

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR

SENATE BILL 2

55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SPECIAL SESSION, 2021

This document may incorporate amendments proposed by a committee, but not yet adopted, as well as amendments that have been adopted during the current legislative session. The document is a tool to show amendments in context and cannot be used for the purpose of adding amendments to legislation.

AN ACT

RELATING TO CRIMINAL RECORDS; PROVIDING FOR EXPUNGEMENT OF ARREST AND CONVICTION RECORDS FOR CERTAIN CANNABIS OFFENSES; PROVIDING FOR DISMISSAL OF SENTENCES OF INCARCERATED PERSONS; REVISING THE LIST OF CRIMINAL RECORDS THAT CANNOT BE CONSIDERED IN AN APPLICATION FOR PUBLIC EMPLOYMENT, LICENSURE OR OTHER AUTHORITY TO PRACTICE A TRADE, BUSINESS OR PROFESSION; AMENDING THE CRIMINAL RECORD EXPUNGEMENT ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 28-2-3 NMSA 1978 (being Laws 1974, Chapter 78, Section 3, as amended) is amended to read:

"28-2-3. EMPLOYMENT ELIGIBILITY DETERMINATION.--

A. Subject to the provisions of Subsection B of this section and Sections 28-2-4 and 28-2-5 NMSA 1978, in

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determining eligibility for employment with the state or any of its political subdivisions or for a license, permit, certificate or other authority to engage in any regulated trade, business or profession, the board or other department or agency having jurisdiction may take into consideration a conviction, but the conviction shall not operate as an automatic bar to obtaining public employment or license or other authority to practice the trade, business or profession. A board, department or agency of the state or any of its political subdivisions shall not make an inquiry regarding a conviction on an initial application for employment and shall only take into consideration a conviction after the applicant has been selected as a finalist for the position.

B. The following criminal records shall not be used, distributed or disseminated in connection with an application for any public employment, license or other authority:

(1) records of arrest not followed by a valid conviction; ~~[and]~~

(2) ~~[misdemeanor]~~ convictions ~~[not involving moral turpitude]~~ that have been sealed, dismissed, expunged or pardoned;

(3) juvenile adjudications; or

(4) convictions for a crime that is not job-related for the position in question and consistent with business necessity."

SECTION 2. Section 28-2-4 NMSA 1978 (being Laws 1974, Chapter 78, Section 4, as amended by Laws 1997, Chapter 238, Section 5 and also by Laws 1997, Chapter 251, Section 1) is amended to read:

"28-2-4. POWER TO REFUSE, RENEW, SUSPEND OR REVOKE PUBLIC EMPLOYMENT OR LICENSE.--

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A. Any board or other agency having jurisdiction over employment by the state or any of its political subdivisions or the practice of any trade, business or profession may refuse to grant or renew or may suspend or revoke any public employment or license or other authority to engage in the public employment, trade, business or profession for ~~[any one or any combination]~~ one or both of the following causes:

(1) where the applicant, employee or licensee has been convicted of a felony ~~[or a misdemeanor involving moral turpitude]~~ and the criminal conviction directly relates to the particular employment, trade, business or profession; and

~~[(2) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction does not directly relate to the particular employment, trade, business or profession, if the board or other agency determines after investigation that the person so convicted has not been sufficiently rehabilitated to warrant the public trust; or~~

~~(3)]~~ (2) where the applicant, employee or licensee has been convicted of homicide, kidnapping, human trafficking, trafficking in controlled substances, criminal sexual penetration or related sexual offenses or child abuse and the applicant, employee or licensee has applied for reinstatement, renewal or issuance of a teaching certificate, a license to operate a child-care facility or employment at a child-care facility, regardless of rehabilitation.

B. The board or other agency shall explicitly state in writing the reasons for a decision ~~[which]~~ that prohibits the person from engaging in the employment, trade, business or profession if the decision is based in whole or in part on conviction of any crime described in Paragraphs (1) and ~~[(3)]~~

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~~(2) of Subsection A of this section. [Completion of probation or parole supervision or expiration of a period of three years after final discharge or release from any term of imprisonment without any subsequent conviction shall create a presumption of sufficient rehabilitation for purposes of Paragraph (2) of Subsection A of this section.] "~~

SECTION 3. Section 29-3A-1 NMSA 1978 (being Laws 2019, Chapter 203, Section 1) is amended to read:

"29-3A-1. SHORT TITLE.--~~[This act]~~ Chapter 29, Article 3A NMSA 1978 may be cited as the "Criminal Record Expungement Act"."

