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# \*New York - Restoration of Rights, Pardon, Expungement & Sealing

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### I.  Restoration of Civil Rights/Firearms Privileges:

#### A.  Voting

In New York, the right to vote is lost upon conviction of a felony if sentenced to a term of actual imprisonment, and restored upon expiration of sentence of imprisonment, including parole.  *See* N.Y. Elec. Law § 5-106(2) (“No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.”); § 5-106(3) (federal convictions); § 5-106(4) (out-of-state convictions).  These provisions “shall not apply if the person so convicted is not sentenced to either death or imprisonment, or if the execution of a sentence of imprisonment is suspended.”  § 5-106(5).  The right to vote is automatically restored upon expiration of sentence or discharge from parole, and can be restored during parole if the individual is issued a Certificate of Relief from Disabilities or Certificate of Good Conduct.**[1](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-1" \o "</strong> See NYS DOCCS website, <a href="https://www.parole.ny.gov/certrelief.html">https://www.parole.ny.gov/certrelief.html</a>. <strong>)** .  The Administrative Office for U.S. Courts has taken the position that persons convicted of federal offenses who are on supervised release are entitled to register and vote.**[2](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-2" \o "</strong> In an opinion dated October 31, 2008, the General Counsel, Administrative Office for U.S. Courts, opined that federal supervised release, as a penalty imposed separately from a prison sentence, is analogous to probation as opposed to parole. E-mail on file with author. <strong>)**

#### B.  Jury/Office

A person convicted of a felony may not serve on a jury, N.Y. Jud. Law § 510(3), and forfeits any public office they hold.  N.Y. Pub. Off. Law § 30(1)(e).  Additionally, a public official forfeits their office if convicted of a crime involving violation of the oath of office, defined as a crime an element of which is “knowing or intentional conduct indicative of a lack of moral integrity.”  *See* *[Feola v. Carroll](https://www.lexis.com/research/buttonTFLink?_m=58a7f822c8482005e91693cde89b615e&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b648%20F.%20Supp.%202d%20461%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=19&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b10%20N.Y.3d%20569%2c%20572%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAA&_md5=1da78a8d539ea6e4eda2210c7624fe0c)*[, 10 N.Y.3d 569, 572-73, 890 N.E.2d 219, 860 N.Y.S.2d 457 (2008)](https://www.lexis.com/research/buttonTFLink?_m=58a7f822c8482005e91693cde89b615e&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b648%20F.%20Supp.%202d%20461%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=19&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b10%20N.Y.3d%20569%2c%20572%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAA&_md5=1da78a8d539ea6e4eda2210c7624fe0c) (citing *[Duffy v. Ward](https://www.lexis.com/research/buttonTFLink?_m=58a7f822c8482005e91693cde89b615e&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b648%20F.%20Supp.%202d%20461%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=20&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b81%20N.Y.2d%20127%2c%20134%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAA&_md5=973a3c3cae88c9d5d5b79db14cafb1a0)*[, 81 N.Y.2d 127, 134-35, 612 N.E.2d 1213, 596 N.Y.S.2d 746 (1993))](https://www.lexis.com/research/buttonTFLink?_m=58a7f822c8482005e91693cde89b615e&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b648%20F.%20Supp.%202d%20461%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=20&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b81%20N.Y.2d%20127%2c%20134%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAA&_md5=973a3c3cae88c9d5d5b79db14cafb1a0).  New York does not disqualify all convicted persons from holding future public office as a general matter, though specific professions may be restricted.  *See* Op. Att’y Gen. 83-60 (1983) (conviction of felony resulting in sentence of probation and fine does not render the individual ineligible to run for public office).  *But see* N.Y. Const. art. VI, § 22(h) (judges removed from office disqualified from future judicial office); *In re Alamo v. Strohm*, 544 N.E.2d 608 (N.Y. 1989) (officeholder who forfeits office is ineligible to stand for election to the remainder of the unexpired term)*.*  While it is not clear whether a convicted individual may stand for a new elective office, those seeking public employment as a police officer, firefighter, or notary, for example, must obtain a Certificate of Good Conduct.  *See* N.Y. Exec. Law § 130 (executive pardon or CGC sufficient to overcome bar to notary public position for person with conviction).  Rights lost may be restored either by a governor’s pardon (rarely granted, *see* IIA below), or by a Certificate of Relief from Disabilities or Certificate of Good Conduct (available from sentencing court or Parole Board, *see* IIC below).

#### C.  Firearms

Firearms privileges are lost upon conviction of a felony or “serious offense.”  N.Y. Penal Law §§ 400.00(1)(c), 265.01(4) (rifles, shotguns, antique firearms, black powder shotguns, black powder rifles, or any muzzle loading firearm).  Privileges may be regained by a pardon, or by a Certificate of Relief from Disabilities or Good Conduct.  *See* N. Y. Correct. Law §§ 701(2), 703-a (2); *see also* 1975 NY Ops Atty Gen Nov 24.  Restoration must be specified in the document, and Class A-1 and violent felonies are ineligible.

