Employment Rights of People with Criminal Convictions

Pathways to Employment Conference

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1 in 4 adult Californians has an arrest or conviction record on file with the State.

National Employment Law Project 2010

Perhaps 30 % of US population has a criminal record.

Wall Street Journal August 7, 2015

California has a recidivism rate of 65%.

CDCR 2011
Employment significantly reduces recidivism.
Safer Foundation 2008

Employment boosts local economies.
Stanford Public Policy study 2014

The right to work is a human right.
Universal Declaration of Human Rights, Article 23

Employment rights of people with criminal convictions
Blanket bans on employment of people with convictions generally are unlawful:

*A policy requiring an automatic exclusion from all employment opportunities because of any criminal conduct is unlawful* because it does not focus on the dangers of particular crimes and the risks in particular positions. ...

*We cannot conceive of any business necessity that would automatically place every individual convicted of any offense in the permanent ranks of the unemployed.*

From *Green v. Missouri Pacific Railroad* (1975, emphasis added)

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**Agenda**

1) What employers can consider regarding a person’s conviction history

2) What employers can learn regarding a person’s conviction history
   - Dismissed convictions shielded (Labor Code 432.7)
   - Drug diversions sealed
   - Private employers
   - Special population employers
   - Government employers

3) When employers can learn conviction history

4) Answering questions on job applications
Federal civil rights law prohibits employment discrimination based on race and national origin.

Title VII, 42 USC § 2000e

“Nationally, African Americans and Latinos are involved in the criminal justice system in numbers disproportionate to their representation in the general population.”


Two types of employment discrimination:

- intentional discrimination
- “disparate impact” discrimination

“Criminal record exclusions [from employment] have a disparate impact based on race and national origin.”

A complete ban on employment of people with criminal records is employment discrimination

EEOC Guidance:

A policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct ... does not focus on the dangers of particular crimes and the risks in particular positions.

EEOC Guidance p. 16

Employers should evaluate each worker individually

Employers should make an individualized assessment to consider:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought.

EEOC Guidance p. 11.
Employers should evaluate each worker individually

An individualized assessment allows a worker to provide information if an employer believes the worker’s criminal history presents a problem.

The EEOC lists things workers might explain:

- possible inaccurate information in record
- facts surrounding the offense
- number of offenses
- older age at time of conviction
- work history
- rehabilitation (e.g., education/training)
- references
- whether bonded, etc.

EEOC Guidance p. 18

Some recent EEOC cases against employers

- **JB Hunt Transport** (trucking company) settled a claim when it denied an African-American applicant employment based on a conviction that was not related to trucking.

- **BMW** assembly plant settled after it fired and denied reemployment of existing employees based on an overbroad criminal background check policy that did not take into account the nature and gravity of the offense, the age of the conviction, or the nature of the job.

- **Dollar General** settled a case based on its overbroad criminal records policy when an applicant was denied based on a faulty criminal background check.

- **Bed Bath & Beyond** settled a case in New York based on refusal to hire people with conviction histories. 
How to file an employment discrimination claim

- File a complaint with the Equal Employment Opportunity Commission (EEOC) within 300 days from discriminatory event
  - [www.eeoc.gov](http://www.eeoc.gov); 96 N. Third St., Suite 250, San Jose; (800) 669-4000
- Employers must have at least 15 employees
- EEOC does an investigation
- Can go to court individually or (in a few cases) EEOC will represent

Employment rights of people with criminal convictions

☑️ What employers should consider regarding a person’s conviction history -> individualized assessment

2) What employers can learn regarding someone’s conviction history
   - Dismissed convictions shielded (Labor Code 432.7)
   - Drug diversions sealed
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   - Special population employers
   - Government employers

3) When employers can learn conviction history
4) Answering questions on job applications
Most California employers cannot consider dismissed convictions

“Expunging” a conviction =
   dismissing the conviction or withdrawing the plea

Employers cannot use dismissed convictions in employment decisions:

   . . . nor shall any employer ... utilize, as a factor in
determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record ... concerning a conviction that has been judicially dismissed or ordered sealed ...

