

# **WEST VIRGINIA LEGISLATURE**

**2016 REGULAR SESSION**

**Engrossed**

**Committee Substitute**

**for**

**Senate Bill 411**

BY SENATORS WALTERS, LAIRD, KESSLER, MILLER,

FACEMIRE, ROMANO AND GAUNCH

[Originating in the Committee on the Judiciary;

reported on February 24, 2016]



1 A BILL to amend and reenact §61-11-26 of the Code of West Virginia, 1931, as amended, relating  
2 to the creation of the West Virginia Second Chance for Employment Act; defining terms;  
3 expanding eligibility for criminal expungement to persons convicted of certain nonviolent  
4 felonies; defining “nonviolent felony”; providing exclusions to eligibility; establishing timing  
5 for filing a petition for expungement; creating petition requirements and court procedure  
6 for evaluating preliminary and final orders of expungement for nonviolent felonies;  
7 providing for preliminary orders of expungement; requiring a ten-year period under a  
8 preliminary order of expungement for a felony before one may obtain a final order of  
9 expungement; clarifying disclosure requirements with respect to the information sealed  
10 pursuant to an order of expungement, including exemptions; providing standard for  
11 inspection of sealed records; and making technical changes.

*Be it enacted by the Legislature of West Virginia:*

1 That §61-11-26 of the Code of West Virginia, 1931, as amended, be amended and  
2 reenacted to read as follows:

**ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.**

**§61-11-26. Expungement of certain criminal convictions; procedures; effect.**

1 (a) Eligibility for expungements. —

2 (1) Misdemeanors. — Any person convicted of a misdemeanor offense or offenses arising  
3 from the same transaction ~~committed while he or she was between the ages of eighteen and~~  
4 ~~twenty-six, inclusive, or series of transactions~~ may, pursuant to the provisions of this section,  
5 petition the circuit court in which the conviction or convictions occurred for expungement of the  
6 conviction or convictions and the records associated therewith. ~~The clerk of the circuit court shall~~  
7 ~~charge and collect in advance the same fee as is charged for instituting a civil action pursuant to~~  
8 ~~subdivision (1), subsection (a), section eleven, article one, chapter fifty-nine of this code for a~~  
9 ~~petition for expungement.~~

10           (2) Nonviolent felonies. — Any person convicted of a nonviolent felony offense, or offenses  
11 arising from the same transaction or series of transactions, may, pursuant to this section, petition  
12 the circuit court in which the conviction or convictions occurred for preliminary order of  
13 expungement of the conviction or convictions and the records associated therewith, and  
14 subsequently the final order of expungement of the conviction or convictions and the records  
15 associated therewith.

16           ~~(b) Expungement shall not be available for any conviction of an offense listed in subsection~~  
17 ~~(i) of this section. The relief afforded by this subsection is only available to persons having no~~  
18 ~~other prior or subsequent convictions other than minor traffic violations at the time the petition is~~  
19 ~~filed: *Provided*, That at the time the petition is filed and during the time the petition is pending,~~  
20 ~~petitioner may not be the subject of an arrest or any other pending criminal proceeding. No person~~  
21 ~~shall be eligible for expungement pursuant to the provisions of subsection (a) of this section until~~  
22 ~~one year after the conviction, completion of any sentence of incarceration or probation, whichever~~  
23 ~~is later in time.~~

24           (b) Fee for filing petition for expungements. — The clerk of the circuit court shall charge  
25 and collect in advance the same fee for a petition for expungement as is charged for instituting a  
26 civil action pursuant to subdivision (1), subsection (a), section eleven, article one, chapter fifty-  
27 nine of this code.

