, suspend or revoke an attorney’s license to practice law. Such action is viewed not as punishment for a criminal offense but as regulation of the legal profession.[\[56\]](#)

## Other Employment Consequences

**Unemployment benefits.** An employee who loses his or her job because of a criminal conviction unconnected to the work and who is available to work will not automatically be denied unemployment benefits. Such a person is generally entitled to receive benefits unless the reason for the separation is misconduct (total disqualification) or substantial fault (partial disqualification) that is “connected with the work.”[\[57\]](#) It is not necessary that the criminal conduct occur at the work site to be considered connected with the work.[\[58\]](#) The unemployment statute does specifically provide that conviction of the manufacture, sale, or distribution of a controlled substance punishable under the North Carolina General Statutes[\[59\]](#) is necessarily misconduct connected with the work. Otherwise, the determination of connection with the work is made on a case-by-case basis by the Employment Security Commission, although the commission and the courts generally interpret “connected with the work” broadly.[\[60\]](#)

One other matter is worth noting. The unemployment statutes contain a provision on self-incrimination that limits criminal prosecution concerning the subject matter of any testimony that an employee is compelled to give in an unemployment hearing.[\[61\]](#)

**Workers’ compensation benefits.** Although the law is far from settled, a person injured on the job who is receiving workers’ compensation and is discharged because of a criminal conviction usually will not, unless incarcerated, lose his or her entitlement to those compensation benefits as a result of the conviction.[\[62\]](#)

**COBRA (Consolidated Omnibus Budget Reconciliation Act) benefits.** A terminated employee is normally entitled to continued coverage under an employer’s group health plan for up to eighteen months if he or she pays the total cost of such coverage, unless the termination was for “gross misconduct.”[\[63\]](#) Although the law is not yet settled, loss of employment because of a conviction unrelated to the work ought not normally to constitute “gross misconduct.”

## The Meaning of “Criminal Conviction”

When is a person subject to the employment consequences just discussed? To answer that question, we need to understand when an individual suffers a criminal conviction. Generally a conviction is a final judgment of the court that finds a person guilty of a criminal offense. The most important aspects of this definition, as used in the criminal law, are discussed below. But the reader should check the employment statutes, regulations, or other provisions governing the work at issue, because some of them may not use the commonly accepted definition of conviction as the event that may trigger any adverse actions, including termination of employment.

### **Nature of the Plea**

A person may be convicted of a criminal offense in North Carolina by (1) pleading guilty, (2) pleading no contest, or (3) pleading not guilty but being found guilty by a judge or jury. Generally, once a court enters final judgment, any of the three serves as a conviction; but the nature of the plea may lead to different collateral effects, particularly with respect to civil liability. The law allows the victim of a crime to bring a civil lawsuit for money damages against the person who committed the crime. For example, suppose John Smith is convicted of assaulting Mary Jones, who then sues Smith concerning the injuries she suffered. The effect of Smith's conviction in that suit depends on the plea he entered in the criminal case. If Smith pleaded guilty, he has admitted doing the act with which he was charged, and that admission may be used in the civil case as evidence that he committed the assault.[\[64\]](#) In contrast, if Smith pleaded no contest in the criminal case, Jones may not introduce evidence of the criminal conviction to show that Smith committed the assault; by definition, a no-contest plea neither admits nor denies the charged conduct.[\[65\]](#) Also, if Smith pleaded not guilty but was found guilty, Jones may not use evidence of the conviction to show that Smith committed the assault. Smith has not admitted committing the act, having pleaded not guilty; and, under North Carolina's rules of evidence, Jones may not use the judgment from the criminal case in place of live testimony proving Smith's conduct.[\[66\]](#)

These distinctions are far less important in the employment context. When an employer learns that an at-will employee or an applicant for employment has been convicted, it might terminate the employee or refuse to hire the applicant without pondering the technical differences between a guilty plea, a no-contest plea, and a finding of guilt after a not-guilty plea. Even if the person has statutory or contractual job protections, the nature of his or her plea may make little difference. Thus some statutes provide that the simple fact of conviction is grounds for discharge. For example, a police officer may be subject to termination for conviction of a felony, regardless of the plea.[\[67\]](#)

