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# Ohio's Criminal Record Sealing Statute: The Need for Further Amendments After Senate Bill 288



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DRUG ENFORCEMENT  
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## INTRODUCTION

Ohio Senate Bill 288 (134th General Assembly) is set to enact significant changes to Ohio's rights restoration laws. One of those significant changes is the creation of an expungement process for those who possess criminal convictions. While expungement is logically a superior mechanism to record sealing, Senate Bill 288 mandates significant waiting times for those with felonies seeking expungement. Further, it is possible that prosecutors, judges, or victims will favor record sealing over expungement in particular cases. Therefore, record sealing may still be the most viable option for many individuals with criminal history. However, Senate Bill 288 failed to address important issues with Ohio's record sealing provisions. The sections below provide an overview of these issues and recommendations to address the issues.

## OVERVIEW OF THE ISSUES WITH OHIO'S RECORD SEALING STATUTE

**Issue 1:** The current version of Ohio Revised Code section 2953.33 (2953.34 after Senate Bill 288 is enacted) allows employers/licensing boards to question individuals about sealed convictions when sealed convictions bear "a direct and substantial relationship to the position for which the person is being considered." However, section 2953.33 does not state who has the responsibility to determine whether particular sealed convictions bear a direct and substantial relationship to the position for which the person is being considered. In essence, do individuals have the responsibility to determine whether particular sealed convictions bear a direct and substantial relationship to a particular position, or do employers/licensing boards have that responsibility? Placing the responsibility on individuals could result in the termination of employment or denial of a license for those who fail to disclose sealed convictions when they believed that no such duty existed. Employers/licensing boards are clearly in a better position to determine whether sealed convictions bear a direct and substantial relationship to a particular position. The recommendations below make it clear that it is the responsibility of the employer/licensing board to explicitly notify applicants about sealed convictions that will be subject to questioning.

**Issue 2:** The Certificate of Qualification for Employment (CQE) in section 2953.25 of the Revised Code provides advantages (rebuttable presumption and negligent hiring immunity) that are currently not available to individuals with sealed convictions. Given that individuals can be questioned about sealed convictions in particular employment and licensing circumstances, the advantages contained in the CQE could also be advantageous for those with sealed convictions. While individuals with sealed convictions could seek a CQE, doing so would mean that traces of criminal history for these individuals could be derived from the public CQE list or the case number relating to the CQE filing (ultimately defeating the purpose of record sealing). Additionally, creating and maintaining a non-public CQE list of approvals for individuals with sealed convictions would be unnecessarily burdensome for the Ohio Department of Rehabilitation and Correction. Therefore, because the legal standards for granting sealing are similar (if not more stringent) to the standards required to grant a CQE<sup>1</sup>, individuals with sealed convictions should automatically receive the benefits of the rebuttable presumption and negligent hiring immunity. The recommendations below effectuate a rebuttable presumption and negligent hiring immunity for those with sealed convictions.

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<sup>1</sup> For a CQE, a judge must find (among other lesser requirements) that granting the petition would not pose an unreasonable risk to the safety of the public or any individual. For record sealing, a judge must determine whether the applicant has been rehabilitated to the satisfaction of the court.

# RECOMMENDATIONS TO ADDRESS THE ISSUES WITH OHIO'S RECORD SEALING STATUTE

## Section 2953.34

(N)(1) An order issued under section 2953.35 of the Revised Code to expunge the record of a person's conviction or, except as provided in division (D) of this section, an order issued under that section to seal the record of a person's conviction restores the person who is the subject of the order to all rights and privileges not otherwise restored by termination of the sentence or community control sanction or by final release on parole or post-release control.

(2)(a) In any application for employment, license, or other right or privilege, any appearance as a witness, or any other inquiry, except as provided in division (B) of this section and in section 3319.292 of the Revised Code and subject to division (N)(2)(c) of this section, a person may be questioned only with respect to convictions not sealed, bail forfeitures not expunged under section 2953.42 of the Revised Code as it existed prior to June 29, 1988, and bail forfeitures not sealed, unless the question bears a direct and substantial relationship to the position for which the person is being considered. Employers and licensing boards must notify applicants about any sealed convictions, bail forfeitures expunged under section 2953.42 of the revised code as it existed prior to June 29, 1988, or sealed bail forfeitures that will be subject to questioning. Notice about any sealed convictions, bail forfeitures expunged under section 2953.42 of the revised code as it existed prior to June 29, 1988, or sealed bail forfeitures that will be subject to questioning must be included in an employment or license application. If an inquiry is made in violation of this section, the person whose official record was sealed or expunged pursuant to section 2953.32 of the revised code may respond as if the arrest and conviction underlying the case to which the sealed or expunged official records pertain and all other proceedings in that case did not occur, and the person whose official record was sealed or expunged shall not be subject to any adverse action because of the arrest and conviction, the proceedings, or the person's response.

(b) In any application for a certificate of qualification for employment under section 2953.25 of the Revised Code, a person may be questioned only with respect to convictions not sealed and bail forfeitures not sealed.

(c) A person may not be questioned in any application, appearance, or inquiry of a type described in division (N)(2)(a) of this section with respect to any conviction expunged under section 2953.35 of the Revised Code.

(d) Orders issued that seal convictions, expunge bail forfeitures under section 2953.42 of the Revised Code as it existed prior to June 29, 1988, or seal bail forfeitures create a rebuttable presumption that the person's sealed convictions, bail forfeitures expunged under section 2953.42 of the revised code as it existed prior to June 29, 1988, and sealed bail forfeitures are insufficient evidence that the person is unfit for the license, employment opportunity, or certification in question.

(e) Orders issued that seal convictions, expunge bail forfeitures under section 2953.42 of the Revised Code as it existed prior to June 29, 1988, or seal bail forfeitures shall provide immunity for employers facing claims of negligence for hiring an individual with sealed convictions, bail forfeitures expunged under section 2953.42 of the revised code as it existed prior to June 29, 1988, or sealed bail forfeitures. Notwithstanding the immunity provided in this division, no immunity is provided for employers facing claims of negligence for hiring an individual with convictions not sealed, bail forfeitures not expunged under section 2953.42 of the Revised Code as it existed prior to June 29, 1988, and bail forfeitures not sealed.