

CONTEMPORARY ISSUES IN LOUISIANA LAW: EXPUNGEMENT

SHENEQUA L. GREY, J.D., LL.M[†]

INTRODUCTION

While Louisiana continues to have the largest prison population in the country,¹ in 2014 the Louisiana Legislature enacted comprehensive revisions to Louisiana's expungement law that might assist some of the offenders completing their sentences in becoming self-sustaining citizens upon reentering society. The new expungement law went into effect on August 1, 2014,² and is now located in the Louisiana Code of Criminal Procedure Title XXXIV, articles 971-995. The old expungement provisions, which were located in Louisiana Revised Statutes section 44:9, have been repealed.³

The new articles make the possibility of expungement obtainable to a broader class of individuals, including some felony offenders.⁴ They streamline the expungement process and provide uniformity across the state with statutorily mandated forms contained in the articles.⁵ The revisions also set forth specific procedural requirements that must be followed,⁶ new eligibility requirements,⁷ and even create new types of expungements⁸ as outlined below.

[†]Shenequa L. Grey an Associate Professor of Law at Southern University Law Center in Baton Rouge, La where she teaches evidence, criminal procedure, trial advocacy, and torts I; B.G.S. University of Louisiana at Monroe, 1997; J.D. Southern University Law Center, 2000; LL.M. Temple University Beasley School of Law, 2009. This article is dedicated to the loving memory of my parents, Mr. and Mrs. Louis Grey, Jr., for their endless support and motivation.

¹ See Heather C. West & William J. Sabol, U.S. Dep't of Justice, Bureau of Justice Statistics, Prison Inmates at Midyear 2008-Statistical Tables 11 (2009).

² Enacted by Acts 2014, No. 145 §1 (2014).

³ See Acts 2014, No. 145 §3 repealing R.S. 44:9 and §4 providing that "The Louisiana State Law Institute is hereby directed to delete any reference to R.S. 44:9 in Louisiana law and to make any necessary changes to Louisiana law to reflect the provisions of this Act [Acts 2014, No. 145]"; see also LA. CRIM. TRIAL PRAC. Formulary § 26-12.1 (2d ed.), "View and application of the Louisiana expungement statute with motions in appendix," for an excellent discussion of prior Louisiana expungement law under LSA R.S. 44:9; Written and contributed by Thomas Davenport, Jr.

⁴ See LA. CODE CRIM. PROC. art. 978 (2014); see also *infra* Part III (discussing the broad range of the various types of records that may be expunged).

⁵ See LA. CODE CRIM. PROC. arts. 986 – 995 (2014).

⁶ See, e.g., LA. CODE CRIM. PROC. ANN. arts. 979 – 982 (addressing service of the motion for expungement, the contradictory hearing, granting of judgment of motion for expungement, and service of the order and judgment of expungement).

⁷ See, e.g., LA. CODE OF CRIM. PROC. ANN. arts. 976 – 978 (setting forth circumstances under which a person may obtain an expungement for an arrest that did not result in a conviction, for obtaining an expungement for certain misdemeanor convictions, and for

These comprehensive measures were taken in response to new federal laws and hiring criteria⁹ that preclude individuals with a felony conviction from obtaining gainful employment for long periods of time after the conviction. By including certain limitations and exclusions as to which records can be expunged, Louisiana's new law strikes a balance between the need for viable employment opportunities for these individuals, and the State's interest in public safety. The enumerated exceptions in the law take into account the State's need to have these records accessible for certain purposes.¹⁰

Even with these limitations, the law significantly broadens the classes of eligible individuals. By expanding the class of individuals who may obtain an expungement of records, coupled with the new streamlined procedures and mandatory forms, the new law not only creates uniformity across the state, but also ensures accessibility to qualified individuals in need of employment opportunities. This in turn benefits these individuals personally by enabling them to have self-sustaining lives, and also benefits society as a whole.

While some concerns continue to persist about the length of the time limitations¹¹ after a conviction before an individual is eligible to obtain an expungement under the law, or that it could do more for post-expungement restoration of rights,¹² the law still represents significant strides by the State towards addressing an important public policy concern.

This article gives a general overview of the expungement law as it was enacted in 2014, as well as additional minor revisions enacted in the 2015 Regular Legislative Session.¹³ Specifically, this article will address: what an expungement means in Louisiana;¹⁴ the goals of enacting the expungement law and the relative benefits of obtaining

certain felony convictions); *see also* LA. CODE CRIM. PROC. ANN. art. 984 (2014) (setting forth additional requirements for obtaining expungement for a conviction for driving while intoxicated).

⁸ *See* LA. CODE CRIM. PROC. ANN. art. 985 (2014) (creating the expungement by redaction); *see also* LA. CODE CRIM. PROC. ANN. art. 985.1 (creating the interim expungement).

⁹ *See infra* Part II (discussing the Maritime Transportation Security Act of 2002, requiring that all individuals who wish to work at ports or on vessels regulated by the Act are to obtain a Transportation Worker Identification Credential (TWIC), which requires a clean record).

¹⁰ *See infra* Part I (discussing exceptions to accessibility of expunged records by law enforcement and other state licensing agencies for certain purposes).

¹¹ *See infra* Part VIII (discussing certain impediments to the law's effectiveness including concerns that time limitations on obtaining an expungement are too long).

¹² Having a record expunged does not restore an individual's right to possess a dangerous weapon. *See generally*, *State v. Eberhardt*, 145 So. 3d 377, 379 (La. 2014) (holding that even under a strict scrutiny analysis, Louisiana Constitution Article 1, Section 11 does not require the restoration of the right to bear arms for certain convicted felons. "Common sense and the public safety allow no other result.")

¹³ *See* 2015 La. Acts No. 200, No. 151.