But under some employment contracts and statutes, the fact of conviction is not itself sufficient to justify discharging an employee. The employer must show that the conviction affects the employee's fitness to do the job, and a decision to terminate is subject to review in an administrative hearing or arbitration.[\[68\]](#) Although the rules of evidence are relaxed in these proceedings-and evidence of a conviction probably will be admissible regardless of the nature of the employee's plea-the conviction normally does not have a binding, or preclusive, effect. The employee probably will be able to present evidence about the conduct underlying the conviction and about whether the conduct warrants discharge.[\[69\]](#)

### **Finality of Judgment**

If an employer does terminate an employee or make other employment decisions on the basis of a conviction, the question of when the conviction becomes final sometimes arises.

If someone is convicted of a misdemeanor in district court, the conviction is not final until the time for appeal has expired (ten days after judgment in district court) because, in North Carolina's two-tiered trial system, the defendant is entitled to a new trial (trial *de novo*) in superior court after trial in district court. If the defendant does exercise the right to a new trial in superior court, "it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose."[\[70\]](#)

If a person is convicted in superior court, whether of a misdemeanor or a felony, the rules on finality vary. The general trend is to treat a superior court's judgment as final even if the defendant has filed a timely appeal. For example, in 1993 the General Assembly amended the rules on sentencing to allow a court to enhance a defendant's sentence on the basis of a prior conviction in superior court regardless of whether an appeal is pending.[\[71\]](#)

### **Outcomes Not Considered Convictions**

Many proceedings in criminal court do not reach judgment and therefore do not result in a conviction. Obviously, no conviction occurs if a person is arrested or indicted and the charges are dismissed or the person is found not guilty. Other proceedings do not result in an unconditional dismissal but are generally viewed as falling short of a conviction, including

- deferred prosecutions,
- prayers for judgment continued, and
- probation without conviction.[\[72\]](#)

A *deferred prosecution* occurs when the state agrees to cease prosecution and give the defendant the opportunity to demonstrate his or her good conduct, such as by making restitution or participating in a treatment program. The court does not enter judgment against the defendant, and the deferred prosecution is generally not considered a conviction.[\[73\]](#)

With a *prayer for judgment continued*, commonly known as a PJC, the court accepts the defendant's guilty plea or finds the defendant guilty after trial but does not impose a sentence or enter judgment. Instead, the court indefinitely postpones—or continues—judgment. If the PJC does not contain conditions amounting to punishment, it is not considered a conviction. For example, a PJC that requires a defendant to pay court costs or not to violate the law is not considered a conviction.[\[74\]](#) If it does include conditions amounting to punishment, such as a fine or imprisonment, the courts generally disregard the PJC label and treat the order as a final judgment and conviction.[\[75\]](#)

Probation without conviction refers to a procedure available for a narrow class of drug offenses.[\[76\]](#) If a defendant pleads guilty or is found guilty, a court may defer further proceedings and place the defendant on probation without entering judgment. The statutes governing this procedure provide that if the defendant fulfills the conditions of probation, the proceedings must be dismissed and "shall not be deemed a conviction . . . for purposes of disqualifications or disabilities imposed by law upon conviction of a crime."[\[77\]](#)

Finally, a proceeding that results in a judgment may not meet the definition of criminal conviction because the law does not consider the proceeding to fall within the realm of criminal law. For example, a juvenile adjudication of delinquency is not a conviction.<sup>[78]</sup> Infractions, which usually involve minor traffic violations such as running a stop sign or not wearing a seat belt, also are not considered convictions.<sup>[79]</sup> But many traffic offenses are misdemeanors (for example, driving fifteen miles per hour over the speed limit) and thus could be the basis of a conviction. Violations of some city or county ordinances (for example, those that prohibit possession of an open container of beer or wine on a public street) also may be classified as misdemeanors.<sup>[80]</sup>