#### D.  General information about sealing, restoration of rights, and employment discrimination

The Legal Action Center has prepared a very helpful booklet that explains in laymen’s terms how to get a record sealed and how to obtain certificates relieving disabilities (*see* Part IIB) and the effect of these forms of relief.  It includes a step-by-step guide to how a private individual can go about having their record sealed, including model letters and forms.  *See* <http://www.lac.org/doc_library/lac/publications/LoweringCriminalRecordBarriers_rev3.pdf>.   LAC also has a booklet explaining what New York employers may and may not ask about a person’s criminal record, how a person should describe their record, and what rights people with a criminal record have to be free of job discrimination.  *See* <http://www.lac.org/doc_library/lac/publications/CriminalRecordsAndEmployment.pdf>.

### II.  Discretionary Restoration Mechanisms

#### A.  Executive pardon

##### *Authority*

The pardon power is vested in the governor (except in cases of treason or impeachment).  N.Y. Const. art 4, § 4.  It may be regulated only as to the manner of applying.  The governor must report annually on the number of pardons and his reasons for granting them.

##### *Administration*

The Board of Parole must advise the governor on clemency cases if requested.  N.Y. Exec. Law § 259-c.  Absent exceptional or compelling circumstances, a pardon will not be considered if there is an adequate administrative remedy available.  Pardon is considered only if there is no other legal remedy in three cases:  1) to set aside a conviction in cases of innocence; 2) to relieve collateral disability (“This is rarely used since relief may generally be obtained by means of a Certificate of Good Conduct or Relief from Disabilities.”); and 3) to prevent deportation or permit reentry.  http://[www](http://www.ny.gov/services/apply-clemency).ny.gov/services/apply-clemency.  The Executive Clemency Bureau within the Division of Parole screens candidates for eligibility requirements, gathers materials concerning clemency applications, and responds to letters from applicants and others regarding clemency applications.  *Id.* Ordinarily a pardon is not a basis for sealing or expungement (but see the new pardon initiative applicable to 16- and 17-years-olds, *infra.*

On January 1, 2015 Governor Cuomo announced the establishment of a dedicated website administered by his office to serve as a resource for pardon applicants.  <http://www.ny.gov/services/apply-clemency>.  The website includes procedural and substantive standards for considering pardon (e.g., “Pardon applicants must demonstrate a specific and compelling need for relief and a substantial period of good citizenship” and “Unless there are exceptional and compelling circumstances, a pardon is not considered if the applicant has other administrative remedies available to them, such as a certificate of good conduct or a certificate of relief from disabilities, pursuant to provisions of Article 23 of the Corrections Law.”)   For information concerning certificates of relief and certificates of good conduct, applicants are directed to write to: New York State Department of Corrections and Community Supervision, Executive Clemency Bureau, The Harriman State Campus – Building 2, 1220 Washington Ave, Albany, NY 12226-2050, or email PardonsAndCommutations@doccs.ny.gov.  Statistics on the website reveal that the number of applications for full pardon have plummeted during Governor Cuomo’s term, dropped from 496 in 2011 to 21 in 2014.

At the end of 2015, Governor Cuomo announced a special pardon program that would apply to approximately 10,000 people convicted of misdemeanors or non-violent felonies that were committed at age 16 or 17.  *See Governor Cuomo Offers Executive Pardons to New Yorkers Convicted of Crimes at Ages 16 and 17*, <https://www.governor.ny.gov/news/governor-cuomo-offers-executive-pardons-new-yorkers-convicted-crimes-ages-16-and-17>.  Pardons under this program are not based on specific need or the availability of other administrative relief, and will be recommended so long as the applicant meets certain screening requirements, including being crime-free for at least 10 years. *See* *Pardons*, New York State, <http://www.ny.gov/services/apply-clemency>. According to the state’s clemency website, “If you receive this pardon, the New York State Office of Court Administration has stated that it will restrict public access to your criminal history, meaning that it will not be available to private employers, landlords or other companies that seek this information.”  *Id.*

##### *Frequency of grants*

In recent years, gubernatorial pardons have been rare, and usually in immigration cases where certificates provide no remedy.**[3](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-3" \o "</strong> <em>See</em> A.G. Sulzberger, <em>The Tradition of Granting Clemency and Second-Guessing it</em>, N.Y. Times (Dec. 2, 2009), <em>available at </em><a href="http://cityroom.blogs.nytimes.com/2009/12/02/clemency)**  As of January 1, 2015, Governor Andrew Cuomo had granted five pardons, four ostensibly to help its recipients avoid deportation and/or become citizens, and the fifth to a man convicted of statutory rape who later married his “victim.”**[4](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-4" \o "</strong> See <a href="http://www.nytimes.com/2015/01/01/nyregion/cuomo-using-pardon-power-gives-pair-a-second-chance.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A8%22%7D">http://www.nytimes.com/2015/01/01/nyregion/cuomo-using-pardon-power-gives-pair-a-second-chance.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A8%22%7D</a>;  <a href="http://www.nytimes.com/2014/01/01/nyregion/cuomo-issues-pardons-for-first-time-in-office.html?_r=0">http://www.nytimes.com/2014/01/01/nyregion/cuomo-issues-pardons-for-first-time-in-office.html?_r=0</a>. <strong>)**  As noted, the number of applications has dropped precipitously during his tenure, but the website and the new pardon program applicable to those who committed crimes at age 16 or 17 will predictably reverse that trend.