Referring to PC sections 1203.4, 1203.4a, 1203.45 and 1210.1

When employers can consider dismissed convictions

Exceptions to Labor Code § 432.7: employers can consider dismissed convictions in the following circumstances:

- peace officers §§ (b), (e)
- health facilities § (f)
- PC § 290-related arrests for positions with regular access to patients
- HS § 11590-related arrests for positions with access to medication
- concessionaires with government §§ (k), (l) though keep in mind new § 432.9 – Ban the Box – re government employment
- employer required by law to obtain conviction information § (m)
- position requires possession/use of firearm in employment § (m)
- conviction bars applicant from holding position, notwithstanding dismissal § (m)
- employer is prohibited from employing applicant with conviction § (m)
Labor Code § 432.7
dismissed convictions

Employers cannot ask about dismissed convictions:

No employer, whether a public agency or private individual or corporation, shall ask an applicant for employment to disclose, through any written form or verbally, information . . . concerning a conviction that has been judicially dismissed or ordered sealed.

Referring to PC sections 1203.4, 1203.4a, 1203.45 and 1210.1
See also 2 CCR § 7287.4(d)(1)(B) (re misdemeanors)

It is illegal for most private California employers to ask about:

- **Arrests** that did not lead to convictions.
  - *Exceptions:* law enforcement can ask about arrests; healthcare facilities or pharmacies can ask about certain drug arrests; employers or arrests pending within last 30 days.
    Cal. Labor Code § 432.7(a)
  - National security or defense contractor exceptions: if a position requires a security clearance.
    EEOC Guidance p. 23.

- **Convictions for small amounts of marijuana** that are over two years old.
  Cal. Labor Code § 432.8
Successful completion of drug diversion / deferred entry of judgment = sealed record

People who successfully completed a drug diversion program can have diversion-related record sealed.

Once sealed, employers are not supposed to ask about or consider the event.

Cal. Labor Code § 432.7(a); 2 CCR § 7287.4(d)(1)(c); PC §§ 1000.4 (DEJ); 1210.1(e) (Prop 36)

Successful completion of drug diversion / deferred entry of judgment = sealed record

PC 1000.4(a) – Deferred Entry of Judgment (DEJ)

Upon successful completion of a deferred entry of judgment program, the arrest upon which the judgment was deferred shall be deemed to have never occurred. The defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or granted deferred entry of judgment for the offense, except [regarding work as a peace officer]. A record pertaining to an arrest resulting in successful completion of a deferred entry of judgment program shall not, without the defendant’s consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.
Successful completion of drug diversion / deferred entry of judgment = sealed record

PC 1210.1 Prop 36

(e) (1... [I]f the court finds that the defendant successfully completed drug treatment, and substantially complied with the conditions of probation, including refraining from the use of drugs after the completion of treatment, the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment, complaint, or information against the defendant. In addition, except as provided in paragraphs (2) and (3), both the arrest and the conviction shall be deemed never to have occurred. ...

Successful completion of drug diversion / deferred entry of judgment = sealed record

PC 1210.1 Prop 36 (cont’d)

(3) Except as provided below, after [a drug diversion case] is dismissed ..., the defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or convicted for the offense. Except as provided below, a record pertaining to an arrest or conviction resulting in successful completion of a drug treatment program under this section may not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate. [exceptions; application for peace officer or “any law enforcement inquiry.”; applications for state or agency license, work with state lottery, or serving on a jury.]
How to find out what’s on a rap sheet

Speed Screenings Thursdays
3:30 – 5:30 PM

• February 25
• April 21
• May 12

What can employers learn about convictions that are not dismissed?