## Removal of Convictions

North Carolina law offers limited opportunities for the removal of a conviction. A person may seek

- a gubernatorial pardon.<sup>[81]</sup>
- expungement of a misdemeanor conviction (that is, destruction of the record) if the convicted person was under eighteen years of age and meets other statutory conditions.<sup>[82]</sup> and
- expungement of a conviction for a narrow range of drug offenses if the person was under twenty-one years of age and meets other statutory conditions.<sup>[83]</sup>

A person also may have records removed that do not amount to a conviction but still may adversely affect his or her employment. Thus, in limited circumstances, a person may be able to obtain expungement of records relating to juvenile proceedings,<sup>[84]</sup> criminal charges that resulted in dismissal or acquittal,<sup>[85]</sup> and probation without conviction for certain drug offenses.<sup>[86]</sup>

## Revisiting Sally

This article began by posing several questions concerning Sally, a college student who was cited for consuming a mixed drink on a public street. We now return to those questions.

*If Sally goes to the magistrate and pays a fine without appearing in court, will she have a criminal conviction on her record?* Yes. Consuming certain alcoholic beverages in violation of G.S. 18B-301(f) is a misdemeanor. If she paid the fine to a magistrate, Sally would suffer a criminal conviction. Before she acts on that citation, she might want to consult a lawyer familiar with local practice, because the prosecutor's office may have a policy of offering deferred prosecutions to first offenders—or the court may have a policy of granting prayers for judgment continued. Neither would result in a conviction.

*Will a conviction prevent Sally from working in certain occupations?* As a legal matter, probably not. Although the law varies with the employment in question (at-will employment, public-sector employment, and employment covered by a collective-bargaining agreement or individual contract), a misdemeanor as minor as this probably would not be a bar to employment. As a practical matter, however, the conviction might create a problem. In hiring, an employer might pass over Sally in favor of job applicants without a criminal record. Further, Sally might not recognize that she has been convicted of a crime and so might not reveal that fact when asked on job applications. This might give an employer grounds to discharge her later.

*Can Sally ever have the records of the incident sealed or destroyed?* No, if she is convicted, because

she was over eighteen, the cutoff age for expungement, when the events occurred. But if the charges are dismissed pursuant to a deferred prosecution agreement, Sally can have all of the records relating to the incident expunged. The right to this type of expungement may be exercised only once. She might therefore want to save the exercise of the right in case one day she is charged with and obtains dismissal of a more serious offense.

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## Notes

- 1.** See generally Stevens H. Clarke, *Law of Sentencing, Probation, and Parole in North Carolina*, 2d ed. (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997); Michael Crowell, *Collateral Consequences of a Criminal Conviction in North Carolina: Effects on Citizenship, Officeholding, Occupational Licensing, and Forfeiture of Property* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1983); David Rudenstine, *The Rights of Ex-Offenders* (New York: Avon Books, 1979); Special Project, "The Collateral Consequences of a Criminal Conviction," *Vanderbilt Law Review* 23 (1970): 929.
- 2.** See Rudenstine, *The Rights of Ex-Offenders*, 71-72.
- 3.** For example, by executive order, the governor prohibited individuals convicted of any of the offenses described in the order from being employed in certain direct-care positions in facilities operated by the North Carolina Department of Human Resources (now called the Department of Health and Human Services). See Exec. Order No. 169, 1991 N.C. Sess. Laws 1329 (Reg. Sess. 1992). This past legislative session, the General Assembly enacted Section 114-19.6 of the North Carolina General Statutes (hereinafter G.S.) concerning employment with the department; this statute is intended to take the place of the governor's executive order.
- 4.** Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e through 2000e-17.
- 5.** Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623.
- 6.** Americans with Disabilities Act of 1990, 42 U.S.C. § 12111.
- 7.** National Labor Relations Act, 29 U.S.C. § 151.
- 8.** G.S. 95-126.
- 9.** G.S. 95-28.2.
- 10.** G.S. 95-28.1.
- 11.** See generally Mack A. Player, *Employment Discrimination Law* (St. Paul, Minn.: West Publishing Company, 1988), 384, 398.
- 12.** See generally *1996-97 Directory of North Carolina State Business Licenses and Permits* (Raleigh, N.C.: N.C. Dept. of the Secretary of State, Business License Information Office, 1996).
- 13.** See Kenneth Olson and Richard A. Pasewark, "Licensing Restrictions for Criminal Offenders,"

