



white paper

EXPUNGEMENT

Sealing and Pardoning of Criminal Records



In the United States, once a criminal prosecution has been recorded in the public record, it typically remains there indefinitely. However, the processes of expungement, sealing and pardoning of criminal matters can affect their availability. This white paper examines each of these processes and the implications of each.

Today, at least forty-five states and the District of Columbia have a mechanism in place for criminal record sealing

or expungement.¹ However, both the use and definition of the terms “sealing” and “expungement” in the context of criminal records vary from state to state. Most often, “expunging” refers to an order to remove and destroy records so that no trace of the information remains and the “sealing” of a record refers to the procedure to segregate certain records from the court activity record information to ensure confidentiality to the extent specified in the state’s record sealing statute.² “[S]tates have enacted [either an] executive, legislative, or judicial mechanism that permits the use of post-conviction remedies to soften the severity of collateral consequences that

result from a conviction [or criminal record].”³ “Though the details can vary from one state to the next, most states’ laws provide that once an arrest or conviction has been expunged [or sealed], it need not be disclosed, including to potential employers or landlords.”⁴ Some states also choose to prohibit employers from considering or inquiring about sealed or expunged records—either in lieu of or in addition to permitting applicants to deny such records. In contrast, federal law offers expungement for first-time offenders on just one criminal offense: simple possession of narcotics.⁵

¹ Michael H. Jagunic, NOTE, *The Unified “Sealed” Theory: Updating Ohio’s Record-Sealing Statute for the Twenty-First Century*, 59 CLEV. ST. L. REV. 161, 165-66 (2011) (citing Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 31 (2008)).

² *Id.* (citing Elizabeth V. Tavares, *Criminal Records: Sealing, Expungement and Impoundment*, in *Crime and Consequence: The Collateral Effects of Criminal Conduct* § 21.3 (Hon. William J. Meade et al. eds., 2009)).

³ Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 157 (Fall 2010).

⁴ *Expunging or Sealing an Adult Criminal Record*, NOLO (last accessed May 8, 2015), available at <http://www.nolo.com/legal-encyclopedia/expungement-of-criminal-records-basics-32641.html>.

⁵ Silva, *supra* note 3, at 157-58. The Federal First Offender Act, 18 U.S.C. §3607(c) (2006) (providing for the expungement of disposition records for individuals found guilty of simple narcotic possession (21 U.S.C. §844) with no prior convictions). *Id.*

I. EXPUNGEMENT

The purpose behind expungement is “to wipe the proverbial slate clean, allowing formerly convicted citizens to live in America without a lifelong struggle with collateral consequences.”⁶

Generally speaking, “expungement” refers to the removal of criminal records from court records (including police reports and arrest records) and from public access (including no access for governmental entities unless they have a court order). Expungement is usually the closest thing to erasing a criminal record and having it treated as if it never existed,⁷ but the term does not necessarily mean the same thing in every state and can be a far more limited remedy. For example, Ohio defines “expungement” as the sealing of a criminal record so it is not publicly available. Ohio’s record-sealing statute does not expunge or destroy records, it merely seals them and requires that the government maintain the records for future (albeit limited) use when such use is in the interest of the public.⁸ Thus, even if a record is sealed or expunged, Ohio still makes it available for use where matters of public safety are of particular concern.

Black’s Law Dictionary defines an “expungement of record” as the removal of a conviction (especially for a first offense) from a person’s criminal record, but the types of records that can be expunged may extend beyond convictions and will also vary by state. Typically all records on file within a court, correctional facility or law enforcement agency concerning a person’s apprehension, arrest, detention, trial or disposition

of a crime can be expunged.⁹ The type of crime which has been allegedly committed will invariably determine the availability of expungement.¹⁰ For example, some states allow expungement for many types of crimes (e.g. Colorado), while others only allow expungement for arrest records (e.g. New Mexico, Nebraska).¹¹ In states where expungement is granted after a conviction, the severity of the crime will play a determinative role in whether or not expungement is possible.¹²

There are relatively few regulations regarding expungement, but some states limit the number of times expungements may be granted¹³ and several address when a person must disclose an expunged record for purposes of employment, licensure and background checks in a variety of situations, such as child welfare issues.¹⁴ Under Florida law, for example, “even though the expunged record is destroyed and unavailable to the public, the Florida Department of Law Enforcement (FDLE) may reveal the existence of an expunged record to the following parties if an individual is applying for employment or a professional license: a law enforcement agency; The Department of Juvenile Justices; a contractor or licensee dealing with children; The Department of Education; any public school; any private school; The Florida Bar.”¹⁵

⁶ Id. at 198.

⁷ *Expungement*, ELECTRONIC PRIVACY INFORMATION CENTER [hereinafter referred to as “EPIC”], available at <http://epic.org/privacy/expungement> (last visited May 8, 2015).

⁸ Jagunic, *supra* note 1, at 169.

⁹ EPIC, *supra* note 7.

¹⁰⁻¹³ Id.