¹⁴ *See infra* Part I.

an expungement;¹⁵ the qualifications for expunging the various types of records;¹⁶ the frequency with which various types of expungements may be obtained;¹⁷ the fees associated with obtaining an expungement;¹⁸ other procedural steps associated with obtaining an expungement;¹⁹ handling post-expungement questions regarding expunged records,²⁰ and concerns regarding possible impediments to the effectiveness of the expungement provisions.²¹

I. WHAT DOES IT MEAN TO HAVE A RECORD EXPUNGED?

Expungement means, “to remove a record of arrest or conviction, photographs, fingerprints, disposition, or any other information of any kind from public access.”²² Expungement of a record does not mean “destruction of the record.”²³ All provisions in the law regarding destruction of records have been removed from the law as of August 1, 2014.²⁴ Expungement only means the records, including the incident reports, photographs, fingerprints, and other information related to the arrest and/or conviction,²⁵ is no longer considered to be a public record. They are considered confidential.²⁶ However, there are exceptions.

Expunged records are still available for access by law enforcement agencies for lawful purposes.²⁷ Expunged convictions

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part III.

¹⁷ See *infra* Part IV

¹⁸ See *infra* Part V.

¹⁹ See *infra* Part VI.

²⁰ See *infra* Part VII.

²¹ See *infra* Part VIII.

²² LA. CODE CRIM. PROC. ANN. art. 972(1) (Westlaw 2014).

²³ *Id.*; see also, *State v. Taylor*, 91 So. 3d 1065 (La. Ct. App. 2012) (holding that “expungement of a record is the removal of a record from public access, but it does not mean destruction of the record; an expunged record is confidential but remains available for use by law enforcement agencies and other specified persons and agencies”).

²⁴ See LA. REV. STAT. ANN. § 44:9(B)(1), (2) Repealed by Acts 2014, No. 145, § 3, previously provided for destruction of misdemeanor arrest records, but not for felony arrest records; see also *State v. Expunged Record* (No.) 249,044, 2003-1940 (La. 7/2/04), 881 So. 2d 104, 107, as clarified on reh'g (Sept. 24, 2004) (holding constitutional the distinction in the law between allowing expungement for misdemeanor arrests, but not felony arrests).

²⁵ See LA. CODE CRIM. PROC. ANN. art. 972(4) (2015) (defining “records” as used in this title).

²⁶ See LA. CODE CRIM. PROC. ANN. art. 973(A) (2015).

²⁷ See LA. CODE CRIM. PROC. ANN. art. 973(A)(1), (4) (2015) (including “for the purpose of investigating, prosecuting, or enforcing criminal law, for the purpose of any other statutorily defined law enforcement or administrative duties, or for the purposes of the requirements of sex offender registration and notification pursuant to the provisions of R.S. 15:540 et seq.” and “for the purpose of defending a law enforcement, criminal justice agency, or prosecutor in a civil suit for damages resulting from wrongful arrest or other civil litigation and the expunged record is necessary to provide a proper defense).

may still be used under the habitual offender bill should a person commit a subsequent offense as a predicate offense for enhancement purposes,²⁸ and the records are available to certain agencies for certain state licensing purposes, such as the Louisiana State Board of Nursing, the Louisiana State Board of Medical Examiners, the Louisiana Supreme Court Committee on Bar Admissions, and other licensing entities.²⁹ Article 973(G) further provides for the use of an expunged record of any arrests or convictions by a “news-gathering organization” as defined by the statute.³⁰ These records are released to such entities on a confidential basis, and any person who fails to maintain the confidentiality of such records shall be subject to contempt proceedings.³¹

Thus, while the expungement removes records from public access, such records continue to be available to law enforcement, courts, and state agencies to further legitimate state interests in public safety.

II. GOALS AND BENEFITS OF EXPUNGEMENT LAW

In enacting the new expungement law, the Louisiana Legislature published specific findings relative to its goals and the consequent benefits for enacting the law. The primary concern of the legislature was the significant negative impact that a record of arrest or conviction has on an individual’s ability to obtain gainful employment.³²

For instance, the legislature points out that “[f]ollowing the passage of the Maritime Transportation Security Act of 2002,³³ all individuals who wish to work at ports or on vessels regulated by this Act are required to obtain a Transportation Worker Identification Credential (TWIC).³⁴” Obtaining this card “requires a criminal history check and clearance, which cannot be obtained without either a clean record or an expunged record with respect to certain offenses.³⁵” With

²⁸ See LA. CODE CRIM. PROC. ANN. art. 973(E) (2015).

²⁹ See LA. CODE CRIM. PROC. ANN. art. 973(B) (2015).

³⁰ See LA. CODE CRIM. PROC. ANN. art. 973(G)(2015) (defining a “news gathering organization” as: (1) A newspaper, or news publication, printed or electronic, of current news and intelligence of varied, broad, and general public interest, having been published for a minimum of one year and that can provide documentation of membership in a statewide or national press association, as represented by an employee thereof who can provide documentation of his employment with the newspaper, wire service, or news publication; (2) A radio broadcast station, television broadcast station, cable television operator, or wire service as represented by an employee thereof who can provide documentation of his employment.).

³¹ See LA. CODE CRIM. PROC. ANN. art. 973(D) (2015).

³² See LA. CODE CRIM. PROC. ANN. art. 971(4) (2015).

³³ Pub.L. No. 107-295.

³⁴ LA. CODE CRIM. PROC. ANN. art. 971(3) (2015); *see also* 46 U.S.C.A. § 70105, “Transportation Security Cards,” (setting forth the regulations and guidelines for issuance of the transportation security cards in accordance with the Maritime Transportation Security Act of 2002).

³⁵ LA. CODE CRIM. PROC. ANN. art. 971(3) (2015).

one of the primary industries in Louisiana being plants, ports, and vessels regulated by the Maritime Transportation Security Act,³⁶ a TWIC card is needed for numerous opportunities for employment, and thus a clean record or an expungement. The ability to obtain an expungement can open up numerous employment opportunities for a person with a criminal record, just by enabling them to obtain the TWIC card.