*Journal of Offender Counseling, Services and Rehabilitation* 5, no. 1 (Fall 1980): 19 (finding that many licensing boards, in the exercise of their discretion, do not revoke or deny licenses for conviction of a crime).

**14.** G.S. 74C-13(g).

**15.** G.S. 58-71-50.

**16.** G.S. 86A-18.

**17.** *See generally* Crowell, *Collateral Consequences in North Carolina*, 5-14.

**18.** *State v. Mann*, 317 N.C. 164, 170, 345 S.E.2d 365, 369 (1986). *See also* *Jones v. Brinkley*, 174 N.C. 23, 93 S.E. 372 (1917) (to same effect).

**19.** John W. Strong, *McCormick on Evidence*, 4th ed. (St. Paul, Minn.: West Publishing Company, 1992), 1:143, n. 5.

**20.** *See, e.g.,* *Averitt v. Rozier*, 119 N.C. App. 216, 458 S.E.2d 26 (1995) (murder and kidnapping are crimes of moral turpitude); *Harris v. Temple*, 99 N.C. App. 179, 392 S.E.2d 752 (giving worthless check for merchandise is crime of moral turpitude), *review denied*, 327 N.C. 428, 395 S.E.2d 678 (1990).

**21.** This enhancement applies only if the law governing the misdemeanor does not specify a particular punishment. *See* G.S. 14-3(b). Before 1994, when structured sentencing was adopted in North Carolina, the courts often struggled with whether attempt and solicitation crimes (which generally did not have specific punishments) should be considered infamous. *See, e.g.,* *State v. Glidden*, 317 N.C. 557, 346 S.E.2d 470 (1986) (reviews cases on issue); *State v. Grant*, 261 N.C. 652, 135 S.E.2d 666 (1964) (attempted felonious breaking and entering is not infamous misdemeanor); *State v. Surles*, 230 N.C. 272, 52 S.E.2d 880 (1949) (attempted burglary is infamous misdemeanor); *State v. Spivey*, 213 N.C. 45, 195 S.E. 1 (1938) (attempt to commit crime against nature is infamous misdemeanor); *State v. Tyner*, 50 N.C. App. 206, 272 S.E.2d 626 (1980) (solicitation to commit crime against nature is not infamous misdemeanor), *review denied*, 302 N.C. 633, 280 S.E.2d 451 (1981). Because attempts, solicitations, and most other crimes now have specific punishments under structured sentencing, the courts will rarely need to divine the meaning of “infamous.”

**22.** *See, e.g.,* *Ingle v. Roy Stone Transfer Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967) (in rejecting any requirement for impeachment that conviction be for crime of moral turpitude, court lists crimes that other jurisdictions have found not to involve moral turpitude, including disorderly conduct, petty larceny, assault, traffic offenses, and others); *State v. King*, 224 N.C. 329, 30 S.E.2d 230 (1944) (unlawful possession of liquor, assault on female, failure to provide support for wife and child, and disorderly conduct not crimes of moral turpitude); Strong, *McCormick on Evidence*, 1:143, n. 5 (ordinance violations, traffic offenses, and other offenses generally not crimes of moral turpitude).

