



# Beyond Confidentiality: Modernizing Criminal Record Clearance Policies in the Digital Age

## Background

Criminal record clearance mechanisms, like expungement and sealing, have quickly become the preferred means to help mitigate many of the barriers and stigma that often stem from having a criminal record.<sup>1</sup> More people than ever are eligible to have their criminal history cleared, and the number has been growing every year as states have continued to make clearance available sooner, for more offenses, and with fewer financial and procedural hurdles.<sup>2</sup>

But what does it mean for a person to have their record cleared, and how does that relief translate into greater access to employment, housing, and other critical opportunities? Many states that make record clearance available have failed to adequately reckon with this important question despite the push to expand access. As a result, in some states, clearance can fall short of providing the relief it appears to promise.

Historically, the effect of record clearance was relatively limited. As originally conceived, record clearance involved restricting public access to a person's official criminal record and, in some instances, nullifying the legal effect of the underlying conviction. This limited relief was generally effective in years past when criminal records could be accessed only by requesting physical copies from the clerk of court or other official state record custodian. But technological innovations that have fundamentally changed how information is accessed and shared have steadily eroded many of the assumptions that underpin that traditional paradigm.

Criminal history information is now easily and cheaply available online from a wide variety of sources including commercial background check providers, mugshot repositories, news organizations, and social media. And the electronic nature of the information means that it can spread effortlessly and unchecked across different platforms and databases. As a result, it can be difficult, if not impossible, for a person's criminal history to be truly "cleared" in the digital public forum where employers, landlords, and others commonly seek information about applicants' criminal histories.<sup>3</sup> In this landscape, the role of official state record custodians is significantly diminished. In response, forward-looking policymakers have had to reimagine clearance as a tool that does more than just limit access to the records those custodians maintain.<sup>4</sup>

The policies of states that have directly confronted the modern challenges posed by criminal records demonstrate that record clearance laws can still play an important role in expanding opportunities for people with criminal histories. This brief discusses the strategies these states have developed to ensure that clearance remains as effective as possible in the digital age. Taken as a whole, they represent a set of best practices that can be leveraged by the many states whose record clearance laws remain tethered, in whole or in part, to outmoded notions about the nature of criminal records and obstacles they present.

# Best Practices for Modernizing the Effect of Record Clearance

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## **Expungement vs. sealing**

Expungement and sealing—the two terms most often used by states to describe their record clearance mechanisms—have no distinct meaning in terms of their effect. Identical mechanisms may be referred to by either term, depending on the state.<sup>5</sup> Ultimately, the legal effect of expungement, sealing, erasure, set-aside, or any other record clearance mechanism is defined by state law, not by the term used to describe it. Therefore, it is critical that state laws clearly define the effect of those mechanisms and ensure it is broad enough to achieve the mechanism’s intended goals.

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## **Eliminating Legal Barriers to Opportunity**

State statutory and regulatory codes are littered with hundreds of provisions that create barriers to employment, licensure, housing, and other opportunities due to a person’s criminal history.<sup>6</sup> The extent to which such provisions implicate cleared criminal history is often uncertain because few of those legal barriers reference history that is expunged, sealed, or otherwise cleared. This omission is usually not because of any specific legislative intent to trigger barriers with cleared history, but because the barriers were created prior to the enactment of record clearance laws.

However, that unresolved ambiguity in the law can leave the door open for agencies, officials, employers, and other decision-makers to use cleared history to impose legal barriers contrary to the unwritten intent of policymakers. Even when decision-makers choose not to consider cleared history when imposing legal barriers, lingering uncertainty can still lead people whose records have been cleared to make inaccurate assumptions about how their criminal history will be used and self-select out of opportunities for which they may be eligible.