In establishing the expungement law, the legislature balanced the legitimate needs of law enforcement agencies and the desire for public safety, against the desire to afford employment opportunities to all Louisiana citizens.³⁷ By enacting this law, it was “the intention of the legislature to provide opportunities to break the cycle of criminal recidivism, increase public safety, and assist the growing population of criminal offenders reentering the community to establish a self-sustaining life through opportunities in employment.”³⁸

When individuals with prior convictions are gainfully employed, they do not only benefit themselves, their families, and offspring, but also society as a whole. Individuals who are unable to provide for themselves are most likely to commit additional crimes, which victimizes the entire community through losses, thefts, and the taxpayer burden of providing public services these individuals are unable to provide for themselves and their families. Thus, expungement provides a number of residual benefits in addition to those afforded directly to the person convicted.

III. ELIGIBILITY REQUIREMENTS TO HAVE RECORDS EXPUNGED

The eligibility requirements to have a record expunged depend upon the type of records a person seeks to have expunged. Eligibility requirements fall into five general categories or types of expungements: 1) an expungement of an arrest (for felony or misdemeanor), that does not result in a conviction;³⁹ 2) an expungement for a misdemeanor conviction;⁴⁰ 3) an expungement for a felony conviction;⁴¹ 4) an “interim expungement;”⁴² and 5) an

³⁶ The Louisiana Department of Administration reports that Louisiana has the greatest concentration of crude oil refineries, natural gas processing plants, and petrochemical production facilities in the Western Hemisphere. More than 25% of the nation’s waterborne exports are shipped through the state’s five major ports. The total value of Louisiana’s chemical shipments is more than \$14 billion per year. Statistics available at www.doa.louisiana.gov last visited August 14, 2015.

³⁷ See LA. CODE CRIM. PROC. ANN. art. 971(7) (2014).

³⁸ See LA. CODE CRIM. PROC. ANN. art. 971(6) (2014).

³⁹ See LA. CODE CRIM. PROC. ANN. art. 976 (2014).

⁴⁰ See LA. CODE CRIM. PROC. ANN. art. 977 (2014).

⁴¹ See LA. CODE CRIM. PROC. ANN. art. 978 (2014).

⁴² See LA. CODE CRIM. PROC. ANN. art. 985.1 (2014).

“expungement by redaction.”⁴³ A person who is incarcerated in any correctional facility shall not be permitted to file a motion to expunge a record of an arrest, which did not result in a conviction or to expunge a record of an arrest and conviction of a misdemeanor or felony offense as outlined below.⁴⁴

A. Arrest/No Conviction

The first type of record that may be expunged is for an arrest that did not lead to a conviction.⁴⁵ For example, a person might be arrested for a crime, but the charges might have never resulted in a conviction, because perhaps formal charges were never brought by the prosecution, or the charges might have been dismissed by the prosecution after charging. In these instances, although there was no conviction, the arrest record remains a part of that person’s criminal history, so he might want it removed from public records. The requirements to expunge an arrest record that did not result in a conviction are the same whether the arrest was for a felony or misdemeanor.

Generally speaking, a person would be eligible to have the arrest record expunged if he was not convicted—it may be because the prosecution chose not to prosecute and all of the time limitations in which to bring the charges have run;⁴⁶ the prosecution brought the charges but later dismissed them;⁴⁷ the person was acquitted, i.e., found not guilty in a trial;⁴⁸ or he prevailed on a motion to quash.⁴⁹ Under any of these circumstances, the records associated with the arrest of the person on those charges may be expunged.

Additional changes were made to this provision in the 2015 Regular Legislative Session, which provides that a person arrested under state or local law for driving while intoxicated and placed in a pretrial diversion program, cannot obtain an expungement of such record until five years has elapsed from the date of the arrest for that offense.⁵⁰

B. Misdemeanor Conviction

Some misdemeanor convictions may also be eligible for expungement.⁵¹ The requirements to expunge a misdemeanor conviction are different from felony convictions. There are two

⁴³ See LA. CODE CRIM. P. art. 985 (2014).

⁴⁴ See LA. CODE CRIM. PROC. ANN. art. 975 (2014).

⁴⁵ See LA. CODE CRIM. PROC. ANN. art. 976 (2014).

⁴⁶ See LA. CODE CRIM. PROC. ANN. art. 976(A)(1) (2014).

⁴⁷ See LA. CODE CRIM. PROC. ANN. art. 976(A)(3) (2014).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See LA. CODE CRIM. PROC. ANN. art. 976(B) (2014), as amended in 2015 La. Acts No. 200.

⁵¹ See LA. CODE CRIM. PROC. ANN. art. 977 (2014).

circumstances under which a person may be eligible to have a misdemeanor conviction expunged.

The first circumstance is found in Louisiana Code of Criminal Procedure article 977(A)(1). It provides a person may file a motion to expunge an arrest and conviction of a misdemeanor if the conviction was set aside and the prosecution was dismissed pursuant to the Louisiana Code of Criminal Procedure article 894(B). A guilty plea pursuant to Louisiana Code of Criminal Procedure article 894(B) should occur at the time of the plea to the misdemeanor. When the person successfully completes a sentence entered into pursuant to Louisiana Code of Criminal Procedure article 894(B), the court sets aside the conviction and dismisses the prosecution. Such a conviction is eligible for expungement.

The second way in which a person may have a misdemeanor conviction expunged is after a five-year cleansing period from the end of the sentence for the misdemeanor conviction.⁵² The end of the sentence would be after the person has completed any sentence, probation, parole, or deferred adjudication.⁵³ For example, if a person plead guilty to a misdemeanor and was placed on probation for six months, the five years would begin at the end of the six-month probationary period. Provided the person was not convicted of any new felony offenses during the five-year cleansing period, nor has any pending felony charges against him,⁵⁴ the misdemeanor conviction is eligible for expungement.

