



WHOLESALE AND TERMINAL DISTRIBUTOR OF DANGEROUS DRUGS **APPLICATION LEGAL QUESTIONS**

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The required legal questions on the initial and renewal applications provide the opportunity for the Board to review the facts and circumstances related to a particular case to determine its potential connection, if any, to the issuance or renewal of a license. The purpose of such questions is to act as a safeguard against the diversion of dangerous drugs and protection of confidential patient information by disclosing information necessary to protect the health and safety of the public. The questions are as follows:

On the initial application:

Does the applicant, owner(s), Responsible Person, any agent or any employee of the location being licensed, or any officer of the corporation, have a record of arrest or charges pending or have a conviction of a felony, misdemeanor or traffic violation (even if expunged, dismissed or sealed) or the equivalent in another jurisdiction?

NOTE: An applicant should not answer yes for any traffic violations such as parking violations, speeding tickets and violations such as failure to obey a red light, failure to use a turn signal or an expired registration.

Has the applicant, owner(s), Responsible Person, any agent or any employee of the location being licensed, or any officer of the corporation, ever been the subject of disciplinary action (or any pending action) by any state or federal agency; even if subsequently dismissed or resolved without formal discipline?

For a renewal application:

Within the last 18 months: does the Responsible Person or owner(s), or any agent or any employee of the location being licensed, or any officer of the corporation, have a record of arrest or criminal charges pending or have a conviction of a felony, misdemeanor, or traffic violation (even if sealed or expunged)?

NOTE: A licensee should not answer yes for any traffic violations such as parking violations, speeding tickets and violations such as failure to obey a red light, failure to use a turn signal or an expired registration.

Within the last 18 months: has the Responsible Person or owner(s), or any agent or employee of the Responsible Person/owner(s), or any officer of the corporation, been the subject of disciplinary action by any state or federal agency?



Frequently Asked Questions:

Q1: Who is covered by the legal questions? Does this apply to all employees, agents, or contractors of an entity, even those that do not work on-site?

A1: The questions include the Responsible Person, any officer of the corporation and all employees, agents, or contractors working at the physical location of the licensee with access to dangerous drugs and D.E.A. controlled substance order forms.

It does **not** include employees/contractors such as administrative, janitorial, IT or other staff that may need limited supervised access to areas where dangerous drugs or D.E.A. controlled substance order forms are kept. However, the licensee must have policies in place that prohibit unsupervised access to such areas by these employees.

This question does not apply to former employees or agents of the licensee at the time the legal questions are answered.

PLEASE NOTE: For a pain management clinic, section 4729.552 of the Revised Code requires all employees of the facility to submit to a criminal records check in accordance with section 4776.02 of the Revised Code and ensure that no person is employed who has previously been convicted of, or pleaded guilty to, either of the following:

(1) A theft offense, described in division (K)(3) of section 2913.01 of the Revised Code, that would constitute a felony under the laws of this state, any other state, or the United States; or

(2) A felony drug abuse offense, as defined in section 2925.01 of the Revised Code.

Q2: How is it possible for a Responsible Person (RP) or owner to sign off that they know about any possible criminal charges, convictions, or discipline that may have occurred for all "owners, agents or employees" at the time of initial licensure or since the previous renewal?

A2: The entity seeking licensure and the RP should exercise due diligence in making sure they know the answers to these questions as they pertain to the owners, officers, employees and contractors described in Q1. For large companies, this will come as a result of having appropriate policies in place that require reporting when an owner, officer, employee or contractor is charged/convicted or disciplined during the timeframe in question. This also means having initial screening policies of new owners, officers, employees or contractors who meet the criteria listed in Q1.

The Board does not advise an entity on how to obtain their information nor instruct an entity as to what their policy must include. However, as a general rule, a policy with a mandatory reporting clause has been found to be acceptable by the Board. Such a policy should be implemented in accordance with all federal and state laws. There must be

mechanism in place for results of that mandatory reporting to be relayed to the RP/owner/applicant on the license so that the legal questions can be answered honestly and accurately. As long as the entity/RP is aware that such a mechanism is in place requiring such reporting and that the necessary personnel (i.e. RP) would be aware of it when completing and signing the application, the entity/RP may check answer the questions accordingly.

NOTE REGARDING THE FEDERAL EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC):

The EEOC does not have the authority to prohibit employers from obtaining or using arrest or conviction records. The EEOC simply seeks to ensure that such information is not used in a discriminatory way.

