



CRIMINAL RECORDS AND EMPLOYMENT RIGHTS: A Tool for Survivors of Domestic Violence

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Purpose of this Brochure

Many survivors of domestic violence find themselves with criminal records. Oftentimes this is due to coerced criminal acts, experienced at the hands of their partner. Sometimes, this is a result of a misguided criminal justice system response to their partner's abuse (for example, a dual arrest). Whatever the reason, survivors who have a criminal record face enormous challenges in accessing employment and economic security. If you find yourself in this position, this tool may be helpful to you. The following information is designed to 1) help you to better understand your employment rights, and 2) offer tips and resources as you prepare for the job application and interview process, as you attend job interviews, and once you've heard from the prospective employer.

This guide also has a companion piece that is designed specifically for advocates who are working with survivors. That guide can be accessed at the following link:

http://nnedv.org/downloads/Thousing/EmptRights_CriminalRecords_AdvocateTool.pdf.

This guide, designed for survivors, can also be accessed online

at: <http://nnedv.org/downloads/Thousing/EmptRightsForSurvivorsWithCriminalRecords.pdf>.

The information below is offered as general information, not legal advice. If you want to learn more about your particular situation and your rights under the laws of your state, you should contact a lawyer in your community. You can find resources on that in the final section of this brochure.

Definitions of Terms

What is a criminal arrest?

An arrest means that you were taken into police custody and held for some period of time. Once someone is arrested, whether or not they are charged, they have a criminal record. An arrest alone is not a finding that you did anything unlawful. Once an arrest takes place, you are brought to the police station for the booking process. If the prosecutor determines that there is probable cause that you committed the crime, you are charged with the crime. Just because you are arrested does not mean that you are charged with a crime.

What is a criminal conviction?

A conviction is a guilty plea or a court's finding of guilt for a crime. You can be convicted of a crime, but not serve jail time. The sentence for a conviction varies from state-to-state, but can include: probation, a fine, community service, conditional or absolute discharge¹ or jail time. Also, a person can be found guilty but not convicted, if they receive a deferred sentence.² This varies by jurisdiction. If you are uncertain whether your criminal history includes a conviction, consult with a qualified attorney in your state with expertise in criminal records.

Employment Rights

Is it legal for an employer to consider my criminal record?

This varies by state law:

- Ten states prohibit all employers and occupational licensing agencies from considering arrests if the arrest did not lead to a conviction. Those states are: California, Hawaii, Illinois, Massachusetts, Michigan, New York, Ohio, Rhode Island, Utah, and Wisconsin.³
- Two states, Arkansas and New Mexico, prohibit both public employers and occupational licensing agencies from considering arrests, but allow private employers to consider arrests that did not lead to a conviction.
- New Hampshire only prohibits public employers from considering arrests. All other employers can consider arrests.
- The remaining 37 states plus the District of Columbia allow all employers and occupational licensing agencies to inquire about, consider, and make hiring decisions based on arrests that never led to a conviction.⁴

The Equal Employment Opportunity Commission has interpreted Title VII of the Civil Rights Act to prohibit employment policies that exclude individuals *on the basis of their criminal conviction records*. An employer may only exclude an applicant based on a criminal conviction if there is a “*business*

¹ A discharge is a type of sentence where there is no punishment. An absolute discharge is unconditional: the defendant is not punished, and the case is over. In some jurisdictions, an absolute discharge means there is no conviction even though the court found that the defendant is guilty. A conditional discharge is a sentence where the defendant is not punished, as long as they comply with certain conditions. After these conditions are met, the discharge becomes absolute. If the conditions are not met, the defendant is re-sentenced.

² A deferred sentence refers to a postponed or delayed sentence. In a deferred sentence, the court gives a defendant an opportunity to complete a probationary period before sentencing. If the defendant successfully completes probation, the court will review the defendant's file and may dismiss the charges against him/her. If, however, the defendant does not follow all of the terms and conditions of probation the court may enter the conviction and sentence the defendant accordingly. Depending on the jurisdiction, a person may or may not have a permanent record of the crime on their criminal record after a successful completion of the probationary period and subsequent dismissal of the charges.