Prior to his establishment of an immigration pardon panel in May 2010, *infra,* Governor Paterson had granted only three pardons, one in 2008 to rapper Ricky Walters (to avoid deportation);**[5](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-5" \o "</strong> <em>See</em> Kirk Semple, <em>Hip-Hopper Is Pardoned by Governor</em>, N.Y. Times (May 24, 2008), <em>available at</em>    <a href="http://www.nytimes.com/2008/05/24/nyregion/24pardon.html?_r=1&em&ex=1211774400&en=1501eee6aa64326d&ei=5087%0A&oref=slogin">http://www.nytimes.com/2008/05/24/nyregion/24pardon.html?_r=1&em&ex=1211774400&en=1501eee6aa64326d&ei=5087%0A&oref=slogin</a>. <strong>)** one in 2009 to Osvaldo Hernandez (to assist him in his effort to join the New York Police Department);**[6](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-6" \o "</strong> <em>See </em>Al Baker, <em>Soldier Says Pardon Buoys His Hopes for Police Career</em>, N.Y. Times (Jan. 2, 2010); C.J. Chivers & William Rashbaum, <em>Army Lets a Felon Join Up, but N.Y.P.D. Will Not</em>, N.Y. Times (Jan. 6, 2008), <em>available at</em> <a href="http://www.nytimes.com/2010/01/03/nyregion/03soldier.html">http://www.nytimes.com/2010/01/03/nyregion/03soldier.html</a>. <strong>)** and one in 2010 to Qing Hong Wu, to avoid deportation.**[7](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-7" \o "</strong> Nina Bernstein, <em>Paterson Rewards Redemption With a Pardon</em>, N.Y. Times (Mar. 6, 2010), <em>available at</em><a href="http://www.nytimes.com/2010/03/07/nyregion/07pardon.html?scp=1&sq=wu%20pardon&st=cse">http://www.nytimes.com/2010/03/07/nyregion/07pardon.html?scp=1&sq=wu%20pardon&st=cse</a>;  Nina Bernstein, <em>Judge Keeps His Word to Immigrant Who Kept His</em>, N.Y. Times (Feb. 19, 2010), <em>available at</em>  <a href="http://www.nytimes.com/2010/02/19/nyregion/19judge.html">http://www.nytimes.com/2010/02/19/nyregion/19judge.html</a>. <strong>)**  The last-mentioned case provided the impetus for the immigration pardon panel.  Governor Spitzer pardoned one individual, also to avoid deportation.**[8](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-8" \o "</strong> <em>See</em> Anahad O’Connor, <em>Spitzer Pardons Ex-Convict to Spare Him Deportation</em>, N.Y. Times (Dec. 22, 2007), <em>available at</em><a href="http://www.nytimes.com/2007/12/22/nyregion/22pardon.html?scp=2&sq=frederick%20Lake%20pardon&st=cse">http://www.nytimes.com/2007/12/22/nyregion/22pardon.html?scp=2&sq=frederick%20Lake%20pardon&st=cse</a>. <strong>)**  In 2003 Governor Pataki issued a posthumous pardon to satirist Lenny Bruce for his 1964 obscenity conviction based on his use of “bad words in a Greenwich Village nightclub act.”**[9](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-9" \o "</strong> See John Kifner, <em>No Joke! 37 Years After Death Lenny Bruce Receives Pardon</em>, N.Y. Times (Dec. 24, 2003),<a href="http://www.nytimes.com/2003/12/24/nyregion/no-joke-37-years-after-death-lenny-bruce-receives-pardon.html">http://www.nytimes.com/2003/12/24/nyregion/no-joke-37-years-after-death-lenny-bruce-receives-pardon.html</a>. <strong>)**

Paterson immigration pardons*:* Governor Paterson was the only New York governor in many years to have used his pardon power on anything approaching a regular basis.  On May 3, 2010, Governor Paterson announced the establishment of a special panel of state officials to review cases of noncitizens lawfully resident in New York who were seeking pardon to avoid deportation.  *See* <http://www.governor.ny.gov/archive/paterson/press/050310Deportation.html>.**[10](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-10" \o "</strong> <em>See</em> Margaret Colgate Love, <em>Pardoning at its Best: N.Y. Gov. Paterson Spares Six From Deportation, Calling Immigration Enforcement “Random and Sometimes Cruel,</em>” American Constitution Society Blog (Dec. 9, 2010), <em>available at</em> <a href="http://www.acslaw.org/acsblog/node/17858">http://www.acslaw.org/acsblog/node/17858</a>;  Danny Hakin & Nina Bernstein, <em>New York to Ease Pardons for Convictions of Immigrants</em>, N.Y. Times (May 3, 2010), <em>available at</em><a href="http://www.nytimes.com/2010/05/04/nyregion/04deport.html">http://www.nytimes.com/2010/05/04/nyregion/04deport.html</a>. <strong>)** In December 2010 he pardoned 33 such individuals, many of whom had come to this country as children.  *See, e.g.*, <http://readme.readmedia.com/Governor-Paterson-Announces-Pardons/1791096>.