¹⁴ *Expungement of Criminal Records*, Thomson Reuters (Oct. 2012). The Ohio record-sealing statute allows the state to use and provide information regarding a sealed record to licensing boards and specific employers who provide care services. Ex-offenders who wish to pursue careers in childcare or healthcare can demonstrate their suitability for a position by notifying a potential employer that a conviction has been sealed, but they cannot hide a conviction in fields where the safety and well-being of others are of utmost concern. See Jagunic, *supra* note 1, at 169.

¹⁵ Galigani Law Firm, <http://www.galiganilaw.com/CriminalDefense/RecordSealingandExpunging.aspx> (last visited May 8, 2015).

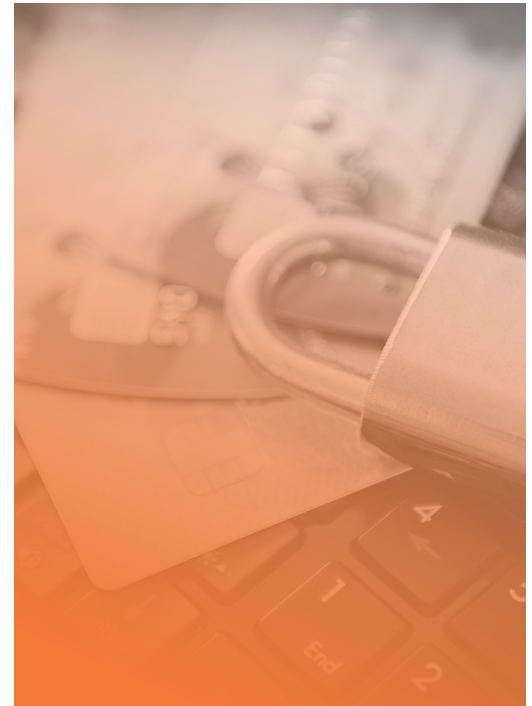
Similarly, the New Jersey expungement statutes contain provisions under which expungements are not effective. These provisions include situations where a person is applying for employment with a law enforcement agency or the judicial branch of government, where a person is seeking a conditional discharge after having had a dismissal from a previous conditional discharge expunged or on sentencing for convictions for new arrests after the previous expungement. So “expunged” records in New Jersey are segregated—not destroyed—and stored in special locations and consulted in the specific situations mentioned above.¹⁶ But in all other situations when an “ordinary record search is made [in New Jersey], records kept in these special locations are not accessed and the ordinary search will return a result of ‘No Record Information.’”¹⁷

II. SEALED RECORDS

All expunged records are sealed, but not all sealed records are expunged.¹⁸ When a criminal record is “sealed” it generally means it is removed from public access but legally the event in question still happened and certain governmental entities likely still have access to the record.

An expungement literally wipes the slate clean, ideally removing all evidence that a person was ever convicted of any criminal offense. Although a sealed record serves much the same purpose, sealing does not erase a criminal record, but instead just keeps it confidential on some level.¹⁹ Some states may also limit sealing of records to only court and probation records without extending it to records of arresting agencies,²⁰ or even limit record sealing to only first offenders.²¹

Furthermore, the actual mechanics used to seal a criminal case are not overly complicated. In Massachusetts, “docket entries are sealed by covering the pertinent information with opaque tape so that none of the information can be read.²² The original docket sheet remains in the docket with ‘Sealed Record’ recorded on the front. All case papers and related files are placed in a sealed envelope and are identifiable by the name of the defendant and related docket numbers. The sealed envelope is kept in a secure place out of public reach. A sealed record



¹⁶ *Straight Answers to Thirty-four Frequently Asked Questions of Expungement Lawyers in New Jersey*, New Jersey Expungement Center, <http://www.njexpungements.com/faq.php> (last visited May 8, 2015).

¹⁷⁻¹⁸ *Id.*

¹⁹ *Expungement Vs Sealing Criminal Records*, <http://www.cleanupmyrecord.com/expungement-vs-sealing-criminal-records.php> (last visited May 8, 2015).

²⁰ EPIC, *supra* note 7.

²¹ Jagunic, *supra* note 1, at 167. First offenders are individuals who have been convicted of only one offense “and who previously or subsequently [have] not been convicted of the same or a different offense.” “The legislature limited the definition of “different offense” to exclude minor traffic offenses and minor misdemeanors so that reformed individuals with relatively common infractions on their records are not barred from applying for sealing.” *Id.*

²² Silva, *supra* note 3, at 192 (citing Dist. Court Dep’t of the Trial Court, Commonwealth of Mass., *A Guide to Public Access, Sealing & Expungement of District Court Records* 39 n.121 (2009) available at <http://www.mass.gov/courts/courtsandjudges/courts/district-court/pubaccesscourtrecords.pdf> (last visited March 14, 2010)).



index is kept by each department and is not available to the public. A sealed record is authorized to be used in a manner consistent with statute. In the event a record is unsealed, the date of the unsealing and the name of the person using the record are recorded on the front of the envelope. When finished with the information, the record is resealed.”²³

