



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

Erika Sussman, Center for Survivor Agency and Justice
In Partnership with the National Network to End Domestic Violence

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 are an advocate working with a survivor who has a criminal record and is seeking employment, this tool may be helpful to you. The following information is designed to help you to 1) better understand the employment rights of survivors who have criminal records and 2) offer tips and resources to survivors as they prepare for the job application and interview process, attend job interviews, and respond to a decision by a prospective employer.

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

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

This guide, designed for advocates who are working with 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 a survivor with whom you work wants to learn more about her particular situation and her rights under the laws of your state, you can encourage her to contact a lawyer in your community. You can find attorney resources in the final section of this brochure.

Definitions of Terms

What is a criminal arrest?

An arrest means that an individual was 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 an individual did anything unlawful. Once an arrest takes place, the person is

brought to the police station for the booking process. If the prosecutor determines that there is probable cause that they committed the crime, they are charged with the crime. Just because someone is arrested does not mean that they 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. Someone 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 a survivor with whom you work is uncertain about whether her criminal history includes a conviction, she should consult with a qualified attorney in her state with expertise in criminal records.

Employment Rights

Is it legal for an employer to consider an applicant's 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

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

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 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 the survivor you are working with is a member of a protected class, as defined by Title VII of the Civil Rights Act, (based on race, sex, ethnicity) and you believe that she may have been discriminated against based on her criminal record without a business necessity, she should consider contacting an attorney to assess whether she has a legal claim under Title VII of the Civil Rights Act. The final section of this tool contains resources for locating legal assistance.

Preparing to Apply for Jobs

If you are working with a survivor who has a criminal record, there are several things that you can do as her advocate that can optimize her chances of obtaining employment.

- **Assist the survivor in obtaining a copy of her criminal record.**

Job applicants are best equipped to apply for jobs when they have a clear understanding of their own criminal record. It is important to review a criminal record for two reasons. First, once the survivor is familiar with her criminal record, she can learn about what her rights are as a job applicant. Second, criminal records can often be inaccurate. Only by checking them can job seekers correct errors and enhance their 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

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> .

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>

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 the survivor was arrested in more than one state, it is often good to get both the state and the FBI record for a complete understanding of her criminal record.

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

To receive a copy of a FBI record, the survivor will need to send a signed written request that includes her 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 fingerprints varies, but usually can be obtained at a police station for a fee. Contact your local police department to learn more about the process, so you may assist survivors as the need arises.

- **Review the survivor’s RAP sheet with her.**

Be sure to familiarize yourself with the following information about the 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 the survivor was convicted of, if convicted; and the sentence for any conviction. Criminal background checks often misstate the disposition or outcome of the case.

Therefore, assisting the survivor to verify the disposition of each case through the court records will be critical.

- **Work with the survivor to clean-up her RAP sheet.**

If, after obtaining and reviewing the RAP sheet, the survivor determines that there are inaccuracies, you can help her 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 the survivor finds mistakes on her RAP sheet, she 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

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 http://www.justice.gov/olp/ag_bgchecks_report.pdf

<http://www.hirenetwork.org/clearinghouse>, then click on your state and scroll down to the section on Criminal Record Repository. *Note: Contacting the Repository can be confusing. Your assistance and guidance in determining the correct process for addressing inaccuracies in you state will be helpful to the survivor.*

- **Explore whether the prior conviction or arrests can 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 publically accessible. If a conviction is expunged or sealed, and it is an individual's only conviction or arrest, then in most states a job applicant can honestly tell employers that she does 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. Advocates should familiarize themselves with their state's specific expungement and sealing requirements and learn 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 that do not 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> and click on your state.

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>.

If you are working with a survivor who you think might be able to expunge or seal an arrest or conviction, you can help by connecting her with an attorney in your area who can provide legal assistance. Information about finding an attorney in your area can be found in the final section of this document.

- **Provide information on certificates of rehabilitation.**

Even if expungement or sealing remedies are not options, you may offer other avenues to enhance her job 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, the job applicant has the right to be considered for the position on an individual basis. Advocates should familiarize themselves with the process of applying for a certificate of rehabilitation in their state.

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

Applying for a job

- **Prepare the survivor for her job interview.**

Once you have taken steps to help the survivor position herself in the most favorable light possible, you can then prepare her for the job interview and application process.

- **What should the survivor do if a potential employer asks about her arrest record?**

The answer to this question depends entirely upon the state in which the survivor is seeking employment.