There are some exceptions to this provision for convictions that may not be expungable, including certain sex offenses,⁵⁵ a misdemeanor conviction “for domestic abuse battery which was not dismissed pursuant to article 894(B) of the Code,”⁵⁶ or a misdemeanor conviction for stalking.⁵⁷

C. Felony Conviction

A person may also be eligible to have certain felony convictions expunged.⁵⁸ Pursuant to Louisiana Code of Criminal Procedure article 978, there are two situations in which a person may be eligible to have a felony conviction expunged. The first

⁵² See LA. CODE CRIM. PROC. ANN. art. 977(A)(2) (2014).

⁵³ See LA. CODE CRIM. PROC. ANN. art. 977(A)(2) (2014).

⁵⁴ See LA. CODE CRIM. PROC. ANN. art. 977(A)(2) (2014) (providing that “[t]he motion filed pursuant to this Subparagraph shall include a certification obtained from the district attorney which verifies that to his knowledge the applicant has no felony convictions during the five-year period and no pending felony charges under a bill of information or indictment).

⁵⁵ See LA. CODE CRIM. PROC. ANN. art. 977(C)(1) (2014) (referring to sex offenses contained in LA. REV. STAT. ANN. § 15:541).

⁵⁶ LA. CODE CRIM. PROC. ANN. art. 977(C)(2) (2014).

⁵⁷ See LA. CODE CRIM. PROC. ANN. art. 977(C)(3) (2014) as amended in 2015 La. Acts No. 200; see also LA. REV. STAT. ANN. § 14:40.2 (2007 & Supp. 2015) (defining stalking).

⁵⁸ See LA. CODE CRIM. PROC. ANN. art. 978 (2015).

circumstance is if a person's conviction was set aside and the prosecution was dismissed pursuant to the Louisiana Code of Criminal Procedure article 893(E).⁵⁹ Such a plea is usually only available to a person who has not been previously convicted of a felony offense.⁶⁰ After the completion of all of the terms of the sentence, the court will set aside the conviction and will dismiss the prosecution. At that time, the conviction becomes eligible for expungement.

A second way in which a person can obtain expungement of a felony conviction is after a ten-year cleansing period after the end of the sentence for the felony conviction.⁶¹ This provision provides that the person have neither been convicted of any new offenses during that period, nor have any pending charges against him at the time of the motion for expungement.⁶²

There are some exceptions to this provision for certain felony convictions. A person shall not be granted an expungement for a felony conviction for any of the following: a crime of violence as defined as Louisiana Revised Statutes section 14:2(B);⁶³ certain sex offenses or offenses involving a victim who is a minor as defined by Louisiana Revised Statutes section 15:541;⁶⁴ certain drug offenses as defined in the Uniform Controlled Dangerous Substances Law;⁶⁵ and a conviction for domestic abuse battery.⁶⁶

⁵⁹ See LA. CODE CRIM. PROC. ANN. art. 978(A)(1) (2015).

⁶⁰ See LA. CODE CRIM. PROC. ANN. art. 893(E) (2015).

⁶¹ See LA. CODE CRIM. PROC. ANN. art. 978(A)(2) (2008 & Supp. 2015).

⁶² See LA. CODE CRIM. PROC. ANN. art. 978(A)(2) (2008 & Supp. 2015) (providing that “[t]he motion filed pursuant to this Subparagraph shall include a certification obtained from the district attorney which verifies that, to his knowledge, the applicant has no convictions during the ten-year period and no pending charges under a bill of information or indictment).

⁶³ See LA. CODE CRIM. PROC. ANN. art. 978(B)(1) (2008 & Supp. 2015); *see also* LA. REV. STAT. ANN. § 14:2(B) (2007 & Supp. 2015) (defining a crime of violence as “an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon,” and includes various grades of murder, rape, kidnapping, robbery, and other similarly violent offenses).

⁶⁴ See LA. CODE CRIM. PROC. ANN. art. 978(B)(2)(a) (2008 & Supp. 2015).

⁶⁵ Pursuant to LA. CODE CRIM. PROC. ANN. art. 978(B)(3) (Supp. 2015), as *amended* in 2015 La. Acts No. 200, the following drug offenses may be expunged, including: (a) A conviction for possession of a controlled dangerous substance as provided for in R.S. 40:966(C), 967(C), 968(C), or 969(C), or 970(C); (b) A conviction for possession of a controlled dangerous substance with the intent to distribute; (c) A conviction for a violation of the Uniform Controlled Dangerous Substances Law which is punishable by a term of imprisonment of not more than five years; and (d) A conviction for a violation of the Uniform Controlled Dangerous Substances Law which may be expunged pursuant to Article 893(E).

⁶⁶ See LA. CODE CRIM. PROC. ANN. art. 978(B)(4) (2008 & Supp. 2015), as *amended* in 2015 La. Acts, No. 151.

D. Interim Motion for Expungement

A new provision in Louisiana law was enacted in 2014 and is referred to as an “interim expungement.”⁶⁷ In some instances, a person may be arrested for a felony offense, such as simple burglary, but he may be subsequently convicted of a misdemeanor, such as criminal trespass. An interim motion for expungement would expunge the felony arrest from the criminal history. This provision does not provide for the expungement of the actual conviction for the misdemeanor. Here, only the felony arrest record would be expunged.⁶⁸

So in the example above, where a person is arrested for simple burglary, but plead guilty to criminal trespass, he could have the arrest record for the simple burglary expunged so as not to have the felony arrest on his record, since he was not convicted of it. The same fees and procedure apply for an “interim motion for expungement,” as to any of the other types of expungements,⁶⁹ and there is no limit on the number that may be granted.⁷⁰

E. Expungement by Redaction

Finally, the new law provides for an “expungement by redaction.”⁷¹ An expungement by redaction applies to records with references to multiple individuals, some of which have not been granted an expungement of their records.⁷² For example, if five individuals are involved in a crime and are arrested and convicted for the crime, obviously all of their names would be a part of various records and reports associated with the arrest and conviction. If only one of these individuals seeks to have his record expunged, but the other four do not have their records expunged, then the records must remain a part of the public record since they include the criminal history of four individuals who have not been granted an expungement.