**23.** *See, e.g.,* *In re Hunt*, 308 N.C. 328, 302 S.E.2d 235 (1983) (acceptance of bribe by judge is crime of moral turpitude); *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975) (trespass and driving while impaired *not* crimes of moral turpitude); *Dew v. State ex rel. North Carolina Dep’t of Motor Vehicles*,

127 N.C. App. \_\_\_\_, 488 S.E.2d 836 (1997) (possession of marijuana with intent to distribute it in violation of federal law is crime of moral turpitude); *North Carolina State Bar v. Speckman*, 87 N.C. App. 116, 360 S.E.2d 129 (1987) (appropriating \$5,000 of client's funds to own use is crime of moral turpitude); *North Carolina Real Estate Licensing Bd. v. Coe*, 19 N.C. App. 84, 198 S.E.2d 19 (1973) (filing false tax return *not* crime of moral turpitude). *See also* *Martin v. Town of Holly Springs*, 230 N.C. 388, 53 S.E.2d 161 (1949) (trial court found that minor assaults, petty traffic violations, and possession of intoxicating liquors were *not* crimes of moral turpitude); *Calvert v. General Motors Corp.*, 327 N.W.2d 542 (Mich. Ct. App. 1982) (in case involving denial of unemployment benefits, carrying unloaded concealed weapon is *not* crime of moral turpitude), *discussed in* *Seagraves v. Austin Co.*, 123 N.C. App. 228, 472 S.E.2d 397 (1996).

**24.** *See, e.g.,* *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (requiring nexus as matter of due process); *In re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975) (following *Schwartz* and requiring rational connection between qualifying standards and applicant's fitness to practice law). *See also* page 16 (discussing nexus requirement in public employment).

**25.** *See generally* G.S. 58-7-15(16)(a) (fidelity insurance guarantees "fidelity of persons holding position of public or private trust").

**26.** *See* Special Project, "Collateral Consequences," 1001-2.

**27.** 29 U.S.C. § 504(a).

**28.** 12 U.S.C. § 1829.

**29.** 18 U.S.C. §§ 2385, 2387.

**30.** 5 U.S.C. § 7313.

**31.** 26 U.S.C. §§ 7213, 7214.

**32.** 10 U.S.C. § 504.

**33.** *See* 5 C.F.R. § 731.

**34.** 5 U.S.C. §§ 7511, 7521.

**35.** The cases discussing this "nexus" are collected in the annotations to 5 U.S.C. § 7513.

**36.** G.S. 126-35. Some state employees are not covered at all by the State Personnel Act—for example, employees of the Judicial Department; the General Assembly; the offices of the governor and lieutenant governor; and instructional and research staff, physicians, and dentists of The University of North Carolina. G.S. 126-5(c1). In addition, the governor is authorized to exempt policy-making positions in state departments, as are members of the Council of State for their own offices. G.S. 126-5(d).

**37.** *See* *Eury v. North Carolina Employment Sec. Comm'n*, 115 N.C. App. 590, 611, 446 S.E.2d 383, 395-96, *review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994).

**38.** *Eury*, 115 N.C. App. 590, 446 S.E.2d 383.

**39.** G.S. 128-16(5).

**40.** Certain county officers, such as the tax collector and assessor, can be removed only for good cause. G.S. 105-349(a), -294(a). But a county or city employee who discloses privileged information about a taxpayer must be dismissed and cannot hold other public employment for five years. G.S. 153A-148.1, 160A-208.1.

**41.** G.S. 126-5(a). County commissioners may extend the provisions of the statute to other county employees.

**42.** See Stephen Allred, *Employment Law: A Guide for North Carolina Employers*, 2d ed. (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1995), 281, 307.

**43.** See G.S. 114-19.2, 115C-332. G.S. 14-236 provides that a public school employee convicted of acting as an agent for those furnishing supplies to a school, a Class 1 misdemeanor, must be removed from his or her position. Whether this statute overrides job protections for teachers and administrators contained in the public school statutes is unclear.

**44.** See G.S. 115C-325(e) (career teachers may be dismissed only for listed reasons); G.S. 115C-325(m) (probationary teachers may be dismissed during the term of their contract only for reasons for which career teachers may be dismissed); G.S. 115C-287.1 (school administrators—which include principals, assistant principals, supervisors, and directors—may be dismissed or demoted during the term of their contract only for reasons for which career teachers may be dismissed); and G.S. 115C-274, -278 (superintendents and assistant superintendents may be removed during the term of their contract only for listed reasons).