#### B.  Judicial sealing or expungement

##### *Conditional sealing of drug and other convictions upon completion of judicial diversion or drug treatment program*

N.Y. Crim. Proc. Law § 160.58 (2010) provides for conditional sealing of certain felony drug and other specified convictions, as defined in § 220 of the penal law (sale of controlled substances in the first degree, Class B felony), § 221 (criminal sale of marijuana, Class C felony), and certain offenses listed in N.Y. Crim. Proc. Law § 410.91(5) (burglary, possession of stolen property, criminal mischief) upon completion of a judicial diversion program or a drug treatment alternative to prison or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision.   Sealing may also extend to up to three prior misdemeanors.  The procedure is set forth in N.Y. Crim. Proc. Law § 160.58(3):

*“At the request of the defendant or the district attorney of a county in which the defendant committed a crime that is the subject of the sealing application, the court may conduct a hearing to consider and review any relevant evidence offered by either party that would aid the court in its decision whether to seal the records of the defendant’s arrests, prosecutions and convictions. In making such a determination, the court shall consider any relevant factors, including but not limited to: (i) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions; (ii) the character of the defendant, including his or her completion of the judicially sanctioned treatment program as described in subdivision one of this section; (iii) the defendant’s criminal history; and (iv) the impact of sealing the defendant’s records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety.”*

##### *Pre-plea diversion options*

Authority for pre-plea judicial diversion is found in New York Crim. Proc. Law §§ 216.00, .05, for persons charged with Class B and lesser felonies who have not been convicted of a violent offense in the past ten years, and no more than one violent felony.

“Adjournment in Contemplation of Dismissal” (ACD) is available for those charged with a misdemeanor. *Id.* § 170.55.  Upon successful completion of a period of probation, the record is expunged:

*“The granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant to this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution*.”

##### *Deferred adjudication*

An individual may plead guilty and have sentencing deferred upon agreement to participate in in-patient drug treatment under the Drug Treatment Alternative to Prison (DTAP) program. The program targets drug-addicted defendants arrested for nonviolent felony offenses who have previously been convicted of one or more nonviolent felonies.  Eligibility for this program is controlled by the prosecutor.  Qualified defendants enter a felony guilty plea and receive a deferred sentence that allows them to participate in a residential therapeutic community drug treatment program for a period of 15 to 24 months.  Those who successfully complete the program have charges dismissed, and the record sealed.  Those who fail are brought back to court by a special warrant enforcement team and sentenced to prison.  The program, including the respective roles of the court and prosecutor, is described in *People v. Fiammegta*, 14 N.Y.3d 90; 923 N.E.2d 1123 (2010) (in its supervision of the DTAP plea and as a measure of the due process owed defendant, the trial court was obligated to make the requisite inquiry into the merits of defendant’s discharge).  *See also* *People v. Jenkins*, 11 N.Y.3d 282; 898 N.E.2d 553 (2008) (court has broad discretion when supervising a defendant subject to DTAP, and in deciding whether the conditions of a DTAP plea agreement have been met); <http://www.brooklynda.org/dtap/prog-updates.html>.

Other deferred adjudication or deferred sentencing programs may also be available for people charged with minor offenses and people with mental illness, which may result in dismissal of charges and no record.  *See, e.g*., <http://www.brooklynda.org/dtap/TADD.htm>.

##### *Juvenile records*

Expungement is neither specifically permitted or prohibited for juvenile records.  *Richard S. v. City of New York*, 32 N.Y.2d 592, 300 N.E.2d 426 (1973).  If a delinquency procedure terminates in favor of the juvenile, the court must immediately order the sealing of records, unless the interests of justice require otherwise.  Y. Fam. Ct. Act § 375.1(1).  A juvenile may also move in writing to seal a record, except for felony acts; the court will grant the motion if in the interest of justice.  *Id.* ¶ 375.2(1).  All records for adjudicated youthful offenders are sealed automatically.  N.Y. Crim. Proc. Law § 720.35(2).

##### *Sealing of non-conviction records*

Adult felony and misdemeanor convictions cannot be expunged, except where a pardon has been given for innocence.  Sealing is mandatory for non-criminal infractions/violations (except DWI and prostitution) unless a court directs that these records not be sealed.  *See* N.Y. Crim. Proc. Law § 160.55.  Sealing is automatic upon termination of the action in favor of a person (e.g. acquittal, dismissal, declined prosecution), unless the district attorney demonstrates to the satisfaction of the court or the court determines on its own motion “that the interests of justice require otherwise, and states the reasons for such determination on the record . . . .”  N.Y. Crim. Proc. Law § 160.50.

Upon the termination of a criminal action or proceeding against a person in favor of such person . . . the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling. Except where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution.

 N.Y. Crim. Proc. Law §160.60.  Additional confidentiality and suppression provisions apply to Youthful Offender adjudications and juvenile delinquency proceedings. N.Y. Crim. Proc. Law § 720.35; N.Y. Fam. Ct. Act §§ 375.2, 380.1.  These provisions are part of a broad public policy of protecting those who have been charged but not convicted, or convicted of minor offenses, from the collateral consequences arising from any criminal record.  In response to a lawsuit, in August 2007 the Office of Court Administration ceased providing information on minor violation convictions.  *See* N.Y.L.J. at 1, col. 5 (Aug. 10, 2007); OCA website:  [https://www.nycourts.gov/apps/chrs/faqs.shtml#faqfunction](https://www.nycourts.gov/apps/chrs/faqs.shtml%22%20%5Cl%20%22faqfunction).