In a situation such as this, if a person is granted an expungement by redaction, then his name and all other information identifying him would be redacted from all the records associated with that particular crime and conviction.⁷³ The redacted records would still be available for public access as it relates to the other individuals who have not been granted an expungement.⁷⁴ However, upon accessing those

⁶⁷ See LA. CODE CRIM. PROC. ANN. art. 985.1 (2014 & Supp. 2015), as enacted by La. Acts 2014, No. 145, §1.

⁶⁸ See LA. CODE CRIM. PROC. ANN. art. 985.1(A) (2014 & Supp. 2015).

⁶⁹ See LA. CODE CRIM. PROC. ANN. art. 985.1(C) (2014 & Supp. 2015).

⁷⁰ See LA. CODE CRIM. PROC. ANN. art. 985.1(D) (2014).

⁷¹ See LA. CODE CRIM. PROC. ANN. art. 985 (2014 & Supp. 2015), as enacted by Acts 2014, No. 145, §1.

⁷² *Id.*

⁷³ See LA. CODE CRIM. PROC. ANN. art. 985(B).

⁷⁴ *Id.*

records, it would make no mention of the person whose records were expunged. All references to him would be redacted from the records.

IV. FREQUENCY OF OBTAINING EXPUNGEMENTS

There are limitations on how often a person may obtain an expungement. For misdemeanor convictions, there is a limit of only one expungement every five years, unless the plea was under Louisiana Code of Criminal Procedure article 894(B).⁷⁵ If however, the conviction was for a misdemeanor DWI, a person may only obtain one expungement within a ten-year period.⁷⁶

Expungement of a felony conviction may only occur once within a fifteen-year period.⁷⁷ There is no limit on the number of interim motions for expungements a person may obtain for felony arrest records that resulted in a misdemeanor conviction.⁷⁸

V. COSTS FOR AN EXPUNGEMENT

A. Non-Refundable Fees

Obtaining an expungement requires the payment of certain non-refundable fees to various entities that, according to Louisiana Code of Criminal Procedure article 983(A), “shall not exceed five hundred fifty dollars.”⁷⁹ Of this amount, the Bureau of Criminal Identification may charge a fee of two hundred fifty dollars;⁸⁰ the sheriff may charge a processing fee of fifty dollars;⁸¹ the district attorney may charge a processing fee of fifty dollars;⁸² and the clerk of court’s office may charge a processing fee of two hundred dollars.⁸³

The processing fees are all payable to the clerk of court at the time the motion for expungement is filed, who disburses them to the appropriate entities.⁸⁴ These fees are non-refundable and shall not be returned even if the court does not grant the motion for expungement.⁸⁵ An additional fifty-dollar court cost is required if the expungement is for a DWI conviction.⁸⁶

⁷⁵ See LA. CODE CRIM. PROC. ANN. art. 977(D)(1)

⁷⁶ See LA. CODE CRIM. PROC. ANN. art. 977(D)(2).

⁷⁷ See LA. CODE CRIM. PROC. ANN. art. 978(D).

⁷⁸ See LA. CODE CRIM. PROC. ANN. art. 985.1(D) (Supp. 2015).

⁷⁹ See LA. CODE CRIM. PROC. ANN. art. 983(A) (Supp. 2015).

⁸⁰ See LA. CODE CRIM. PROC. ANN. art. 983(B)(1) (Supp. 2015).

⁸¹ See LA. CODE CRIM. PROC. ANN. art. 983(B)(2) (Supp. 2015).

⁸² See LA. CODE CRIM. PROC. ANN. art. 983(B)(3) (Supp. 2015).

⁸³ See LA. CODE CRIM. PROC. ANN. art. 983(B)(4) (Supp. 2015).

⁸⁴ See LA. CODE CRIM. PROC. ANN. art. 983(D) (Supp. 2015).

⁸⁵ See LA. CODE CRIM. PROC. ANN. art. 983(E) (Supp. 2015).

⁸⁶ See LA. CODE CRIM. PROC. ANN. art. 984(C) (Supp. 2015).

B. Qualifications to Waive Expungement Fees

There are certain limited circumstances in which a person may qualify for a fee waiver. Fee waivers are not based on ability to pay. In order to qualify for a fee waiver for an expungement, an applicant must complete the appropriate form and submit it to the District Attorney's office to certify that the three requirements for fee waiver exist:

- 1) applicant has no felony convictions;⁸⁷
- 2) applicant has no pending felony charges;⁸⁸ and
- 3) either one of the following applies:⁸⁹
 - i) the applicant was acquitted, i.e. found not guilty of all the charges at trial; or
 - ii) the District Attorney (DA) did not bring formal charges on the offense for which the applicant was arrested within the time limitations to bring charges after arrest (and did not participate in pretrial diversion); or
 - iii) the DA consents and will dismiss or decline to prosecute even though time limitations to bring charges have not passed (and did not participate in pretrial diversion); or
 - iv) the applicant was found "factually innocent" and was entitled to compensation for a wrongful conviction under R.S. 15:572.8.⁹⁰

Additionally, a juvenile who has successfully completed any juvenile drug court program operated by a court of this state shall be exempt from payment of the processing fees authorized by this article.⁹¹

VI. STREAMLINED PROCEDURES

A. Statutorily Mandated Forms

Perhaps one of the most beneficial changes resulting from 2014 enactment of Louisiana's new expungement law was the creation of forms to be used in obtaining an expungement:

⁸⁷ See LA. CODE CRIM. PROC. ANN. art. 983(F) (Supp. 2015).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See LA. REV. STAT. ANN. § 15:572.8(B) (providing "[f]or the purposes of this Section, 'factual innocence' means that the petitioner did not commit the crime for which he was convicted and incarcerated nor did he commit any crime based upon the same set of facts used in his original conviction).