Depends on type of employer and work:

• **Private** employers
• **Special population** employers
• **Government** employers
Access by private, special populations and government employers to workers’ conviction histories

Generally:

- Different types of employers have different access to criminal history information
- Workers should get a copy of background information
- In light of Labor Code § 432.7, it is particularly helpful to get all eligible convictions dismissed
- Government employers should not ask applicants about conviction histories until it is clear that they meet the minimum requirements for the job

Private employers’ access to workers’ undismissed convictions

“Private” employers = non-government
  e.g., Target, Cisco, Home Depot

Access to rap sheets is tightly controlled for private employers
PC § 11105

- Individual convictions are matters of public record, unless sealed or purged*
  Some information is available on internet
  e.g., in Santa Clara County Criminal Court case info since 2004
  http://scscourt.org/court_divisions/criminal/index_search.asp

- It is a misdemeanor to improperly release a rap sheet

* “Purged” relates to marijuana convictions; not the destruction of paper copies of court records
Private employers’ access to workers’ undismissed convictions

Private employers can run employment background checks, with workers’ permission

Background check companies that compile and sell background reports are regulated

Employees are entitled to request -- and should request -- a free copy of the background check report

Cal. Civil Code § 1786.12(c), (d)(1) (investigative consumer reporting agencies)

Errors are common: the criminal records of at least 2.1 million New Yorkers contain errors.

(June 2013)

Some recent cases against background check companies

• HireRight Solutions settled a case when a man lost a job offer based on its erroneous background check report. (June 2013)

• ChoicePoint settled a case when its on-line application form for Radio Shack kicked people out if they clicked the box ‘yes’ in answer to whether they had a criminal conviction. (January 2010) (Radio Shack settled the related case against them too.)
Different employers can see different information

**Government employers** can see full record, including expunged convictions

*Examples:*  
Department of Social Services  
State lottery  
Elmwood Jail

**Banking and hospitals / medical facilities**

special rules apply  
have greater access to records than private employers

**Federal employers**

Most federal employers can see records, but many are limited in how they consider criminal convictions

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Different employers can see different information

**Licensing boards** can see full record, including expunged convictions

*Examples:*  
Real estate agents  
Security guards  
Accountants

**Caregivers for special populations** will find out about expunged convictions from the state Department of Social Services

*Examples:*  
Child care workers  
Disabled people’s assistants  
Elder care workers
Licensing boards and caregivers

People can advocate for permission to work even with convictions on their records

A person cannot be denied a license solely based on a dismissed conviction.
Bus & Prof Code § 480(c)

Licensing boards must take into account
• evidence of rehabilitation
  Bus & Prof Code § 482, 486(b)
• whether the conviction is job-related
  Bus. & Prof. Code § 490(b)

Different employers can see different information

Private employers do not have access to state computer files

Examples: Target, Cisco, Safeway cannot see rap sheets

Private employers usually buy background check reports

In California, background check companies are not supposed to report:
• past arrests, or
• convictions that are older than 7 years

Cal. Civil Code § 1786.18(a)(7)

Federal law (in other states) allows broader disclosure
Background check companies

When employers ask applicants for permission to get a background check report, they must offer the applicant a free copy. This gives people the right to know what is on their report.

Cal. Civil Code § 1786.16(b)(1)) (Cal. Civil Code § 1786.16(a)(2) and 15 U.S.C. § 1681b(b)(2)

Mistakes on background reports are common

People who are the subject of an unlawful report can sue for $10,000

Cal. Civil Code § 1786.50

Employment with special populations: children, disabled, elderly

Employers in facilities with special populations must request criminal history reports of workers

- Department of Social Services notifies the employer if worker has a conviction PC § 11105.3
- Worker can request an exemption to work

Process outlined at California Department of Social Services http://ccld.ca.gov/PG404.htm
Government employers have greater access than private employers to workers’ criminal histories

All government and other authorized parties requesting a state criminal background review must give the worker a copy of the state response when the employer uses that information in adverse employment licensing or certification decisions

