



# **Collateral Consequences**

## **Criminal Justice Reform Subcommittee**

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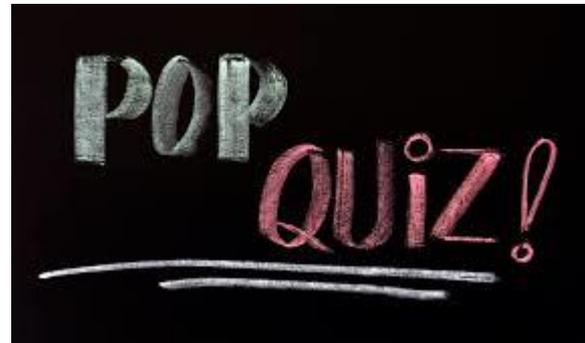
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# Topics of Discussion

- Overview of Collateral Consequences
- New Developments in New Mexico
- New Developments Nationally
- Collateral Consequences in New Mexico
- State and Federal Law
- Let's test our knowledge!!



# Overview of Collateral Consequences

## Collateral consequences

Sanctions, restrictions, or disqualifications that attach to a person because of the person's criminal history.

Barriers include:

- voting
  - jury service
  - holding public office
  - securing employment
  - maintaining legal status as an immigrant
  - qualifying for financial aid and college admission
- 
- owning a firearm
  - getting a driver's license
  - qualifying for military service
  - receiving public assistance
  - obtaining housing

The reach of each collateral consequence extends past people with criminal records to affect families and communities.

# Overview of Collateral Consequences

Due to overrepresentation in the criminal justice system, people of color, people with disabilities, and LGBT individuals are disproportionately impacted by collateral consequences.

Because the female incarceration rate has accelerated, collateral consequences increasingly impact women, many of whom are single mothers whose children will be affected.

Immigrants who are not U.S. citizens (and those misidentified as noncitizens) often face the unique collateral consequence of deportation, which can disrupt familial relationships.



# Fair Chance Hiring (Ban the Box) For Private Employers



- New Mexico already has Ban the Box for public employment
- SB96 passed during the 2019 Legislative Session (Sen. O’Neill, Rep. Baldonado)
- New Mexico became the 12<sup>th</sup> State to Enact Ban the Box for Private Employers as well as Public Employers
- NM Human Rights Act provides relief

# Expungement of Criminal Records

- New Mexico became one of the last states to pass Expungement
- Legislature has passed several times before but was vetoed by two different Governors
- HB370 passed during the 2019 Legislative Session (Rep. Maestas, Rep. Romero, Sen. O'Neill)
- Takes effect January 1, 2020
- Implementation



# Expungement of Criminal Records

- Not all records are eligible
- Significant public protections in place, including waiting periods and a hearing in District Court
- Removes records from public view
- Law enforcement still has access
- Certain types of background checks and certain types of employers will still have access
- Allows applicants to reply “no” when asked if they have ever been arrested or convicted

# Petitions for Executive Clemency

- For individuals that cannot expunge (due to the nature of the offense), they can seek a pardon from the Governor.
- A pardon in New Mexico does not expunge the record but may reinstate certain rights.
- Pardons are infrequently granted and an extraordinary remedy.
- Governor Lujan Grisham has updated protocols for executive clemency



# New Developments Nationally – U.S. Commission on Civil Rights (2019)

## Key Findings:

- Collateral consequences exacerbate punishment beyond the criminal conviction after an individual completes the court-imposed sentence.
- Valid public safety bases support some collateral consequences, such as limitations on working with children for people convicted of particular dangerous crimes.
- Many collateral consequences are unrelated either to the underlying crime for which a person has been convicted or to a public safety purpose.
- When the collateral consequences are unrelated in this way, their imposition generally negatively affects public safety and the public good.

# New Developments Nationally – U.S. Commission on Civil Rights

## Key Recommendations:

- Collateral consequences should be tailored to serve public safety.
- Policymakers should avoid punitive mandatory consequences that do not serve public safety, bear no rational relationship to the offense committed, and impede people convicted of crimes from safely reentering and becoming contributing members of society.
- Jurisdictions that impose collateral consequences should periodically review the consequences imposed by law or regulation to evaluate whether they are necessary to protect public safety and if they are related to the underlying offenses.

# New Developments Nationally – Pennsylvania Clean Slate

- Clean Slate uses technology to seal certain criminal records from public view. **Arrest records will be sealed after charges are dropped and some minor conviction records will be sealed after 10 years.** Automated sealing began on June 28, 2019. By June 27, 2020, over 30 million cases will be sealed, without the cost of filing petitions in court. That's more than half of the charges in the court's database.
- According to a recent study, only 6.5% of people eligible for record clearing filed petitions. Automated sealing addresses this “second chance gap” by sealing records when people don't have access to lawyers, can't afford filing fees, or don't know that their record is eligible.
- In addition to pioneering an automated sealing process, Clean Slate also expanded the number of misdemeanor convictions that can be sealed after a petition is filed in court. Sealed records are not available to the public, helping people access employment, housing and education. Clean Slate will allow hundreds of thousands of Pennsylvanians to move past their old, minor criminal records.