Rather than revising each of the hundreds of barriers buried in state law to eliminate the potential use of cleared convictions, 28 states have implemented statutes that override those barriers, explicitly prohibiting cleared history from being used to impose any barriers to opportunity imposed by law. These policies often nullify underlying convictions for most legal purposes, including the imposition of statutory and regulatory barriers. Michigan is among the states that take this approach, broadly stating that a person whose record is cleared (“set aside,” under Michigan law) “shall be considered not to have been previously convicted.”<sup>7</sup> Other states, like Washington, address legal barriers more directly. Per Washington law, a person whose record is cleared (“vacated”) “shall be released from all penalties and disabilities resulting from the offense.”<sup>8</sup>

Some states take a more limited approach, usually by prohibiting consideration of cleared records with respect to certain categories of barriers. For example, the fair chance occupational licensing laws of a majority of states generally prohibit cleared records from being used to disqualify applicants for licensure.<sup>9</sup> A number of state laws governing public employment specifically prohibit consideration of cleared convictions.<sup>10</sup> These types of limitations are often effective at eliminating discretionary barriers imposed by law (i.e., those that allow a licensing body or public agency to disqualify a person due to criminal history but do not require it). But the extent to which they effectively relieve mandatory legal barriers (those that the law says must be imposed in all instances where a person has a disqualifying

conviction) can be unclear if the law does not explicitly override those mandatory barriers as they relate to cleared history. Oklahoma law typifies the approach taken by states that have explicitly overridden such barriers, stating that “convictions that have been sealed, or expunged,” cannot be used by licensing bodies “notwithstanding any other provision of law.”<sup>11</sup>

## Limitations on Discrimination Based on Cleared Criminal History

People with criminal histories must contend not only with legal barriers but stigma-based discrimination from private employers and other actors. States have long recognized the pervasiveness of such discrimination, and the record confidentiality aspects of traditional clearance laws were largely designed to combat those practices. However, as access to information about cleared records has grown, many states have recognized the need to directly prohibit discrimination based on information about cleared criminal records.

Five states now explicitly prevent private employers from considering cleared records when making hiring decisions. In Illinois, the law states that cleared records “may not be considered by any private or public entity in employment matters, certification, licensing, revocation of certification or licensure, or registration.”<sup>12</sup> Indiana’s law goes even further, covering far more than employment and credentialing:

It is unlawful discrimination for any person to:

1. suspend;
2. expel;
3. refuse to employ;
4. refuse to admit;
5. refuse to grant or renew a license, permit, or certificate necessary to engage in any activity, occupation, or profession; or
6. otherwise discriminate against; any person because of a conviction or arrest record expunged or sealed...<sup>13</sup>

California and New York’s prohibitions on consideration are similarly broad. But the prohibitions in both states are written into state antidiscrimination statutes, making employers and others who illegally consider cleared records liable to the same extent that they would be for violating state laws against racial and other forms of discrimination.<sup>14</sup>

## Inquiries into Cleared History and the Right of Denial

In addition to the few states that directly prohibit discrimination based on cleared records, there are many others that indirectly combat the practice by limiting self-disclosure of cleared history for job applicants and others.<sup>15</sup> These policies are especially important given the ubiquity of questions about criminal history on applications for employment, housing, and other opportunities. Such inquiries can often force people with cleared histories to choose between (1) acknowledging the existence of criminal history that an employer or other decision-maker could not officially access, fundamentally undermining the relief afforded by record clearance, or (2) denying the existence of cleared criminal history that an employer may become aware of through unofficial means, potentially raising red flags about honesty and integrity that could result in the loss of the job or other opportunity.

Among the policies designed to address this dilemma are those that directly prohibit decision-makers from asking about cleared criminal history, as 19 states have done. Those policies are important for ensuring that employers do not circumvent limits on record access, but they are unlikely to have much effect on their own because they fail to address a far more pervasive problem posed by criminal history inquiries: the fact that they are generally open-ended. Common questions such as “Have you been convicted of a crime?” do not necessarily amount to an inquiry about cleared history. However, the question is broad enough that it may spur an applicant to disclose such history unless both the law and the applicant are clear about how applicants can respond to such questions.