28           (c) Limitations on eligibility for expungement. —

29           (1) Certain convictions excluded. — For the purposes of this section, the term “nonviolent  
30 felony” means any felony offense other than the following:

31           (A) A felony crime of violence against the person as defined in subsection (o), section  
32 twenty-seven, article five, chapter twenty-eight of this code;

33           (B) A felony offense wherein the victim was a minor child, as defined in subsection (p),  
34 section twenty-seven, article five, chapter twenty-eight of this code;

35 (C) A felony offense involving the use or exhibition of a firearm, deadly weapon or  
36 dangerous instrument; or

37 (D) A felony offense involving possession of a controlled substance with the intent to sell  
38 or deliver to a minor child, as set forth in article four, chapter sixty-a of this code;

39 (2) Temporal requirements. —

40 (A) No person shall be eligible for expungement pursuant to this section until one year  
41 after completion of any sentence of incarceration or completion of any period of supervision,  
42 whichever is later in time.

43 (B) No person shall be eligible for permanent expungement pursuant to subdivision (2),  
44 subsection (a) of this section until ten years after an order is entered granting the petition of that  
45 person for preliminary order of expungement.

46 (3) Other miscellaneous exclusions. — No person shall be eligible for expungement under  
47 this section if he or she:

48 (A) Has any prior or subsequent conviction other than minor traffic violations at the time  
49 the petition is filed: *Provided*, That at the time the petition is filed and during the time the petition  
50 is pending, the petitioner may not be the subject of arrest or any other pending criminal  
51 proceeding;

52 (B) Has violated the provisions of subsection (b) or (c), section nine, article two of this  
53 chapter where the victim was a spouse, a person with whom the person seeking expungement  
54 had a child in common or with whom the person seeking expungement ever cohabitated prior to  
55 the offense;

56 (C) Has violated the provisions of section twenty-eight, article two of this chapter; or

57 (D) Has been convicted of driving under the influence of alcohol or controlled substances  
58 or has violated section three, article four, chapter seventeen-b of this code.

59           ~~(e)~~(d) Content of petition for expungements. — Each petition to expunge a conviction or  
60 convictions pursuant to this section shall be verified under oath and include the following  
61 information:

62           (1) Petitioner's current name and all other legal names or aliases by which petitioner has  
63 been known at any time;

64           (2) All of petitioner's addresses from the date of the offense or alleged offense in  
65 connection with which an expungement order is sought to date of the petition;

66           (3) Petitioner's date of birth and social security number;

67           (4) Petitioner's date of arrest, the court of jurisdiction and criminal complaint, indictment,  
68 summons or case number;

69           (5) The statute or statutes and offense or offenses for which petitioner was charged and  
70 of which petitioner was convicted;

71           (6) The names of any victim or victims, or that there were no identifiable victims;

72           (7) Whether there is any current order for restitution, protection, restraining order or other  
73 no contact order prohibiting the petitioner from contacting the victims or whether there has ever  
74 been a prior order for restitution, protection or restraining order prohibiting the petitioner from  
75 contacting the victim. If there is such a current order, petitioner shall attach a copy of that order  
76 to his or her petition;

77           (8) The court's disposition of the matter and punishment imposed, if any;

78           (9) Why expungement is sought, such as, but not limited to, employment or licensure  
79 purposes, and why it should be granted;

80           (10) The steps the petitioner has taken since the time of the offenses toward personal  
81 rehabilitation, including treatment, work or other personal history that demonstrates rehabilitation;

82           (11) Whether petitioner has ever been granted expungement or similar relief regarding a  
83 criminal conviction by any court in this state, any other state or by any federal court; and

84 (12) Any supporting documents, sworn statements, affidavits or other information  
85 supporting the petition to expunge.

86 ~~(d)~~(e) Service of petition for expungements. — A copy of the petition, with any supporting  
87 documentation, shall be served by petitioner pursuant to the rules of the trial court upon the  
88 following persons of entities:

89 (1) The Superintendent of the State Police;

90 (2) the The prosecuting attorney of the county of conviction;

91 (3) the The chief of police or other executive head of the municipal police department  
92 wherein the offense was committed;

93 (4) the The chief law-enforcement officer of any other law-enforcement agency which  
94 participated in the arrest of the petitioner;

95 (5) the The superintendent or warden of any institution in which the petitioner was  
96 confined;

97 (6) the The magistrate court or municipal court which disposed of the petitioner's criminal  
98 charge; and

99 (7)-all All other state and local government agencies whose records would be affected by  
100 the proposed expungement.