³ See table summarizing relevant state laws pertaining to pre-employment inquiries about arrest records by visiting National H.I.R.E Network's website: www.hirenetwork.org

⁴ Legal Action Center, *After Prison: Roadblocks to Re-Entry: A Report on State Legal Barriers Facing People With Criminal Records*, visit: <http://lac.org/roadblocks-to-reentry/index.php>. The Legal Action Center provides a menu for you to access legal rights in your particular state. Go to: <http://www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=4>.

necessity.”⁵ To show that there is a business necessity, the employer must demonstrate that three factors were taken into consideration in the hiring decision:

- (1) the nature and gravity of the offense,
- (2) the timeframe since the conviction, and
- (3) the nature of the job that the applicant is seeking.

Employers should consider individual circumstances by examining the following factors: employment history, rehabilitation, and age at the time of the conviction. The process should include three steps: 1) employer notification to the applicant that he/she may be rejected based on the criminal record, 2) opportunity for applicant to respond, and 3) employer consideration of applicant’s response.

If you are a protected class, as defined by Title VII of the Civil Rights Act, (based on race, sex, ethnicity) and you believe that you have been discriminated against based on your criminal record without a business necessity, consider contacting an attorney to assess whether you have a legal claim under Title VII of the Civil Rights Act. The final section of this tool contains resources for locating a lawyer near you.

Preparing to Apply for Jobs

How do I obtain a copy of my criminal record?

You will be best equipped to apply for jobs when you have a clear understanding of your own criminal record. It is important to review your criminal record for two reasons. First, once you are familiar with your criminal record, you can learn about what your rights are as a job applicant. Second, criminal records can often be inaccurate. Only by checking them can you correct errors and enhance your job prospects.

A Record of Arrest and Prosecution, commonly known as a RAP sheet, is a report of the history of arrests based on an individual’s fingerprints. Each state has its own central repository that maintains the arrest and disposition (outcome) information for cases handled in its own state. The Federal Bureau of Investigation (FBI) also maintains all information collected from state, federal, immigration, and military cases/crimes. However, FBI records are often incomplete, as states are not required to forward information to the federal government, and they are frequently inaccurate as well.⁶ Therefore, if you were arrested in more than one state, it is often good to get both the state and the FBI record for a complete understanding of your criminal record.

To obtain a copy of your State criminal record, visit www.hirenetwork.org/clearinghouse, then click on your state and scroll down to “criminal repository.”

⁵ National Employment Law Project & Community Legal Services of Philadelphia, “Highlights of EEOC’s New Criminal Record Guidance,” April 26, 2012, visit: <http://www.nelp.org/page/-/SCLP/2012/EEOCHighlights.pdf?nocdn=1>

⁶ US Department of Justice Office of the Attorney General, The Attorney General’s Report on Criminal History Background Checks (June 2006) at 3, available at www.justice.gov/olp/ag_bgchecks_report.pdf

To receive a copy of a FBI record, send a signed written request that includes your name, date of birth, place of birth, a full set of fingerprints (including 10 rolled and four plain fingerprint impressions), and a certified check or money order for \$18, payable to “Treasury of the United States” to:

US Department of Justice
Federal Bureau of Investigation Information Services Division
Attention SCU, Mod. D-2
1000 Custer Hollow Road, Clarksburg, WV 26306.

Note: The process for obtaining a set of your fingerprints varies, but usually can be obtained at a police station for a fee. Contact your local police department for more information.

What should I look for in my RAP sheet?

Be sure to familiarize yourself with the following information about your criminal record: arrest dates; the arresting agency; arrest charges; court docket or indictment numbers; and most importantly, the “disposition” or outcome of each of the cases (for example, did it result in a conviction or was it dismissed?), the specific offense you were convicted of, if convicted, and the sentence for any conviction. Criminal background checks often misstate the disposition or outcome of the case. *Therefore, you should be sure to verify the disposition of each case through the court records.*

How can I clean up my RAP sheet?

If, after obtaining and reviewing your RAP Sheet, you determine that there are inaccuracies, you can take steps to correct them. Oftentimes, RAP Sheets contain mistakes, such as listing arrests without explaining the outcome. This is particularly problematic when the charges were dismissed, or the defendant was found not guilty of the crime. Domestic violence survivors often find that protection orders mistakenly appear on a RAP Sheet, even when they were issued on their own behalf against their abusive partner. If you find mistakes on your RAP sheet, you should contact the original agency that submitted the information to the FBI or the criminal history repository in the state where the criminal record occurred to find out how to change, correct or update information as soon as possible. To learn more about the process for cleaning-up Rap Sheets in your state, go to www.hirenetwork.org/clearinghouse, click on your state and scroll down to the section on Criminal Record Repository.

