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White-Collar Crime

Expert Analysis

Proposals for a Comprehensive Federal Conviction Expungement Law

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Individuals with criminal records often face extraordinary hurdles in rebuilding their lives due to the significant collateral consequences of their conviction—even after years or decades of law abiding conduct. The lifelong collateral consequences, imposed by state and federal statutes and regulations, can make it nearly impossible for many to obtain gainful employment, support their families or otherwise live productive lives. See Robert G. Morvillo and Robert J. Anello, "The Need for 'Second Chances' After Suffering a Federal Conviction," N.Y.L.J., April 7, 2009. Expungement, the removal of a criminal record, particularly after a period of demonstrated rehabilitation, is one remedy that can assist individuals to avoid the "scarlet letter" of a criminal record and the associated collateral consequences.[1] Unfortunately, under today's federal legal framework, expungement—even by the judge who imposed the underlying conviction—is virtually impossible. Although a near-term legislative fix may be a long shot, recent bipartisan legislation proposed in both houses of Congress shows that the issue at least is on federal lawmakers' radar screen.

Many federal judges readily acknowledge the often unfair difficulties faced by individuals convicted of a crime. They vary widely, however, in their approach to applications for expungement. Some district courts routinely deny such applications, often asserting that they do not have jurisdiction over applications for expungement. Those courts that believe they have jurisdiction to order the expungement of a criminal record typically reserve such power for "unusual or extreme" cases. Even in instances such applications are denied, however, federal judges—most recently the Second Circuit—have called upon Congress to step into the fray to provide an avenue to redress the collateral consequences of criminal convictions in appropriate cases.

In the past decade, many state lawmakers have enacted laws providing for expungement or sealing remedies, with over 60 percent of states broadening their expungement laws between 2009 and 2014. Brian M. Murray, "A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels," 10 Harvard Law and Policy Review 361, 369 (2016). Newly proposed federal legislation offers hope that the federal system may follow these states' lead, even with a conservative Congress and administration. Recent Republican pronouncements regarding criminal justice reform, and evidence that expungement opportunities might result in a reduction of recidivism

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rates and corresponding savings in spending on federal incarceration are reasons for optimism.

Collateral Consequence Of Criminal Convictions

Estimates from the National Employment Law Project put the proportion of adults in the United States having a criminal record at between 25 and 35 percent. Id. at 363. Approximately 8.6 percent of the adult population has a felony conviction. National Employment Law Project et al., Legislative Update, "State Reforms Reducing Collateral Consequences for People with Criminal Records: 2011-2012 Legislative Round-Up" (September 2012). Accordingly, a substantial number of Americans are forced to deal with the stigma of a criminal record and the accompanying collateral consequences.

According to researchers for the American Bar Association, as many as 46,000 collateral consequences exist on the state and federal level, ranging from restrictions on civil liberties, such as the right to vote or hold public office, to those that have a direct impact an individual's ability to obtain employment, housing, student aid, or loans. In the white-collar context, regulatory agencies such as the SEC, FINRA, FDIC and CFTC permanently can revoke an individual's license or forever disqualify them from working in that industry. Similarly, under state laws, attorneys convicted of crimes may face disbarment, suspension, or censure and doctors may lose their license to practice once convicted. See e.g., N.Y. Judiciary Law §90(4)(a); N.Y. Pub. Health L. §230-a. Convicted felons can be denied licenses to sell real estate, insurance, or engage in other professions.

