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# Expungement: A Pathway to Employment

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A P R E F A C E T O

# Expungement: A Pathway to Employment

**W**isconsin, like most states, allows individuals who have been convicted of a one-time, low-level offense to ask a judge to have the record of that conviction expunged once they've served their sentence and demonstrated they pose no risk to public safety. Lawmakers have long recognized that an isolated, nonviolent event shouldn't erect a lifetime of barriers to employment, education, housing or service.

The individual, the community and the economy all benefit when someone chooses employment over government dependency or criminal activity. A sealed record can increase the likelihood that the beneficiary will secure the dignity and other benefits associated with work.

Wisconsin, however, is an outlier in that it is the only state to require a judge to make this decision at the time of sentencing when there is scant information about the individual's desire to reform. A negative decision by the judge at this time means the individual can never again seek to have his record sealed, even if he goes on to live a spotless life.

Wisconsin residents overwhelmingly support reforming the timing of a judge's decision. In April 2021, the Badger Institute released the results of a survey conducted by Public Opinion Strategies that found that nearly three-quarters of Wisconsin voters support allowing a judge to grant an expungement after the completion of a sentence. Support for that change extends across party lines.

Wisconsin also has an arbitrary age cap of 25 that prevents anyone who committed a crime after that age from seeking an expungement. Most states allow for records to be expunged regardless of the age of the individual at the time of the crime.

Badger Institute research found that about 35,000 people a year who are 25 or older and have no prior felonies commit expungement-eligible offenses. Of those, a significant majority committed misdemeanors or were never found guilty of an offense. The rest committed lower-level Class H or I felonies. Higher-level felonies would be ineligible for consideration of an expungement.

— *Badger Institute*

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## Introduction

Since 1975, the expungement (or sealing) of a criminal record in Wisconsin has been an option for low-level offenders as a means of helping them avoid some of the collateral consequences associated with a nonviolent crime. Expungement is designed to help those who served their time to secure employment, education, housing and other essentials that enable them to become contributing members of their communities.

Unfortunately, more people are affected by such policies than one might suspect. Some 70 million Americans — one out of every three working-age adults — have a criminal conviction.<sup>1</sup> Criminal records carry lifelong consequences that can affect everything from getting a job or a loan to joining the military to getting into college. The problem is particularly acute in Milwaukee, where 42% of the unemployed seeking jobs reportedly have a criminal history.<sup>2</sup>

**Expungement offers a way to maintain public safety while helping those who want to chart a new course.** When an expungement is requested, the decision is made by the presiding judge, who factors in the potential impact on others. Wisconsin law states that “the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition.”<sup>3</sup>

In short, at the time of sentencing, the court may order the conviction to be expunged eventually if the defendant successfully completes his or her sentence, including any probation.

Wisconsin legislators long have provided leeway to low-risk offenders in the hope that given a second chance they will prosper and earn the dignity that comes with a job — instead of dependence on government or, worse, a return to criminal activity and an expensive prison cell.

“Expungement is one of many tools that will assist people that have a prior, nonviolent felony conviction,” says Steve Kuehl, economic development director and Wisconsin state director at the Federal Reserve Bank of Chicago. “These are individuals who have paid their debt to society. We have to ask ourselves: (Do) people who have been in prison need to keep paying over and over again for that, or can we move forward?”

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**Most defendants who benefited from expungement were charged with possession of small amounts of marijuana or drug paraphernalia, or minor thefts such as shoplifting or disorderly conduct.**

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The “Now Hiring” signs visible in almost every Wisconsin community demonstrate the urgent need for growing and retaining the state’s workforce. While most inmates do not have a high level of education — only about 5% to 6% of the Wisconsin prison population have an associate or bachelor’s degree — there are plenty of low-skill, entry-level jobs that need filling.

### Current Law

Wisconsin law allows for the expungement of minor criminal offenses for anyone who was under age 25 at the time of the offense if a judge finds that the offender will benefit and that society will not be harmed.<sup>4</sup>

There are limitations:

- The maximum punishment for the crime cannot be more than six years, which eliminates the vast majority of felonies from consideration. In Wisconsin, Class A through G felonies allow for sentences over six years, meaning none of those felonies is eligible to be expunged. Only Class H and I felonies are potentially eligible, and individuals charged with those types of felonies are also disqualified if they have a prior felony, even one that was expunged, or if their crime fits a definition of violent.
- No defendant, regardless of the charge, is eligible if he or she has a prior felony conviction.

While most states have expungement laws, Wisconsin’s is unique in that it requires judges to order relief at the time of sentencing, with the actual expungement occurring at a later date, contingent on the successful completion of the individual’s sentence.

In other words, Wisconsin judges have to determine whether expungement is appropriate very soon after the crime has been committed, rather than a year or more later, when the defendant’s rehabilitation (or lack thereof) would be more readily apparent. This oddity of timing, combined with a lack of statutory clarity about when it is appropriate to grant expungement, means that the mechanism is underutilized for people who go on to lead law-abiding lives following a criminal conviction.

Unless a judge declares a defendant eligible at the time of sentencing, the offender’s record can never be expunged. This means that a 45-year-old who wrote a bad check 22 years ago and has maintained a clean record since cannot seek this option.

A more common-sense approach would move the eligibility decision from the time of sentencing to a point after an offender has completed his or her sentence, allowing the judge to make an informed decision based on a defendant’s post-sentencing behavior. This would have the added benefit of incentivizing the expungement seeker to demonstrate good behavior.