Note: contacting the Repositories can be confusing and can take some time. Try to call and get a person to provide information on the proper process or work with a local domestic violence program for assistance.

Can the conviction or arrest be expunged or sealed?

Expungement and sealing have different meanings in every state. Essentially, they are remedies whereby a court sets aside a conviction or arrest so the information is no longer publicly accessible. If a conviction is expunged or sealed, and it is your only conviction or arrest, then in most states you can honestly tell employers that you do not have a criminal record. States can only expunge or seal state convictions. Local authorities cannot do anything about a federal conviction; only the President of the United States can issue a pardon for those. You will want to check on your state’s specific expungement and sealing requirements and, if you do qualify, learn more about the process to apply.

All but four states allow for expungement or sealing of an *arrest* (where there was not a conviction); those states are Montana, North Dakota, South Dakota, and Vermont. To learn about the process for sealing an arrest in your state and the process, go to: <http://lac.org/roadblocks-to-reentry/main.php?view=question&subaction=2&qnum=0&qans=0>, click on your state, and consult with an attorney in your area to seek legal assistance.

To find whether your state allows for expungement or sealing of a *prior conviction* and the process, go to <http://lac.org/roadblocks-to-reentry/main.php?view=question&subaction=2&qnum=1> and consult with an attorney in your area to seek assistance.

If a conviction cannot be expunged or sealed, what steps can I take to enhance my employment prospects?

Some states allow individuals with criminal records to obtain a certificate of rehabilitation. At this time, six states provide for certificates of rehabilitation: Arizona, California, Nevada, New Jersey, New York, and Illinois.⁷ A Certificate can usually remove what are called "statutory bars" to employment or occupational licenses. This means that, instead of automatically being disqualified for a particular job or license due to a conviction, you have the right to be considered for the position on an individual basis. To learn more about the process of applying for a certificate of rehabilitation, consult with a legal services attorney in your state with expertise in criminal records.

Applying for a job

What should I do if a potential employer asks about my arrest record?

The answer to this question depends entirely upon the state in which you are employed.

- Ten states have laws that make it illegal for any employer to ask a job applicant about arrests that did not lead to convictions. Those states are: California, Hawaii, Illinois, Massachusetts, Michigan, New York, Ohio, Rhode Island, Utah and Wisconsin.
- Two states, Arkansas and New Mexico, prohibit both *public* employers and occupational licensing agencies from considering arrests, but allow *private* employers to consider arrests that did not lead to a conviction.
- New Hampshire only prohibits *public* employers from considering arrests. All other employers can consider arrests.
- The remaining 37 states plus the District of Columbia allow all employers and occupational licensing agencies to inquire about, consider and make hiring decisions based on arrests that never led to a conviction.⁸

⁷ www.lac.org/toolkits/certificates/summary_state_laws.htm

⁸ Legal Action Center, *After Prison: Roadblocks to Re-Entry: A Report on State Legal Barriers Facing People With Criminal Records*, visit: <http://lac.org/roadblocks-to-reentry/index.php>. The Legal Action Center provides a menu for you to access legal rights in your particular state. Go to: www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=4.

If your state has a law that prohibits employers from asking about prior arrests (these states are listed above):

- Job interviewers should not ask whether you have “ever been arrested.” If an employer asks you this question anyway, you have the right to refuse to answer. However, this might raise the employer’s suspicion, and you might not get the job as a result. Whether you can just answer ‘no’ to this question is debatable. Some would advise that, if you have arrests, but none resulted in a conviction, you can answer no. This is because it is illegal to ask about arrests that did not lead to a conviction and the law allows you to answer no to this illegal question. Yet, others would advise that you answer that you have been arrested but it didn’t lead to a conviction. Seek legal advice in your state to help determine what you should do if this applies to you.
- If your arrest resulted in a conviction that was then sealed, the law is less clear about whether you can answer no to this question. It will depend greatly upon the specific wording of your state’s laws. Therefore, it will be important to consult with an attorney in your local area to anticipate this type of situation and plan your response.

