Accessing Legal Tools for Restoring Voices during the Pandemic

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Over 2,220,000 adults were incarcerated in US federal and state prisons, and county jails in 2013.

Additionally, 4,751,400 adults were on probation or parole that year.

That’s a total of 6,899,000 adults were under correctional supervision – about 2.8% of adults (1 in 35) in the U.S. resident population.

More than 90 percent of all incarcerated individuals return to society.

1 in 3 Americans has a criminal record in the FBI’s Database.
Collateral Consequences

Criminal records barriers… Collateral sanctions…

Seeking Employment?

90% of potential employers conduct background checks.

The presence of any criminal record lowers the chances of even being called back by 50%.

The presence of a felony conviction lowers the chances of being hired even further.

Formerly incarcerated persons make 40% less than before they were incarcerated.

Barrier: Negative perception
Collateral Consequences

Criminal records barriers… Collateral sanctions…
Civil impacts of a criminal conviction

- After imprisonment, fines, probation…
- Federal, state, local: mandatory and discretionary consequences affecting employment, housing, education, family, and civic-participation
Race & Criminal Justice

Black and Hispanic people have a higher likelihood of being…
- Stopped for a traffic safety stop
- Arrested or searched during traffic stop
- Detained
- Stopped and frisked
- Arrested
- Charged more harshly
- Convicted
- Given stiffer sentences

…all after accounting for relevant legal differences, such as crime severity and criminal history.

Lifetime likelihood of imprisonment for those born in 2001

Race, Re-Entry, & Employment

Racial Impact of a Criminal Record on Interview Callbacks, 2003

- **Criminal Record**
  - Black: 5%
  - White: 17%

- **No Criminal Record**
  - Black: 14%
  - White: 34%

High school star...
...Falls into drug addiction...
...12 years gone.
Two drug-related felonies, prison...
...Hits rock bottom...
...and turns around.

Don’t miss the best employee

Gene Mays
Don’t miss the best employee

Electrician apprenticeship
1st ever: 12 tests, 100%
#1 in class

Civil service = great job
Passes exam, great interview

Disclosed felonies 3 times

DENIED entry level jobs as electrician
The letter: “You have a felony therefore you cannot work for the city.”

So, who did the city hire?

❌ Hired an electrician less qualified than Gene because of 12-year-old convictions

Excluding people with records leaves positions unfilled, or filled by less qualified people.
Employer Concerns: Negligent Hiring Liability

• A client or customer gets injured by the employee; says that the employer “knew or should have known” that the employee was dangerous.

• Employers are almost never found liable – very hard to prove.

• Negligent hiring liability is the #1 reason employers run criminal-record checks and do not hire people with criminal records.
Other concerns

What are the primary reasons your organization conducts criminal background checks on job candidates?

- To reduce legal liability for negligent hiring: 52% (2012), 55% (2010)
- To ensure a safe work environment for employees: 49% (2012), 61% (2010)
- To reduce/prevent theft and embezzlement, other criminal activity: 36% (2012), 39% (2010)
- To comply with applicable state law requiring a background check (e.g., day care teachers, licensed medical...): 28% (2012), 20% (2010)
- To assess the overall trustworthiness of the job candidate: 17% (2012), 12% (2010)
- Other: 5% (2012), 4% (2010)
Record Sealing vs. Expungement

- Ohio uses record sealing as a mechanism to clear background checks.
- Convictions or non-convictions can be sealed or “hidden” from most background checks.
- Record sealing is NOT expungement – which is completely deleting a record.
  - In Ohio, expungement is only available for juvenile records, limited weapons charges, and records related to human trafficking.
Record Sealing: Benefits and Limitations

Benefits
• Gives MANY people an avenue to clear their record.
• Relatively simple process.
• Eliminates barriers to housing, employment, volunteering, education, professional licensing, etc. for those who qualify.