<https://mycleanslatepa.com/>

# New Developments Nationally

## NATIONWIDE TREND TO REFORM UNFAIR OCCUPATIONAL LICENSING LAWS

*In 2019, legislatures adopted “fair chance licensing” reforms in at least nine states: Arkansas, Iowa, Maryland, Mississippi, Oklahoma, Nevada, North Carolina, Texas, and Utah.*

- *SB 385 Professional Licensure (Sen. Mark Moores & Rep. Andrea Romero) Vetoed*
- *Eliminate automatic blanket bans*
- *Expand transparency*
- *Remove vague statutory language*

# Collateral Consequences in New Mexico



## VOTING

Felony Disenfranchisement  
House Bill 57 (Rep. Chasey)  
Secretary of State  
Certificate of Completion

# Collateral Consequences in New Mexico

## HOUSING

Subsidized Housing and HUD

Project Based

Section 8

Private Landlords



# Collateral Consequences in New Mexico

## EDUCATION & FINANCIAL AID

Federal Student Loans  
College Admissions  
Specialized Programs



# Collateral Consequences in New Mexico

## EMPLOYMENT

“Regular” Employers

Special Circumstances

- Vulnerable Populations
- Security Clearance
- Independent Contractors

Occupational Licenses



# Complying with State and Federal Law

- Fair Credit Reporting Act
- New Mexico Human Rights Act
- Equal Employment Opportunity Commission (Federal Civil Rights Act)

# Fair Credit Reporting Act

- Arrest records and non-convictions older than 7 years cannot be reported (15 U.S.C. § 1681c). This includes conditional discharge under New Mexico law.
- One of FCRA's purposes is to notify job applicants and employees when an employer is using a criminal background check by a private company.
- Another purpose is to give job applicants and employees the opportunity to correct mistakes on those criminal background checks before an employer takes “adverse action.”

# Fair Credit Reporting Act

- Examples of “adverse action” includes:
  - Denying a job application
  - Reassigning or terminating an employee
  - Denying a promotion to an employee
- Employers must do the following before getting the background check:
  - Provide notice to applicant/employee (in writing, by itself)
  - Receive consent from applicant/employee (in writing)
  - Certify to credit reporting agency

# Fair Credit Reporting Act

- Requirements before taking adverse action:
  - Disclosure to applicant/employee.
  - Provide a copy of the criminal background check
  - Provide a summary of FTC’s “A Summary of Your Rights Under the Fair Credit Reporting Act.”

# Fair Credit Reporting Act

## Requirements after taking adverse action:

- Notice to applicant/employee, orally, in writing or electronically.
- Provide contact information for company that supplied the criminal background check.
- Statement that the CRA did not make the decision to take the adverse action and cannot give specific reasons for it.
- Applicant/employee's right to dispute accuracy or completeness of information.
- Applicant/employee's right to an additional free consumer report upon request within 60 days.

# Fair Credit Reporting Act

- Consumer Reporting Agencies must follow “reasonable procedures to ensure maximum possible accuracy of the information concerning the individual about whom the report relates” (15 U.S.C. § 1681e(b)).
- Damages are available for both negligent non-compliance and punitive damages are available for willful non-compliance.

# New Mexico Human Rights Act

- **Criminal Offender Employment Act**
  - A conviction shall not operate as an automatic bar to obtaining public employment or license or other authority to practice the trade, business or profession.

# New Mexico Human Rights Act

- Private employers: An applicant who claims to be aggrieved by a violation of Subsection A of this section may seek relief under the Human Rights Act pursuant to the process set out in Sections 28-1-10 through 28-1-13 NMSA 1978
- File complaint with Human Rights Commission
- Investigation
- Conciliation, Hearings, Resolution, Appeals, Complaint in District Court

# EEOC and “No Conviction” Policies

No conviction policies may result in disparate impact claims under Title VII of the Civil Rights Act.

- Criminal records-related hiring criteria often have a disparate impact on African-Americans and Latinos.
- Therefore, the policy must be job related and consistent with business necessity, and there must be no viable alternative policies that lack the same discriminatory effect. See 42 U.S.C. § 2000e-K
- See for instance BMW EEOC Settlement  
<https://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm>

# EEOC Policy Statement

- (1) The nature and gravity of the offense or offenses;
- (2) The time that has passed since the conviction and/or completion of the sentence; and
- (3) The nature of the job held or sought.