If your state does not have a law that prohibits employers from asking about prior arrests (any state not listed above):

- If an employer asks about past arrests, you are required to disclose any you may have. Untruthful responses to this question can result in refusal to hire or, if you have already been hired, the decision to fire. Regardless of your answer, if a potential employer runs a criminal background check, he/she will obtain the information.

What should I do if a potential employer asks about my conviction record?

You should answer questions about prior convictions truthfully. But, before you answer the question, be sure to respond only to the *specific* question asked. Below are some examples:

- *Have you ever been convicted of a crime?*
If an interviewer only asks about convictions, you do not need to reveal prior arrests that did not result in a conviction. Convictions generally include felonies, misdemeanors, or violations that are not sealed.
- *Have you been convicted of a crime in the past seven years?*
If an employer asks if you have been convicted of a crime in the past seven years and your conviction took place more than seven years ago, you can answer no.
- *Have you ever been convicted of a felony?*
If you have violations or misdemeanor convictions on your record but no felonies, you can honestly answer no to a question focused only upon felonies.

If your criminal record requires that you answer yes to one of their questions, consider whether it would be beneficial to share the context of the conviction. Was it related to the domestic violence you suffered? If so, consider the risks and benefits of sharing that information with a potential employer. While some employers may see the abusive context as a justification for prior criminal conduct, others may (consciously or subconsciously) disfavor individuals who are victims of domestic violence.

How can I show evidence of “rehabilitation”?

You can provide information to persuade a potential employer to hire you despite your criminal record. Evidence of “rehabilitation” aims to show the potential employer that you have taken steps to improve your life since your last conviction. Consider whether you can bring documentation to show you have done any of the following:

- (1) Attended school for at least six months, are now in school, and have a positive school record;
- (2) Participated in a job training program;
- (3) Have been employed for at least six months with a positive record;
- (4) Completed or are currently involved in a counseling or other social service program to deal with the problem that led to criminal justice outcome;
- (5) Received a Certificate of Relief from Disabilities or Certificate of Good Conduct. As mentioned earlier, if a state law says that you cannot work in a field due to your conviction, these certificates can remove an absolute bar to the position by allowing employers to consider them as evidence of rehabilitation.
- (6) Received a Parole or Probation Officer recommendation (negative drug tests, compliance with requirements, character);
- (7) Demonstrated community involvement (example: letter from clergy); or
- (8) Volunteered for a school, non-profit, or other community group (example: letter saying you have made a contribution and are dedicated).⁹

Are employers permitted to use consumer and credit report information to obtain criminal record information?

Yes, employers are permitted to use consumer report information for a criminal background check, as long as they comply with the federal Fair Credit Reporting Act¹⁰ (FCRA) and state laws. While the FCRA is intended to promote accuracy, fairness, and privacy of information in the files of consumer reporting agencies (CRA),¹¹ criminal information can still contain inaccuracies.

To obtain a background check, most private employers use companies that provide professional background screening services and/or commercial databases with collected criminal records. These private data providers and screening services are considered CRAs under the FCRA.

The Fair Credit and Reporting Act requires that employers give notice and get permission from the job applicant before they request information from a CRA.¹² The employer must obtain *written* authorization from the job candidate. Standard notification language that appears on an application for employment is not acceptable.

⁹ Legal Action Center, *How to Gather Evidence of Rehabilitation*, visit:

http://lac.org/doc_library/lac/publications/How%20to%20Gather%20Evidence%20of%20Rehabilitation%207-06.pdf

¹⁰ See 15 U.S.C. §§1681 et seq.

¹¹ A consumer reporting agency (CRA) is a person who, for monetary compensation, regularly engages in the practice of investigating and evaluating information to provide reports to employers for the purpose of evaluating an individual for employment, promotion, assignment or retention as an employee.