SECTION 4. Section 29-3A-4 NMSA 1978 (being Laws 2019, Chapter 203, Section 4) is amended to read:

"29-3A-4. EXPUNGEMENT OF RECORDS UPON RELEASE WITHOUT CONVICTION.--

A. One year from the date of the final disposition in the case, a person released without conviction for a violation of a municipal ordinance, misdemeanor ~~[or]~~, felony, penalty assessments under the Criminal Code and the Motor Vehicle Code or violations and deferred sentences under the Motor Vehicle Code may petition the district court in the district in which the charges against the person originated for an order to expunge arrest records and public records related to that case.

B. A petitioner shall provide notice by first-class United States mail of the filed petition to the following parties, which parties shall be given ~~[an opportunity]~~ thirty days in which to provide to the district court any objections to the petition:

- (1) the district attorney for that district;
- and
- (2) the department of public safety ~~[and~~
 - ~~(3) the law enforcement agency that arrested~~

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the petitioner].

C. A single petition filed pursuant to Subsection A of this section may include a request to expunge multiple arrest records and public records that originated within the jurisdiction of a district. A petition shall be filed under seal or under pseudonym. Petitions brought pursuant to the Criminal Record Expungement Act and all records of proceedings thereunder shall be expunged upon the conclusion of proceedings. The petitioner shall attach to and file with the petition copies of the petitioner's record of arrest and prosecutions from the department of public safety dated no earlier than ninety days prior to the date the petition is filed.

D. A party that seeks to object to a petition on the basis of the contents of a petitioner's record of arrest and prosecutions from the federal bureau of investigation must provide a copy of that record to a petitioner at no charge at the time the party objects.

~~[C.]~~ E. After a hearing on the petition, the court shall issue an order within thirty days of the hearing requiring that all arrest records and public records related to the case be expunged if it finds that no other charge or proceeding is pending against the petitioner and if the petitioner was released without a conviction, including:

- (1) an acquittal or finding of not guilty;
- (2) a nolle prosequi, a no bill or other dismissal;
- (3) a referral to a preprosecution diversion program;
- (4) an order of conditional discharge pursuant to Section 31-20-13 NMSA 1978; or
- (5) the proceedings were otherwise discharged.

~~[D.]~~ F. The court shall cause a copy of the order

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to be delivered to all relevant law enforcement agencies and courts. The order shall prohibit all relevant law enforcement agencies and courts from releasing copies of the records to any person, except upon order of the court."

SECTION 5. A new section of the Criminal Record Expungement Act is enacted to read:

" [NEW MATERIAL] EXPUNGEMENT OF ARREST AND CONVICTION RECORDS--PROCEDURE.--If a person was charged with an offense involving cannabis that is no longer a crime on the effective date of the Cannabis Regulation Act or that would have resulted in a lesser offense if that act had been in effect at the time of the offense, whether or not the person is convicted, all public records held by a court or an agency of the state or a local jurisdiction that relate to the person's arrest or conviction shall be automatically expunged two years after the date of the person's conviction or the date of the person's arrest if there was no conviction; provided that if the arrest or conviction included multiple charges, only the portions of the public records related to the cannabis charge shall be expunged. If the person is or was under eighteen years of age at the time of the arrest or conviction, the public records shall be retained for two years or until the person is eighteen years of age, whichever comes first, and shall then be automatically expunged; provided that if the arrest or conviction included multiple charges, only the portions of the public records related to the cannabis charge shall be expunged. The public records shall be removed from all statewide criminal databases. Sfl1→The supreme court shall promulgate rules to implement the provisions of this section.←Sfl1 "

SECTION 6. A new section of the Criminal Record Expungement Act is enacted to read:

" [NEW MATERIAL] DISMISSAL OF SENTENCES--INCARCERATED

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PERSONS.--

A. Within thirty days following the effective date of this section, a correctional facility, a county jail or a juvenile correctional facility in which a person is currently incarcerated for an offense that is no longer a crime pursuant to the provisions of the Cannabis Regulation Act, or that would have resulted in a lesser offense if that act had been in effect at the time of the offense, shall notify the court that the convicted person's case may be:

(1) reopened to consider possible dismissal of the person's sentence; or

(2) expunged pursuant to the provisions of the Criminal Record Expungement Act.

B. A court shall reopen a case pursuant to Subsection A of this section and dismiss the person's sentence if it is legally invalid.

C. A person who has completed the person's sentence for a conviction, whether by trial or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense if the Cannabis Regulation Act had been in effect at the time of the offense is entitled to have the conviction dismissed and expunged because the prior conviction is now legally invalid or redesignated as a penalty assessment citation.

D. On or before January 1, 2022, the department of public safety shall review the public records in the state criminal history databases and shall identify all past convictions that are potentially eligible for dismissal and expungement or redesignation pursuant to the Cannabis Regulation Act. The department of public safety shall notify the corrections department, prosecutors and ~~Sf11~~ ~~the public defender department~~ ~~Sf11~~ ~~Sf11~~ ~~defense counsel of record in the case resulting in the conviction~~ ~~Sf11~~ of all cases that are

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eligible for dismissal and expungement or redesignation.