#### C.  Administrative certificate

A Certificate of Relief from Disabilities (CRD), N.Y. Correct. Law §§ 701-703, or a Certificate of Good Conduct (CGC), §§ 703-a, 703-b, may be obtained to restore certain rights, and may be limited to one or more specific rights.  Their purpose is to effectuate the public policy of encouraging the licensure and employment of convicted individuals.  *See [People v. Adams](https://web2.westlaw.com/find/default.wl?DB=602&SerialNum=2002616843&FindType=Y&AP=&mt=LawSchoolPractitioner&fn=_top&sv=Split&vr=2.0&rs=WLW5.05)*[, 747 N.Y.S.2d 909 (2002).](https://web2.westlaw.com/find/default.wl?DB=602&SerialNum=2002616843&FindType=Y&AP=&mt=LawSchoolPractitioner&fn=_top&sv=Split&vr=2.0&rs=WLW5.05)  The Certificate of Good Conduct dates from the 1940s, and the Certificate of Relief from Disabilities was added in 1966 with the support of Governor Rockefeller as an aid to rehabilitation as opposed to recognition of it.**[11](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-11" \o "</strong> <em>Legislative History of Certificate Statutes</em>, Memorandum to Alan Rothstein, Corporate Counsel for the New York City Bar Association, from Danielle D’Abate, Summer Intern for the Legal Clinic for the Homeless, August 11, 2006 (on file with authors).  <em>See</em> <em>generally</em> Joy Radice, <em>Administering Justice: Removing Statutory Barriers to Reentry</em>, 83 U. ColO. L. Rev. 715 (2012) (describing history and operation of the New York’s certificate statute). <strong>)**   A 2011 amendment to the law authorizing certificates of relief from disabilities is intended to require courts to consider this relief for eligible individuals at sentencing.  *See* *infra*.  New York practitioners claim that the certificate program is of limited value, in part because some courts are disinclined to certify rehabilitation as early as sentencing, and in part because employers and others are unwilling to rely on them.

##### *Eligibility*

###### 1.  Certificate of Relief from Disabilities

A CRD is available to people with no more than one felony conviction and any number of misdemeanor convictions, either from the sentencing court (for misdemeanor convictions and non-prison state sentences for felony convictions), or from the Board of Parole (for persons sentenced to imprisonment under New York law or who reside in New York but were convicted in another jurisdiction).  N.Y. Correct. Law §§ 700(1)(a), 703(1).  Under § 701(1) a CRD may be granted

*“to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein.  Such certificate may be limited to one or more enumerated forfeitures, disabilities or bars, or may relieve the eligible offender of all forfeitures, disabilities and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply, to the right of such person to retain or to be eligible for public office.”*

The court may issue a CRD at the time sentence is pronounced, in which case it may grant relief from forfeitures as well as from disabilities, or at any time thereafter.  § 702(1).  The Parole Board may issue a CRD at any time after release from prison.  § 703(1)(a).  A CRD is also available to people with federal convictions who reside in New York at sentencing, or at any time thereafter.  If issued prior to expiration of supervision, it is deemed temporary, and may be revoked.  § 703(4).  It is important to seek a CRD at sentencing in order to avoid public housing and employment bars.  The Court or Parole Board must find that the issuance of a CRD is “consistent with the rehabilitation of the eligible offender,” and “consistent with the public interest.”  §§ 702(2), 703(3).

###### 2.  Certificate of Good Conduct

A CGC is available to people with multiple felony convictions from the Board of Parole, “or any three members thereof by unanimous vote,” after a waiting period of one to five years, depending on the seriousness of the offense(s).  N.Y. Correct. Law §§ 703-b(1), (3).  A Certificate of Good Conduct is also available to persons convicted outside New York, including federal offenders.  § 703-b(2).  It is granted only if the person has demonstrated “good conduct” for the requisite period and if (like the CRD) granting relief would be “consistent with the rehabilitation of the eligible offender” and “consistent with the public interest.”  § 703-b(1).  If granted during a period of parole, the CRD is temporary, and it may be revoked at any time until the Board’s jurisdiction is ended. If not revoked, it becomes permanent at the conclusion of parole supervision.

Persons convicted in jurisdictions outside New York State must in addition demonstrate “that there exist specific facts and circumstances, and specific sections of New York state law that have an adverse impact on the applicant and warrant the application for relief to be made in New York.”  § 703-b(2).

##### *Effect*

Certificates issued under either N.Y. Correct. Law § 703 (CRD) or § 703-b (CGC) have essentially the same effect:  they relieve an eligible person of “any forfeiture or disability,” and “remove any barrier to . . . employment that is automatically imposed by law by reason of conviction of the crime or the offense.” §§ 701(1), 703-a.  (The CRD statute contains certain exceptions that apparently do not apply to CGCs, as described in the section on “public office,” below.)  A certificate may be limited to particular disabilities, and the relief may be enlarged by the court or Board of Parole at any time, to include firearms permits.  A certificate does not preclude employers or licensing agencies from considering the conduct underlying the conviction as a factor in licensing or other discretionary decisions, but it does create a “presumption of rehabilitation” that must be given some effect in deciding whether there is a disqualifying “direct relationship” between a crime and a job or license.  *See* § 753 (Part III *infra*).

