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Alejandro
Valle, Esq.

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Indiana Employers - Are You Ready for Indiana's New Criminal Record Expungement Law?

By Alejandro Valle

Effective July 1, 2013, all employers with employees in Indiana will need to comply with changes to the Indiana Code that grant rights to certain individuals convicted of misdemeanors and some felonies. The changes, brought about by Indiana House Enrolled Act No. 1482 (the "Act"), were signed into law by Governor Mike Pence in May 2013, and codify changes to the Indiana Code at Sections 35-38-9, *et seq.*, among others.

The Act, generally speaking, sets up procedures by which individuals arrested for or convicted of various crimes, from misdemeanors to various levels of felonies, can require modification of their criminal record after varying periods of time without further criminal activity. For example, a person convicted of a misdemeanor may, after five years from the date of conviction, petition the sentencing court for expungement of the conviction from the court's files and from the files of the department of corrections and other government agencies, so long as the petition shows by clear and convincing evidence that no charges are pending against the person, the person's driver's license is not subject to suspension, the person's sentence and any supervised release are satisfied, and the person has not been convicted of another crime within the previous five years. Other periods of time apply, depending on the severity of the criminal conviction in question (for example, one year for any previously vacated criminal convictions or for arrests not producing convictions, or eight years for Class D felonies and certain other types of felonies).

The relief obtainable under the Act also varies depending on specific circumstances, from sealing of records (for arrests and previously vacated convictions), to full expungement (for misdemeanors and Class D felonies),

to marking as expunged (for felonies beyond Class D). Certain felonies are excluded from these provisions, such as those committed by sex offenders or those involving "official misconduct," and some forms of felonies (such as those committed by elected officials who are convicted while in public office, or those involving serious bodily injury to another) require the written consent of the prosecutor for the relief sought. The law defines precisely what is meant by terms such as "expungement" and by "marking as expunged," and also explains what exceptions apply for the subsequent release even of records marked as expunged.

The section of the new law most relevant to Indiana employers is Section 10. This section provides some protection to employers in negligent-hire actions, but also imposes certain requirements of which Indiana employers need to be aware, given the effective date of July 1, 2013. Section 10 makes it unlawful for any person to refuse to employ, or to otherwise discriminate against, any person because of a conviction or arrest record expunged or sealed under the law. It is not clear whether this also applies to conviction records merely marked as expunged. Committing such discrimination results in a Class C infraction under the law and can lead to a contempt order by either the expunging criminal court or by any other applicable civil court of general jurisdiction, as well as injunctive relief. Moreover, and importantly, in any application for employment subject to Indiana law, the inquiry into prior criminal convictions must seek such information *only in terms that exclude expunged convictions or arrests*, such as (using the specific example suggested by the statute): "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?" While the penalty for violating this provision is not clear from the statute, Indiana employers should be mindful of the new requirement and also amend their employment applications to conform to the new law.

The new law does provide some protections for Indiana employers, who will no longer have access to certain criminal records of their job applicants. Section 10(f) provides that an order of expungement may be introduced as evidence of the exercise of due care in connection with hiring or retaining an employee for purposes of any action or administrative proceeding involving alleged negligence in the hire or retention of such employee. However, the underlying (expunged) conviction is not admissible in an action for negligent hiring against a person relying on such an expungement order.

The new expungement law will impact not only Indiana-based employers but also national employers who hire and employ workers in the State of Indiana. Not much time is provided to bring relevant employment applications into compliance with the new law, so employers of such workers should be encouraged to move quickly to familiarize themselves with the new law's requirements and to assess the need for any adjustments needed in response to them.

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