

# **WEST VIRGINIA LEGISLATURE**

## **2019 REGULAR SESSION**

**Introduced**

### **Senate Bill 349**

BY SENATORS CARMICHAEL (MR. PRESIDENT) AND

PREZIOSO

(BY REQUEST OF THE EXECUTIVE)

[Introduced January 18, 2019; Referred

to the Committee on the Judiciary]

1 A BILL to amend and reenact §61-11-26 of the Code of West Virginia, 1931, as amended, relating  
2 to allowing an individual to petition a circuit court for the expungement of misdemeanor  
3 offenses; requiring that the petition may be filed not fewer than 90 consecutive days after  
4 the successful compliance with a West Virginia Department of Health and Human  
5 Resources approved substance abuse treatment and counseling program and graduation  
6 from a West Virginia Department of Education approved Job Readiness Adult Training  
7 course, and entering into an agreement with the Department of Health and Human  
8 Resources to undergo random drug screenings if required by an employer for a period not  
9 to exceed 24 months, with no subsequent violations or random drug test failures after the  
10 petitioner began the rehabilitation and counseling program and the adult training course;  
11 setting forth what the petition must contain; limiting the number of expungements; and  
12 setting forth a fee.

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

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

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

1 (a) Any person convicted of a misdemeanor offense or offenses arising from the same  
2 transaction committed while he or she was between the ages of 18 and 26, inclusive, may,  
3 pursuant to the provisions of this section, petition the circuit court in which the conviction or  
4 convictions occurred for expungement of the conviction or convictions and the records associated  
5 therewith. The clerk of the circuit court shall charge and collect in advance the same fee as is  
6 charged for instituting a civil action pursuant to §59-1-11(a)(1) of this code for a petition for  
7 expungement.

8 (b) Any person convicted of a misdemeanor offense or offenses, regardless of the age of  
9 that person when the offense or offenses were committed, may, upon not less than 90 consecutive  
10 days of successful compliance with a substance abuse treatment and counseling programs  
11 approved by the Secretary of the Department of Health and Human Resources, graduation from

12 a West Virginia Department of Education approved Job Readiness Adult Training course, and  
13 execution of an agreement with the Department of Health and Human Resources to undergo  
14 random drug screenings if required by an employer for a period not to exceed 24 months, pursuant  
15 to the provisions of this section, petition the circuit court or circuit courts in which the conviction  
16 or convictions occurred for expungement of the conviction or convictions and the records  
17 associated therewith: *Provided*, That no subsequent offenses or failure of random drug tests occur  
18 during the time since the petitioner began the rehabilitation and counseling program and the adult  
19 training course. The clerk(s) of the circuit court or circuit courts shall charge and collect in advance  
20 the same fee as is charged for instituting a civil action pursuant to §59-1-11(a)(1) of this code for  
21 a petition for expungement. A person may file only one petition for expungement, to the circuit  
22 court or circuit courts as applicable, pursuant to the provisions of this subsection.

23 The Department of Health and Human Resources shall pay for random drug screenings  
24 of the petitioner employee at a frequency agreed to by the employer and the department for up to  
25 24 months from the date of receipt of the Job Readiness Adult Training certificate. If the petitioner  
26 employee refuses to submit to drug screening or fails a drug screening, the Department of Health  
27 and Human Resources shall notify the petitioner's employer who may discharge the employee.

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

36 ~~(e)~~ (d) Each petition to expunge a conviction or convictions pursuant to this section shall  
37 be verified under oath and include the following information: *Provided*, That for the purposes of a

38 petition for expungement filed pursuant to subsection (b) of this section, the petition shall identify  
39 and group such information by circuit court, as applicable, from which expungement of a particular  
40 conviction or convictions is being sought:

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

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

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

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

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

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

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

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

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

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

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

63 (12) Documentation of compliance from the approved treatment and counseling program,

64 if applicable;

65 (13) Certificate of graduation from the Adult Training Job Readiness Course, if applicable;

66 (14) Executed agreement with the Department of Health and Human Resources to submit

67 to random drug tests for up to 24 months from the completion date of the Job Readiness Adult

68 Training Certificate, if applicable; and

69 ~~(12)~~ (15) Any supporting documents, sworn statements, affidavits or other information

70 supporting the petition to expunge.

71 ~~(d)~~ (e) A copy of the petition, with any supporting documentation, shall be served by

72 petitioner pursuant to the rules of the trial court upon the Superintendent of the State Police; the

73 prosecuting attorney of the county of conviction; the chief of police or other executive head of the

74 municipal police department wherein the offense was committed; the chief law-enforcement

75 officer of any other law-enforcement agency which participated in the arrest of the petitioner; the

76 superintendent or warden of any institution in which the petitioner was confined; the magistrate

77 court or municipal court which disposed of the petitioner's criminal charge; and all other state and

78 local government agencies whose records would be affected by the proposed expungement. The

79 prosecutorial office that had jurisdiction over the offense or offenses for which expungement is

80 sought shall serve by first class mail the petition for expungement, accompanying documentation

81 and any proposed expungement order to any identified victims.

