

Expungement Fact Sheet

Summary: The remedy of obtaining an expungement is a wonderful tool designed to motivate a person convicted of a crime to rehabilitate and demonstrate a commitment to bettering society. However, this remedy is often times either burdened with administrative and procedural hurdles that makes an expungement an overly lengthy, or impossible, process altogether. Utah law should not make obtaining an expungement an unreasonably difficult or long process for individuals that qualify for an expungement. And yet the current law has components that do just that. As such, the current Utah law needs to be modified to prevent unnecessary delay and create a more streamlined approach in cases where charges have never been filed as well as in cases where a criminal charge was filed, but ultimately dismissed, so that a person seeking an expungement does not have to wait unreasonable amounts of time to move on with their lives. Further, the expungement remedy should extend to all qualified persons that have demonstrated rehabilitation, remorse, and a commitment to bettering society, including certain “qualified” sex offenders.

Benefits of an Expungement for an Individual

- 1) **Obtaining Employment**--the majority of employers do background checks before hiring an applicant. The information employers receive is sometimes incomplete or inaccurate. Even if it is not, it reveals the applicants record of arrests, convictions, and probation status. United States Congressman Charles Rangel (D-NY) has long advocated a federal statute permitting expungement for non-violent crimes.
- 2) **State Licensing Agencies** most often require the applicant to list whether they have ever been convicted of a crime, or ever obtained an expungement (such as a contractor’s license or real estate license).
- 3) **Professional Organizations** often reject a person if they have any criminal convictions.
- 4) **Personal satisfaction** for the individual in helping them feel that society has finally fully forgiven them, which allows them the ability to psychologically “move on” so they can give their full energies to contribute to society.
- 5) **Immigration**--sometimes having a criminal conviction can result in being denied a renewal application for residency status, whether a work visa or other temporary visa to reside in the United States.

Benefits of an Expungement for Society

1) **Encourages Rehabilitation.** When society makes the expungement remedy available to a person, it removes the dark cloud of despair that hangs over them with the thought that everyone knows, and will always know, their criminal history. This dark cloud has a significant psychological effect, which hampers them from giving a full contribution to society. Often times this person may feel that they made a simple mistake and they have grown from that mistake and would like to move on and not be judged for the rest of their life as the person they used to be, but rather the person they are today. We can all relate to this to some degree, since we have all made mistakes in our past. To be judged for the rest of our lives based on these mistakes would certainly stifle our growth and true potential.

2) **Productive, Rehabilitated Individuals contribute more to Society.** Rehabilitated individuals that receive a fresh start via expungement are likely to contribute more than if they were not given a fresh start. They are more likely to receive better employment. And better employment means higher income. Higher income means more income tax paid, more consumer spending, more sales tax generated, and more jobs created.

3) **Society's costs go down:** The more people that are rehabilitated and are deemed low risk to reoffend and are granted an expungement, the lower the costs to society in cases of sex offenders, since the registry is less difficult to maintain. As a result, these savings are passed on to the taxpayers.

Areas of Concern for Utah's Current Expungement Laws:

1) In cases where charges have not been filed: if a person was arrested, or simply under investigation, and charges were never even filed against that person, s/he cannot get a certificate of eligibility for an expungement (the first step in the process) until the prosecutor writes a letter indicating that they do not intend on filing charges against that person. But this letter is sometimes very challenging, or impossible, to obtain in a timely fashion, as the prosecutor is often reluctant to write such a letter out of concern that it will preclude them from the option to file in the future. A person seeking to obtain this letter often has to wait several months, and many times, after waiting, the prosecutor denies the request altogether, resulting in the person having to wait until the statute of limitations runs, which is usually 4 years. To make a person wait in legal limbo, with all its adverse consequences such as prospective employment discrimination, etc., is to undermine the precious constitutional right we all profess to honor, which is "innocent until proven guilty."

2) In situations where the prosecutor has actually filed a charge against a person, but the prosecutor eventually dismisses the case: a person seeking the expungement is prohibited from obtaining an expungement UNLESS the case was dismissed WITH PREJUDICE, meaning that they are barred from refileing the case. Usually prosecutors will not want to dismiss with prejudice for the same reasons stated above: the preclusion effect. As such, the law should state that any dismissed case, whether with or without prejudice, can be expunged. This would

preserve the prosecutor's right to refile, if appropriate. This would also help the person seeking the expungement to not be placed in "limbo" waiting for the statute of limitations to expire, which could be several years in the future. A provision in any modified Utah Code could include language that the prosecutor has discretion to refile a case within the statute of limitations.

