

2013 IPAC WINTER CONFERENCE

**THE NEW EXPUNGEMENT LAW**

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**Outline of I.C. 35-38-9**

- SECTION 1 (arrest no conviction, conviction vacated)
- SECTION 2 (misdemeanor)
- SECTION 3 (D felony)
- SECTION 4 (felony – 8 year wait)
- SECTION 5 (felony – 10 year wait)
- SECTION 6 (sealing - Section 1 & 2)
- SECTION 7 (marking - Section 3 & 4)
- SECTION 8 (petition requirements)
- SECTION 9 (petition procedure)
- SECTION 10 (sanctions)
- QUESTIONS

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**Repeals the Old Rules**

- Expungement (Effective July 1, 2013)
  - Repeals IC 35-38-5-5.5 - restricted arrest and criminal records with no conviction
  - Repeals IC 35-38-8 - restricted access for certain misdemeanor/ D Felony convictions

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**Section 1 - Arrest Only General Requirements**

- ⦿ No filing fee!
- ⦿ Shall Expunge
- ⦿ Burden of Proof - Clear and Convincing
- ⦿ All BMV, Corrections, Court ordered treatments, ISP information sealed
  - except criminal justice agencies.
- ⦿ Where to file petition
  - in court where charged
  - If not charged - any court with criminal jurisdiction

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**Section 1 - What is Arrest Only**

- ⦿ Arrested and charges not filed
- ⦿ Arrested, charged and later **All** charges are dismissed
- ⦿ Arrested, charged and Defendant is acquitted or no true finding on ALL charges
- ⦿ Arrested, charged, convicted and conviction/adjudication vacated on appeal

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**Section 1 - Time Frame**

Cannot be filed earlier than:

- ⦿ One (1) year after the date of **arrest**, if the person was not convicted or was not adjudicated a delinquent child
- ⦿ One (1) year after the date the appellate opinion vacating the conviction or adjudication becomes final

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**Section 1 - What Petitioner Must Show**

- ⦿ All counts were either dismissed, overturned on appeal or there was an acquittal on all counts
- ⦿ Petitioner does not have any pending cases
- ⦿ Petition is filed timely:
  - One (1) year after the arrest; or
  - One (1) year after all counts of the conviction was reversed on appeal

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**Section 1 - Who Can Access the Sealed Info?**

- ⦿ **ONLY** a Criminal Justice Agency may access the records **without order of the Court**
  - Prosecutors and Police considered Criminal Justice Agency
- ⦿ **This information CANNOT be made public and must be for internal use only.**

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**Section 2 - Misdemeanors - General Requirements**

- ⦿ Misdemeanor Convictions (**includes D Felonies reduced to Class A misdemeanors**)
- ⦿ Civil filing fee – Can't be waived
- ⦿ Filed in the "sentencing Court"
- ⦿ Verified Petition
- ⦿ Burden of Proof - Clear and Convincing
- ⦿ Shall expunge/seal
- ⦿ All Court records, BMV, Corrections, Court ordered treatments, ISP information sealed - expunged & sealed as described in Section 6

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**Section 2 - What Petitioner Must Show**

- No pending charges
- No existing or pending license suspensions
- Successful completion of all Sentence terms
- 5 Years since the date of conviction - Prosecutor may waive
- Not convicted of a crime within last 5 years (from date of conviction)

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**Section 3 - D felonies**

The following D felony offenses are *excluded* from section 3:

- D felonies by elected officials or candidates
- Sex or violent offenders (IC 11-8-8-5)
- Felony resulting in bodily injury
- Human trafficking
- Sex Crimes (IC 35-42-4)
- Perjury
- Official Misconduct

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**Section 3 - D Felony General Requirements**

- Civil filing fee
- Filed in the "sentencing court"
- Verified Petition
- Burden of Proof - Clear and Convincing
- Shall expunge/seal per section 6
  - Including All BMV, Corrections, Court ordered treatments, ISP information sealed (NOT Prosecutor records)

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**Section 3 – What Petitioner Must Show**

- No pending charges
- No existing or pending license suspensions
- Successful completion of all Sentence terms
- 8 Years since the date of conviction - Prosecutor may waive
- Not convicted of a crime within last 8 years (from date of conviction)

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**Section 4 - Felonies**

Does not apply to the following convictions:

- IC 35-42-1 (Homicide)
- IC 35-42-3.5 (Human Trafficking)
- IC 35-42-4 (Sex crimes)
- IC 35-44.1-1 (Official Misconduct)
- Felony conviction that resulted in serious bodily injury to another person
- Sex or violent offender as defined in IC 11-8-8-5
- Elected official or a candidate for public office when convicted

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**Section 4 – Felony General Requirements**

- Civil filing fee – no waiver
- Filed in the "sentencing court"
- Verified Petition
- Burden of Proof - Clear and Convincing
- Court *may* order records expunged
  - NOT sealed – file is marked "Expunged" per section 7
  - STILL PUBLIC RECORD

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**Section 4 - What Petitioner Must Show**

- No pending charges
- No existing or pending license suspensions
- Successful completion of all Sentence terms
- 8 Years since the date of conviction - Prosecutor may waive
- Not convicted of a crime within last 8 years (from date of conviction)

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**Section 5 - Felonies**

Applies to persons convicted of a felony including the following:

- Elected official or a candidate for public office when convicted
- Felony conviction that resulted in serious bodily injury to another person.