⁹¹ See LA. CODE CRIM. PROC. ANN. art. 983(G) (Supp. 2015).

Only the forms provided for in Articles 987, 988, 989, 990, 991, 992, 993, 994, and 995 of this Code shall be used for filing motions to expunge a record of an arrest which did not result in a conviction, for the expungement of a record of arrest and conviction of a misdemeanor or felony offense, or for an interim motion to expunge a felony offense which resulted in a misdemeanor conviction.⁹² Forms are also provided for a fee exemption,⁹³ affidavit of response,⁹⁴ order of expungement,⁹⁵ and an order for interim expungement.⁹⁶

While if a person chooses to represent himself, he may do so, it is imperative that he be prepared to conduct some research and do some legwork to ensure that all of the proper forms are filled out correctly, and in their entirety. Obtaining an expungement will require obtaining information about an arrest, the arresting agency, the offenses charged, as well as a required background check. Thus, assistance of counsel may be beneficial to timely obtain an expungement.

B. Service of Motion and Hearing

Once a motion for expungement is filed, the clerk shall serve notice of the motion upon the District Attorney, the Louisiana Bureau of Criminal Identification and Information, and the arresting agency.⁹⁷ The motions may be served electronically or by U.S. Mail.⁹⁸ A party receiving notice may object to the granting of the expungement.⁹⁹ An objecting party may file an affidavit of response with reasons within sixty days of receiving the motion for expungement.¹⁰⁰ The court may grant an extension of time to file the objecting affidavit not to exceed an additional thirty days from the expiration of the original sixty days for a party to object.¹⁰¹

If timely filed, the matter is set for a hearing wherein the objecting party must show by a preponderance of the evidence why the motion should not be granted.¹⁰² If no motion is filed, the mover may waive the contradictory hearing, and the court *shall* grant the

⁹² See LA. CODE CRIM. PROC. ANN. art. 986(A).

⁹³ See LA. CODE CRIM. PROC. ANN. art. 988.

⁹⁴ See LA. CODE CRIM. PROC. ANN. art. 990.

⁹⁵ See LA. CODE CRIM. PROC. ANN. art. 992.

⁹⁶ See LA. CODE CRIM. PROC. ANN. art. 995.

⁹⁷ See LA. CODE CRIM. PROC. ANN. art. 979 as amended in 2015 La. Acts No. 200.

⁹⁸ *Id.*

⁹⁹ See LA. CODE CRIM. PROC. ANN. art. 980(A).

¹⁰⁰ See LA. CODE CRIM. PROC. ANN. art. 980(B)

¹⁰¹ See LA. CODE CRIM. PROC. ANN. art. 980(C), as amended in 2015 La. Acts No. 200.

¹⁰² See LA. CODE CRIM. PROC. ANN. art. 980(E).

expungement if he is entitled to it under the law.¹⁰³ Further, any of the listed agencies may waive the time period to file an objection by filing a “no opposition” into the record.¹⁰⁴

The clerk shall serve the order and judgment granting the expungement on the district attorney of the parish of conviction, the Louisiana Bureau of Criminal Identification and Information, the sheriff of the parish of conviction, and the arresting agency.¹⁰⁵

C. Additional Requirements for DWI Convictions (felony or misdemeanor)

If the defendant seeks to have a conviction for driving while intoxicated expunged, there are additional procedural requirements that must be met. A person convicted of operating a vehicle while intoxicated shall be required to supplement his motion for expungement with a certified letter from the Department of Public Safety and Corrections, Office of Motor Vehicles that he has complied with the requirements of this Article.¹⁰⁶

The court shall order the clerk of court to mail to the Department of Public Safety and Corrections, Office of Motor Vehicles, all of the following as provided by the defendant: (1) a certified copy of the record of the plea of guilty or nolo contendere; (2) fingerprints of the defendant; and (3) proof that the defendant meets the requirements as set forth in article 556 or 556.1 of this Code, which shall include the defendant's date of birth, social security number, and driver's license number.¹⁰⁷ In lieu of forwarding these items, the clerk of court may send a copy of the letter issued by the department pursuant to subparagraph (B)(1) of article 894 if the clerk had previously submitted records of the plea to the department pursuant to that article.¹⁰⁸

Further, the defendant must pay an additional fifty-dollar court cost to the Department of Public Safety and Corrections, Office of Motor Vehicles, when the motion for expungement is filed for the costs of storage and retrieval of the records.¹⁰⁹

D. Time for Obtaining an Expungement

The process to have records expunged could take up to six months. However, the process could be longer or shorter depending upon an applicant's specific circumstances.

¹⁰³ See LA. CODE CRIM. PROC. ANN. art. 980(F).

¹⁰⁴ See LA. CODE CRIM. PROC. ANN. art. 980(G).

¹⁰⁵ See LA. CODE CRIM. PROC. ANN. art. 982.

¹⁰⁶ See LA. CODE CRIM. PROC. ANN. art. 984(A).

¹⁰⁷ See LA. CODE CRIM. PROC. ANN. art. 984(B).

¹⁰⁸ See LA. CODE CRIM. PROC. ANN. art. 984(D) as *amended* in 2015 La. Acts No. 200.

¹⁰⁹ See LA. CODE CRIM. PROC. ANN. art. 984(C).

VII. ANSWERING QUESTIONS ABOUT RECORD POST-EXPUNGEMENT

Article 973 specifically provides that “no person whose record of arrest or conviction has been expunged shall be required to disclose to any person that he was arrested or convicted of the subject offense, or that the record of the arrest or conviction has been expunged,”¹¹⁰ except in the situations provided in Part A of the article.