**45.** The courts have required such a connection, or nexus, for dismissal of a teacher for “immoral conduct,” another of the statutory grounds for dismissal of a career teacher. See *Barringer v. Caldwell County Bd. of Educ.*, 123 N.C. App. 373, 473 S.E.2d 435 (1996). There is also a nexus requirement for revoking a teacher’s license for conviction of a crime. See note 46 and accompanying text.

**46.** N.C. Admin. Code tit. 16, ch. 6C, § .0312(a)(3) (July 1997).

**47.** Marvin Hill and Anthony V. Sinicropi, *Evidence in Arbitration*, 2d ed. (Washington, D.C.: Bureau of National Affairs, 1987), 375-85.

**48.** See generally Tim Bornstein and Ann Gosline, *Labor and Employment Arbitration* (Albany, N.Y.: Matthew Bender, 1995), 20.46-20.48.

**49.** *Shore v. Edmisten*, 290 N.C. 628, 631, 227 S.E.2d 553, 557 (1976).

**50.** See N.C. Const. art. XI, § 1. In November 1996, the state constitution was amended to broaden the range of permissible punishments. Section 1 of Article XI now provides as follows (new provisions in italics):

The following punishments only shall be known to the laws of this State: death, imprisonment,

finer, suspension of a jail or prison term with or without conditions, restitution, community service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.

Whatever the effect of these changes, any punishment still must be one that the law authorizes for the particular offense committed by a defendant. Most criminal statutes refer only to imprisonment, monetary sanctions, and probation.

**51.** For example, a person adjudged guilty of a felony is ineligible to hold public office, whether elected or appointed. N.C. Const. art. VI, § 8. The disqualification from public office lasts until the person has completed his or her sentence.

**52.** See generally Special Project, “Collateral Consequences,” 988.

**53.** G.S. 15A-1343(a), -1343(b1)(10).

**54.** State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492, review denied, 311 N.C. 767, 319 S.E.2d 284 (1984).

**55.** G.S. 15A-1342(a). With the defendant’s consent, the court may extend the period of probation for three more years but only to allow the defendant to complete a program of restitution or to continue medical or psychiatric treatment. G.S. 15A-1342(b).

**56.** See, e.g., *In re Delk*, 336 N.C. 543, 444 S.E.2d 198 (1994) (court has inherent power to discipline attorneys). A relatively new statute, G.S. 15A-1331A, appears to give the court greater power over a person’s employment in felony cases. It provides that a convicted person’s occupational and certain other licenses are forfeited for the term of the original probation if the court revokes his or her probation and finds that the person failed to make reasonable efforts to comply with the conditions of probation. The statute has not yet been challenged, and whether it provides a constitutionally authorized form of punishment remains unclear. See Clarke, *Law of Sentencing, Probation, and Parole*, 18-19.

**57.** G.S. 96-14(2), -14(2)(A).

**58.** *In re Collins v. B & G Pie Co.*, 59 N.C. App. 341, 296 S.E.2d 809 (1982), review denied, 307 N.C. 469, 299 S.E.2d 221 (1983).

**59.** See G.S. 90-95(a)(1), -95(a)(2).

**60.** See, e.g., *Lynch v. P.P.G. Industries*, 105 N.C. App. 223, 412 S.E.2d 163 (1992) (conviction for possession of cocaine with intent to sell it constitutes misconduct connected with work). See also *Smith v. Spence & Spence*, 80 N.C. App. 636, 343 S.E.2d 256 (secretary’s delinquency in her personal financial affairs that caused detrimental effect on employer’s relationship with clients constituted substantial fault connected with her work), review denied, 317 N.C. 707, 347 S.E.2d 440 (1986).

