

MARCH 9, 2007

## KENTUCKY

### I. Automatic Restoration of Rights:

**Vote:** Persons convicted of felony lose the right to vote, and it is restored only by personal action of the governor. See Ky. Const. § 145(1) (“Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.”) In addition, people who are “in confinement under the judgment of a court for some penal offense” at the time of the election, whether convicted of felony or misdemeanor, are not allowed to vote. § 145(2). The legislature has chosen not to extend disenfranchisement to those convicted of “high misdemeanors,” except those “in confinement under the judgment of a court” at the time of election. See Ky. Rev. Stat. Ann. § 27A.070 (court shall send notice of a felony conviction to the state board of elections when conviction is final).

**Office, jury:** A person convicted of a felony “or of such high misdemeanor as may be prescribed by law” loses the right to hold office, unless pardoned. § 150. A person who has “been previously convicted of a felony and has not been pardoned or received a restoration of civil rights by the Governor or other authorized person of the jurisdiction in which the person was convicted” is disqualified from jury service. Ky. Rev. Stat. Ann. § 29A.080(2)(e).

**Firearms:** Person convicted after 1975 prohibited from possessing a handgun, and a person convicted after 1994 prohibited from possessing any firearm, unless pardoned. Ky. Rev. Stat. Ann. § 527.040(1).

### II. Discretionary Restoration Mechanisms:

#### A. Executive pardon:

- **Authority:** The power to pardon is vested in the governor, who may grant either a full pardon or a restoration of citizenship (known as a “partial pardon”). Ky. Const. § 77, § 150. For pardons, Governor must file with the legislature a statement of reasons with each pardon grant, which must be available to the public. Ky. Const. § 77. Governor may ask Kentucky Parole Board to investigate and make recommendations on pardon cases, but he is not bound by its advice. Ky. Rev. Stat. Ann. § 439.450 (“On request of the governor the board shall investigate and report to him with respect to any case of pardon”).

- *Administration:* Parole Board composed of seven full-time and two part-time members appointed by the Governor to four-year terms, chosen from slate of nominees submitted by Commission on Correction and Community Service. § 439.420(1). No more than five of the same party. Full-time members are salaried employees. Governor appoints chair. § 439.450(2).
- *Eligibility:* For restoration of rights, expiration of sentence or discharge, with no pending charges. For pardon, governor requires seven-year waiting period. Federal and out-of-state offenders are eligible only for a partial pardon (restoration of citizenship). *See Arnett v. Stumbo*, 153 S.W.2d 889 (1941).
- *Effect:* Restoration of citizenship restores right to vote and eligibility for jury service. Pardon relieves additional legal disabilities. Pardon document may limit rights being restored. *See Anderson v. Com.*, 107 S.W. 2d 193 (Ky. 2003)(Governor's order restoring a convicted person's civil rights did not restore felon's "right" or eligibility to serve as a juror, where order specifically limited the restoration to felon's rights to vote and to hold office).
- *Process:* Pardon application made to Parole Board, which forwards eligible applications to Governor. Then sent to prosecutor for recommendation (if no response within 30 days, assumes no objection). Applicant at that point asked to submit three letters of reference. Simplified process for restoration of rights: In 2001, legislature directed Department of Corrections to implement "simplified" process for restoration of civil rights, including informing all eligible offenders of their right to apply, generating a monthly list of all eligible offenders who have asked for their rights back, conducting investigations, giving notice to prosecutor in county of conviction and county of residence, and forwarding to Governor's office on a monthly basis a list of all eligible offenders for consideration for partial pardon. Ky. Rev. Stat. Ann. § 196.045. In 2004, Governor Ernie Fletcher issued an executive order requiring 'character tests' for restoration applicants. The order mandated submission of a formal letter from each applicant explaining why their rights should be reinstated, along with three letters of reference.
- *Frequency of grants (Restoration of Rights):* Governor Fletcher has been criticized for his parsimonious restoration policy. *See* "Fewer felons seeing voting rights restored under Fletcher," [http://www.kentucky.com/mld/kentucky/news/breaking\\_news/13067695.htm](http://www.kentucky.com/mld/kentucky/news/breaking_news/13067695.htm) (Governor's policy criticized as disproportionately disenfranchising African-Americans as Department of Corrections presented data to a legislative committee documenting that only 25% of applications for restoration of rights have been approved in 2005, down from 52% in 2004

and 86% in 2003). A recent study reported that in 2002-2003, 1266 people applied for restoration of voting rights and 1241 (97%) were approved. Two years later, in 2004-2005, after issuance of Governor Fletcher's order, 941 people applied and only 464 (49%) were approved. For the second half of 2005, only 104 applications (25%) were approved. See Elizabeth A. Wahler, *Losing the Right to Vote: Perceptions of Permanent Disenfranchisement and the Civil Rights Restoration Application Process in the State of Kentucky*, The Sentencing Project, April 2006. <http://www.sentencingproject.org/pdfs/ky-losingtherighttovote.pdf>. See also Marc Mauer & Tushar Kansal, "Barred For Life: Voting Rights Restoration in Permanent Disenfranchisement States," Sentencing Project (Feb. 2005) at 14, available at <http://www.sentencingproject.org/pdfs/barredforlife.pdf>.