Neither type of certificate voids the conviction as if it were a pardon.  § 706.  (As noted above in IIA, gubernatorial pardons are not generally available in New York State.)  Nor does a certificate preclude a licensing agency from relying on the conviction as the basis for the exercise of its discretionary power to deny or revoke a license.  §§ 701(3), 703-a.  *See, e.g.*, *Adams*, 747 N.Y.S.2d at 916 (CRD creates a “presumption of rehabilitation” and removes the automatic bar from obtaining a license, but does not establish a prima facie entitlement to the license; the licensing agency still maintains the ultimate control whether to grant the license.).  A CRD does not authorize a job applicant with a criminal record to deny on an employment application that he has ever been convicted of a crime, but the employer must consider the certificate, which establishes a “presumption of rehabilitation” as to the criminal offenses specified in the certificate.  *See* § 753(2), discussed in Part III *infra*; Op. Att’y Gen. (Inf.) 81-124 (1981).

These certificates, with certain exceptions, preclude reliance on the conviction as an automatic bar or disability, but they do not preclude agencies from considering the conviction as a factor in licensing or other decisions.  §§ 701(3), 703-a(3).  *Compare* *[Meth v. Manhattan & Bronx Surface Transit Operating Auth.](https://web2.westlaw.com/find/default.wl?DB=155&SerialNum=1987144516&FindType=Y&ReferencePositionType=S&ReferencePosition=432&AP=&mt=LawSchoolPractitioner&fn=_top&sv=Split&vr=2.0&rs=WLW5.02)*[, 521 N.Y.S.2d 54 (N.Y. App. Div. 1987)](https://web2.westlaw.com/find/default.wl?DB=155&SerialNum=1987144516&FindType=Y&ReferencePositionType=S&ReferencePosition=432&AP=&mt=LawSchoolPractitioner&fn=_top&sv=Split&vr=2.0&rs=WLW5.02) (transit authority improperly denied employment as a bus driver to man convicted of bribery, who had been granted certificate of relief from disabilities; authority presented no evidence of consideration of the eight factors to rebut the presumption of rehabilitation that the certificate of relief from disabilities creates) *with Soto-Lopez v. N.Y. City Civil Serv. Comm’n*, [713 F. Supp. 677 (S.D.N.Y. 1989)](https://web2.westlaw.com/find/default.wl?DB=345&SerialNum=1989085029&FindType=Y&AP=&mt=LawSchoolPractitioner&fn=_top&sv=Split&vr=2.0&rs=WLW5.02) (dated manslaughter conviction alone was not directly related to a caretaker position nor did it pose an unreasonable risk to persons or property; however, unreasonable risk test met when combined with more recent conviction for sale of narcotics).

Public office*:* A CRD does not apply to “the right of such person to retain or to be eligible for public office.”  N.Y. Correct. Law § 701(1).  Nor does a CRD overcome automatic forfeiture resulting from convictions for violations of N.Y. Pub. Health Law § 2806(5) (nursing home operator’s license) or N.Y. Veh. & Traf. Law § 1193(f)(2) (driver’s license suspension).  However, these exceptions do not appear in the statute authorizing issuance of CGCs.  Therefore, a CGC would appear to be sufficient to overcome bars to public employment.  *Compare People v. Olensky*, 91 Misc. 2d 225, 397 N.Y.S.2d 565 (N.Y. Sup. Ct. 1977) (Notary Public was a “public officer” so that CRD not sufficient to enable defendant to obtain a notary public commission and work as a court reporter) *with* N.Y. Exec. Law § 130 (executive pardon or CGC sufficient to overcome bar to notary public position for person with conviction).  Accordingly, a first offender who is eligible for a CRD must in addition obtain a CGC if he wishes to obtain certain kinds of public employment deemed to be a “public office,” or overcome the specific disabilities in the public health and vehicle codes*.   But see People v. Flook*, 164 Misc. 2d 284, 285 (N.Y. Cnty. Ct. 1995) (noting that some licensing statutes require persons convicted of the designated crimes to obtain a CGC and others permit them to obtain either a CGC or a CRD, and finding no relevant distinction between the two statutes for purposes of restoration of firearms rights).

Firearms*:* Either type of certificate may restore firearm rights, except to those convicted of Class A-1 felonies or violent felonies, and this relief must be specified in the certificate. N. Y. Correct. Law §§ 701(2), 703-a (2).

##### *Process*

The application for a CRD from the New York courts is explained at <http://www.nycourts.gov/courts/6jd/forms/dmv/DP-53.pdf>, and from the Parole Board at <https://www.parole.ny.gov/certrelief.html>.  The court may request an investigation from the probation service and a written report.  N.Y. Correct. Law § 702(3).  If a CRD is sought from the Parole Board, the process may take several months.  *See* <https://www.parole.ny.gov/pdf/parolecert.pdf>.  The certificate is temporary during the period of parole supervision, and becomes permanent thereafter if not revoked.  “In granting or revoking a certificate of relief from disabilities the action of the board of parole shall be by unanimous vote of the members authorized to grant or revoke parole.  Such action shall be deemed a judicial function and shall not be reviewable if done according to law.”  § 703(5).