Although the Equal Employment Opportunity Commission has issued guidance that an employer's consideration of arrest and conviction records in making employment decisions may violate civil rights laws[2] and some states, including New York (N.Y. Exec. Law §296[16]), have laws limiting the use of criminal history as a basis for an employer's hiring decision unless required or permitted by statute, the fact remains that a criminal record can severely impede an individual's ability to find a job. The roadblocks to gainful employment as a result of statutes that bar the hiring or licensing of individuals with criminal convictions are perhaps the most devastating. A 2011 study found that employment was the single most important influence on decreasing recidivism. National Employment Law Project, "Research Supports Fair-Chance Policies: Research Fact Sheet" (August 2016). As pointed out by the American Bar Association, "If promulgated and administered indiscriminately, a regime of collateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism." See ABA, Standards for Criminal Justice, Collateral Sanction and Discretionary Disqualifications of Convicted Persons, 10 (3d ed. 2004). The recent high-profile case of Michelle Jones tells the story of how despite tremendous success and rehabilitation, past mistakes can still haunt individuals convicted of a crime. Jones became a recognized scholar of American history while serving a prison sentence for the murder of her child and subsequently was admitted to an elite history doctoral program at Harvard, only to have the history department's decision overruled by the university's administration because of her criminal past. While this may be an extreme example, it is a reminder that an individual's criminal history, no matter how far in the past, can pose hurdles to a productive life.

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Judicial Response

In the absence of a federal expungement statute, the issue has been left to the courts. Federal courts currently disagree whether district judges have jurisdiction to hear expungement applications under their equity powers. Courts in the First, Third, Sixth, Eight, Ninth, and, most recently, Second Circuits have held that district courts do not have ancillary

jurisdiction over equitable expungement actions. Alexia Lindley Faraguna, "Wiping the Slate … Dirty," 82 Brook. L. Rev. 961, 977 (Winter 2017). The Seventh, Tenth and D.C. Circuits have held that courts do have jurisdiction, but requests for expungement in these circuits usually are granted only in limited cases where the court finds "extreme circumstances" exist and that the government's need to maintain the record is outweighed by the harm that the record can cause a citizen. *Doe v. United States*, 110 F. Supp. 3d 448, 454-55 (E.D.N.Y. 2015) (internal citations omitted).

In 2015, Eastern District of New York Judge John Gleeson found "extraordinary circumstances" to exist in *Doe*, id., based on the applicant's inability to obtain gainful employment. Doe had been convicted of insurance fraud 17 years earlier and had completed a five-year sentence of probation. In the eight years between the completion of her sentence and her expungement application, she had no further criminal incidents. Although her criminal conviction was distant in "time and nature" from her present life, the criminal record continued to have a "dramatic adverse impact on her ability to work." Doe had been terminated from a number of jobs as a result of her conviction.

Granting Doe's application for an order expunging her conviction, Judge Gleeson ordered that the government's arrest and conviction records, and any other documents relating to the case, be placed in a separate storage facility and that electronic records be deleted from government databases, electronic filing systems and the public record. He wrote: "There is no justification for continuing to impose this disability on her. I sentenced her to five years of probation supervision, not to a lifetime of unemployment."

The Second Circuit reversed Judge Gleeson's decision. 833 F.3d 192, 199 (2d Cir. 2016), cert. denied, 137 S.Ct. 2160 (2017). The court determined the district court did not have jurisdiction because the facts underlying the expungement petition were independent of the facts underlying the prior criminal case and sentencing. Nevertheless, the circuit court took note of the applicant's difficult predicament. The court noted:

> [O]ur holding that the District Court had no authority to expunge the records of a valid conviction in this case says nothing about Congress's ability to provide for jurisdiction in similar cases in the future. As described [in this decision], Congress has done so in other contexts. It might consider doing so again for certain offenders who, like Doe, want and deserve to have their criminal convictions expunged after a period of successful rehabilitation.

Recent expungement bills and momentary flashes of bipartisan action on criminal justice reform provide a basis for hope. Time will tell if a much-needed legislative remedy will become a reality.

Federal Legislative Action

Given the general unavailability of judicial remedies, the task of providing expungement opportunities falls at the feet of the very legislators who enact the criminal laws and the statutes that create the collateral consequences that frustrate efforts to reintegrate into society. While state laws have made advances in providing for relief from the collateral consequences of a conviction, over the last few decades federal legislation has taken giant steps backward in this area.

