STATE OF NEW YORK

6399

2021-2022 Regular Sessions

IN ASSEMBLY

March 17, 2021

Introduced by M. of A. CRUZ -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, the executive law and the correction law, in relation to automatic expungement of certain convictions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The criminal procedure law is amended by adding a new section 160.57 to read as follows:

§ 160.57 Automatic sealing and expungement of convictions.

1. Convictions for certain traffic infractions and violations or any crime defined in the laws of this state shall be sealed in accordance with paragraph (c) of this subdivision as follows:

(a) Convictions for subdivision one of section eleven hundred ninety-two of the vehicle and traffic law shall be sealed after one year.

(b) Criminal convictions for misdemeanors and felonies shall be sealed upon satisfaction of the following conditions:

(i) at least one year has passed from the imposition of sentence on the defendant's most recent misdemeanor conviction in this state and at least three years have passed since the imposition of sentence on the defendant's most recent felony conviction in this state;

(ii) the defendant does not have a criminal charge pending in this state;

(iii) the defendant is not currently under the supervision of any probation or parole department for the eligible conviction; and

(iv) the defendant is not currently required to register as a sex offender pursuant to article six-C of the correction law as a result of this conviction.

(c) Where a conviction is eligible for sealing pursuant to this paragraph before, on, or after the effective date of this section, the division of criminal justice services shall immediately notify the office of court administration, the court of conviction, and the heads of all appropriate police and sheriff departments that the conviction is sealed.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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(d) Records of convictions sealed pursuant to this paragraph shall not be accessed, made available to any person or public or private agency, or used by any state agency covered by subdivision three of this section except for:

(i) the defendant and such defendant's attorney;

(ii) any court or prosecutor for the purposes of a pending criminal action;

(iii) the court, prosecutor, and defense counsel if the defendant becomes a witness in a criminal proceeding, or the claimant and respondent if the defendant becomes a witness in a civil proceeding;

(iv) when an individual is a defendant in a criminal action and the sealed records of conviction of a third-party are integral to their defense. In such instances, use of sealed records shall be requested upon ex parte motion in any superior court, or in any district court, city court or the criminal court of the city of New York provided that such court is where the action is pending. The applicant must demonstrate to the satisfaction of the court that the records will be used for the purpose of this subparagraph;

(v) entities that are required by law to request a fingerprint-based check of criminal history information;

(vi) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer, provided, however, that every person who is an applicant shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto;

(vii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the defendant has made application for such license;

(viii) for the purposes of civilian investigation or evaluation of a civilian complaint or civil action concerning law enforcement or prosecution actions, upon ex parte motion in any superior court, or in any district court, city court or the criminal court of the city of New York provided that such court sealed the record; the applicant must demonstrate to the satisfaction of the court that the records will be used for the purposes of this subparagraph; and

(ix) for information provided to an individual or entity pursuant to paragraph (e) of subdivision four of section eight hundred thirty-seven of the executive law or for bona fide research purposes provided all identifying information is removed.

(e) Where the sealing required by this paragraph has not taken place, or where supporting court records cannot be located or have been destroyed, and a defendant or their attorney submits notification of such fact to the division of criminal justice services, as prescribed in subdivision twenty-three of section eight hundred thirty-seven of the executive law, within thirty days of such notice to the division, the conviction shall be sealed as set forth in this subdivision.

2. A conviction for any violation or traffic infraction, including but not limited to convictions sealed pursuant to section 160.55 of this article, or any crime defined in the laws of this state shall be expunged pursuant to subdivision three of this section as follows:

(a) Convictions for violations and traffic infractions, including but not limited to convictions sealed pursuant to section 160.55 of this article, shall be expunged five years after the date of conviction.

(b) Criminal convictions for misdemeanors and felonies, including convictions sealed pursuant to section 160.58 or 160.59 of this article, shall be expunged upon satisfaction of the following conditions:

(i) At least five years have passed since the imposition of sentence on the defendant's most recent misdemeanor conviction in this state and at least seven years have passed since the imposition of sentence on the defendant's most recent felony conviction in this state;

(ii) The defendant does not have a criminal charge pending in this state;

(iii) The defendant is not currently under the supervision of any probation or parole department for the eligible conviction; and

(iv) The defendant is not currently required to register as a sex offender pursuant to article six-C of the correction law as a result of this conviction.

(c) In calculating the time periods under this subdivision, any period of time during which the defendant was incarcerated shall be excluded and such time period shall be extended by a period equal to the time served under such incarceration.

3. Where a conviction is eligible for expungement pursuant to subdivision two of this section before, on, or after the effective date of this section, the commissioner of the division of criminal justice services shall immediately notify the office of court administration, the court of conviction and the heads of all appropriate police departments, prosecutors' offices and law enforcement agencies that the conviction is expunged. Upon receipt of such notification, records of or relating to such conviction shall be immediately expunged.

