

LAWS ENACTED IN 2013-2014 DEALING WITH RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION

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I. GENERAL RELIEF SCHEMES

Arkansas: Effective January 1, 2014, the Comprehensive Criminal History Sealing Act of 2013 consolidated and clarified Arkansas' patchwork of overlapping laws on judicial expungement and sealing, some of which dated back to the 1970's. See Ark. Code Ann. § 16-90-1401, et seq. Authorities for diversionary dispositions leading to sealing (including deferred adjudication) were preserved for persons sentenced to probation, first felony offenders, and juveniles. The new law also extended the possibility of sealing to certain minor felony convictions after a five-year waiting period. § 16-90-1401. For misdemeanors and nonconviction records there is a presumption in favor of sealing, and for felonies the court must make certain findings relating to rehabilitation. A person whose record has been sealed under this subchapter shall have all privileges and rights restored, and the conviction "shall be deemed as a matter of law never to have occurred, and the person may state that the underlying conduct did not occur and that a record of the person that was sealed does not exist." § 16-90-1417(b). Sealing does not restore the right to carry a firearm if that right was removed as the result of a felony conviction.

Colorado: In 2013 Colorado enacted a broad menu of new relief authorities and expanded old ones. These new laws enlarged courts' authority to seal records of drug convictions, and cases in which no conviction resulted. Colo. Rev. Stat. § 24-72-308.1 et seq. In addition, persons convicted of less serious felony drug offenses (whether by plea or trial) with no more than one prior may have their convictions vacated and reduced to a misdemeanor upon successful completion of probation. 18-1.3-103.5. Prosecutors were authorized to establish pretrial diversion programs. § 18-1.3-101. In addition, courts imposing a non-prison sentence were granted new authority to enter an "order of collateral relief" at sentencing, dispensing with collateral consequences "for the purpose of preserving or enhancing the defendant's employment or employment prospects and to improve the defendant's likelihood of success" while serving the non-prison sentence. See subsection 1 of the substantially identical provisions of Colo. Rev. Stat. §§ 18-1.3-107 (sentencing alternatives), 18-1.3-213 (probation), and 18-1.3-303 (community corrections).

Also during 2013 the Colorado legislature directed a general review of agency licensing requirements, Colo. Rev. Stat. § 24-34-104(9), and barred introduction of an employee's criminal record in a civil action for negligent hiring if "[t]he nature of the criminal history does not bear a direct relationship to the facts underlying the cause of action." § 8-2-201(b). The year before, in 2012, state agencies and licensing agencies were barred from performing a

¹ A fuller description of the laws identified in this survey memo can be found in the state-by-state profiles of relief mechanisms posted on the NACDL website at www.nacdl.org/rightsrestoration.

background check “until the agency determines that an applicant is a finalist or makes a conditional offer of employment to the applicant.” Colo. Rev. Stat. § 24-5-101.

Delaware: In May 2014 the Delaware legislature amended § 711 of Title 19 of the Delaware Code to make it an unlawful employment practice for public employers to inquire into or consider the criminal record, criminal history or credit history or score of an applicant “during the initial application process, up to and including the first interview.” Del. Code Ann. tit. 19, § 711(g)(1). In addition, a public employer may inquire into or consider an applicant’s criminal record “only after it has determined that the applicant is otherwise qualified and has conditionally offered the applicant the position.” § 711(g)(2). Inquiry is limited to felonies within 10 years from release from custody (or sentencing if never in custody). In connection with any decision regarding employment, a public employer “shall consider” the following factors in evaluating the candidate or employee and the results of any criminal history inquiry: “(A) The nature of the crime and its relationship to the duties of the position sought or held; (B) Any information pertaining to the degree of rehabilitation and good conduct, including any information produced by the candidate or employee, or produced on his or her behalf; (C) Does the prospective job provide an opportunity for the commission of a similar offense(s)?; (D) Are the circumstances leading to the offense(s) likely to reoccur?; (E) How much time has elapsed since the offense(s). § 711(g)(3). The law does not apply to police force, the Department of Correction, or any position where federal or state law requires or expressly permits the consideration of an applicant’s criminal history. § 711(g)(4).