3) Third party companies that Profit by Publishing Expunged Crimes: Those that have received expungements often find themselves the victim of third party companies that publish their crimes on the Internet or other media for profit. These same companies frequently continue to publish these crimes even after the person has obtained a valid expungement order. Although there is currently a federal law that speaks to this issue, there is no Utah law that does. Since federal laws are hard to enforce in this scenario due to the cost to the United States government versus the benefit it would obtain from litigating such small cases, a Utah law needs to be enacted in order to give persons that have obtained an expungement order the benefits the law intended for them: to have a completely clean record and to not have third parties publishing crimes they have been "forgiven" of by a court of law. The law should have a criminal component as well. It is suggested that it be a Class B misdemeanor for a person to knowingly or intentionally publish a person's expunged record.

4) All qualified persons should be entitled to an expungement, including certain "Qualified Sex Offenders" The benefits of an expungement are currently unavailable to sex offenders. The rationale for this is most likely the assumption that sex offenders are beyond help or rehabilitation. But psychologists are nearly unanimous in concluding that there are varying degrees of sex offenders and that, while some are a high risk to reoffend, there are a significant number of sex offenders that pose little to no risk of reoffending if they had some counseling and therapy to correct their thinking errors. Therefore, to deny these persons the benefits of an expungement sends a mixed message; a message that the law is an unfair arbiter of the administration of true justice and does not have a logical justification by discriminating against certain classes of people that have proven they are rehabilitated and are a low risk to society.

Under the current law, expungements are unavailable to all registered sex offenders. Sex offenders are defined under section 77-41-102 of the Utah Code. However, even if a person successfully obtains a reduction of their offense by a court of law, subsection 16 (a) of that section specifically prohibits any person from being eligible if they even *attempted* any of the listed sex offenses. Therefore, there is no hope a sex offender will ever be forgiven of their conviction, regardless of what they do to improve, to rehabilitate, and to contribute positively to society.

Thus, an 18 year old that is caught nude in a shower at a beach while intoxicated and is seen by a child is categorized as a sex offender just as a pedophile that has raped a child. Both are required to register as sex offenders. Both are precluded from ever obtaining an expungement. Obviously there is a big difference between these two extremes with respect to not only their respective mental culpability at the time of the offense, but also with respect to the

harm inflicted on their respective victims, etc.

The chart below contains the above issues in spreadsheet format for easy analysis of Utah's current law, a summary of the potential problems the current law presents, what other states are doing, and some suggestions for reform that will benefit individuals, families, and society as a whole:

Issue Presented	Utah's Current Law	Potential Problems	Other states	Suggestions for Reform
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<p>1. Whether Certain “qualified” sex offenders can eventually be eligible to receive an expungement.</p>	<p>Utah Code 77-40-et al</p> <p>Any sex offender cannot qualify, ever, for an expungement</p> <p>-77-40-105(2)(vi)(“registerable sex offender”, as defined under Utah Code <u>77-41-102</u>(16)):</p>	<p>While it is important to protect society from any potential recidivism from certain sexual offenders, psychologists are virtually unanimous in their conclusion that there are varying degrees of sex offenders: some pose a significant risk to reoffend, while others clearly do not. And yet, our current laws are not adequately distinguishing between these varying degrees of risk to society and should.</p> <p>Society is actually better served if the law encourages a fresh start for those that have demonstrated complete rehabilitation and have never reoffended for a certain period of time and are deemed a low risk by a competent and licensed</p>		<p>Permit qualified sex offenders the opportunity to have their records expunged if they meet certain criteria. Qualified would be someone that has: 1) completed all sex offender treatment as ordered by the court at sentencing, 2) successfully completed all other terms of probation, 3) not had any subsequent sex convictions, 4) recently obtained a full psycho sexual evaluation and been deemed, by a licensed psychologist, to be a low risk to reoffend and is not a pedophile, and 5) the court finds that it is in the best interests of society to grant the expungement.</p>
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		<p>professional.</p> <p>Offenders that can so demonstrate can then have an opportunity to live free of discrimination in their housing, their employment, and in the many opportunities limited to those without a registry listing.</p> <p>Living as a regular member of society not only helps the offender feel total forgiveness, but it also helps avoid victimizing his/her spouse and family.</p> <p>Additionally, under current Utah law, if the Petitioner were to file a Motion to Reduce under 402 of the Criminal Code, making the offense an “attempted” crime, this does not help, as subsection xxiv of that section precludes</p>		
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		<p>a registered sex offender from getting an expungement if they have a conviction for an “attempted” sex offense listed.</p> <p>To deny an expungement for those that are low risk and have demonstrated complete rehabilitation is to send a message to society that certain types of crimes are unforgivable. This is NOT the message we want to send to society. We want to send a message that there is always hope to rehabilitate and if a person takes the steps to do so, they will be rewarded with a fresh start.</p>		
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<p>2. Whether a petitioner should be entitled to an expungement when the prosecutor fails to object to a Petition within thirty days in cases where no charges were ever filed and where the applicant seeks to have the arrest and/or investigation expunged.</p>	<p>Current Utah law prohibits a person that has been arrested, but NOT charged, for a crime, from obtaining a certificate of eligibility from the Utah Bureau of Criminal Investigation unless s/he obtains from the prosecutor a letter indicating they do not intend on filing charges against that person in the future. See Utah Code 77-40-104 (1)(c)(i).</p>	<p>Often times a person has been either arrested for or investigated for a criminal offense and the prosecutors office does not make a timely decision on whether charges will ultimately be filed. If this happens, it causes a great amount of stress to the person that was targeted.</p> <p>Sometimes this means that the person targeted cannot pursue certain business ventures or cannot proceed with their lives until the investigation has been completed and/or the state has made a decision on whether to file charges or not.</p> <p>Unfortunately, often times the prosecutors take significant amounts of time to decide whether they will file charges or not. This</p>		<p>Prosecutors should be given a window of 30 days from the time a person requests a letter from the prosecutor's office and if the prosecution does not provide a written objection to the Bureau of Criminal Identification within the thirty days, then the person applying for a certificate of eligibility should be entitled to a certificate of eligibility without a letter from the prosecutor, so long as all other qualifying requirements have been satisfied.</p>
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<p>3. Whether employers or housing providers should be prohibited from asking whether an applicant has ever been arrested for a crime, or has ever obtained an expungement.</p>	<p>In the past, Utah's Administrative Code indicated that it was not permissible for employers to ask about arrest records. Although employers were legally allowed to ask about convictions, the Code stated that such inquiries were not advisable unless the convictions were related to the job. However, this Code provision has been repealed.</p>		<p>States take different approaches in limiting employer use of criminal records in hiring and other employment decisions. Some states require employers to consider whether the offense bears a reasonable relationship to the job. Some states have passed laws restricting how employers may use an applicant's criminal record in making job decisions. And, some states prohibit employers from asking about arrest records or criminal records that have been expunged. Source: http://www.nolo.com/legal-encyclopedia/employer-use-arrest-conviction-records-utah.html</p> <p>The Federal</p>	<p>A law needs to be implemented to prohibit an employer from asking a candidate whether they have ever been arrested for a crime, or have ever obtained an expungement. It is suggested that an employer that asks a job candidate whether they have ever obtained an expungement should be in violation of the code, <i>per se</i>, and shall be penalized a set sum, in addition to any additional damages the job candidate can prove the employer's violation caused him/her.</p>
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			<p>Code has some protections against discrimination based on criminal convictions and arrests:</p> <p>The Fair Credit Reporting Act: Protection Against Inaccurate Records</p> <p>The Fair Credit Reporting Act (FCRA) addresses the issue of accuracy in consumer reports, including background checks. Records generated by criminal background check firms may include errors, such as information on convictions that have been expunged, multiple listings of the same offense, misclassification of crimes, incomplete information (for</p>	
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			<p>example, failing to report that the person was exonerated of a crime or that charges were dropped), and even records that belong to another person with the same name.</p> <p>The FCRA imposes responsibilities both on employers who request criminal background checks and on the firms that provide them.</p> <p>Employers must:</p> <ul style="list-style-type: none">● Get the applicant's written consent before requesting a check.● Notify the applicant if the employer plans to screen him or her out	
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			<p>based on the contents of the report. In this situation, the employer must also give the applicant a copy of the report.</p> <ul style="list-style-type: none">● Give the applicant notice once the employer makes a final decision not to consider the applicant based on the report.	
			<p>The firms that provide background checks must take reasonable steps to make sure that the information they provide is accurate and up</p>	

			<p>to date. If you dispute what's in the report, the agency must conduct a reasonable investigation. If the investigation reveals that the report was incorrect, the agency must inform you and any other person or company to whom it has provided the report.</p> <p>Notwithstanding these limited protections, however, it is oftentimes difficult to obtain a federal remedy since it is very costly to litigate.</p>	

<p>4. Whether the Utah Bureau of Criminal Identification should be required to issue a Certificate of Eligibility in all cases that were dismissed, whether that dismissal was with or without prejudice.</p>	<p>Current Utah law requires that the case be dismissed with prejudice. See Utah Code 77-40-104(1)(c) (ii)</p>	<p>Petitioners often run into challenges when the prosecutor dismisses the case due to evidentiary reasons but fails to specify that the dismissal is with prejudice. They often times also state, on the record, that the dismissal is without prejudice, and although they have no reason to believe they will file in the future, they state without prejudice “just in case they want to refile in the future.” This causes problems for a person seeking in expungement because they would then have to wait until the statute of limitations runs to have their record expunged.</p>		<p>Prosecutors should be given a window of 30 days after a person requests a letter from the prosecutor and if the prosecution does not provide a written objection to the Bureau of Criminal Identification within the thirty days, then the person applying for a certificate of eligibility should be entitled to a certificate without a letter from the prosecutor so long as all other requirements have been satisfied.</p> <p>A provision could be inserted into the modified law that states that the prosecutor retains the right to refile if it is within the statute of limitations.</p>
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