To more fully address the problem posed by criminal history inquiries, 18 states grant people whose records have been cleared the explicit right to either deny or refuse to acknowledge the existence of such records in response to employer inquiries. Seven states extend the right of denial or refusal to inquiries from *anyone*, not just employers.

Five states have gone even further and ensured that applicants are aware of their rights by enacting laws that require applications for employment—and sometimes housing and other opportunities—to include a notice that information about cleared records need not be disclosed. Among them is New Hampshire, where the state’s “annulment” statute states the following:

In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record only in terms such as “Have you ever been arrested for or convicted of a crime that has not been annulled by a court?”<sup>16</sup>

Apart from informing applicants about their rights, these application requirements help mitigate the fear that an employer may view the withholding or denial of cleared history as a sign of dishonesty.

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### **Interstate challenges**

Making clearance effective is especially challenging when considering the needs of people whose records are cleared in one state and then relocate to, work in, or conduct business in another. The sovereignty of each state means that states cannot clear the records of another or dictate how another must treat records cleared elsewhere. As a result, the full scope of the relief afforded by record clearance policies rarely crosses state lines. Consider a worker whose record from state A was cleared and who is now looking for a job in state B. Even though state A may prohibit inquiries about, or use of, the worker’s cleared record, employers in state B are free to make such inquiries and use that information unless state B’s own laws prohibit it. To the extent that state A’s law does more than make the worker’s criminal record confidential, those effects will not necessarily apply outside of state A’s borders.

States have yet to address these interstate challenges in a meaningful way, likely because the laws of any two states are rarely in agreement about who can have their record cleared, for what convictions, and how long they must wait. Models from other policy realms can potentially be leveraged to address the interstate effect of clearance, including interstate compacts and other agreements that could conceivably require states to give reciprocal treatment to the clearance mechanisms of other states.<sup>17</sup>

The interaction between state and federal law poses additional challenges. There is no broadly applicable federal record clearance law, so convictions in federal court cannot be cleared. And without jurisdiction over federal records, state record clearance laws cannot directly limit access to federal records—even those for crimes that were committed and prosecuted in the state. Moreover, federal laws are largely silent on how cleared state records should be treated when it comes to imposing conviction-based barriers implemented by federal law. These problems will likely require a federal solution unless states are willing to impose specific limitations on how they allow themselves to use uncleared federal records.

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## Criminal Record Providers

Some states have deployed additional strategies that target the record providers themselves and seek to limit disclosure and dissemination of cleared criminal history information at its source. States such as Louisiana have policies that prevent commercial background check providers and others from reporting cleared records.<sup>18</sup> Other states have implemented robust oversight and enforcement schemes like the one recently enacted in Virginia. The state's new "clean slate" law requires providers to delete information about cleared records from their databases; enter into contracts with the state that dictate how providers will maintain and report criminal history information; and create a process for individuals whose criminal history is reported or maintained by a provider to challenge the information's accuracy and completeness.<sup>19</sup> Citizens and the state attorney general are both authorized by the law to seek civil damages from providers that improperly maintain or disseminate cleared criminal history information.

## Policy Priorities

None of the strategies discussed in this brief represents a full solution to the modern challenges posed by criminal records. Each addresses a specific problem, and together they supplement and support one another to more fully realize the opportunity that record clearance can offer. States seeking to ensure that their record clearance authorities are maximally effective at mitigating the barriers posed by criminal history should consider all the following policy priorities:

- Prohibit information about cleared records from being used to impose legal barriers to jobs, licensure, and other opportunities.
- Prohibit discrimination based on cleared criminal history in decisions related to employment, housing, and other opportunities.
- Prohibit employers and other decision-makers from asking applicants about cleared criminal history.

- Grant people with cleared records the explicit right to deny and refuse to acknowledge the existence of such records.
- Require applications that inquire about criminal history to include a notice that cleared records should not be disclosed.
- Place limitations on third-party dissemination of information about cleared criminal history.
- Enforce prohibitions and obligations related to record clearance by imposing penalties for unlawful disclosure and/or use of information about cleared records.