The law also amended Chapter 69 of Title 29 of the Delaware Code by adding a new section 6909B titled Fair Background Check Practices, providing that the state will do business only with contractors “that have adopted and employ written policies, practices and standards that are consistent with the requirements of § 711(g) of Title 9.” Del. Code Ann. Tit. 29, § 6909B(a). Agencies are directed to review all contractors’ background check policies for consistency with the policies of the State as expressed in § 711(g) of Title 9, and to consider background check policies and practices among the performance criteria in evaluating a contract. These requirement “shall not apply where a criminal background check or credit check is a requirement of State or federal law for a particular class of services.” § 6909B(b) and (c).

Indiana: A comprehensive new law enacted in May 2013 authorizes “expungement” of all records except those involving serious violence and sexual offenses, after a waiting period ranging from three to ten years. It also authorizes “sealing” of minor offenses and non-conviction records. See Ind. Code § 35-38-9. The records of convictions that have been expunged “remain public,” although they must be “clearly and visibly marked or identified as being expunged.” § 35-38-9-7. After a record is sealed, even a prosecutor may not access the records without a court order. § 35-38-9-1(d). It is unlawful discrimination for any person to refuse to employ, admit or license a person because of a conviction or arrest record that has been expunged or sealed, and a person may be questioned about a previous criminal record only in terms that exclude expunged convictions or arrests. § 35-38-9-10(a) and (c). Expunged convictions are not admissible as evidence of negligence in a civil action against a person who relied on the expungement order, § 35-38-9-10(f) and (g), and convictions that have been expunged may not be reported by credit reporting companies. See Ind. Code § 24-4-18-6(a).

Certain minor felonies may be converted to Class A misdemeanors upon entry of judgment on a one-time basis, or three years after imposition of sentence (DV and child pornography offenses are ineligible), and are then eligible for sealing. Ind. Stat. § 35-50-2-7. A petitioner may seek to expunge more than one conviction at the same time, but may file only one petition in the petitioner's lifetime – except that if a petition is denied on the merits then a subsequent petition covering some or all of the convictions in the original petition may be filed after three years. § 35-38-9-9(h), (i) and (j). The Indiana courts have published sample petitions for expungement at <http://www.in.gov/judiciary/2706.htm>.

Credit reporting companies: In 2012 a new chapter 24-4-18 was added to the Indiana Code to restrict criminal history information that may be reported by a “criminal history provider” (background screening company). As subsequently amended twice in 2013, this chapter prohibits reporting non-conviction records and minor conviction records, and records that have been expunged or sealed. The Attorney General may enforce sections 6 and 7 through injunction and fines, and a private individual injured by a violation of these sections may recover damages, court costs and attorney fees. See § 24-4-18-8.

Missouri: Under a 2012 law, sentencing courts are authorized to expunge bad check convictions (both felony and misdemeanor) and certain public order misdemeanors (trespassing, gambling, disturbing the peace). Mo. Rev. Stat. § 610.140. The eligibility waiting period for misdemeanors is 10 years, for felonies 20 years from completion of sentence. § 610.140(5). Expunged conviction may be used to enhance subsequent sentence, and be given predicate effect. § 610.140(7). A person granted an expungement shall disclose any expunged offense when the disclosure of such information is necessary to complete any application for a professional license, any license or employment relating to alcoholic beverages, or employment with any state-operated lottery, or any emergency services provider, including any law enforcement agency. “Notwithstanding any provision of law to the contrary, an expunged offense shall not be grounds for automatic disqualification of an applicant, but may be a factor for denying employment, or a professional license, certificate, or permit.” § 610.140(8).

New Jersey: Under the 2014 Opportunity to Compete Law, most public and private employers with more than 15 employees (over a minimum of twenty calendar weeks) are required to delay inquiry into criminal history until after a conditional offer of employment has been made. The bill and its exceptions is described at http://www.njsj.org/wp-content/uploads/2014/03/1_Opportunity-to-Compete-Act-Explanatory-Materials-Summary-Myths-Realities.pdf. The law carves out exceptions, including but not limited to jobs in law enforcement and the judiciary, jobs for which criminal checks are required by law, and jobs for which lack of prior record is required for licensing or similar purposes. Beyond those narrow exclusions, employers face significant financial penalties for violating the law. Under Sections 5 and 6 of the new law, covered employers may consider most convictions only for ten years after sentencing or release from imprisonment, disorderly offenses for five years, and may not consider at all non-conviction records, expunged convictions, and juvenile adjudications. Certain specified serious violent offenses may be considered indefinitely. Under Section 8(a) an employer is given guidance in evaluating a criminal record, including the extent of the individual's rehabilitation, time elapsed since conviction, and the responsibilities of the job. If adverse action is taken based upon conviction record, the employer “shall certify in writing its reasonable consideration of the