(a) Any state agency that possesses biometric information, records, documents or papers related to the eligible conviction shall expunge them as follows:

(i) Every photograph of such defendant and photographic plates or proof, and all palmprints, fingerprints and retina scans taken or made of such individual pursuant to the provisions of this article in regard to the eligible conviction, and all duplicates, reproductions, and copies thereof, except a digital fingerprint that is on file with the division of criminal justice services for a conviction that has not been expunged pursuant to this section or section 160.50 of this article, shall forthwith be destroyed by the division of criminal justice services and by any police department, prosecutor's office or law enforcement agency having any such photograph, photographic plate or proof, palmprint, fingerprints or retina scan in its possession or under its control. Where fingerprints subject to the provisions of this section have been received by the division of criminal justice services and have been filed by the division as digital images, such images may be retained, provided that a fingerprint card of the individual is on file with the division which was not destroyed pursuant to this section.

(ii) Every official record and paper and duplicates and copies thereof, including, but not limited to, judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the conviction, on file with the agency shall be marked as expunged by conspicuously indicating on the face of the record or at the beginning of the digitized file of the record that the record has been designated as expunged.

(b) Third-party agencies shall expunge biometric information and all records, documents and papers relating to the eligible conviction as follows:

(i) Every police department, prosecutor's office or law enforcement agency, including the division of criminal justice services, which transmitted or otherwise forwarded to any agency of the United States or of any other state or jurisdiction outside of this state copies of any such photographs, photographic plates or proofs, palmprints, fingerprints or retina scans, shall forthwith formally inform such agency in writing that the matter has been expunged and request in writing that all such copies be destroyed.

(ii) Every official record and paper and duplicates and copies thereof, including, but not limited to, judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the conviction, on file with the agency shall be marked as expunged by conspicuously indicating on the face of the record or at the beginning of the digitized file of the record that the record has been designated as expunged.

4. Except as provided below, all records, documents and papers marked as expunged shall not be accessed or used by any state agency covered by subdivision three of this section. Such agencies shall not make expunged records available to any individual or public or private agency or confirm the existence of such record. This subdivision shall not apply to instances where access to or use of such records is specifically authorized by law. Expunged records shall be made available:

(a) to the defendant or their attorney;

(b) to the court and the prosecutor for charging and sentencing purposes only if the fact of a prior conviction would enhance a penalty or is an element of the offense charged. The prior conviction shall be made available to the prosecution if upon ex parte motion to the court the prosecutor demonstrates that the fact of a prior conviction is an element of the offense charged;

(c) to the court and the prosecutor for cases in which an appeal is pending;

(d) to the court, prosecutor, and defense counsel if the defendant becomes a witness in a criminal proceeding, or to the claimant and respondent if the defendant becomes a witness in a civil proceeding;

(e) when an individual is a defendant in a criminal action and the expunged records of conviction of a third-party are integral to their defense. In such instances, use of expunged records in the criminal action shall be requested upon ex parte motion in any superior court, or in any district court, city court or the criminal court of the city of New York provided that such court is where the matter is pending. The applicant must demonstrate to the satisfaction of the court that the records will be used for the purposes of this subparagraph;

(f) to the prosecutor and defense counsel for purposes of meeting the requirements of article two hundred forty-five of this chapter;

(g) to any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the defendant has made application for such a license; or

(h) to any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer; provided, however, that every individual who is an applicant for the position of police officer or peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto;

(i) for the purposes of civilian investigation or evaluation of a civilian complaint or civil action concerning law enforcement or prose-

cution actions, upon ex parte motion in any superior court, or in any district court, city court or the criminal court of the city of New York provided that such court was the court of conviction. The applicant must demonstrate to the satisfaction of the court that the records will be used for the purposes of this subparagraph; and

(j) for information provided to an individual or entity pursuant to paragraph (e) of subdivision four of section eight hundred thirty-seven of the executive law or for bona fide research purposes provided all identifying information is removed.

5. Records expunged pursuant to this section cannot be used in a criminal prosecution against the individual unless they are accessed pursuant to and for purposes of paragraphs (a) through (j) of subdivision four of this section.

6. A conviction which is expunged pursuant to this section shall not be included within the definition of a conviction pursuant to section 1.20 of this chapter for the purposes of any subsequent criminal proceeding, except as specified under subdivision four of this section.

7. In situations where expungement and record destruction is required by subdivision three of this section but has not taken place, or where supporting court records cannot be located or have been destroyed, and an individual or their attorney submits notification of such fact to the division of criminal justice services, as prescribed in subdivision twenty-three of section eight hundred thirty-seven of the executive law, within thirty days of such notice to the division, the conviction shall be expunged as set forth in subdivision three of this section.