In implementing policies related to obtaining appropriate employment information in the Wholesale or Terminal Distributor of Dangerous Drugs setting, be mindful that the policy should be applied equally to all applicants. The EEOC publishes the following guidance:

In all cases, make sure that you're treating everyone equally. It's illegal to check the background of applicants and employees when that decision is based on a person's race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older). For example, asking only people of a certain race about their financial histories or criminal records is evidence of discrimination.

The EEOC enforces Title VII, which prohibits employment discrimination based on race, color, religion, sex, or national origin. Having a criminal record is not listed as a protected basis in Title VII. Therefore, whether a covered employer's reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin. Title VII liability for employment discrimination is determined using two analytic frameworks: "disparate treatment" and "disparate impact."

Title VII also does not preempt federal statutes and regulations that govern eligibility for occupational licenses and registrations. These restrictions cover diverse sectors of the economy including the transportation industry, the financial industry, and import/export activities, among others.

Q3: If an owner, officer, employee or contractor described in Q1 has been charged/convicted/disciplined prior to initial licensure or in the intervening timeframe for renewals, must the entity terminate that individual's employment in order to obtain a license?

A3: The Board does not advise an entity on whether to terminate an individual with a criminal case/conviction or disciplinary action; that decision rests with the entity's personnel policies. However, the entity MUST report the underlying charge/conviction/discipline to the Board so that the Board may review the facts and

circumstances related to a particular case to determine its potential connection, if any, to the license for which the entity/RP is renewing or applying.

Q4: Rule 4729-9-27 states the following:

(A) Pursuant to [21 C.F.R. Section 1301.76](#) (10/20/2015), a terminal or wholesale distributor of dangerous drugs that is a United States Drug Enforcement Administration registrant shall not employ in a position which allows access to controlled substances any person who has been convicted of a felony relating to controlled substances, or who, at any time, has had an application for DEA registration denied, revoked, or surrendered for cause. "For cause" means surrendering a registration in lieu of, or as a consequence of, any federal or state administrative, civil, or criminal action resulting from an investigation of the individual's handling of controlled substances.

(B) Paragraph (A) of this rule does not apply if a waiver is obtained by a registrant pursuant to [21 C.F.R. Section 1307.03](#).

Does this apply to a potential employee who may have had their felony record(s) expunged, unless granted a waiver by the DEA?

A4: Yes. According to the DEA, the employer would be required to obtain a waiver even if a conviction is expunged. A waiver would also be required for a potential employee who has entered a felony guilty plea relating to controlled substances, as the DEA considers this a conviction. As this rule references an existing federal regulation, the Board will interpret and enforce this requirement in the same manner as the DEA.

More information regarding the waiver process can be accessed here:

http://www.deadiversion.usdoj.gov/faq/waiver_1301_76.htm

To contact your local DEA regional office:

<https://www.deadiversion.usdoj.gov/contactDea/spring/fullSearch?execution=e3s1>

Q5: How can the Board expect an employer to require an employee, agent, etc. to disclose an expunged or sealed criminal record?

A5: Section 2953.33(B) of the Ohio Revised Code permits inquiry into sealed convictions if the question bears a direct and substantial relationship to the position for which the person is being considered. This code section applies to applications for employment, license, or other right or privilege. An inquiry into past charges or convictions for violating state and federal drug laws bears a direct and substantial relationship to the position of a licensed pharmacist. See also *Ohio State Bd. of Pharmacy v. Friendly Drugs*. Employers are expected to perform due diligence in the hiring process to ensure that no applicant is hired in violation of state or federal law (unless a DEA waiver has been granted, please see Q4).

Q6: Is there a list of disciplinary actions (including pending actions) by state or federal agencies that must be reported to the Board of Pharmacy upon initial licensure or renewal? Does the Board expect to be notified of employer disciplinary action?

A6: While no such list of disciplinary action exists, the National Practitioner Data Bank has developed some guidance for reporting of licensure discipline actions:
<http://www.npdb.hrsa.gov/resources/aboutGuidebooks.jsp?page=EStateLicensureActions.jsp> (NOTE: While this reference is specific to state licensure or certification actions, it can also apply to similar actions by federal agencies.)

The Board is not seeking information on an employer disciplinary action (such as being late to work, dress code, or attendance issues), ***unless*** that action resulted in or is related to state licensing and certification action taken against a license.