factors set forth in subsection a. of this section.” Under Section 14, negligent hiring liability based in whole or part on an employee’s criminal record is limited to gross negligence.

Tennessee: Prior to 2012, Tennessee law did not provide for expungement of adult convictions. Tennessee courts are now authorized to grant expungement of convictions for certain less serious non-violent offenses. See 40-32-101(g), *amended by* 2012 Tennessee Laws Pub. Ch. 1103 (adding subsection (g) to Tenn. Code Ann. § 40-32-101). The effect of expungement is to restore persons to the position they occupied prior to arrest or charge, and thus persons whose records have been expunged may properly decline to reveal or acknowledge existence of charge. See Tenn. Code Ann. § 40-32-101(g)(14)(B)-(C)). Expungement restores firearms privileges even for drug and violent offenders. See § 40-32-101(g)(15)(B). In addition, effective May 2013, a pardon may serve as grounds for expungement, and thus pardon now restores firearms privileges. See Tenn. Code Ann. § 40-29-105(h); *see also Blackwell v. Haslam*, 2013 WL 3379364 (Tenn. Ct. App. 2013) (*Blackwell II*)(remanding for consideration whether Georgia pardon restoring firearms privileges should be given full faith and credit in Tennessee, in light of new Tennessee law authorizing expungement of pardoned convictions).

Vermont: On June 10, 2014, the Governor of Vermont signed the Uniform Collateral Consequences of Conviction Act, making Vermont the first state in the Nation to enact this scheme into law. See Act 181, 13 V.S.A. Chapter 231. Its text of the bill can be found at <http://www.leg.state.vt.us/docs/2014/Acts/ACT181.pdf>. This law, which will become effective January 1, 2016, authorizes courts to issue orders relieving collateral sanctions imposed under the laws of Vermont, to benefit those convicted and sentenced under Vermont law and under the laws of other jurisdictions.

- *Order of Limited Relief* - Under 13 V.S.A. § 8010, the sentencing court is authorized to issue an order dispensing with “one or more mandatory sanctions related to employment, education, housing, public benefits, or occupational licensing,” if the court finds that the individual has established by a preponderance of the evidence that granting the petition “will materially assist the individual” in obtaining a benefit in one of these areas, that the individual has substantial need for the relief requested in order to live a law-abiding life; and that granting the petition would not pose an unreasonable risk to the safety or welfare of the public or any individual.
- *Certificate of Restoration of Rights* – Under § 8011, a court may issue a certificate relieving all but certain specified collateral sanctions five years after sentencing or release from incarceration.

Sanctions not affected include sex offender registration, driver’s license suspensions and revocations, and law enforcement employment. § 8012(a). Serious crimes, including drug trafficking, are not eligible for relief. § 8012(b). Under § 8014, an order of limited relief or a certificate of restoration of rights may be introduced as evidence of a person’s due care in a judicial or administrative proceeding alleging negligence or other fault. Pardon and other relief afforded convictions from other jurisdictions is given the same effect in Vermont as it has in the jurisdiction that granted it. § 8009(d) and (e).