82 ~~(e)~~ (f) Upon receipt of a petition for expungement, the Superintendent of the State Police;

83 the prosecuting attorney of the county of conviction; the chief of police or other executive head of

84 the municipal police department wherein the offense was committed; the chief law-enforcement

85 officer of any other law-enforcement agency which participated in the arrest of the petitioner; the

86 superintendent or warden of any institution in which the petitioner was confined; the magistrate

87 court or municipal court which disposed of the petitioner's criminal charge; all other state and local

88 government agencies whose records would be affected by the proposed expungement and any

89 other interested individual or agency that desires to oppose the expungement shall, within 30

90 days of receipt of the petition, file a notice of opposition with the court with supporting  
91 documentation and sworn statements setting forth the reasons for resisting the petition for  
92 expungement. A copy of any notice of opposition with supporting documentation and sworn  
93 statements shall be served upon the petitioner in accordance with trial court rules. The petitioner  
94 may file a reply no later than 10 days after service of any notice of opposition to the petition for  
95 expungement.

96 ~~(f)~~ (g) The burden of proof shall be on the petitioner to prove by clear and convincing  
97 evidence that: (1) The conviction or convictions for which expungement is sought are the only  
98 convictions against petitioner and that the conviction or convictions are not excluded from  
99 expungement by subsection ~~(j)~~ (k) of this section; (2) that the requisite time period has passed  
100 since the conviction or convictions or end of the completion of any sentence of incarceration or  
101 probation; (3) petitioner has no criminal charges pending against him or her; (4) the expungement  
102 is consistent with the public welfare; (5) petitioner has, by his or her behavior since the conviction  
103 or convictions, evidenced that he or she has been rehabilitated and is law-abiding; and (6) any  
104 other matter deemed appropriate or necessary by the court to make a determination regarding  
105 the petition for expungement.

106 ~~(g)~~ (h) Within 60 days of the filing of a petition for expungement the circuit court shall:

107 (1) Summarily grant the petition;

108 (2) Set the matter for hearing; or

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

112 ~~(h)~~ (i) If the court sets the matter for hearing, all interested parties who have filed a notice  
113 of opposition shall be notified. At the hearing, the court may inquire into the background of the  
114 petitioner and shall have access to any reports or records relating to the petitioner that are on file  
115 with any law-enforcement authority, the institution of confinement, if any, and parole authority or

116 other agency which was in any way involved with the petitioner's arrest, conviction, sentence and  
117 post-conviction supervision, including any record of arrest or conviction in any other state or  
118 federal court. The court may hear testimony of witnesses and any other matter the court deems  
119 proper and relevant to its determination regarding the petition. The court shall enter an order  
120 reflecting its ruling on the petition for expungement with appropriate findings of fact and  
121 conclusions of law.

122       (†) (j) No person shall be eligible for expungement of a conviction and the records  
123 associated therewith pursuant to the provisions of subsection (a) of this section for any violation  
124 involving the infliction of serious physical injury; involving the provisions of §61-8B-1 *et seq.* of  
125 this code where the petitioner was 18 years old, or older, at the time the violation occurred and  
126 the victim was 12 years of age, or younger, at the time the violation occurred; involving the use  
127 or exhibition of a deadly weapon or dangerous instrument; of the provisions of §61-2-9(b) or §61-  
128 2-9(c) of this code where the victim was a spouse, a person with whom the person seeking  
129 expungement had a child in common or with whom the person seeking expungement ever  
130 cohabitated prior to the offense; any violation of the provisions of §61-2-28 of this code; a  
131 conviction for driving under the influence of alcohol, controlled substances or a conviction for a  
132 violation of §17B-4-3 or §61-8-19 of this code.

133       (†) (k) If the court grants the petition for expungement, it shall order the sealing of all  
134 records in the custody of the court and expungement of any records in the custody of any other  
135 agency or official, including law-enforcement records. Every agency with records relating to the  
136 arrest, charge or other matters arising out of the arrest or conviction that is ordered to expunge  
137 records shall certify to the court within 60 days of the entry of the expungement order that the  
138 required expungement has been completed. All orders enforcing the expungement procedure  
139 shall also be sealed. For the purposes of this section, "records" do not include the records of the  
140 Governor, the Legislature or the Secretary of State that pertain to a grant of pardon. Such records  
141 that pertain to a grant of pardon are not subject to an order of expungement. The amendment to

142 this section during the fourth extraordinary session of the Legislature in the year 2009 is not for  
143 the purpose of changing existing law, but is intended to clarify the intent of the Legislature as to  
144 existing law regarding expungement.

145 ~~(k)~~ (l) Upon expungement, the proceedings in the matter shall be deemed never to have  
146 occurred. The court and other agencies shall reply to any inquiry that no record exists on the  
147 matter. The person whose record is expunged shall not have to disclose the fact of the record or  
148 any matter relating thereto on an application for employment, credit or other type of application.

149 ~~(j)~~ (m) Inspection of the sealed records in the court's possession may thereafter be  
150 permitted by the court only upon a motion by the person who is the subject of the records or upon  
151 a petition filed by a prosecuting attorney that inspection and possible use of the records in  
152 question are necessary to the investigation or prosecution of a crime in this state or another  
153 jurisdiction. If the court finds that the interests of justice will be served by granting a petition to  
154 inspect the sealed record, it may be granted.

NOTE: The purpose of this bill is to allow an individual to petition a circuit court for the expungement of misdemeanor offenses. The bill requires that the petition may be filed not fewer than 90 consecutive days after the successful compliance with a West Virginia Department of Health and Human Resources approved substance abuse treatment and counseling program and graduation from a Department of Education approved Job Readiness Adult Training course, and entering into an agreement with the Department of Health and Human Resources to undergo random drug screenings if required by an employer for a period not to exceed 24 months, with no subsequent violations or random drug test failures after the petitioner began the rehabilitation and counseling program and the adult training course. The bill sets forth what the petition must contain. The bill limits the number of expungements. The bill sets forth a fee.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.