

Expunged convictions set hidden trap for Illinois employers

Being convicted of a crime is bad enough, but having a criminal record can make punishment last years longer than a prison sentence by making it difficult to get a job.

Sure, records of state and federal convictions can be expunged under certain limited circumstances. But, as a federal court in Chicago recently held, potential problems getting a new job aren't enough to warrant wiping clean the conviction slate.

By the same token, when an Illinois court expunges a conviction, an Illinois employer cannot use that conviction as a reason to deny a job to an otherwise qualified former offender. Doing so would be a civil rights violation. Employers need to understand how they may be affected if someone with an expunged criminal record applies for a job.

He did the time

In 1989, Gary Kotsiris pleaded guilty to federal charges that he fraudulently induced his financial clients to trade commodities by telling them that the investments carried minimal risks. As a part of his plea agreement, Kotsiris agreed to cooperate with a government investigation of other traders. The court sentenced him to five years' probation and required him to pay \$25,000 in restitution.

He complied with all the conditions of his probation and succeeded in landing a job with a real estate company. But apparently Kotsiris failed to tell his new employer of his conviction.

He asked federal Judge Charles Norgle to erase the conviction from his record because he believed it could cause him to "face adverse employment consequences in the future." Kotsiris said he worried that he might be fired from his position if the company conducted a background check. Up until Kotsiris filed his request with Norgle, his employer had not taken any adverse employment action against him.

Couldn't remove the crime

When considering Kotsiris' expungement request, Norgle had to balance the dangers of unwarranted adverse consequences to Kotsiris against the public interest in keeping his record "on the books." He noted that the balance very rarely tips in favor of expungement, especially when the court had to spend a lot of time just to confirm Kotsiris' claims of his good behavior during and after his probation.

Many people with criminal records, Norgle conceded, face significant obstacles in finding employment, but that kind of obstacle was not an adverse consequence sufficient to outweigh the government's interest in maintaining criminal records.

In contrast, the judge cited the unwarranted adverse consequences of convictions that civil rights protesters received following the minor infractions committed as they attempted to force Alabama officials to conduct fair

elections in the 1960s. He noted that an appeals court had ruled that the consequences of carrying those convictions were indeed unwarranted and adverse for the protesters.

Plus, Norgle said Kotsiris was merely speculating about his *potential* firing—and that wasn't enough to show that he suffered anything more than a routine criminal conviction with the usual consequences.

Employers, beware expunged records

If you are an Illinois employer with 15 or more employees and your application asks job-seekers to detail their criminal histories, expunged criminal records pose a hidden trap for you.

Someday you're likely to encounter a potential employee who has had a conviction removed from the official records of the arresting authority, the state police and the courts. That will make it impossible for you to find the conviction. For example, records of minor drug offenses that result in probation can be removed five years after the probation ends. (On the other hand, records of probation, guilty pleas or verdicts for more serious crimes can never be expunged.)

Illinois law prohibits using expunged, sealed or impounded arrest or criminal-history records as a basis for denying employment, promotion or other privileges or conditions of employment.

Illinois law also requires employment applications to include specific language stating that applicants are not obligated to disclose sealed or expunged arrest or conviction records. If an employer does ask about expunged information, it can be found liable for a civil rights violation under the Illinois Human Rights Act. It might have to pay damages to the job applicant.

Review your job application to make sure it specifically notes that the applicant doesn't need to disclose his or her sealed or expunged records of conviction or arrest.

Other ways to find arrest and conviction info

Note that Illinois law doesn't prohibit obtaining or using *other* information that might indicate that a person engaged in the conduct that led to an arrest.

Employers may still use third-party investigators to conduct background checks that could locate information relating to older arrests and convictions, as well as those that have not been expunged.

Additionally, there may be media accounts or other records available on the Internet that may show if a particular employee or applicant has been arrested or convicted of a crime—even if the records have been expunged.