STATE OF NEW YORK

6399--A

2021-2022 Regular Sessions

IN ASSEMBLY

March 17, 2021

Introduced by M. of A. CRUZ, PRETLOW, GONZALEZ-ROJAS, MEEKS, BURGOS, FERNANDEZ, MAMDANI, WALKER, QUART, BARRON, JACKSON, SEAWRIGHT, SIMON, DICKENS, HYNDMAN, EPSTEIN, FORREST, ANDERSON, SILLITTI, DE LA ROSA, KELLES, GOTTFRIED, BURDICK, GALLAGHER, CARROLL, SEPTIMO, L. ROSENTHAL, RICHARDSON, ZINERMAN, REYES, NIOU, HEVESI, DARLING, AUBRY, MITAYNES -- read once and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the criminal procedure law, the executive law and the correction law, in relation to automatic sealing 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 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 three years.

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

(i) at least three years have passed from 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

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

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(iv) the conviction is not defined as a sex offense under section one hundred sixty-eight-a of the correction law.

(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.

(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) qualified agencies, as defined in subdivision nine of section eight hundred thirty-five of the executive law, and federal and state law enforcement agencies, when acting within the scope of their law enforcement duties;

(iv) 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;

(v) 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;

(vi) entities that are required by state or federal law to request a fingerprint-based check of criminal history information, provided, however, that every person whose information is retrieved pursuant to this paragraph shall be furnished with a copy of such information and afforded an opportunity to explain or contest the information to the entity;

(vii) 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;

(viii) any federal, state or local officer or agency with responsibility for the issuance of licenses to possess a firearm, rifle or shotgun or with responsibility for conducting background checks before transfer or sale of a firearm or explosive, when the officer or agency is acting pursuant to such responsibility. This includes the criminal justice information services division of the federal bureau of investigation, for the purposes of responding to queries to the national instant background check system regarding attempts to purchase or otherwise take possession of firearms, rifles or shotguns, as defined in 18 U.S.C. § 921 (A)(3);

(ix) 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

(x) 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. In calculating the time periods under this section, 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 sealing pursuant to 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 sealed. Upon receipt of such notification, records of or relating to such conviction shall be immediately sealed.

(a) Any state agency that possesses information, records, documents or papers related to the eligible conviction shall seal 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 sealed 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 sealed 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 sealed.

(b) Third-party agencies shall seal 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 tran-

smitted 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 sealed 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 sealed 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 sealed.

4. (a) Nothing in this section requires the destruction of DNA information maintained in the New York state DNA database of such individual pursuant to the provisions of the executive law in regard to the eligible conviction.

(b) Nothing in this section requires the sealing or destruction of records maintained by the department of motor vehicles, and nothing in this section shall be construed to contravene the vehicle and traffic law, the federal driver's privacy protection act (18 U.S.C 2721 et. seq.), or the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. 31311).

(c) The division of criminal justice services is authorized to disclose a conviction that is sealed pursuant to this section to entities that are required by federal law, or by rules and regulations promulgated by a self-regulatory organization created under federal law, to consider sealed convictions. Such entities must certify to the division that they are required by federal law, or by rules and regulations promulgated by a self-regulatory organization that has been created under federal law, to make an inquiry about or consider records sealed pursuant to this section for purposes of employment, licensing, or clearance. To the extent permitted by federal law, a record sealed pursuant to this section may not be considered a conviction that would prohibit the employment, licensing or clearance of the defendant.

(d) Nothing in this section shall prohibit entities required by federal law, or by rules and regulations promulgated by a self-regulatory organization that has been created under federal law, from making an inquiry about or considering an applicant's criminal history for purposes of employment, licensing, or clearance from inquiring into convictions sealed pursuant to this section.

(e) In any civil action, an official record of a conviction that has been sealed pursuant to this section may not be introduced as evidence of negligence against a person or entity that provided employment, contract labor or services, volunteer work, licensing, tenancy, a home purchase, a mortgage, an education, a loan, or insurance if such record was sealed and was not provided to the person or entity by or on behalf of a governmental entity in accordance with this section in response to such person's or entity's authorized and timely request for conviction history information.

(f) A person or entity described in this subdivision, acting reasonably and in good faith, may not have a duty to investigate the fact of a prior conviction that has been sealed pursuant to this section.

5. No defendant shall be required or permitted to waive eligibility for sealing 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.

6. Sealing 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.

7. All records for a conviction subject to sealing 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 two years after such effective date.

8. A conviction which is sealed pursuant to this section is included within the definition of a conviction for the purposes of any criminal proceeding in which the fact of a prior conviction would enhance a penalty or is an element of the offense charged.

9. 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 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.

§ 3. 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 under section 160.57 of the criminal procedure law, but for which the division has not taken the requisite action for related records.

§ 4. 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 pursuant to section 160.57 of the criminal procedure law, in connection with the licensing, housing, employ-

ment, 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 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 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.

§ 5. 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~~].

§ 6. Severability. If any provision of this act or the application thereof to any person, corporation or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

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