Generally, expungement is a much stronger and more absolute remedy since it usually leaves no indication behind that information has been removed. In Florida, for example, sealing does not require certain agencies to actually “destroy” their records whereas a court order expunging records does. Once sealed, the public will not have access to the person’s criminal record (except for

government officials). Both sealing and expunging a record removes the information from Florida’s public records and both require that the information be made confidential, but only expungement goes the extra step to remove or destroy the records of arrest. “Once expunged, the only way a person from the public can access an expunged record would be through a court order.”²⁴ But often times there isn’t much of a choice available because certain offenses can only be sealed and not expunged, or a particular state may only seal records and not make expungement an available option.²⁵

Furthermore, the process for expungement or sealing of a criminal record may vary by state. For example, in Maryland and Missouri, you must

file a petition for expungement with the court. New Jersey has a similar process, requiring that a petition for expungement be filed in the Superior Court in the county where the arrest or prosecution took place, and then allowing a judge to decide whether to grant an expungement order. In Massachusetts, a person can request that the commissioner seal a criminal record by filling out a form furnished by the commissioner and signing it under the penalties of perjury. There are similar processes in place in the other states that allow the expungement and sealing of criminal records once the records become eligible for expungement or sealing per the state’s laws and guidelines.

²³ *Id.* at 193.

²⁴ Galigani Law Firm, *supra* note 15.

²⁵ *Expungement Vs Sealing Criminal Records*, *supra* note 19.

III. PARDONS

A “pardon” is the act or an instance of officially nullifying punishment or other legal consequences of a crime.²⁶ Individuals who have been convicted of a crime may apply for a pardon which is granted by the Governor for state convictions and the President for federal convictions.²⁷

However, the procedures and implications of being granted a pardon can vary significantly by state. In some states, unlike an expungement which removes an arrest or citation from a record, a pardon appears on a record and indicates that the state has pardoned that individual for his or her crime.²⁸ In New Jersey, for example, expunging a criminal record and being pardoned are two completely separate things. “When an expungement is granted, the person whose record is expunged may, for most purposes, treat the event as if it never occurred. A pardon (also called ‘executive clemency’), on the other hand, does not ‘erase’ the event. Rather, it constitutes forgiveness.”²⁹

In contrast, in Connecticut “absolute pardons” have the dual effect of forgiving and expunging the record of conviction.³⁰ The governor of Connecticut has delegated the power to pardon to the Board of Pardons and Parole (“Board”).³¹ In turn, the Board uses its discretion to determine whether to grant an individual a (1) provisional pardon, (2) an absolute pardon, or (3) to deny the petition outright.³² “An absolute pardon is an expungement. If granted, the individual is not required by law to disclose convictions.”³³ “A provisional pardon is used for employment purposes only and does not expunge the record of conviction. The individual is still required to disclose convictions when asked.”³⁴ “However, he can use the provisional pardon as an advocacy tool. The intended effect of the provisional pardon is to demonstrate to employers that the Board considers the applicant trustworthy enough to hire. The applicant may also re-apply for an absolute pardon in one year. When the Board denies a petition or grants a provisional pardon, it provides the applicant with the reasoning underlying its decision, which allows the applicant to conform his [or her] conduct in a manner most conducive to securing a pardon.”³⁵

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²⁶ Black’s Law Dictionary.

²⁷ EPIC, *supra* note 7.

²⁸ *Id.*

²⁹ New Jersey Expungement Center, *supra* note 16.

³⁰ Silva, *supra* note 3, at 194.

³¹ *Id.* (citing Conn. Gen. Stat. §54-130a (2010)).

³² *Id.* “The applicant may apply three years after completing his sentence for a misdemeanor and five years after a felony. The applicant is required to fill out a ten-page questionnaire that includes the reporting of child support orders, employment history, criminal history and basic demographic information. It also requires that the applicant obtain at least three references, all of whom must be aware of the applicant’s criminal history, provide the board with the criminal history printout from the state police and all police reports related to the applicant’s criminal convictions over the previous ten years.” *Id.*

³³ *Id.* at 194-95 (citing Conn. Gen. Stat. § 54-142(a)(d) (2010)).

³⁴ *Id.* at 195 (citing Conn. Gen. Stat. § 54-130(a)(e) (2010)).

³⁵ *Id.* (citing Conn. Gen. Stat. § 54-124a(j)(2)(A)(3) (2010)).



IV. CAUTION IN THE DATA AGE

While the sealing, expungement and pardoning of records mandate that courts and state agencies prevent or limit access to records, the initial criminal information can often appear in multiple places.

It is not uncommon for matters that are sealed or expunged at the local level to still appear in state or federal records due to lack of communication between agencies. Further, private data aggregators that purchase and compile publicly available criminal records for resale may not receive updates when records are sealed or expunged. It is important that when criminal searches are performed for employment purposes that those records are verified at the local level to ensure accuracy.

It is important for employers to be aware of the sealing, expungement and pardoning laws in the states in which they operate because they often include restrictions on employers' ability to consider such records in making

employment decisions—either by allowing the applicant to deny the existence of such records or by prohibiting employers from asking about such records. Employers must be aware of these laws and ensure that their hiring practices are in full compliance in order to avoid the possibility of being held liable for unlawful hiring practices.