It also would give defendants an opportunity to focus on and ask for expungement when they are less immersed in other legal questions and at a greater distance from the prosecution of their case.

### *Who's Affected*

Wisconsin law also contains an arbitrary age restriction that eliminates expungement eligibility for anyone who was age 25 or older when he or she committed the crime.

Badger Institute research found that about 35,000 people a year who are 25 or older and have no prior felonies commit expungement-eligible offenses.

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**The majority of inmates will be out in less than five years. When they complete their sentences, gainful employment can play a critical role in preventing their return to the corrections system.**

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Roughly 24,000 of that total are people who commit misdemeanors. Another 6,600 are individuals who had a misdemeanor charge reduced to a forfeiture and, therefore, were never found guilty of a criminal offense. The remainder would be individuals who committed a lower-level felony.

Our analysis determined that roughly 4,500 lower-level Class H or I felonies are committed every year by people 25 or older who would be eligible if the age cap were removed, but only for those who have no prior felony offense.

In our 2019 report “Black Robes & Blue Collars,” we partnered with Court Data Technologies in Madison to analyze every expungement case filed between Jan. 1, 2010, and April 14, 2017 — a total of 10,000 expunged cases.

We found that most defendants who benefited from expungement were charged with possession of small amounts of marijuana or drug paraphernalia, or minor thefts such as shoplifting or disorderly conduct. Nearly two-thirds of the expungements — more than 6,300 — involved cases where the most serious charge was a misdemeanor. The remaining third — just over 3,600 — included low-level felonies. A small fraction involved traffic cases that rose to the level of a criminal offense.

### *Disparities*

Badger Institute research has shown that the process produces troubling disparities by age, class, race and geography for those seeking an expungement.

In order to determine how, when and where the expungement law is used in Wisconsin, we examined the 10,000 cases filed and later expunged, and then linked each of those to original Wisconsin court documents identifying the county in which the crime was committed, the nature of the crime, the defendant’s race and his or her age at the time of the offense.

The goal was to identify how often cases are being expunged in Wisconsin, the types of cases most frequently expunged and whether expungement decisions vary by county, age

or race. As noted above, we found that of the cases examined, most were criminal misdemeanors or involved charges for which the defendant had been found not guilty. Several factors could contribute to the disparities found by Badger Institute research — economics and the related lack of legal representation, bias, differences in prior criminal records, differing attitudes among judges. Regardless, the research found that the defendants in Milwaukee, the city with the highest widespread levels of unemployment and poverty in the state, have much less likelihood of securing an expungement than Wisconsinites elsewhere.

But unemployed Milwaukeeans with records of nonviolent, low-level crimes are not the only ones who could benefit from better use of Wisconsin's expungement law. Burnett County, for example, has very low median household income, a higher-than-average poverty rate and one of the highest unemployment rates in Wisconsin. For some reason, nearly 25 times as many defendants are granted expungements in neighboring Washburn County, where the unemployment rate is comparable.

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**Wisconsin requires judges to decide on the possibility of expungement at the time of sentencing, rather than later, when the defendant's rehabilitation (or lack thereof) would be more apparent.**

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### *Bipartisan Support for Reform*

In recent years, various bills have been introduced that would make it easier for deserving citizens to receive a second chance. The most recent version, which passed in the Assembly last session and enjoyed broad bipartisan support in the Senate, would have eliminated the age restriction and allowed for expungements to be granted after a sentence is served.

The measure would not have expanded the types of crimes eligible. Judicial discretion would have been retained. In cases where a sentencing court denied an expungement request, the bill would allow the individual to file a petition with the sentencing court upon completion of his or her sentence. The court then would be required to review the petition and make a determination.

If a petition were denied, the bill would have allowed the applicant to file a one-time petition two years after the denial.

The bill also specified that if a record is expunged, that crime is not considered a conviction for employment purposes.

Even if this bill was signed into law, the state would continue to maintain a record of all convictions. The Crime Information Bureau within the Wisconsin Department of Justice maintains the Wisconsin Online Record Check System, which contains even expunged convictions.

Only one in 20 male inmates, and fewer women, are serving life terms in the Badger State. The majority of inmates will be out in less than five years. When they complete their sentences, gainful employment can play a critical role in preventing their return to the

corrections system.

Education and stable housing can also be affected by an isolated, low-level criminal act. Expungement can make it easier for an individual to secure the basic essentials that are so key to human success.

### Conclusion

Wisconsin policymakers clearly recognize that expungement can be an effective tool; they created the law and have kept it on the books for decades. But the unique timing and the random age limitation keep the law from being used by many people who committed a low-level crime and subsequently turned their lives around.

Policymakers should make the state's expungement law a more logical, equitable and effective path for low-level offenders to find work and companies to find employees.



### **Badger Institute takeaways**

Wisconsin should:

- **Eliminate the age limit of 25 for expungement eligibility.**
- **Move the decision about an offender's expungement eligibility from the time of sentencing to a point after the sentence is served.**

### **Endnotes**

<sup>1</sup> Brennan Center for Justice based on FBI database.

<sup>2</sup> Barriers to Employment, 2015, Public Policy Forum.

<sup>3</sup> <https://docs.legis.wisconsin.gov/statutes/statutes/973/015/1m/a/3/b>

<sup>4</sup> For anyone sentenced before July 1, 2009, expungement is available only to those under age 21 at the time of the crime and if the crime was a misdemeanor.