101 The prosecutorial office that had jurisdiction over the offense or offenses for which  
102 expungement is sought shall serve by first class mail the petition for expungement, accompanying  
103 documentation and any proposed expungement order to any identified victims.

104 ~~(e)~~ (f) Filing and service of notice of opposition to petition for expungement. — Upon  
105 receipt of a petition for expungement, the ~~Superintendent of the State Police; the prosecuting~~  
106 ~~attorney of the county of conviction; the chief of police or other executive head of the municipal~~  
107 ~~police department wherein the offense was committed; the chief law enforcement officer of any~~  
108 ~~other law enforcement agency which participated in the arrest of the petitioner; the superintendent~~  
109 ~~or warden of any institution in which the petitioner was confined; the magistrate court or municipal~~

110 ~~court which disposed of the petitioner's criminal charge; all other state and local government~~  
111 ~~agencies whose records would be affected by the proposed expungement~~ persons and entities  
112 listed in subsection (e) of this section and any other interested individual or agency that desires  
113 to oppose the expungement shall, within thirty days of receipt of the petition, file a notice of  
114 opposition with the court with supporting documentation and sworn statements setting forth the  
115 reasons for resisting the petition for expungement.

116 (1) A copy of any notice of opposition with supporting documentation and sworn  
117 statements shall be served upon the petitioner in accordance with trial court rules.

118 (2) The petitioner may file a reply no later than ten days after service of any notice of  
119 opposition to the petition for expungement.

120 ~~(f)~~ (g) Burden of proof. — The burden of proof shall be on the petitioner to prove by clear  
121 and convincing evidence that: (1) The conviction or convictions for which expungement is sought  
122 are the only convictions against petitioner and that the conviction or convictions are not excluded  
123 from expungement by subsection (j) of this section; (2) the requisite time period has passed since  
124 the conviction or convictions or end of the completion of any sentence of incarceration or ~~probation~~  
125 period of supervision as set forth in subdivision (2), subsection (c) of this section; (3) petitioner  
126 has no criminal charges pending against him or her; (4) the expungement is consistent with the  
127 public welfare; (5) petitioner has, by his or her behavior since the conviction or convictions,  
128 evidenced that he or she has been rehabilitated and is law-abiding; and (6) any other matter  
129 deemed appropriate or necessary by the court to make a determination regarding the petition for  
130 expungement.

131 ~~(g)~~ (h) Court procedure for petition for expungement. — Within sixty days of the filing of a  
132 petition for expungement the circuit court shall:

133 (1) For persons eligible pursuant to subdivision (1), subsection (a) of this section:

134 (A) Summarily grant the petition;

135 ~~(2)~~ (B) Set the matter for hearing; or

136           ~~(3)~~ (C) Summarily deny the petition if the court determines that the petition is insufficient  
137 or, based upon supporting documentation and sworn statements filed in opposition to the petition,  
138 the court determines that the petitioner, as a matter of law, is not entitled to expungement.

139           (2) For persons eligible pursuant to subdivision (2), subsection (a) of this section:

140           (A) Summarily and preliminarily grant the petition subject to the provisions of subsection  
141 (j) of this section;

142           (B) Set the matter for hearing; or

143           (C) Summarily deny the petition if the court determines that the petition is insufficient or,  
144 based upon supporting documentation and sworn statements filed in opposition to the petition,  
145 the court determines that the petitioner, as a matter of law, is not entitled to expungement.

146           ~~(h)~~ (i) Hearing on petition for expungement. — If the court sets the matter for hearing, all  
147 interested parties who have filed a notice of opposition shall be notified. At the hearing, the court  
148 may inquire into the background of the petitioner and shall have access to any reports or records  
149 relating to the petitioner that are on file with any law-enforcement authority, the institution of  
150 confinement, if any, and parole authority or other agency which was in any way involved with the  
151 petitioner's arrest, conviction, sentence and post-conviction supervision, including any record of  
152 arrest or conviction in any other state or federal court. The court may hear testimony of witnesses  
153 and any other matter the court deems proper and relevant to its determination regarding the  
154 petition. The court shall enter an order reflecting its ruling on the petition for expungement with  
155 appropriate findings of fact and conclusions of law.