In 1984, Congress repealed the Federal Youth Corrections Act which, among other things, allowed federal offenders who committed crimes between the ages of 18 and 26 to "set aside" a conviction if they had successfully completed their programs and the court released them early from probation. The legislation had been enacted in 1950 with the belief that setting aside a youthful offender's conviction would help reduce the associated stigma and aid in rehabilitation. The Act was repealed for reasons unrelated to the legislation's "set aside" or expungement provisions. Congress has not enacted any replacement or comprehensive federal adult expungement legislation since. Faraguna, supra at 967-68.

Nevertheless, reason exists to hold out hope that the current Republican-led Congress might pass a federal expungement law, given vocal bipartisan agreement on the need for criminal justice reform in recent years. Republicans and Democrats have on occasion found common ground on issues such as reducing mandatory minimum sentences and other sentencing reforms. To the extent expungement leads to increased employment and reduced recidivism, and a corresponding savings in the almost $6 billion spent by the federal government every year on the more than 185,000 federal inmates (Federal Bureau of Prisons website), it is perhaps a notion that can be supported by both conservatives and liberals.

The most recent bipartisan attempt at expungement legislation is the REDEEM Act—short for Record Expungement Designed to Enhance Employment Act, which purports to amend the federal criminal code to provide a process for the sealing or expungement of records relating to nonviolent criminal or juvenile offenses. Under the bill co-sponsored by Senators Cory Booker (D-NJ) and Rand Paul (R-KY), one year after a person has completed his or her sentence, they can petition a federal district court for a sealing order for any "covered nonviolent offense." Covered nonviolent offenses are defined as those federal criminal offenses that are neither a crime of violence nor a sex offense as defined in the Sex Offender Registration and Notification Act.

To be eligible to make such a petition, individuals need to meet the following criteria: (1) they must have been arrested for or convicted of a covered nonviolent offense; (2) they must have fulfilled each requirement of their sentence by completing each term and satisfying each condition of imprisonment, probation, or supervised release; and (3) they cannot have been convicted of more than two felonies that are covered nonviolent offenses.

Courts petitioned under this law only would be permitted to deny an otherwise valid petition if the government proves that the interest of public knowledge and safety and the legitimate interest, if any, of the government to maintain the accessibility of the protected information outweighs the petitioner's interest in positively contributing to the community and securing and maintaining employment. A sealed "offense and any arrest, criminal proceeding, conviction or sentence relating to the offense shall be treated as if it never occurred."

The REDEEM Act also has been introduced in the House of Representatives and the legislation currently sits with the judiciary committee of each branch. Other legislation focused on the expungement of criminal records for certain nonviolent offenders also has been offered. In February 2016, House Democrats introduced H.R. 4410 titled the Fresh Start Act of 2016 and, most recently, in July 2017, H.R.3578, the Expungement Act of 2017 was introduced to the House by Representative Danny Davis (D-Ill.). Currently, both bills have been referred to the House Subcommittee on Crime, Terrorism, Homeland Securities and Investigations by the House Judiciary Committee. Thus far, there is no record of the Administration having weighed in on any of these proposals.

Conclusion

There has been growing recognition of the need to take another look at federal expungement laws and the policies that underlie the imposition of collateral consequences that deny individuals the social, economic and educational opportunities needed to reintegrate into society and support themselves and their families. Recent expungement bills and momentary flashes of bipartisan action on criminal justice reform provide a basis for hope. Time will tell if a much-needed legislative remedy will become a reality.

1. Although the information age and the internet have made it almost impossible to completely remove information regarding a conviction from the public arena, expungement at least offers some relief for those convicted.

2. EEOC Enforcement Guidance, "Consideration of Arrest and Conviction Records in Employment Decisions Under title VII of the Civil Rights Act of 1964" (April 25, 2012).