As stated above, expunged records may still be accessible to certain statutorily created agencies and entities to further important state interests in public safety. Convictions may still be used by law enforcement for any lawful purpose,¹¹¹ and they may be used under the Habitual Offender Bill.¹¹² Additionally, the records are also available to certain agencies for certain state licensing purposes, such as the Louisiana Supreme Court Committee on Bar Admissions, and others.¹¹³ Article 973(G) further provides for the use of expunged records of any arrests or convictions by a “news-gathering organization” as defined by the statute.¹¹⁴ These records are released to such entities on a confidential basis and any person who fails to maintain the confidentiality of the records will be subject to contempt proceedings.¹¹⁵

VIII. IMPEDIMENTS TO EFFECTIVENESS OF THE LAW

A. Lengthy Waiting Periods

While the 2014 revisions significantly expanded the availability of expungements in Louisiana, it has not been without criticism as to how effective it might prove to be in actually helping individuals regain employment opportunities, particularly with respect to being able to obtain a TWIC card. One such criticism of the new expungement law has been the length of the waiting periods for obtaining an expungement. As outlined above, a person convicted of a felony who did not enter his plea, pursuant to Louisiana Code of Criminal Procedure article 893(E), must wait ten years after completion of his sentence in order to obtain an expungement.¹¹⁶ However, a person is eligible to obtain a TWIC card *seven* years after a disqualifying felony offense.¹¹⁷ In some instances, an applicant for a TWIC card may be able to obtain a waiver, and obtain the card after a

¹¹⁰ See LA. CODE CRIM. PROC. ANN. art. 973(C).

¹¹¹ See *supra* note 27 (setting forth purposes for which law enforcement may access expunged public records).

¹¹² See LA. CODE CRIM. PROC. ANN. art. 973(E).

¹¹³ See LA. CODE CRIM. PROC. ANN. art. 973(B).

¹¹⁴ See LA. CODE CRIM. PROC. ANN. art. 973(G).

¹¹⁵ See LA. CODE CRIM. PROC. ANN. art. 973(D).

¹¹⁶ See LA. CODE CRIM. PROC. ANN. art. 978(A)(2).

¹¹⁷ See 46 U.S.C.A. § 70105 (c)(1)(B), and (D).

shorter length of time.¹¹⁸ Thus, a person convicted of a felony would be eligible for a TWIC card years before he would be able to obtain an expungement for the conviction. As a result, the expungement would not assist such an individual in obtaining employment any quicker than without the benefit of an expungement.

Similarly, there is a five-year waiting period to obtain an expungement for a misdemeanor conviction not pursuant to Louisiana Code of Criminal Procedure article 894(B).¹¹⁹ The criticism here is that five years is a lengthy amount of time for a person to wait for employment to provide for his and his family's immediate needs. While there may be some validity to this argument, it is certainly worth noting that five years is significantly more beneficial than *never* having the benefit of having such records expunged.

B. Applicable Fees

Additionally, some argue the fees are too stiff for many of those unemployed individuals who are in most need of the expungement. A fee of \$550, plus additional fees to pay an attorney if the applicant is unable to complete the process himself, could bar many would-be applicants from being able to obtain an expungement.

C. Third-Party Commercial Providers

Another concern deals with the third-party commercial providers of criminal background checks. Many questions have been raised as to whether these private entities regularly update their files and maintain the most accurate and up-to-date information. Thus, it is feared that even though a person may have been granted an expungement, these entities will nonetheless provide the expunged records to potential employers. While the law precludes third-party providers¹²⁰ from releasing expunged records under this statute, it only applies to those providers who actually receive notice of the court order to expunge the record of arrest or conviction.¹²¹ The person obtaining the expungement must provide such notice by certified or registered mail with return receipt requested and a certified copy of the order of expungement.¹²²

In many instances, it might prove to be difficult for a person to notify every possible entity who might possibly be contacted by a potential employer or other entities seeking a background check regarding a criminal record. As to those entities, the expungement is

¹¹⁸ See 46 U.S.C.A. § 70105 (c)(2).

¹¹⁹ See LA. CODE CRIM. PROC. ANN. art. 977(A)(2).

¹²⁰ LA. CODE CRIM. PROC. ANN. art. 974 (noting "[th]e provisions of this Paragraph shall not apply to private third-party entities which are regulated by the Fair Credit Reporting Act (15 U.S.C. §§ 1681 et seq.) or the Gramm-Leach-Bliley Act (15 U.S.C. §§ 6801-6809)").

¹²¹ See LA. CODE CRIM. PROC. ANN. art. 974.

¹²² See LA. CODE CRIM. PROC. ANN. art. 974(B).

virtually nonexistent and there is no remedy to the person whose records were expunged if the criminal records are released. However, assuming the notice of the expungement is properly given to a private third-party entity, they may be liable for any actual damages, court costs, and attorney fees incurred by the person whose criminal history was disseminated.¹²³

D. Electronic Media

There is no question that in today's technological era, information is commonly and conveniently transmitted and retrieved via electronic media. It is extremely difficult, if not impossible, to control the dissemination of information available via electronic media. The same is true for expunged records. "Today's technology [has also] severely diminishe[d] the effectiveness of many expungements. For example, if an arrest has been reported in a newspaper, it would not be difficult to discover the arrest through an internet search using a common search engine."¹²⁴ There is no doubt that practically any information sought can be accessed online if it was once available. It might be practically impossible to remove every possible online reference to what was once public information. Thus, some might question whether in today's age of technology, expungements might ever truly serve its purpose of preventing access to criminal records.

IX. OTHER EFFORTS TO FURTHER EMPLOYMENT FOR INDIVIDUALS WITH CRIMINAL RECORDS: EMPLOYER IMMUNITY FROM NEGLIGENT HIRING

A final point worth noting is that another piece of legislation was also enacted in 2014 that might also further employment opportunities for individuals with criminal records. In 2014, the Louisiana Legislature amended Louisiana Revised Statutes section 23:291¹²⁵ to add subsection (E), which provides for immunity from liability to employers for tortious acts committed by their employees based solely on the fact that the employee has a criminal conviction. In other words, a prospective employer can hire a person with a criminal record and not fear he will be held liable for damages caused by that person's tortious conduct based solely on the fact that he hired a person who has a criminal conviction.

