



## **The Council on Mentally Ill Offenders (COMIO)**

### **Justice Status, Employment, and Expungement Frequently Asked Questions (FAQ):**

Individuals should know their rights when it comes to managing their justice status and its impact. Employers should also be aware of what kind of information and questions the law requires and what it excludes. Significant progress in reducing the collateral consequences of being justice-involved has been made nationally, but even more so in California.

Seeking an expungement can be a useful step in achieving stability and access to employment opportunities. While there are still improvements to seek, COMIO intends for this FAQ to be a simple tool that can be used to navigate the issue of expungement and its effects. It is also recommended, depending upon the situation, that the references listed at the end of the FAQ be examined as needed to assist with individual circumstances.

#### **1. Can an employer ask if you have ever been arrested?**

Federal law does not prohibit employers from asking about your criminal history. But, federal Equal Employment Opportunity (EEO) laws do prohibit employers from discriminating when they use criminal history information. Using criminal history information to make employment decisions may violate Title VII of the Civil Rights Act of 1964, as amended (Title VII).

- Title VII prohibits employers from treating people with similar criminal records differently because of their race, national origin, or another Title VII-protected characteristic (which includes color, sex, and religion).
- Title VII prohibits employers from using policies or practices that screen individuals based on criminal history information if:
  - They significantly disadvantage Title VII-protected individuals such as African Americans and Hispanics; AND
  - They do not help the employer accurately decide if the person is likely to be a responsible, reliable, or safe employee.

**In California the simple answer is NO.** California law (Labor Code 432.7) excludes employers (public or private) from asking about arrest or detention that did not result in a conviction (although it permits employers to utilize a case that is currently pending and not yet resolved). In addition, the employer cannot ask about a referral to or participation in any diversion program and is not supposed to look for any record of arrest (from any source) that did not end in a conviction.

**2. Can an employer ask if you if you have ever been convicted? What if your conviction has been expunged?**

As of January 1, 2014 California Senate Bill 530 explicitly prohibits employers (public and private) from asking an applicant to disclose, or from utilizing as a factor in determining any condition of employment, information concerning a conviction that has been judicially dismissed or ordered sealed. The legislation adds protection for criminal convictions that have been expunged or judicially set aside but there are exceptions based on the conviction and if the job being sought has a security clearance or other conditions, such as working with children (see below).

For more information please review: [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0501-0550/sb\\_530\\_bill\\_20131010\\_chaptered.htm](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0501-0550/sb_530_bill_20131010_chaptered.htm)

Effective July 1, 2014 in California Assembly Bill 218 bars public sector employers from asking about criminal records on employment applications. The legislation stipulates law enforcement positions are exempted from the requirements, as are other positions that require a criminal background check by law such as a job that requires a security clearance or working in a hospital or with the elderly or children.

Other exemptions include:

- a. The job requires possession or use a firearm
- b. The individual who has been convicted of a crime is prohibited by law from holding the position sought by the applicant, (regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation)
- c. The employer is prohibited by law from hiring an applicant who has been convicted of a crime

For more information please review: [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_0201-0250/ab\\_218\\_bill\\_20131010\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0201-0250/ab_218_bill_20131010_chaptered.pdf)

**Note:** *At the time of writing this fact sheet AB 1843 was pending the Governor's signature and would ensure that the provisions created in SB 530 and AB 218 applied also to the jurisdiction of juvenile court. AB 1843 would provide that "conviction" excludes adjudication by a juvenile court or any other court order or action taken with respect to a person who is under the jurisdiction of the juvenile court law, and would make related and conforming changes. In addition, the bill would prohibit an employer at a health facility from inquiring into events that occurred while the applicant was subject*

*to juvenile court law, with a certain exception, and from inquiring into information concerning or related to an applicant's juvenile offense history that has been sealed by the juvenile court.*

For more information please review: [http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab\\_1801-1850/ab\\_1843\\_bill\\_20160829\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1801-1850/ab_1843_bill_20160829_enrolled.pdf)

**3. Can a felony be turned into a misdemeanor?**

Some crimes, termed “wobblers “due to their location on the boarder of both misdemeanors and felonies, are automatically considered felonies if an individual had a sentence serving some amount of time in prison. These crimes can go on to be considered misdemeanors if:

- The individual is charged with a misdemeanor by the prosecutor
- The individual is charged with a felony by the prosecutor but made a plea bargain agreement that resulted in a reduction to a misdemeanor.
- The individual is given a sentence without jail time, only probation or a fine.
- An individual is committed to a juvenile facility and the judge specifies that the crime is to be considered a misdemeanor.

**4. Is having a misdemeanor over a felony better?**

Yes because misdemeanors can later be taken off of a criminal record through expungement (after incarceration), while felonies cannot.

**5. What are the appropriate times to request expungements?**

It depends on the given individual’s sentence.

- Misdemeanors without probation: apply for dismissal one year after the conviction date.
- Misdemeanors with probation: apply for dismissal at completion of probation or early discharge from probation.
- Felony with probationary jail term: request a reduction to misdemeanor from the court and then request expungement.
- Diversion program: convictions cleared automatically after the program is successfully completed.

**6. Why get an expungement?**

If an individual has a criminal record expunged, they no longer have to list the expungement on non-government employment applications. Expungement means that individuals can legally state that they have no convictions. However, some employers will still conduct a background check and may find out about the conviction, depending on how thorough their check is.

**7. How can an individual double check to make sure their expungement has been appropriately processed?**

Individuals can request a copy of their own criminal record from the Department of Justice to see for themselves that it has been changed. It may take a month or so for the record to be updated. If it has not yet, a copy of the court order granting the expungement and the “Claim of Alleged Inaccuracy or Incompleteness” form (available on the California Courts website) can be sent in to make the adjustment.

**8. After a criminal record has been expunged, do individuals have to answer the following questions any differently due to wording?**

○ **Do you have a criminal record?**

Please see the answer to #1. Federal Equal Employment Opportunity (EEO) laws do prohibit employers from discriminating when they use criminal history information. In California an employer asking a question in this way may not be following the law as outlined in California Labor Code 432.7. Your response depends upon whether you were ever convicted, the conviction type, and the job type. If your case is complex you may wish to consult legal aid or an employment attorney.

○ **Have you ever been convicted of a felony?**

Please see the answer to #1 and #2 which outline the types of circumstances (type of conviction, type of job) in which one would feel more or less comfortable with disclosing a prior conviction, even if expunged.

**References and Additional Resources:**

- California Courts Guide to Cleaning Your Record  
<http://www.courts.ca.gov/1070.htm>
- U.S. Equal Employment Opportunity Commission  
[https://www.eeoc.gov/eeoc/newsroom/wysk/arrest\\_conviction\\_records.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm)
- National Employment Law Project  
<http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>
- Local Legal Aid Resource Directory  
<http://lawhelpca.org/>
- Los Angeles Public Defenders Office – FAQ on Expungement  
[http://pd.co.la.ca.us/faqs\\_Expungement.html](http://pd.co.la.ca.us/faqs_Expungement.html) and <http://lawprojectla.org/workshops.html>
- American Civil Liberties Union, California  
<https://www.acluca.org/#criminal-justice>

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