Cal. Penal Code §§ 11105, 11105.2 (effective January 1, 2013)

Employment rights of people with criminal convictions

- What employers must consider regarding a person’s criminal history
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3) When employers can learn conviction history
4) Answering questions on job applications
“Ban the Box” is law for government employers in California

“Ban the Box”: public employers must wait until later stages in the employment process before asking applicants about criminal histories

(effective July 1, 2014)

From www.nelp.org

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Ban the Box

A state or local agency shall not ask an applicant for employment to disclose, orally or in writing, information concerning the conviction history of the applicant, including any inquiry about conviction history on any employment application, until the agency has determined the applicant meets the minimum employment qualifications, as stated in any notice issued for the position.

Cal. Labor Code § 432.9(a)
Ban the Box: exceptions

This section shall not apply to a position for which an agency is
• otherwise required to conduct a conviction history background check
• within a criminal justice agency (even if by contract or temporary work)

Cal. Labor Code § 432.9(b)

Employment rights of people with criminal convictions

☑ What employers must consider regarding a person’s criminal history

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☑ When employers can learn conviction history

4) Answering questions on job applications
How do I fill out job applications when I have a record?

Carefully!

Misrepresentation on employment application is legal grounds to not hire a person or to fire a person (even if years later)

An employer can use an employee’s false statements on a job application as a legal reason to not hire or to fire someone, even after years of work

Most expunged (dismissed) convictions remain in a person’s computer file – the issue is which employers can find out about them.

Generally: the courts, law enforcement and national security workplaces can see everything in a person’s record.

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How do I fill out job applications when I have a record?

Read the application question carefully

Does it ask about current convictions only?

Does it ask about felonies only?

Does it ask about recent convictions only?
How do I fill out job applications when I have a record?

If a job application asks about current convictions only:

If all convictions are dismissed and all drug diversion programs are sealed – meaning no convictions* remain on your record:

→ you can answer “no” to the question “Do you have any current criminal convictions?” because:

* Convictions to state prison (e.g., San Quentin) cannot be dismissed. This does not include AB 109 convictions: all those convictions are eligible to be dismissed.

PC §§ 1203.4, 1203.4a and 1203.41 dismiss a conviction or withdraw a plea. All that’s left is an arrest, not a conviction

PC 1000.4 and 1210.1 seal a drug diversion. There is no arrest and no conviction


How do I fill out job applications when I have a record?

If a job application asks about felonies only:

If all felonies on your record have been reduced to misdemeanors:

→ you can answer “no” to the question “Do you have any felony convictions?”

A felony that has been reduced to a misdemeanor is treated as if it were a misdemeanor “for all purposes”

Cal. Penal Code § 17(b)
How do I fill out job applications when I have a record?

- If a job application asks about recent convictions only:
  
  Verify the date of the conviction
  - Rap sheets list when a sentence was entered

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- Answering questions on job applications
The employer’s questions may be unlawful, but what can I do?

- Practice responses to questions
  - Career training agencies can help
- Get written documents if possible (e.g., job application form, letters of rejection)
- Take notes
- Talk to others about a specific employers’ actions

Some resources for employment of people with criminal convictions:

- National Employment Law Project [www.nelp.org](http://www.nelp.org)
- National H.I.R.E. network: [www.reentry.net](http://www.reentry.net)
- All of Us or None: [www.allofusornone.org](http://www.allofusornone.org)
- The Papillon Foundation: [www.papillonfoundation.org](http://www.papillonfoundation.org)

Workers’ rights free legal advice in San Jose:

- Alexander Community Law Center workers’ rights clinic
  - (408) 288-7030

Ascent Employment Services

To request a copy of this Employment Rights presentation or to request an expungement presentation, contact the SJSU Record Clearance Project at

expunge@sjsu.edu

Or (408) 924-2758 (message line)

www.sjsu.edu/expunge