## State Implementation of Major Best Practices

The following table provides an overview of the key features of state policies that dictate the effect of record clearance. The data below are current through the end of 2021 legislative sessions.

↗ = Policy implemented

/ = Policy implemented, but with significant exceptions that apply depending on factors like the type of decision-maker or barrier (private vs. public employer, e.g.) or the underlying crime.

○ = Policy not implemented

NA = No record clearance

State	Limitations on Imposing Legal Barriers	Prohibitions on Consideration/Discrimination		Prohibitions on Inquiries	Right to Deny/Refuse to Disclose	Notice of Rights on Applications
		Public/Licensing	Private Sector			
Alabama	↗	/	○	/	/	○
Alaska	NA	NA	NA	NA	NA	NA
Arizona	○	○	○	○	/	○
Arkansas	↗	○	○	○	↗	○
California	↗	↗	↗	↗	○	○
Colorado	/	↗	○	/	/	○
Connecticut	↗	↗	↗	↗	↗	↗
Delaware	↗	○	○	↗	/	○
DC	/	/	/	/	↗	○

State	Limitations on Imposing Legal Barriers	Prohibitions on Consideration/Discrimination		Prohibitions on Inquiries	Right to Deny/Refuse to Disclose	Notice of Rights on Applications
		Public/Licensing	Private Sector			
Florida	NA	NA	NA	NA	NA	NA
Georgia	○	○	○	○	○	○
Hawaii	NA	NA	NA	NA	NA	NA
Idaho	NA	NA	NA	NA	NA	NA
Illinois	/	/	/	/	↗	↗
Indiana	↗	↗	↗	↗	/	↗
Iowa	○	○	○	○	○	○
Kansas	/	○	○	○	○	○
Kentucky	↗	○	○	/	/	○
Louisiana	○	○	○	○	/	○
Maine	○	○	○	○	○	○
Maryland	○	/	/	/	/	○
Massachusetts	○	/	○	/	↗	○
Michigan	↗	/	○	○	○	○
Minnesota	↗	↗	○	/	○	○
Mississippi	/	○	○	○	↗	○
Missouri	↗	○	○	○	○	○
Montana	○	○	○	○	○	○
Nebraska	↗	○	○	○	○	○
Nevada	↗	○	○	○	↗	○
New Hampshire	↗	○	○	↗	○	↗

State	Limitations on Imposing Legal Barriers	Prohibitions on Consideration/Discrimination		Prohibitions on Inquiries	Right to Deny/Refuse to Disclose	Notice of Rights on Applications
		Public/Licensing	Private Sector			
New Jersey	↗	/	○	/	↗	○
New Mexico	↗	○	○	○	○	○
New York	↗	↗	↗	↗	○	○
North Carolina	↗	↗	↗	↗	↗	○
North Dakota	○	○	○	○	○	○
Ohio	↗	/	○	/	○	○
Oklahoma	↗	/	○	↗	↗	○
Oregon	↗	○	○	○	○	○
Pennsylvania	↗	/	○	↗	↗	○
Rhode Island	↗	/	○	/	↗	○
South Carolina	○	○	○	○	○	○
South Dakota	↗	○	○	○	○	○
Tennessee	↗	↗	○	/	↗	○
Texas	○	/	○	↗	↗	○
Utah	○	○	○	○	↗	○
Vermont	↗	○	○	↗	○	↗
Virginia	○	○	○	○	○	○
Washington	↗	↗	○	/	↗	○
West Virginia	↗	/	○	↗	↗	○
Wisconsin	○	○	○	○	○	○
Wyoming	↗	○	○	○	○	○



# Endnotes

<sup>1</sup> All but four states (Alaska, Florida, Hawaii, and Idaho) now allow at least some broad categories of criminal conviction records to be cleared. Since 2018, 11 states have enacted so-called “clean slate” laws that clear a broad range of conviction records automatically after a period of time. Those states are California, Colorado, Connecticut, Delaware, Michigan, New Jersey, Oklahoma, Pennsylvania, South Dakota, Utah, and Virginia. See “50-State Comparison: Expungement, Sealing & Other Record Relief,” Restoration of Rights Project, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside-2/>. The trend in states with existing record clearance policies has consistently leaned toward expanding the ranges of offenses that are eligible for clearance and reducing the amount of time that a person must wait for it.