- *Frequency of grants (Full pardon)* As of May 2006, Governor Fletcher had issued no pardons through the established pardon process. Source: Kentucky Governor's Office. However, in August of 2005 Governor Fletcher caused a sensation by issuing blanket pardons to nine of his aides who were being investigated by a grand jury for merit system personnel violations, but had not been convicted. See Mark R. Chellgren, "Kentucky Governor Issues Pardons in Hiring Probe," Washington Post, August 29, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/29/AR2005082901344.html>.
- *Contact:* Mike Alexander, Deputy General Counsel, Office of the Governor, State Capitol, 700 Capitol Avenue, Frankfurt Kentucky, 40601. 502-564-2611, [malexander@ky.gov](mailto:malexander@ky.gov).

#### B. Judicial Expungement or Sealing of Adult Felony Convictions:

- *Misdemeanor Expungement:* Under Kentucky law passed in 1992, judges, upon request, must expunge misdemeanor convictions five years after completion of the person's sentence if the applicant has no other criminal violations within that time. See Ky. Rev. Stat. Ann. § 431.078. Under § 431.078(1), "any person who has been convicted of a misdemeanor or a violation, or a series of misdemeanors or violations arising from a single incident, may petition the court in which he was convicted for expungement of his misdemeanor or violation record." A person must be informed of this "right" at the time of adjudication. *Id.* The only felony convictions eligible for expungement are Class D drug possession convictions. Upon filing a petition, court must notify prosecutor and any identified victim. § 431.078(3). If a person has no prior felony convictions, no other convictions of any time during the five year period, and no criminal matters pending against him, the court "shall" seal the record. § 431.078(4). "Upon the entry of an order to seal the records, and payment to the circuit clerk of twenty-five dollars (\$25), the proceedings in the case shall be deemed never to have

occurred; all index references shall be deleted; the persons and the court may properly reply that no record exists with respect to the persons upon any inquiry in the matter; and the person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application.” § 431.078(5). Section retroactive to offenses committed prior to July 14, 1992. § 431.078(8).

*Nonconviction records:* Under 1996 law, judges have discretion to expunge records of misdemeanor or felony cases that result in dismissals or acquittals. Ky. Rev. Stat. Ann. § 431.076. In spousal abuse cases judges must expunge if the charges are dismissed or end in acquittal. § 510.300. *See also* Ky. Rev. Stat. Ann. § 431-017 (segregation of records).

*Comment:* Investigative article from Louisville Courier-Journal reports that 12,000 expungements were granted in Kentucky in two-year period prior to May 2005. *See* Jason Riley & Kay Stewart, “Confusing laws allow abuse and inequality: Filing errors also leave some sealed cases open,” Courier-J. (Louisville), May 15, 2005, *available at* <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20050515/NEWS01/505150409>. Courier-Journal article also documents confusion among judges as to whether they have discretion to deny expungement under these statutes. Uncertainty expressed about court authority to expunge records in diversion cases. When a case is expunged, several agencies—including Metro Corrections, the commonwealth's attorney's office, metro police and sometimes the state police and the FBI—are ordered to seal their records. They are supposed to certify to the court within 60 days that they have done so. The FBI, which runs the National Crime Information Center, is not bound by the state order but routinely erases the requested records. *See also* “Jefferson works to improve expungement process,” <http://www.wkyt.com/Global/story.asp?S=3499230> (in 2004 there were 6500 applications for expungement filed in Jefferson County alone, 2100 of which were granted).

- *Pretrial Diversion:* Ky. Rev. Stat. Ann. § 533.250(1)(a): Pretrial diversion available to a person charged with a Class D felony offense who has had no prior felony convictions within a ten-year period, or who has not been under felony sentence within the ten year period immediately preceding the commission of the offense. Must plead guilty, but upon successful completion of probationary period the charges are listed as "dismissed-diverted" and “shall not constitute a criminal conviction.” § 533.258. The defendant shall not be required to list this disposition on any application for employment, licensure, or otherwise unless required to do so by federal law. *Id.*

C. Administrative: N/A

### III. **Nondiscrimination in Licensing and Employment:**

Public Employment and Licensing: *See* Ky. Rev. Stat. Ann. §§ 335B.020-.070. Under § 335B.020(1), “no person shall be disqualified from public employment, or from . . . any occupation for which a license is required, solely because of a prior conviction of a crime, unless the crime for which convicted is [a felony or misdemeanor punishable by imprisonment] or otherwise directly relates to the position of employment sought or the occupation for which the license is sought.” In determining if a conviction “directly relates” to the position of public employment sought or the occupation for which the license is sought, “the hiring or licensing authority shall consider:

- (a) The nature and seriousness of the crime for which the individual was convicted;
- (b) The relationship of the crime to the purposes of regulating the position of public employment sought or the occupation for which the license is sought;
- (c) The relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.” § 335B.020(2).

Also, under Ky. Rev. Stat. Ann. § 335B.020(3), “Nothing in KRS 335B.020 to 335B.070 shall be construed so as to limit the power of the hiring or licensing authority to determine that an individual shall be entitled to public employment or a license regardless of that individual's conviction if the hiring or licensing authority determines that the individual has been successfully rehabilitated.”

*See* Op. Att’y Gen. 80-388 (1980): Conviction of a felony is not an absolute bar to an occupational license. Ky. Rev. Stat. Ann. Ch. 335B supersedes all other statutes and regulations as to licensing convicted persons. The licensing board should consider if an applicant has been rehabilitated.