

Unlocking labour laws

Deleting criminal record

A criminal record is not a life sentence that should stop you from getting a job. The law now allows you to remove it. To expunge a record means to erase or destroy it and to give you a clean slate in your job hunting. But not all crimes can be wiped. However, it is a worker's right to disclose or not to disclose that they expunged their criminal record.

For example, James (29) was convicted of drunk driving at the age of 18, and paid a fine of R5 000. He remains unemployed and suspects that the reason for this is because most prospective employers routinely conduct criminal record checks.

Services which conduct criminal record checks for prospective employers typically produce incomplete results, which simply indicate that a job applicant has a criminal record. However, they do not provide the employer with a comprehensive check detailing the nature of the offence, and how long ago the offence was committed.

How can I get my criminal record expunged?

Recently the Criminal Procedure Act, 1977 was amended to provide for the removal of certain criminal

records. The law now allows for people to apply for certain criminal records to be deleted, provided that certain conditions are met.

A person can apply for the record to be deleted if:

- A period of ten years has passed since the person was convicted of the crime. And that the person has not been convicted of any offence and sentenced to a period of imprisonment without the option of a fine during those ten years.
- The sentence following the conviction of the crime was in the form of a caution or reprimand or a suspended or periodic imprisonment or correctional supervision or a fine only, and the fine did not exceed R20 000.

James meets these requirements and therefore he can successfully

apply for a clean record once more.

A form that James must use has been issued in a set of regulations by the Department of Justice and Constitutional Development that explain how this can be done. There are three different forms in the regulations. James must apply on Form A of the regulations. Form A is available online at http://www.justice.gov.za/forms/expungement/J744e_formA.pdf.

Before James can submit the form to the Department of Justice and Constitutional Development, he must obtain a police clearance certificate from the Criminal Record Centre of the South African Police Service. This clearance certificate, which must show that a period of ten years has lapsed since the applicant was convicted and sentenced, needs to be attached to the form.



The nearest police station should be able to assist James to apply for a police clearance certificate, otherwise he can communicate directly with the South African Criminal Record Centre (for attention: Police Clearance Certificates), Private Bag X308, Pretoria, Gauteng, South Africa, 0001. Once James receives the police clearance certificate from SAPS he should complete Form A and submit it together with the clearance certificate to the Director-General: Justice and Constitutional Development, Private Bag X 81, Pretoria, 0001.

If the director-general is satisfied that James meets the requirements for the criminal record to be removed, within 14 working days the director-general will send a certificate of expungement to the Criminal Record Centre of SAPS, who will then let James know, within 21 working days that the conviction and sentence is gone.

If James' application was unsuccessful, the director-general must inform him in writing, stating the reason why the application was unsuccessful.

Which offences do not qualify for expungement?

The following persons do not qualify to have a criminal record erased:

- A person who has served a lengthy prison sentence without the option of a fine, which may be the case in certain serious offences such as murder.
- A person who has been convicted of a sexual offence against a child or a person who is mentally disabled and whose name has been included in the National Register for Sex Offenders.
- A person who was found unsuitable to work with children by a criminal court and whose name has been included in the national Child Protection Register.

A person who committed a sexual offence but whose name has been removed from the national Register for Sex Offenders and from the national Child Protection Register may apply for the expungement of their criminal record.

The Criminal Procedure Act also provides for the wiping away of certain offences that relate to race. These offences were created in terms of statutes such as the Black Land Act, 1913, the Group Areas Act, 1966, and the Prohibition of Mixed Marriages Act, 1949.

These laws, which deny human dignity, equality and freedom, are in breach of the South African Constitution and have subsequently been repealed. Most of the criminal records relating to these offences should have been automatically repealed but if they have not, a person may apply, using Forms B or C (depending on the offence) to have the record set aside.

Must I tell a prospective employer about my arrest and conviction?

Everyone has a constitutional right to privacy, which includes the right to keep personal information, such as a criminal record, private. However, sometimes this right must be balanced against competing rights, such as an employer's right to protect their property, or the need to protect vulnerable persons such as children and the mentally disabled.

Prospective employers may therefore be justified in seeking information about an applicant's criminal record. Applicants who lie about their criminal record when seeking employment may later lose their job for being dishonest.

However, an applicant does not need to volunteer information about their criminal record and need only provide an answer to what is specifically requested. For example, if the application form asks 'Have you been convicted

of fraud?' the applicant does not need to indicate any other offences that they may have been convicted of.

The right to privacy means that an employer may not collect information about an applicant that is irrelevant in the circumstances. In other words, an employer must only ask for information about an applicant's criminal record if it is justified by the type of job that the applicant has applied for.

An applicant's (and an employee's) right to personal information will be further strengthened when the Protection of Personal Information Bill becomes law. The Bill protects collection and storage of personal information which will limit an employer's right to personal information. It will also provide a mechanism for dealing with complaints about the way an organisation has dealt with personal information.

Once a criminal record has been wiped as explained above, an applicant can choose not to disclose to an employer. An employer should not ask an applicant if they have had a criminal record erased. Although there might be some limited exceptions or instances where an employer is justified in seeking information about such records, the general rule is not to disclose.

An expunged record means that a job applicant can apply for a job with a 'clean slate'. Job applicants generally need not disclose the erased record to their prospective employer and the record will not appear on a subsequent criminal check conducted on the applicant. ^{LB}

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