Does not apply to person convicted of the following:

- IC 35-42-1 (Homicide)
- IC 35-42-3.5 (Human Trafficking)
- IC 35-42-4 (Sex crimes)
- IC 35-44.1-1 (Official Misconduct)
- Sex or violent offender as defined in IC 11-8-8-5

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**Section 5 - Felony General Requirements**

- Civil filing fee – no waiver
- Filed in the “sentencing court”
- Verified Petition
- Burden of Proof - Clear and Convincing
- Court may order records expunged
  - NOT sealed – file is marked “Expunged” per section 7
  - STILL PUBLIC RECORDS

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**Section 5 – What Petitioner Must Show**

- ⦿ No pending charges
- ⦿ No existing or pending license suspensions
- ⦿ Successful completion of all Sentence terms
- ⦿ 10 Years since the date of conviction
- ⦿ Not convicted of a crime within last 10 years (from date of conviction)
- ⦿ PROSECUTOR CONSENTS IN WRITING

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**CAN PROSECUTORS GET THIS INFORMATION?**

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**Section 6(a)(2)(A) – Disclosure of Records When Misd/Felony Records Sealed**

- ⦿ Central Repository for Criminal History may disclose only to:
  - Prosecutor
    - authorized by court order
    - needed to carry official function of office
  - FBI & Homeland Security
    - if disclosure is required to comply with agreement of sharing criminal history information

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**Section -6(d) Petition to Unseal**

- ⦿ Written application
  - Must show records are relevant to a new prosecution of the petitioner
- ⦿ If granted, the records shall be unsealed
- ⦿ If used in new prosecution that results in new conviction - court is NOT required to reseal records.
- ⦿ Otherwise, records shall be resealed at the earliest possibility

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**Section 7 - Expungements under Section 4 & 5 (Felonies)**

- ⦿ Court and other records remain as “public records”
- ⦿ Must be marked clearly and visibly as “expunged”
- ⦿ Law enforcement, ISP, BMV and others must add entry showing expungement
- ⦿ Records not hidden from anyone!

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**Section 8 - Petition Requirements**

- ⦿ Applies to Sections 2-5 (not section 1)
- ⦿ Lists verified petition requirements such as:
  - listing all convictions
  - describing any other petitions filed
  - evidence of completion of sentence, etc.
  - State Court Admin has sample forms/instruction on website
- ⦿ Prosecutor shall reply within 30 days

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**Section 8 - Petition Requirements**

- If Prosecutor objects, court shall set hearing within 60 days
- Victim may provide oral or written statement against (no impact on Section 2 & 3 petitions)
- Clear and convincing evidence standard by petitioner
- Denial is appealable as final order
- Court may summarily deny petition

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**Section 9 – Procedure for Multiple Convictions**

- Section 1 (arrests) multiple petitions allowed
- Sections 2-5 petitions
  - 1per lifetime; however,
    - More than one conviction can be expunged
    - Multiple jurisdiction filings are considered 1 petition provided all petitions are filed within a 365 day period
    - If a petition is denied on the merits a 3 year waiting period (subsequent petition limited to matters in the first petition)

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**Section 9 - Prosecutor obligations**

- Respond within 30 days of receipt of filing
- Notify Victims of the filing of the petition and the right to comment on the petition
- Consider written permission to file a petition earlier than statutorily required time frame
- Consider written permission to file a petition under section 5 (10 year felonies)

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**Section 10 - Remedies**

- ⦿ Unlawful to discriminate against any person with an expunged or sealed record by:
  - Suspending, expelling, refusing to employ, refusing to admit, grant or renew a license or otherwise discriminate
  - Civil rights are restored for voting, holding public office, serving as juror and owning or possessing firearm

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**Section 10 - Remedies**

- ⦿ Employers may only ask questions such as "Have you been arrested for or convicted of a crime that has not been expunged by a court?"
- ⦿ Person shall be treated as if never convicted of offense
- ⦿ Violators commit a Class C infraction and may be held in contempt of court

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**Section 10 - Impact on Subsequent Crimes:**

- ⦿ Court may consider prior expunged/sealed conviction in determining new sentence
- ⦿ Prior expunged/sealed conviction may be used for sentence enhancement and habitual offender
- ⦿ May use an expunged record as evidence in a criminal proceeding as though the record or conviction was not expunged

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**Issues/Questions**

- What defines successful completion of Sentence?
- If fines, fees, costs, and restitution are reduced to a judgment but the judgment has not been satisfied, has the court order not been satisfied? (This would have ramifications on the time frames in sections 4 and 5)
- How is the Court to know what persons or providers provided services to the petitioner under court order?

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**Issues/Questions**

- The Odyssey system is available and accessible to the public and filings of Petitions to Seal/Expunge are available to the public.
- Does Indiana Administrative Rule 9 offer confidentiality protection?
- You should expect further amendments to this legislation in the next and future sessions.

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