In August 2011 subsection (1) of N.Y. Correct. Law § 702 was amended to require a court, upon application, and prior to or at the time of imposing a sentence that does not involve commitment to state prison, to consider an individual’s fitness for a CRD.  The memorandum accompanying this change in the law states that certificates are a “powerful tool [to] promote and encourage reintegration after a conviction,” but notes that they are “underutilized” and that “only a tiny fraction” of those eligible actually hold them.  <http://www.communityalternatives.org/pdf/2011-amend-Corr-L-702.pdf>.  This memorandum notes that the purpose of CRDs is to “prevent eviction, loss of a job and loss of an occupational license,” and that they may accordingly be issued “prior to an individual’s demonstration of proper conduct.”  *Id*.   New York practitioners report that some courts are reluctant to issue certificates at the time of sentencing because of their legal effect in establishing “rehabilitation” under Article 23A.

The process for seeking a CGC is more demanding, since an applicant must satisfy the “good conduct” waiting period specified in § 703-b(3).  The waiting period “shall be measured either from the date of the payment of any fine imposed upon him or the suspension of sentence, or from the date of his unrevoked release from custody by parole, commutation or termination of his sentence.”  *Id.*  The board “shall have power and it shall be its duty to investigate all persons when such application is made and to grant or deny the same within a reasonable time after the making of the application.”  Vote is by the whole board, or of a unanimous three-member panel.  § 703-b(1).

##### *Additional guidance*

The Legal Action Center has prepared a very helpful booklet that explains in laymen’s terms how to get a record sealed and how to obtain certificates relieving disabilities, and the effect of these forms of relief.  It includes a step-by-step guide to how a private individual can go about having their record sealed, including model letters and forms.  *See* <http://www.lac.org/doc_library/lac/publications/LoweringCriminalRecordBarriers_rev3.pdf>.

##### *Frequency of grants*

According to the Executive Clemency Bureau of the Division of Parole, 1,621 certificates of both kinds were issued in 2010; 1,857 granted in 2009; 3,046 granted in 2008; 1,637 granted in 2007; and 657 granted in 2006.  The percentage granted exceeds 95% each year.  There are no figures on grants made by the courts.  A 2006 report of a New York State Bar Association committee speculated that the relatively low number of certificates issued each year can be attributed to the fact that most people convicted of crimes are not informed about them.**[12](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-12" \o "</strong> <em>See</em> <em>Reentry and Reintegration: The Road to Public Safety</em>, Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings at 99-106 (May 2006), <em>available at</em> <a href="http://www.nysba.org/AM/Template.cfm?Section=Home&CONTENTID=11415&TEMPLATE=/CM/ContentDisplay.cfm">http://www.nysba.org/AM/Template.cfm?Section=Home&CONTENTID=11415&TEMPLATE=/CM/ContentDisplay.cfm</a>. <strong>)**

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### III.  Nondiscrimination in Licensing and Employment

#### A.  Non-conviction records

The New York State Human Rights Law, N.Y. Exec. Law § 296(16), prohibits public and private employers and occupational licensing agencies from asking about, or acting adversely (i.e., denying employment or licensure) because of, any arrest that did not result in a conviction, or that terminated as a youthful offender adjudication; or that resulted in a sealed conviction, including violations, infractions, and misdemeanors and felonies sealed under the 2009 Drug Law Reform Act (for individuals who successfully completed a diversion program).  The Human Rights Law does not distinguish between current employees and applicants for employment, but insofar as its protections apply only to accusations that are “not then pending” it appears to provide limited protection to current employees who are accused of crime.**[13](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-13" \o )** In addition, it does not apply to police or law enforcement jobs.

#### B.  Violation of Article 23-A and protection from negligent hiring liability

The Human Rights Law also makes it an unlawful discriminatory practice to deny employment in violation of Article 23-A of the Corrections Law (see Part IIC, above).

*“It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of “good moral character” which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law*.”

N.Y. Exec. Law § 296(15).

Section 752 of Article 23-A makes it unlawful for public employers, occupational licensing authorities, and private employers with more than ten employees, to deny or terminate**[14](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-14" \o "</strong> Until 2007, current employees were not covered by Article 23A.  S.1602/A.3208 extended the anti-discrimination protections to current employees and license holders but only if their convictions predate employment or licensure.  The law does not protect individuals who lie on an employment application, or who are accused of committing a crime while employed. <strong>)** employment or licensure based on a previous conviction unless:

*“(1) there is a “direct relationship” between one or more of the previous criminal offenses and the specific license or employment sought; or*

*(2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public*.”

N.Y. Correct. Law. § 752.  The term “direct relationship” is defined as follows:  “the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought.”  This prohibition does not apply if disqualification is mandated by law, and the person has not received a certificate of relief from disabilities or certificate of good conduct.  § 751.  Law enforcement positions are excluded from the definition of “employment” under this section.  Id.