- 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 include: 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

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 the applicant has “ever been arrested.” If an employer asks this question anyway, the applicant has the right to refuse to answer. However, this may raise the employer’s suspicion and the survivor may not get the job as a result. Whether the applicant can answer ‘no’ to this question is debatable. Some would advise that, if an applicant has arrests, but none resulted in a conviction, she can answer no. This is because it is illegal to ask about arrests that did not lead to a conviction and the law allows an applicant to answer no to this illegal question. Yet, others would advise that an applicant answer that she has been arrested but it didn’t lead to a conviction. If the survivor finds herself in this situation, you can connect her with a lawyer to help her determine what she should do, given her particular circumstances.
- If the survivor’s arrest resulted in a conviction that was then sealed, the law is less clear about whether she can answer no to this question. It will depend greatly upon the specific wording of your state’s laws. Given this, the survivor may want to

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: <http://www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=4> .

consult with an attorney in your local area to anticipate this type of situation and plan her response. Your program can also seek out this interpretation from an attorney to prepare advocates for this scenario.

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, then the job applicant is required to disclose any she may have. Untruthful responses to this question can result in refusal to hire or the decision to fire. Regardless of the applicant's answer, if a potential employer runs a criminal background check, they will obtain the information.

- **What should the survivor do if a potential employer asks about her conviction record?**

Job applicants should answer questions about prior convictions truthfully. But, before answering, they should 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, the applicant does 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 whether the applicant has been convicted of a crime in the past seven years, and her conviction took place more than seven years ago, she can answer no.
- *Have you ever been convicted of a felony?*
If the survivor has violations or misdemeanor convictions on her record but no felonies, she can honestly answer no to a question focused only upon felonies.

If the survivor's criminal record requires that she answer yes to one of the questions, think with her ahead of time about whether it would be beneficial to share the context of the conviction. Was the conviction related to the domestic violence she suffered? If so, partner with her to 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. If the benefits of sharing the context of the abuse seem worthwhile, be sure to still brainstorm strategies that will mitigate the possible risks.

- **Gather evidence of “rehabilitation”.**

A job applicant can provide information to persuade a potential employer to hire her despite her criminal record. Evidence of “rehabilitation” aims to show the potential employer that the applicant has taken steps to improve her life, since her last conviction. Consider whether your client can bring to her interview documentation to show she has done any of the following:

- (1) Attended school for at least sixth months, are now in school, and have a positive school record;
- (2) Participated in a job-training program;
- (3) Has been employed for at least six months with a positive record;
- (4) Completed or 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 applicants cannot work in a field due to a prior conviction, these certificates can remove an absolute bar to hiring for the position by allowing employers to consider the certificates as evidence of rehabilitation.
- (6) Parole or Probation Officer recommendation (negative drug tests, compliance with requirements, character);
- (7) Community involvement (example: letter from clergy); or
- (8) Volunteer work for a school, non-profit, or other community group (example: letter saying she has made a contribution and is 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

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

If she is unable to confirm that the employer did in fact deny employment based on her criminal record, she can request a copy of the criminal background report upon which the employer relied. Once she's obtained the report, it can be examined for inaccuracies. It will be up to the survivor if this is a process she will want your assistance on, but you can offer while letting her know that nothing in the record will affect her services with your program or be entered into your files.

- If she finds inaccuracies, she may start a dispute process with the criminal background check company. The contact information can be found on the criminal background report itself.
- If she finds that the employer based his/her job decision upon an accurate criminal report, you can help her figure out if 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. The survivor will need to file a charge with the EEOC and the state Human Rights Commission before she can sue the employer in court for discrimination. You can help her to identify an attorney in your area to advise on whether she has a case of employment discrimination.

Resources

Finding an attorney:

Free or low-cost legal resources, both in civil and criminal law, are helpful to individuals with criminal histories in learning about relevant state laws governing the expungement or sealing of criminal histories or in addressing other legal issues resulting from having a criminal record. Employment lawyers may help individuals who 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 web link and click on your state: <http://www.hirenetwork.org/clearinghouse>

Survivors 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 a survivor does not qualify for free legal services, a listing of private employment lawyers across the nation may be found at: www.nela.org

More information:

Michigan Coalition Against Domestic and Sexual Violence

- Best Practice Toolkit for Working with Domestic Violence Survivors with Criminal Histories (2011) available at: <http://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.
- Visit their website at: 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.

- Visit the website at: 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.
- Visit 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/>