



BEST PRACTICES:

CLEAN SLATE AND IMMIGRANTS

Generally, immigration authorities will not give effect to a court order that eliminates a conviction pursuant to “rehabilitative relief.” See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Rehabilitative relief refers to any elimination of a conviction that is based not on a finding of legal error, but rather on a finding that the person completed probation or other requirements, or for humanitarian reasons. Immigration law often refers to rehabilitative relief as an “expungement.”

There are at least two exceptions to this rule. First, an expungement will remove a conviction as an automatic bar to Deferred Action for Childhood Arrivals (DACA). Second, in immigration proceedings in the Ninth Circuit only, state rehabilitative relief will eliminate all immigration consequences of certain minor drug convictions that occurred on or before July 14, 2011. See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). In addition, in some instances, an expungement may be viewed as a positive factor for discretionary immigration relief.

The growing national effort to expand access to, and automate, state record clearance is commendable, but unless it considers the unique needs of immigrants, it could create unintended consequences.

The following suggests some best practices for advocates and stakeholders working on these laws.

- **Include the option of vacatur for cause**
- **Ensure courts retain future jurisdiction**
- **Ensure individuals can still access expunged and/or sealed records**
- **Eliminate expunged convictions from federal records and ensure the Department of Homeland Security does not have access**
- **When advocating for the bill and implementing it, prioritize public education and community partnerships**

Include the option of vacatur for cause.

Most record clearance vehicles do not contain a provision allowing people to vacate the underlying charge on the basis of legal or procedural invalidity. However, if you are creating a new expungement vehicle, or amending an existing one, for immigrant defendants it is critical to include a potential ground for expungement and/or vacatur for “legal error” or to remedy “procedural or substantive defect.” This provides a strong argument that the immigration consequences of the conviction are erased.

Sample language: “An expungement may be based on equitable factors or to correct a procedural or substantive defect in the underlying proceeding.”

****Alternatively, for immigrants in particular, you can add language that says:** “There is a rebuttable presumption that due to legal error, a noncitizen defendant was not aware of the immigration consequences of the plea, and the plea therefore is legally invalid.”

Ensure courts retain future jurisdiction.

Some courts mistakenly hold that an expungement deprives the court of future jurisdiction to vacate that same conviction for cause. If you are not sure what the established law is on this matter within in your state, the best practice is to address the jurisdiction issue in the legislation. As noted above, many immigrants may need to vacate the conviction for cause at some later date.

Sample language: “An expungement performed pursuant to this section will not preclude the court’s jurisdiction over any subsequently filed motion to amend the record, post-conviction relief motion or petition, or any other future collateral attack on an expunged conviction.”

Ensure individuals can still access expunged and/or sealed records.

Some states hold that once a conviction is expunged or sealed, the individual can no longer access copies of their own record or can only access those records if they get a court order. This can be very problematic for noncitizens. For example, if a noncitizen defendant is trying to prove eligibility for some immigration benefit, like naturalization, they may need to prove that their expunged conviction is not a bar to eligibility. They may need to prove that even though the “conviction” still may exist for immigration purposes, it did not involve the type of crime that would be a bar. If their expunged conviction has been sealed, they may not be able to prove this. In addition, especially as ICE increases its presence in and around state courthouses, simply going to some courthouses to obtain an order can be dangerous and ill-advised for noncitizens. Defendants who are U.S. citizens also may need access to their own records, and may find it burdensome to have to obtain a court order. To avoid this problem, consider affirmatively addressing the issue in the legislation.

Sample language: “Any individual who has received an expungement may access information contained in expunged records without first obtaining a court order.”

Eliminate expunged convictions from federal records and ensure the Department of Homeland Security does not have access.

Contact with the criminal legal system is the number one way that immigrants end up in the deportation system. It is worth the time to ensure that state expunged convictions and their underlying arrests are eliminated from federal RAP sheets and databases, including FBI and Department of Homeland Security databases. Under the National Crime Prevention and Privacy Compact Act, which the majority of states have ratified, a state expungement should be immediately deleted from some federal databases. This does not always happen, however. It's worth investigating how a state expungement will appear on the various national federal databases, including through the Interstate Identification System, otherwise known as the "Ill System," which is a centralized system that also includes other database records, and making sure that these records do not appear there or other federal databases. It's also important to ensure that states are not sharing these records with the Department of Homeland Security through other means such as through state contracts that allow for direct access.

Sample language: "Any individual who has received an expungement may access information contained in expunged records without first obtaining a court order."

When advocating for the bill and implementing it, prioritize public education and community partnerships.

Many immigrants do not know that rehabilitative relief has such limited immigration use. Based on advice that the conviction is now "eliminated," they may put themselves at great risk by submitting some immigration application when in fact the conviction disqualifies them. It is worth thinking through public advisements and community partnerships to ensure that the immigrant community is well-informed about what impact, if any, the record clearance vehicle will have on their immigration case.

We at the ILRC are committed to helping advocates run these bills in a thoughtful way that maximizes the benefits and reduces the harms of state record clearance. To receive free technical assistance please reach out to Rose Cahn, rcahn@ilrc.org.