**61.** See G.S. 96-4(j).

**62.** See *Seagraves v. The Austin Co.*, 123 N.C. App. 228, 472 S.E.2d 397 (1996).

**63.** 29 U.S.C. § 1162.

**64.** See generally Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence*, 4th ed. (Charlottesville, Va.: Michie Company, 1993), 2:57, nn. 246-47. But compare Strong, *McCormick on Evidence*, 2:151-52, n. 29 (some jurisdictions exclude guilty pleas from evidence when the offense is fairly minor, such as a traffic offense).

**65.** N.C. R. EVID. 410 (barring use of no-contest plea). A defendant may plead no contest only if the prosecutor and judge consent. G.S. 15A-1011(b). A defendant also may enter an “*Alford* plea,” a type of plea in which the defendant essentially pleads guilty but denies guilt. See *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Whether such a plea would be admissible in a later proceeding is unclear.

**66.** See Broun, *Brandis and Broun*, 2:19-22 (judgment of another court, including judgment of conviction, not admissible in another case as evidence of fact found except when principle of *res judicata* applies); *Moore v. Young*, 260 N.C. 654, 133 S.E.2d 510 (1963) (criminal conviction ordinarily not *res judicata* in subsequent civil proceeding because parties not identical); *Carawan v. Tate*, 53 N.C. App. 161, 280 S.E.2d 528 (1981) (evidence of conviction for assault not admissible in lawsuit to recover for same assault), *modified on other grounds*, 304 N.C. 696, 286 S.E.2d 99 (1982). The federal rules of evidence allow a conviction to be used in a subsequent proceeding to prove facts essential to the conviction but only when the crime is a relatively serious one and other conditions are met. See FED. R. EVID. 803(22) (crime must be punishable by imprisonment in excess of one year); see also Strong, *McCormick on Evidence*, 2:296-99 (explaining rationale for various approaches to admissibility of conviction).

**67.** G.S. 128-16.

**68.** See pages 16 and 17 (discussing public employment and employment under a collective-bargaining agreement or individual contract).

**69.** See *In re Elkins*, 308 N.C. 317, 302 S.E.2d 215, *cert. denied*, 464 U.S. 995 (1983); Hill and Sinicropi, *Evidence in Arbitration*, 375-85. As a practical matter, however, an employee may stand on firmer ground in contesting the allegations in an employment proceeding if he or she pleaded no contest to the criminal charge.

**70.** *State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970); see also G.S. 15A-1431 (sentence imposed by district court judge automatically stayed upon appeal; judgment reinstated only if defendant withdraws appeal), G.S. 15A-1340.11(7)a. (district court conviction counts as prior conviction for sentencing purposes only if defendant has not appealed). A defendant has the right to a new trial in superior court even after pleading guilty in district court; but whether the guilty plea could be used in a subsequent civil proceeding as an admission of the defendant is unclear. See Broun, *Brandis and Broun*, 2:57, n. 246.

**71.** G.S. 15A-1340.11(7)b. Similarly, in 1995 the General Assembly amended the statutes governing attorneys to allow the State Bar to initiate disciplinary proceedings without awaiting the outcome of

an appeal of a conviction in superior court. G.S. 84-28(d).

**72.** Because statutes and regulations may vary, however, readers should check the applicable language to be sure it conforms to the common definition of conviction. *See, e.g.*, G.S. 20-4.01(4a)a.4. (for purposes of revoking a driver's license, a third prayer for judgment continued within five years constitutes a conviction); G.S. 113-166(a) (for purposes of revoking certain fishing licenses, a conviction includes "a plea of guilty or nolo contendere, any other termination of a criminal prosecution unfavorably to the defendant after jeopardy has attached, or any substitute for criminal prosecution whereby the defendant expressly or impliedly confesses his guilt").