Ordinarily, an employer can be held liable for the tortious conduct of an employee based on a theory of 1) vicarious liability,¹²⁶ or 2)

¹²³ See LA. CODE CRIM. PROC. ANN. art. 974(C).

¹²⁴ State v. Tillman, 969 So. 2d 824, 824 n.3 (La. Ct. App. 2007).

¹²⁵ Amended in 2014 La. Acts No. 335, § 1.

¹²⁶ See Elzen, *Workplace Violence: Vicarious Liability and Negligence Theories as a Two-Fisted Approach to Employer Liability. Is Louisiana Clinging to an Outmoded Theory?*, 62 LA. L. REV. 897 (Spring 2002); see also LA. CIV. CODE art. 2768 ("The undertaker is responsible for the acts of the persons employed by him.").

negligent hiring, retention, training, and supervision.¹²⁷ While under the theory of vicarious liability, an employer is held liable for the conduct of his employee; an employer is held liable for his own conduct “directly to the employee's victim if it were itself negligent in hiring, retaining, training, or supervising the responsible employee.”¹²⁸

Injured victims often bring actions against employers for injuries sustained as a result of an employee's conduct who has a criminal record, claiming the employer was negligent in hiring a person with a criminal record.¹²⁹ As a result, many potential employers decline to extend employment opportunities to individuals with criminal records for fear of potential liability for harm caused by the employee with the criminal record. However, the 2014 amendment to Louisiana Revised Statutes 23:291 specifically provides:

Any employer, general contractor, premises owner, or other third party shall not be subject to a cause of action for negligent hiring of or failing to adequately supervise an employee or independent contractor due to damages or injury caused by that employee or independent contractor solely because that employee or independent contractor has been previously convicted of a criminal offense.¹³⁰

Thus, a plaintiff now has a higher burden in showing the employer was in fact negligent in his decision to hire a person with a criminal record in order for the employer to be held liable, beyond the fact that the employee had a criminal record alone.

As with the expungement provisions, this provision similarly recognizes the need to balance such laws against the state's interest in public safety and similarly sets forth exceptions, where in which the immunity of this provision does not apply. Specifically, the employer may be held liable if:

¹²⁷ See *Roberts v. Benoit*, 605 So. 2d 1032 (La. 1991).

¹²⁸ La. Prac. Employment Law § 14:2: Direct Liability: Negligent Hiring, Supervision, and Retention.

¹²⁹ See, e.g., *Thistlethwaite v. Gonzalez*, 106 So. 3d 238 (La. Ct. App. 2012) (holding that an employer could be held liable for negligent entrustment for allowing an employee to keep and drive a company truck that he crashed after becoming intoxicated, when the employee had two prior DUI's that were not discovered because employers failed to perform background check); *Bloxom v. City of Shreveport*, 103 So. 3d 383 (La. Ct. App. 2012) (employer hired known registered sex offender to drive taxicab, who posing as a young girl, began exchanging text messages with a 12-year-old boy and lured him into the taxicab and later killed him and dumped his body); *Smith v. Orkin Exterminating Co., Inc.*, 540 So. 2d 363 (La. Ct. App. 1989) (holding employer liable for damages caused when an employee raped a customer after the employer negligently administered a polygraph test to the employee that if properly administered would have revealed that employee had raped another customer).

¹³⁰ LA. REV. STAT. ANN. § 23:291(E)(1).

(1) the crime [the employee] later commits while an employee is (i) in the course and scope of his employment, (ii) is substantially similar to a prior conviction, and (iii) the employer knew or should have known of the conviction¹³¹ or (2)(i) the prior conviction was for a violent crime or sex offense and (ii) the employer knew or should have known of the conviction.¹³²

Thus, if the employer hires a person with such serious offenses or violent crimes the immunity of the provision does not apply. These are the same types of offenses that are exempted under the expungement provisions discussed above in Part III.¹³³ This amendment does not “prohibit or create a cause of action for negligent hiring or inadequate supervision,” in any other situations. Further, this provision neither “supplant[s] the immunity from civil liability provided for in Louisiana Revised Statutes 23:1032,”¹³⁴ nor does it “affect the employer’s vicarious liability pursuant to Civil Code Article 2320.”¹³⁵

CONCLUSION

Based on the foregoing, it is evident the Louisiana Legislature has made significant strides towards achieving its goals of helping to break the cycle of criminal recidivism by assisting the growing population of criminal offenders reentering the community to establish a self-sustaining life through opportunities in employment.¹³⁶ As enacted, the expungement laws effectively strike a balance between maintaining public safety and allowing for expungement of such records by specifying specific limitations and guidelines wherein expungements may be obtained.

Additionally, the statute sets forth the eligibility requirements and procedures with sufficient detail and clarity, along with applicable forms, to ensure access by qualified individuals who might benefit from the new law.

While the law is not perfect, and many in need of employment might find themselves waiting several more years before being able to take advantage of the benefits of the law; it is a significant step on the part of the State towards decreasing recidivism and assisting the growing amount of felony offenders reentering society in becoming

¹³¹ See LA. REV. STAT. 23:291(E)(2)(a).

¹³² La. Prac. Employment Law § 14:2: Direct Liability: Negligent Hiring, Supervision, and Retention; see also LA. REV. STAT. ANN. § 23:291(E)(2)(b).

¹³³ See LA. CODE CRIM. PROC. ANN. art. 978(B) and 977(C).

¹³⁴ See LA. REV. STAT. ANN. § 23:291(E)(3).

¹³⁵ See LA. REV. STAT. ANN. § 23:291(E)(4).

¹³⁶ LA. CODE CRIM. PROC. ANN. art. 971(6).

productive self-sustaining individuals by increasing employment opportunities.