Section 753(1) provides that in making a determination under § 752 a public agency or private employer “shall consider” the following factors:

*“(a) the public policy of this state . . . to encourage the licensure and employment of all persons previously convicted of one or more criminal offenses;*

*(b) the specific duties and responsibilities necessarily related to the license or employment sought;*

*(c) the relation of the conviction to the applicant’s ability to perform his responsibilities;*

*(d) the time elapsed since offense;*

*(e) the age of the person at the time of offense;*

*(f) the seriousness of the offense;*

*(g) any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and*

*(h) the interest of the employer of protecting property, and the safety and welfare of individuals or the general public.”*

An employer’s failure to consider each of these factors may violate § 753.  *See Acosta v. Dep’t of Education of City of N.Y.,* 16 N.Y.3d 309, 320 (2011)(Department of Education acted arbitrarily when it failed to consider the documentation petitioner submitted which evidenced her education, rehabilitation and volunteer work over the 13 years since her teenage conviction for robbery, despite its policy of closely reviewing first time applicants; “it is difficult to conclude on this record that the ‘closer review’ purportedly applied here amounted to anything more than a pro forma denial of petitioner’s application on the basis of her prior criminal conviction,” without considering each of the eight factors set forth in § 753).  *But see* *Arrocha v. Bd. of Educ. Of City of N.Y.*, 93 N.Y.2d 361 (1999) (Board of Education’s determination that teaching license applicant’s prior conviction for sale of cocaine came within statutory “unreasonable risk” exception to general rule that prior conviction should not place person under disability, was neither arbitrary nor capricious, where Board properly considered all statutory factors and determined that those weighing against granting license outweighed those in favor; age of conviction, applicant’s positive references and educational achievements, and presumption of rehabilitation were outweighed by teacher’s responsibility as role model and nature and seriousness of applicant’s offense.).

Section 753(2) provides that the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant,**[15](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-15" \o "</strong> Certificate of Relief from Disabilities, N.Y. Correct. Law §§ 700-703, or a Certificate of Good Conduct, §§ 703-a, 703-b, may be obtained to restore certain rights, and may be limited to one or more specific rights.  <em>See</em> discussion in Part IIC above. <strong>)** “which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.”  This provision has been interpreted by the courts to create a presumption of rehabilitation that must be given effect by the employing or licensing agency even where an applicant’s prior conviction is directly related to the license or employment sought.   *See* *Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 612 (1988) (because presumption of rehabilitation applies even where there is a direct relationship, the agency or employer must consider statutory factors to determine whether that relationship is sufficiently attenuated to warrant issuance of license or employment).  The authority of an agency to refuse a license based on conviction alone is discussed in *La Cloche v. Daniels*, 2006 N.Y. Misc. LEXIS 9379; 235 N.Y.L.J. 118 (N.Y. Sup. Ct. 2006).**[16](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-16" \o "</strong> The La Cloche case gained notoriety as an example of arbitrary and unreasonable agency action against a convicted person.  <em>See</em> Clyde Haberman, <em>He Did Time, So He’s Unfit to Do Hair</em>, N.Y. Times, at B1 (Mar. 4, 2005); Jennifer Gonnerman, <em>Banned From the Barbershop: The quiet death of a fighter for civil rights</em>, The Village Voice (Nov. 9-15, 2005). <strong>)**

Section 754 provides that if an individual who was previously convicted of at least one offense was denied employment or licensure, the employer or licensing agency must provide  a statement of reasons for the denial, if the individual so requests.  Section 755 specifies the mode of enforcement (in case of public employer through a civil action, and private employer through division of human rights and commission on human rights). The New York State Human Rights Law also authorizes filing a civil action in court against private employers.  N.Y. Exec. Law § 297(9).

##### *Negligent hiring protections*

The Human Rights Law also extends protections against negligent hiring lawsuits to employers who have “made a reasonable good faith determination” pursuant to the factors set forth in Article 23-A:

*“Further, there shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee’s past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee*.”

N.Y. Exec. Law § 296(15).

#### C.  Ban the Box

##### *Public employment*

In September 2015, Governor Andrew Cuomo announced plans to implement recommendations from the Council on Community Re-entry whereby applicants for competitive positions in state agencies will not be required to discuss or disclose prior convictions until an agency has interviewed the candidate and made an initial hiring decision. *See* *Governor Cuomo Announces Executive Actions to Reduce Barriers for New Yorkers with Criminal Convictions*, <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-reduce-barriers-new-yorkers-criminal-convictions> (Sept. 21, 2015).

##### *New York City Fair Chance Act*

The 2015 Act prohibits all employers in the city from asking about a job applicant’s conviction record until after a job offer is made.  After making an offer, and employer may only revoke that offer after providing the applicant with an explanation of the decision, a copy of any background check report used in the decision, and giving the applicant three days to respond.  *See* *Fair Chance Act,* NYC Human Rights Comm’n,  <http://www.nyc.gov/html/cchr/html/coverage/fair-chance.shtml>.

#### D.  Additional guidance

The Legal Action Center has prepared a helpful booklet explaining in laymen’s terms what New York employers may and may not ask about a person’s criminal record, how a person should describe their record, and what rights people have to be free of job discrimination because of their criminal record.  *See* <http://www.lac.org/doc_library/lac/publications/CriminalRecordsAndEmployment.pdf>