**73.** There are two forms of deferred prosecution, formal and informal. Formal deferred prosecution is governed by G.S. 15A-1341(a1), which allows deferral of prosecution for misdemeanors and Class H and I felonies. Prosecutors also informally "defer" prosecution by dismissing the case on the defendant's promise to abide by certain conditions. In either instance, the defendant ordinarily does not enter a plea but may be asked to sign a statement admitting the charged conduct. **74.** *See* G.S. 15A-101(4a) (PJC upon payment of costs, without more, does not constitute entry of judgment); *State v. Southern*, 314 N.C. 110, 331 S.E.2d 688 (1985) (PJC, not being conviction, cannot be used as aggravating factor in sentencing for subsequent offense); *Florence v. Hiatt*, 101 N.C. App. 539, 400 S.E.2d 118 (1991) (PJC was not conviction and did not authorize revocation of driver's license); *State v. Cheek*, 31 N.C. App. 379, 229 S.E.2d 227 (1976) (PJC was not final judgment, and defendant had no right to appeal). Although a PJC is not a conviction, a person's guilty plea might be admissible as an admission in a subsequent civil case. *See* note 70.

**75.** *See State v. Brown*, 110 N.C. App. 658, 430 S.E.2d 433 (1993).

**76.** G.S. 90-96 and -113.14 authorize probation without conviction for possession of some controlled substances, possession of drug paraphernalia, and inhalation or possession of substances that release toxic vapors.

**77.** G.S. 90-96(a). Here again, if a defendant pleads guilty and is placed on probation without conviction, the guilty plea might be admissible as an admission in a subsequent civil case. *See* note 70.

**78.** G.S. 7A-638. Although not convictions, some adjudications of delinquency have collateral consequences. *See* G.S. 15A-1340.16(d)(18a) (delinquency adjudication for act that would have been Class A through E felony if committed by adult may be used as aggravating factor at sentencing for later offense); N.C. R. EVID. 404(b) (making admissible in some circumstances evidence of offense committed by juvenile that would be Class A through E felony if committed by adult); N.C. R. EVID. 609(d) (in criminal case, court may allow evidence of juvenile adjudication of witness other than accused if conviction of same offense would be admissible to impeach).

**79.** *See* G.S. 14-3.1 (infraction is noncriminal violation of law). For a list of motor vehicle infractions, *see* Ben F. Loeb, Jr., and A. Britt Canady, *Punishment Chart for North Carolina Motor Vehicle Offenses* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, Jan. 1995). Infractions also may involve unlawful conduct outside motor vehicle law. *See, e.g.*, G.S. 14-313 (some tobacco violations); G.S. 14-415.21 (some violations of law on concealed-handgun permits).

**80.** See G.S. 14-4(a) (violation of ordinance other than one regulating parking or operation of vehicle is Class 3 misdemeanor). A city or county has the option of decriminalizing violations of ordinances. See G.S. 153A-123, 160A-175.

**81.** See N.C. Const. art. III, § 5(6); G.S. 147-21 through -25. See also *State v. Clifton*, 125 N.C. App. 471, 481 S.E.2d 393 (pardoned conviction, whether conditional or unconditional, may not be used as prior conviction to enhance defendant's sentence), *review granted*, 346 N.C. 182, 486 S.E.2d 200 (1997); G.S. 17C-13 (when person presents evidence of unconditional pardon, Criminal Justice Education and Training Standards Commission may not deny, suspend, or revoke person's certification on basis of offense).

**82.** G.S. 15A-145.

**83.** G.S. 90-96(e), -113.14(e).

**84.** G.S. 7A-676.

**85.** G.S. 15A-146 (general provisions); G.S. 90-96(d), -113.14(d) (certain drug offenses). Effective June 4, 1997, G.S. 15A-146 allows expungement of a charge under G.S. 18B-302(i), an infraction involving purchase or possession of beer or wine by a person nineteen or twenty years old, if the charge is dismissed or the person is found not responsible.

**86.** G.S. 90-96(b), -113.14(b). An application form for the types of expungement discussed in this article is available from the clerk of court in any county. See North Carolina Administrative Office of the Courts, *North Carolina Judicial Department Forms Manual*, AOC-CR-237 (Raleigh, N.C.: NCAOC, June 1992).

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