II. CERTIFICATES OF RESTORATION OF RIGHTS

Ohio: Certificate of Qualification for Employment: An individual who has been convicted of or pleaded guilty to an offense who is subject to a "collateral sanction" barring him from a particular occupation or license, and who has fully discharged his sentence, may after a short eligibility waiting period apply to the court of common pleas in the county of his residence for a "certificate of qualification for employment" (CEQ) that will provide relief from the sanction and allow him to be considered on the merits. See Ohio Rev. Code Ann. § 2953.25. A CQE has the effect of lifting the "automatic bar" of most collateral sanctions imposed under Ohio law. Ohio Rev. Code Ann. §§ 2953.25(B)(1)-(2). See also § 2953.25(D) (CEQ "lifts the automatic bar of a collateral sanction, and a decision-maker may consider on a case-by-case basis whether to grant or deny the issuance or restoration of an occupational license or an employment opportunity, notwithstanding the individual's possession of the certificate"). The standard for issuing a certificate is whether the individual has established by a preponderance of the evidence that (a) granting the petition will materially assist in obtaining employment or occupational licensing; (b) the individual has a substantial need for the relief in order to live a law-abiding life; and (c) granting the petition would not pose an unreasonable risk to the safety of the public or any individual. Ohio Rev. Code Ann. § 2953.25(C)(3). The certificate is "presumptively revoked" if the individual is convicted of or pleads guilty to a felony offense committed after issuance of the certificate. § 2953.25(H).

Rhode Island: Certificate of recovery & re-entry: Effective July 1, 2014, a person with no more than one non-violent felony conviction may apply to the Parole Board for a "certificate of recovery & re-entry" which may "serve to relieve the petitioner, in appropriate cases, of some of the collateral consequences resulting from his or her criminal record." R.I. Gen. Laws § 13-8.2-1. Specifically, the certificate may "serve as one determining factor as to whether the petitioner has been successful in his or her rehabilitation." See also § 13-8.2-2(5)(a certificate "shall serve as one determining factor, consistent with concerns of public safety, of the person's ability to obtain employment, professional licenses, housing and other benefits and opportunities. Provided, further, that said instrument shall serve as a determination that the person receiving it has successfully achieved his or her recovery & re-entry goals as provided for in § 13-8.2-4.") Eligibility criteria are established in § 13-8.2-2(4)(no more than one felony conviction) and (8) (violent crimes ineligible). The "minimum period of recovery & re-entry" is one year where the most serious conviction is a misdemeanor, and three years for a non-violent felony. The waiting period "shall be measured either from the date of the payment of any fine imposed upon him or her, or from the date of his or her release from the institutional facility, custody by parole or home confinement, whichever is later." The certificate does not result in expungement or sealing, or limit the procedure for applying for a pardon. § 13-8.2-6.

Note: The judicial relief schemes recently enacted in Indiana and Vermont, described in Part I of this memo, are similar to these and other certificate schemes.

III. BAN-THE-BOX LAWS

In 2013 and 2014, **California, Delaware, Illinois, Maryland, Minnesota, Nebraska, New Jersey, and Rhode Island** all passed new state-wide “ban-the-box” legislation.² The phrase refers to the currently popular way of imposing systemic limits on consideration of conviction in employment by prohibiting inquiry into an individual’s criminal history until after an opportunity for an interview has been granted or after a decision to offer employment has been reached. As of August 2014, ban-the-box laws had been enacted state-wide in thirteen states³ and adopted by more than fifty cities and counties.⁴ In addition, Governor Quinn of Illinois issued an administrative order removing inquiries into applicants’ criminal history on state employment applications. In five states the policy extends to private as well as public employment,⁵ and Colorado extends the bar to licensing

² New Jersey’s “Opportunity to Compete” law applies to both public and private employers with 15 or more employees; in addition to limiting the timing of inquiry, it imposes standards for consideration of conviction, bars consideration of nonconviction records and expunged/pardoned convictions. See A1999 (August 2014). California, Delaware, Maryland, and Rhode Island applied a ban-the box rule to public employment. See Cal. Lab. Code § 432.9(a) (enacted by A.B. 218 (2013)) (prohibiting inquiry into criminal history of applicants for public employment until the “agency has determined the applicant meets the minimum employment qualifications”); Delaware (Del. Code Ann. tit. 19, § 711(g)(a) (public employer may inquire into or consider an applicant’s criminal record “only after it has determined that the applicant is otherwise qualified and has conditionally offered the applicant the position”); Md. Code Ann., State Pers. & Pens. § 2-203 (enacted by S.B. 4 (2013)) (no inquiry by public employer until applicant has an opportunity for an interview); R.I. Gen. Laws. § 28-5-7(7) (as amended by 2013 Rhode Island Laws Ch. 13-309 (13-H 5507A)). Colorado extends its bar to licensing agencies. Colo. Rev. Stat. § 24-5-101. Minnesota extended to private employers its existing ban-the-box law prohibiting inquiry by public employer until applicant is selected for an interview or made conditional offer of employment. See Minn. Stat. § 364.021 (as amended by 2013 Minn. Sess. Law Serv. Ch. 61 (S.F. 523)). Illinois’ law, signed by Governor Quinn in 2014, applies only to private employers with more than 15 employees. 30 ILCS 105/5.855. Governor Quinn’s Executive Order remains in effect for Illinois state agencies.