156           ~~(i) No person shall be eligible for expungement of a conviction and the records associated~~  
157 ~~therewith pursuant to the provisions of subsection (a) of this section for any violation involving the~~  
158 ~~infliction of serious physical injury; involving the provisions of article eight-b of this chapter where~~  
159 ~~the petitioner was eighteen years old, or older, at the time the violation occurred and the victim~~  
160 ~~was twelve years of age, or younger, at the time the violation occurred; involving the use or~~  
161 ~~exhibition of a deadly weapon or dangerous instrument; of the provisions of subsection (b) or (c),~~

162 ~~section nine, article two of this chapter where the victim was a spouse, a person with whom the~~  
163 ~~person seeking expungement had a child in common or with whom the person seeking~~  
164 ~~expungement ever cohabitated prior to the offense; any violation of the provisions of section~~  
165 ~~twenty-eight of said article; a conviction for driving under the influence of alcohol, controlled~~  
166 ~~substances or a conviction for a violation of section three, article four, chapter seventeen-b of this~~  
167 ~~code or section nineteen, article eight of this chapter.~~

168 (j) Preliminary and final orders of expungement for nonviolent felonies. — If the court  
169 grants the petition for expungement pursuant to subdivision (2), subsection (a) of this section, the  
170 court's order shall be preliminary and subject to a motion by the petitioner to make the order a  
171 final order of expungement.

172 (1) Preliminary order of expungements. — A preliminary order of expungement shall order  
173 the sealing of all court records and other records pursuant to subsection (k) of this section related  
174 to the nonviolent felony or felonies that are the subject of the petition. The preliminary order of  
175 expungement is subject to the following limitations:

176 (A) Notwithstanding subsection (m) of this section, the custodians of records subject to  
177 sealing pursuant to subsection (k) of this section may inspect the sealed records without obtaining  
178 an order of the court if inspection is made for a legitimate law enforcement purpose; and

179 (B) A preliminary order of expungement shall be vacated if the petitioner is convicted of a  
180 felony or misdemeanor offense other than a minor traffic violation subsequent to the entry of the  
181 order.

182 (2) Motion for final order of expungement. — A motion to make the preliminary order of  
183 expungement a final order of expungement may not be made until five years after the preliminary  
184 order of expungement was entered by the court.

185 (A) A motion filed under this subdivision shall be verified under oath and include  
186 information evidencing whether the petitioner:

187 (i) Has any felony or misdemeanor convictions other than a minor traffic violation since  
188 entry of the preliminary order of expungement;

189 (ii) Has outstanding restitution orders or civil judgements representing amounts ordered  
190 for restitution against the petitioner since the entry of the preliminary order of expungement; or

191 (iii) Is subject of any outstanding warrants or is currently the subject of a pending criminal  
192 proceeding.

193 (B) Within sixty days of the filing of a motion for a final order of expungement, the circuit  
194 court shall:

195 (i) Summarily grant the motion;

196 (ii) Set the matter for hearing; or

197 (iii) Summarily deny the petition if the court determines that the motion is insufficient or,  
198 based upon supporting documentation and sworn statements filed in opposition to the motion, the  
199 court determines that the petitioner, as a matter of law, is not entitled to expungement. If the court  
200 determines that the petitioner is not entitled to expungement as a matter of law, the court shall  
201 also vacate the preliminary order of expungement.

202 (C) The provisions of subsections (f), (g) and (h) of this section apply to a motion filed  
203 under this subsection.