Limitations
• Many state/federal agencies still have access – preventing employment and licensing opportunities for people who have had their records sealed.
• Must 1) be an eligible offender 2) with eligible offenses and 3) satisfied a particular waiting period. Many people do not qualify and will have to answer for their crimes forever.
Certificates of Qualification for Employment

Certificates of Achievement and Employability
Who is Applying for a CQE/CAE?

- Someone who doesn’t qualify to have their record sealed or expunged;
- Someone who is interested in a field that still has access to their sealed records.
What are CQEs?

Three legal effects

1. **Removes legal barriers** to employment; converts mandatory civil impacts into a discretionary ones;

2. Protects employer from **negligent-hiring liability**.

3. **Rebuttable presumption** against denial of individual or company license based on record.

A Certificate does NOT hide or erase a criminal record.
CQEs

• For people out in the community.

• Granted by a Court of Common Pleas where the applicant resides, which does thorough investigation.

• By a preponderance of the evidence:
  
  (a) Granting the petition will materially assist the individual in obtaining employment or occupational licensing.

  (b) The individual has a substantial need for the relief requested in order to live a law-abiding life.

  (c) Granting the petition would not pose an unreasonable risk to the safety of the public or any individual.
CAEs

• For inmates with less than 1 year left or currently on parole.
• Granted by Ohio Dept of Rehabilitation and Correction.
• Must have completed various kinds of programming in prison, required community service.
# CQE/CAEs: Benefits and Limitations

## Benefits

- Helps people who do not qualify for record sealing or are applying to agencies that have access to sealed records.
- Shorter waiting periods to qualify than record sealing.
- Addresses the biggest concern for employers: negligent hiring liability.

## Limitations

- Long process.
- This is a newer form of relief, so many courts and employers are unaware of what these certificates and their legal impacts are.
- Can only be used for Ohio records and Ohio employers.
  - Can be persuasive in other areas but no binding legal impact.
Recent study

An Experimental Study of the Effectiveness of Certificates of Recovery as Collateral Consequence Relief Mechanisms

Peter Leasure & Tia Stevens Andersen, University of South Carolina, Department of Criminology and Criminal Justice

In Franklin County...
Recent study

Figure 1: The effect of certificates of qualification for employment on positive responses (N = 319)
Safe Harbor Expungement

What is *Safe Harbor Expungement*?

Ohio Revised Code 2953.38 (convictions) & 2953.521 (nonconvictions)
A person who was convicted of soliciting, loitering, or prostitution may apply to expunge the record of conviction of any offense other than aggravated murder, murder, or rape, when their participation in the underlying offense was the result of being a victim of human trafficking.
Safe Harbor Expungement

Traffickers use force, fear, duress, intimidation, and fraud to overcome victims’ will and compel victims’ to participate in illegal activity.

Victims of human trafficking are often compelled to participate in a variety of illegal activities, resulting in multiple records of arrests and convictions.
Safe Harbor Expungement: Benefits and Limitations

Benefits
• Completely deletes the records so that HT survivors are not subject to the limitations of record sealing.

Limitations
• Very lengthy process.
• Must have a predicate offense to qualify for expungement but many human trafficking survivors do not have those offenses on their records.
Pardons

- An act of mercy or leniency exercised by the Governor after receiving a recommendation from the Parole Board.
- A pardon is the remission of a penalty. It is an act of grace or forgiveness that relieves the person pardoned from some or all of the ramifications of lawful punishment. A pardon may be conditional or unconditional.
- Pardons DO NOT erase or seal a conviction; a pardon forgives guilt.
Benefits
• An individual granted a full pardon is deemed, by law, to have never committed the offense.
• The Governor has created an Expedited Pardon Program for applicants who meet certain requirements.

Limitations
• Very lengthy process.
• Most applicants will be denied. In 2014, only 17 of 433 clemency requests were granted.
• Does not seal or expunge the record.
Thanks!

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CIVICC Collateral Sanction Database:
http://civicc.opd.ohio.gov