³ The thirteen states are Colorado (Colo. Rev. Stat. § 24-5-101), California (Cal. Lab. Code § 432.9(a) (enacted by A.B. 218 (2013))), Connecticut (Conn. Gen. Stat. § 46a-80(b)), Delaware (Del. Code Ann. tit. 19, § 711(g)), Hawaii (Haw. Rev. Stat. § 378-2.5(b)), Illinois (30 ILCS 105/5.855), Maryland (Md. Code Ann., State Pers. & Pens. § 2-203), Massachusetts (Mass. Gen. Laws ch. 151B, § 4(9 ½)), Minnesota (Minn. Stat. § 364.021), Nebraska, §12 of LB 907 (2014); New Jersey, A1999 (2014); New Mexico (N.M. Stat. Ann. § 28-2-3), and Rhode Island (R.I. Gen. Laws. § 28-5-7(7)).

⁴ The National Employment Law Project keeps an updated tally of local governments that have adopted ban-the-box laws and policies, as well as pending initiatives to remove barriers to hiring people with a criminal record. See Nat’l Emp’t Law Project, *Seizing the “Ban the Box” Momentum to Advance a New Generation of Fair Chance Hiring Reforms* (August 2014), <http://www.nelp.org/page/-/SCLP/2014/Seizing-Ban-the-Box-Momentum-Advance-New-Generation-Fair-Chance-Hiring-Reforms.pdf?nocdn=1>. Ban-the-box laws and policies have now been implemented in many of the nation’s largest cities including Atlanta, Baltimore, Boston, Chicago, Philadelphia, and Washington, D.C. *Id.*

⁵ See Haw. Rev. Stat. §§378-2.5(b) (prohibiting inquiries into arrest and conviction records before an employee receives a conditional offer of employment, which may be withdrawn only if a conviction within the previous ten years “bears a rational relationship to the duties and responsibilities of the position”); Mass. Gen. Laws ch. 151B, § 4(9 ½)(public and private employers prohibited from inquiring into criminal records on an initial job application, unless the particular job is one for which a convicted person is at least presumptively disqualified by law, or the employer “is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1

agencies.⁶ The intent of these limited disclosure requirements is to allow applicants to be judged by their skill, character, and qualifications without regard to their criminal history. In theory, at least, if an employer gets to the point of offering someone a job, the fact that the employer has had a chance to get acquainted with the person will put their conviction into some perspective. Additionally, elimination of the application-stage inquiry blunts the “chilling effect” that often discourages people with a record from applying at all. As discussed in Chapter 6 of the 2013 edition, the Equal Employment Opportunity Commission listed “banning the box” as a “best practice” in its updated guidelines on the consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964.⁷

or more types of criminal offenses”); Minn. Stat. § 364.021 (as amended by 2013 Minn. Sess. Law Serv. Ch. 61) (“A public or private employer may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant for employment until the applicant has been selected for an interview by the employer or, if there is not an interview, before a conditional offer of employment is made to the applicant.”); New Jersey, A1999 (2014) (Opportunity to Compete law applies to all employers with 15 or more employees); R.I. Gen. Laws. § 28-5-7(7) (as amended by 2013 Rhode Island Laws Ch. 13-309 (13-H 5507A)) (no inquiry into criminal history by public or private employer until first interview).

⁶ Colo. Rev. Stat. § 24-5-101(3)(b)(state agencies and licensing boards may not perform a background check “until the agency determines that an applicant is a finalist or makes a conditional offer of employment to the applicant”).

⁷ EEOC, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as Amended, 42 U.S.C. § 2000e et seq., No. 915.002, § V(B) (3) (April 25, 2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf. (“As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.”). The EEOC Guidelines are reprinted in the Appendix.