204 ~~(j) (k) Sealing of records. —~~ If the court grants the petition for expungement, it shall order  
205 the sealing of all records in the custody of the court and expungement of any records in the  
206 custody of any other agency or official, including law-enforcement records. Every agency with  
207 records relating to the arrest, charge or other matters arising out of the arrest or conviction that is  
208 ordered to expunge records shall certify to the court within sixty days of the entry of the  
209 expungement order that the required expungement has been completed. All orders enforcing the  
210 expungement procedure shall also be sealed. ~~For the purposes of this section, “records” do not~~  
211 ~~include the records of the Governor, the Legislature or the Secretary of State that pertain to a~~  
212 ~~grant of pardon. Such records that pertain to a grant of pardon are not subject to an order of~~

213 expungement. ~~The amendment to this section during the fourth extraordinary session of the~~  
214 ~~Legislature in the year 2009 is not for the purpose of changing existing law, but is intended to~~  
215 ~~clarify the intent of the Legislature as to existing law regarding expungement.~~

216 ~~(k)~~ (l) Disclosure of expunged proceedings. —

217 (1) Upon expungement, the proceedings in the matter shall be deemed ~~are considered~~  
218 never to have occurred. The court and other agencies shall reply to any inquiry that no record  
219 exists on the matter. The person whose record is expunged shall not have to disclose the fact of  
220 the record or any matter relating thereto on an application for employment, credit or other type of  
221 application: *Provided, That any person applying for a position in which he or she would be*  
222 *engaging in the prevention, detection, investigation, prosecution or incarceration of persons for*  
223 *violations of the law shall disclose any and all convictions to his or her prospective employer*  
224 *regardless of whether the conviction or convictions had been expunged pursuant to this section.*

225 (2) No persons for whom an order of expungement has been entered pursuant to this  
226 section may be found guilty of perjury or otherwise giving a false statement, under any provision  
227 of this code, because of that person's failure to recite or acknowledge the arrest, indictment,  
228 information, trial or conviction: *Provided, That the person is in compliance with subdivision (1),*  
229 *subsection (l) of this section.*

230 (3) Persons required by state law to obtain a criminal history record check on a prospective  
231 employee are not considered to have knowledge of any convictions expunged under this section.

232 ~~(l)~~ (m) Inspection of sealed records. — Inspection of the sealed records in the court's  
233 possession may thereafter be permitted by the court only upon a motion by the person who is the  
234 subject of the records or upon a petition filed by a prosecuting attorney that inspection and  
235 possible use of the records in question are necessary to the investigation or prosecution of a  
236 crime in this state or another jurisdiction. If the court finds that there is a legitimate reason for  
237 access and the interests of justice will be served by granting a petition to inspect the sealed  
238 record, it may be granted under the terms and conditions that the court determines.

239 (n) For the purposes of this section:

240 (1) "Court record" means an official record of a court about a proceeding that the clerk of  
241 the court or other court personnel keeps. "Court record" includes an index, a docket entry, a  
242 petition or other pleading, a memorandum, a transcription of proceedings, an electronic recording,  
243 an order and a judgement;

244 (2) "Records" do not include the records of the Governor, the Legislature or the Secretary  
245 of State that pertain to a grant of pardon. Such records that pertain to a grant of pardon are not  
246 subject to an order of expungement;

247 (3) "Seal" means to remove information from public inspection in accordance with this  
248 section; and

249 (4) "Sealing" means:

250 (A) For a record kept in a courthouse, removing to a separate, secure area to which  
251 persons who do not have a legitimate reason for access are denied access;

252 (B) For electronic information about a proceeding on the website maintained by the  
253 magistrate court, circuit court or the Supreme Court of Appeals, removing the information from  
254 the public website; and

255 (C) For a record maintained by any law-enforcement agency, by removing to a separate,  
256 secure area to which persons who do not have a legitimate reason for access are denied access.

257 (o) The amendment to this section during the fourth extraordinary session of the  
258 Legislature in 2009 is not for the purpose of changing existing law, but is intended to clarify the  
259 intent of the Legislature as to existing law regarding expungement.

260 (p) The amendments made to this section during the regular session of the Legislature in  
261 2016 may be known and cited as the Second Chance for Employment Act.