¹² <http://hirenetwork.org/content/employer-use-consumercredit-reports-obtain-criminal-record-information>

The FCRA provides the following protections:

- Any employer who uses information from a consumer reporting agency (CRA) to deny employment must inform the job applicant and provide the name, address and phone number of the CRA that provided the consumer report.
- A CRA must give the information contained in an individual file upon request to that individual and also provide a list of everyone who has requested it recently. There is no charge for the report if an employer has taken action against the individual because of information supplied by the CRA and if the request occurs within 60 days of receiving notice of the action.
- If a file contains inaccurate information, the CRA must investigate the item(s) in question and provide a written report of the investigation to the individual and a copy of an amended report if the investigation results in any change. If no change is made to the disputed item, the person may submit a statement for their file.
- Inaccurate information must be corrected or deleted within 30 days of being disputed.
- If an item is disputed at the source (to the creditor or criminal record repository), the source may not report the information to a CRA without including a notice of dispute.
- CRAs may not produce consumer reports that contain adverse information (including arrests that did not lead to conviction) more than seven years old with the following exceptions:
 - bankruptcies may be reported for ten years;
 - convictions may be reported without any time limitation; and
 - there is no limitation on reporting adverse information older than seven years if the individual's annual salary is \$75,000 or more.
- Access to a file is limited to people with a need recognized by the FCRA. This includes employers.

Discrimination in Employment

What should I do if an employer denies me the job based on my criminal record?

If you suspect that a prospective employer did not hire you because of your criminal record, consider asking the employer for his/her reason for denying you the job. Some states explicitly provide that right.

If you are able to confirm that the employer did in fact deny employment based on your criminal record, request a copy of the criminal background report that they relied on. Examine the report for inaccuracies.

- If you find inaccuracies, you should start a dispute process with the criminal background check company. The contact information can be found on the criminal background report itself.
- If you find that the employer based his/her job decision upon an accurate criminal report, you'll need to consider whether the decision was unlawful. It is illegal for an employer to, as a matter of policy, refuse employment to all individuals with criminal records. Employers must make individualized employment decisions using considerations that are related to the particular job requirements. If the conviction *is not related to the job requirements* and/or *significant time has passed since the conviction*, then the employer should not consider the conviction in making employment decisions.

The Equal Employment Opportunity Commission (EEOC) is the federal agency that investigates charges of employment discrimination. You need to file a charge with the EEOC and your state Human Rights Commission before you can sue your employer in court for discrimination. Consider consulting with an attorney in your area to advise you on whether you have a case of employment discrimination.

Resources

How can I find an attorney in my area?

Free or low-cost legal resources, both in civil and criminal law, are helpful to individuals with criminal histories. They can help in learning about relevant state laws governing the expungement or sealing of criminal histories or addressing other legal issues resulting from having a criminal record. Employment lawyers may help you if you have experienced discrimination in hiring or on the job.

The H.I.R.E. website state map provides a listing of local legal services attorneys for each state. Visit the following link and click on your state: www.hirenetwork.org/clearinghouse

You can also find legal services attorneys in your state by visiting the National Legal Aid and Defenders Association's website at: www.nlada.org

If you do not qualify for free legal services, you may find a listing of private employment lawyers across the nation at: www.nela.org

Where can I find more information?

Michigan Coalition Against Domestic and Sexual Violence

- Best Practice Toolkit for Working with Domestic Violence Survivors with Criminal Histories (2011): www.mcadsv.org/projects/Toolkit/index.php

Legal Action Center

- The Legal Action Center is the only non-profit law and policy organization in the United States whose sole mission is to fight discrimination against people with histories of addiction, HIV/AIDS, or criminal records, and to advocate for sound public policies in these areas. www.lac.org

HIRE Network

- Established by the Legal Action Center in 2001, the National Helping Individuals with Criminal Records Re-enter Through Employment (H.I.R.E.) Network is both a national clearinghouse for information and an advocate for policy change. The goal of the National H.I.R.E. Network is to increase the number and quality of job opportunities available to people with criminal records by changing public policies, employment practices and public opinion. www.hirenetwork.org

National Employment Law Project

- The National Employment Law Project works to restore the promise of economic opportunity in the 21st century economy. In partnership with national, state and local allies, they promote policies and programs that create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing through improved benefits and services. www.nela.org

National Reentry Resource Center

- The National Reentry Resource Center provides education, training, and technical assistance to states, tribes, territories, local governments, service providers, non-profit organizations, and corrections institutions working on prisoner reentry.

<http://nationalreentryresourcecenter.org/>