8. No defendant shall be required or permitted to waive eligibility for sealing or expungement pursuant to this section as part of a plea of guilty, sentence or any agreement related to a conviction for a violation of the laws of this state. Any such waiver is void and unenforceable.

9. Expungement as set forth in subdivision three of this section is without prejudice to a defendant or their attorney seeking further relief pursuant to section 440.10 of this chapter. Nothing in this section shall diminish or abrogate any rights or remedies otherwise available to the defendant.

10. All records for a conviction subject to sealing or expungement under this section where the conviction was entered on or before the effective date of this section shall receive the appropriate relief promptly and, in any event, no later than one year after such effective date.

11. Any defendant claiming to be aggrieved by a violation of this section shall have a cause of action in any court of appropriate jurisdiction for damages, including punitive damages, and such other remedies as may be appropriate. The provisions of this article shall also be enforceable by the division of human rights pursuant to the powers and procedures set forth in article fifteen of the executive law.

§ 2. Subdivision 45 of section 1.20 of the criminal procedure law, as added by chapter 131 of the laws of 2019, is amended to read as follows:

45. [~~"Expunge"~~] "To expunge" means as set forth in criminal procedure law section 160.50 or 160.57, to destroy, or to mark as expunged, seal and not make available to any person or public or private agency, all records, including all official records and papers, of an arrest, prosecution and/or disposition[~~, where an arrest and any enforcement activity connected with that arrest, including prosecution and any disposition in any New York state court, is deemed a nullity and the accused is restored, in contemplation of the law, to the status such individual~~

~~occupied before the arrest, prosecution and/or disposition; that records of such arrest, prosecution and/or disposition shall be marked as expunged or shall be destroyed as set forth in section 160.50 of this chapter~~]. [~~Neither the arrest nor prosecution and/or disposition, if any, of a matter deemed a nullity shall operate~~] **An expunged conviction shall not operate** as a disqualification of any person [~~so accused~~] to pursue or engage in any lawful activity, occupation, profession or calling**, except for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of this section**. Except where specifically required or permitted by statute [~~or upon specific authorization of a superior court,~~] no such person shall be required to divulge information pertaining to the arrest, prosecution and/or disposition of such a matter.

§ 3. Subdivision 3 of section 845-d of the executive law, as added by section 1 of subpart N of part II of chapter 55 of the laws of 2019, is amended to read as follows:

3. Nothing in this section shall authorize the division to provide criminal history information that is not otherwise authorized by law or that is sealed pursuant to section 160.50, 160.55, **160.57,** 160.58 or 160.59 of the criminal procedure law **or expunged pursuant to section 160.57 of the criminal procedure law**.

§ 4. Section 837 of the executive law is amended by adding a new subdivision 23 to read as follows:

23. Promulgate a standardized form for use by individuals to notify the division of criminal justice services of convictions subject to sealing or expungement under section 160.57 of the criminal procedure law, but for which the division has not taken the requisite action for related records.

§ 5. Subdivision 16 of section 296 of the executive law, as amended by section 2 of subpart O of part II of chapter 55 of the laws of 2019, is amended to read as follows:

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55, 170.56, 210.46, 210.47, or 215.10 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.59 or 160.58 of the criminal procedure law, **or by a conviction which is sealed or expunged pursuant to section 160.57 of the criminal procedure law,** in connection with the licensing, housing, employment, including volunteer positions, or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning

the criminal action in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law**, or by a conviction which is sealed or expunged pursuant to section 160.57 of the criminal procedure law**. An individual required or requested to provide information in violation of this subdivision may respond as if the arrest, criminal accusation, or disposition of such arrest or criminal accusation did not occur. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law**, or by a conviction which is sealed or expunged pursuant to section 160.57 of the criminal procedure law**. For purposes of this subdivision, an action which has been adjourned in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, shall not be considered a pending action, unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution.

§ 6. Section 9 of the correction law, as added by section 2 of part OO of chapter 56 of the laws of 2010, is amended to read as follows:

§ 9. Access to inmate information via the internet. Notwithstanding any provision of law to the contrary, any information relating to the conviction of a person[~~, except for a person convicted of an offense that would make such person ineligible for merit time under section eight hundred three of this chapter or an offense for which registration as a sex offender is required as set forth in subdivision two or three of section one hundred sixty-eight-a of this chapter,~~] that is posted on a website maintained by or for the department, under article six of the public officers law, may be posted on such website for a period not to exceed [~~five~~] **three** years after the expiration of such person's sentence of imprisonment and **at the conclusion of** any period of parole or post-release supervision[~~; provided, however, that in the case of a person who has been committed to the department on more than one occasion, the department may post conviction information relating to any prior commitment on such website for a period not to exceed five years after the expiration of such person's sentence of imprisonment and any period of parole or post-release supervision arising from the most recent commitment to the department~~].

§ 7. This act shall take effect on the one hundred twentieth day after it shall have become a law.