<sup>2</sup> See Margaret Love and David Schlüssel, Collateral Consequences Resource Center, *From Reentry to Reintegration: Criminal Record Reforms in 2021* (January 2022), <https://ccresourcecenter.org/wp-content/uploads/2022/01/2022-CCRC-Annual-Report.pdf>.

<sup>3</sup> See Sharon M. Dietrich, “Ants Under the Refrigerator?” *Criminal Justice* 4, no. 30 (Winter 2016).

<sup>4</sup> This is not to suggest that more traditional expungement mechanisms no longer provide any benefit, only that they are inherently less effective than they once were. Even recent research has shown that people with cleared records tend to have higher rates of employment and earn more money than people with records that have not been cleared, even in states that have not fully modernized their clearance laws. See, e.g., J.J. Prescott and Sonja B. Starr, “Expungement of Criminal Convictions: An Empirical Study,” *Harvard Law Review* 133, no. 8 (2020): 2460–555 (studying the effect of Michigan’s relatively traditional expungement law and finding that “those who obtain expungement experience a sharp upturn in their wage and employment trajectories; on average, within one year, wages go up by over 22 percent versus the pre-expungement trajectory”).

<sup>5</sup> *Expungement* has generally been used to describe mechanisms that eliminate the record of conviction and the conviction itself, restoring the person to the legal status they occupied prior to conviction. *Sealing* has traditionally referred to mechanisms that limit public access to records of conviction without addressing the underlying conviction itself. Over time, these two terms have become less distinct, though. Sealing in one state may refer to a process that resembles expungement in another and vice versa. Compare, e.g., La. C. Cr. Proc. arts. 977 & 978 (Louisiana “expungement” does not affect the underlying conviction) and Ohio Rev. Code Ann. § 2953.32 (Ohio “sealed” convictions “shall be considered not to have occurred.”).

<sup>6</sup> According to the National Inventory of Collateral Consequences of Conviction, around 40,000 provisions of the laws of the 50 states law impose barriers to jobs, licensure, and other rights, benefits, and opportunities based on a person’s criminal history. National Inventory of Collateral Consequences of Conviction, <https://niccc.nationalreentryresourcecenter.org/>.

<sup>7</sup> Mich. Comp. Laws § 780.622.

<sup>8</sup> Wash. Rev. Code § 9.94A.640.

<sup>9</sup> See “Fair Chance Licensing Project: States Expand Access to In-Demand Jobs,” The Council of State Governments Justice Center, <https://csgjusticecenter.org/projects/fair-chance-licensing/>.

<sup>10</sup> See, e.g., C.R.S. § 24-5-101.

<sup>11</sup> Okla. Stat. § 4000.1

<sup>12</sup> 20 Ill. Comp. Stat. 2630/12.

<sup>13</sup> Ind. Code § 35-38-9-10.

<sup>14</sup> Cal. Labor Code § 432.7; N.Y. Exec. Law § 296.

<sup>15</sup> A number of the states that prohibit consideration of cleared criminal history also impose limits on inquiries.

<sup>16</sup> RSA 651:5(X)(f).

<sup>17</sup> See generally, “What are Interstate Compacts,” National Center for Interstate Compacts, <https://compacts.csg.org/compacts/>; Congressional Research Service, *Interstate Compacts: An Overview*, August 15, 2022, <https://crsreports.congress.gov/product/pdf/LSB/LSB10807>.

<sup>18</sup> La. C. Crim. Proc. art. 974;

<sup>19</sup> Va. Code § 19.2-392.16 (B) – (K).