E. The prosecutor of the case shall have until July 1, 2022 to review all cases and determine whether to challenge the dismissal and expungement or redesignation.

F. The prosecutor of the case may challenge the resentencing of a person pursuant to this section when the person does not meet the criteria established under the Cannabis Regulation Act.

G. On or before July 1, 2022, the prosecutor of the case shall inform the court and ~~Sf11~~→the public defender department←Sf11 Sf11→defense counsel of record in the case resulting in the conviction←Sf11 when the prosecutor of the case is challenging a particular dismissal and expungement or redesignation. The prosecutor of the case shall also inform the court when the prosecutor of the case is not challenging a particular dismissal and expungement or redesignation.

~~Sf11~~→H. ←The public defender department, upon receiving notice from the prosecutor of the case, shall make a reasonable effort to notify the person whose dismissal and expungement or redesignation is being challenged.←Sf11

Sf11→I.←Sf11 Sf11→H.←Sf11 If the prosecutor of the case does not challenge the dismissal and expungement or redesignation by July 1, 2022, the court shall notify the department of public safety that the case has been dismissed. Upon notice, the department of public safety shall expunge the public record pertaining to the offense; provided that if the arrest included multiple charges, only the portions of the public records related to the cannabis charge shall be expunged.

Sf11→J.←Sf11 Sf11→I.←Sf11 A person who is currently incarcerated or who was incarcerated in the past for a cannabis offense that is no longer a crime may at any time petition to modify the person's criminal sentence or to have

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the person's conviction vacated. If the petition is granted, the court shall issue an order within thirty days of the granting of the petition requiring that the portions of the public records related to the cannabis offense, as well as all records of proceedings related to the petition for expungement, be expunged.

~~Sf11~~→~~K.~~←~~Sf11~~ Sf11→~~J.~~←~~Sf11~~ Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to a person who was convicted of or incarcerated for a cannabis offense.

~~Sf11~~→~~I.~~←~~Sf11~~ Sf11→~~K.~~←~~Sf11~~ The provisions of this section shall apply equally to juvenile delinquency adjudications and convictions of a juvenile if the juvenile would not have been guilty of an offense or would have been guilty of a lesser offense as provided in the Cannabis Regulation Act.

~~Sf11~~→~~M.~~←~~Sf11~~ Sf11→~~L.~~←~~Sf11~~ No fee or cost of any kind shall be imposed upon a person whose sentence is reviewed pursuant to this section."

SECTION 7. Section 61-1-1 NMSA 1978 (being Laws 1957, Chapter 247, Section 1, as amended) is amended to read:

"61-1-1. SHORT TITLE.-- [~~Sections 67-26-1 through 67-26-31 NMSA 1953~~] Chapter 61, Article 1 NMSA 1978 may be cited as the "Uniform Licensing Act"."

SECTION 8. A new section of the Uniform Licensing Act is enacted to read:

" [NEW MATERIAL] CRIMINAL CONVICTIONS--EXCLUSION FROM LICENSURE--DISCLOSURE REQUIREMENT.--

A. A board shall not exclude from licensure a person who is otherwise qualified on the sole basis that the person has been previously arrested for or convicted of a crime, unless the person has a disqualifying criminal conviction.

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B. By December 31, 2021, each board shall promulgate and post on the board's website rules relating to licensing requirements to list the specific criminal convictions that could disqualify an applicant from receiving a license on the basis of a previous felony conviction. Rules relating to licensing requirements promulgated by a board shall not use the terms "moral turpitude" or "good character". A board shall only list disqualifying criminal convictions.

C. In an administrative hearing or agency appeal, a board shall carry the burden of proof on the question of whether the exclusion from occupational or professional licensure is based upon a disqualifying criminal conviction.

D. No later than October 31 of each year, while ensuring the confidentiality of individual applicants, a board shall make available to the public an annual report for the prior fiscal year containing the following information:

(1) the number of applicants for licensure and, of that number, the number granted a license;

(2) the number of applicants for licensure or license renewal with a potential disqualifying criminal conviction who received notice of potential disqualification;

(3) the number of applicants for licensure or license renewal with a potential disqualifying criminal conviction who provided a written justification with evidence of mitigation or rehabilitation; and

(4) the number of applicants for licensure or license renewal with a potential disqualifying criminal conviction who were granted a license, denied a license for any reason or denied a license because of the conviction.

E. As used in this section, "disqualifying criminal conviction" means a conviction for a crime that is job-related for the position in question and consistent with business necessity."

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