

ANSWERING QUESTIONS FROM EMPLOYERS ABOUT CRIMINAL RECORDS OR ARRESTS

It is not unusual for victims of domestic violence, sexual assault, or stalking to have been arrested for or convicted of crimes related to the violence. Additionally, proceedings related to protective orders can sometimes appear on criminal background checks, even if the protective order was issued on your behalf against your abuser or the perpetrator of an assault. When you are looking for a job, you may be asked about your arrest record or your criminal record. This guide answers some common questions about laws that can protect you against discrimination and afford you privacy.[†]

1. Is there a difference between arrests and convictions?

Yes. Arrest - An *arrest* means only that you were taken into police custody and temporarily held by the police. An arrest is *not* a finding that you are guilty of a crime – or that you have done anything wrong at all. After you are arrested, the prosecutor decides whether to charge you with a crime. You may never be charged with a crime. You may be charged but the charges may later be dropped or dismissed. Finally, you may be charged, go to trial and be acquitted (found “not guilty”). In all of these situations, you have been arrested but not convicted. You are not guilty of a crime.

Conviction - A *conviction* means that you have been found guilty of a crime by a court or that you have agreed to plead guilty to a crime. There are many levels of crimes, including both misdemeanors and felonies. If you are found guilty of, or plead guilty to, *any* level of crime, you are generally considered to have a conviction. You may have been convicted of a crime even if you did not spend any time in jail. If you paid a fine, were put on probation, did community service, or received a conditional or unconditional discharge in connection with a crime, you may still have a conviction record. There are some states where low-level offenses – such as “violations” – are not technically criminal convictions. If this could apply to you, you should learn what the relevant law in your state is.

2. What should I do if a potential employer asks about my arrest record on a job application or in an interview?

The answer to this question depends on where you live. In some states, it is illegal for potential employers to ask about or consider arrests that did not lead to convictions. As of January 2005, the states that make it illegal are: California, Hawaii, Illinois, Massachusetts, Michigan, New York, Ohio, Rhode Island, Utah, and Wisconsin. All other states allow most or all potential employers to ask about arrests as well as convictions. (This question may be asked in many different ways. For example, an employer may ask whether you have ever been charged with a crime – this is essentially another way of asking whether you have ever been arrested).

[†] Much of the information on this guide came from guides prepared by the Legal Action Center (LAC), an organization that advocates on behalf of people with criminal records. For more information on LAC, visit its website at <http://www.lac.org>. LAC tracks relevant state laws on its website at <http://www.lac.org/lac/>.

States that do not have a law - If you live in a state that does not have a law that prohibits potential employers from asking about arrests, you must answer any questions you are asked about arrests truthfully. You might think it would be helpful to lie about your arrest record, but this is not a good idea. Obviously, lying is unethical. Also, if you lie on a job application or in an interview and the employer finds out, the employer is legally entitled to refuse to hire you. If you have already been hired, the employer may fire you because of the lie. This is true even if you have been a good employee in all other respects. Many employers now do criminal background checks on potential employees (see question #6, below), so it is likely that the employer will find out about the arrest.

States that do have a law - If you live in a state that does have a law that prohibits employers from asking questions about arrests that did not lead to convictions, you should not be asked whether you have ever been arrested. However, some employers may ask you this anyway. The employer may not know that this is an illegal question. This can put an applicant in an uncomfortable position. You can refuse to answer the question, but this may make it unlikely that you will get the job. Some advocates suggest that if you decide to answer the question, you can lawfully leave out any arrests that did not lead to convictions. You may wish to consult with an attorney about how to handle this situation. You may also wish to get a copy of your “Rap” sheet to make sure that it is accurate and includes all relevant information (such as that charges were dropped). (See Question #7 below.)

3. What should I do if a potential employer asks about my conviction record on an application or in an interview?

You should answer questions about convictions truthfully – but make sure to answer the specific question asked. Is the question: “Have you *ever* been convicted of a crime?” “Have you been convicted of a crime *in the past seven years?*” “Have you ever been convicted of a *felony?*” To prepare for such questions, before you begin the job application process you should make sure that you understand exactly what your criminal record is (for example, is a conviction a misdemeanor or a felony?). If you are asked about convictions, you do not need to disclose any arrests that did not lead to a conviction. You might think it would be helpful to lie about your conviction record, but this is not a good idea. Obviously, lying is unethical. Additionally, if you lie on a job application or in an interview and the employer finds out, the employer is legally entitled to refuse to hire you. If you have already been hired, the employer may fire you because of the lie. This is true even if you have been a good employee in all other respects. Also, many employers now do criminal background checks on potential employees (see Question #6, below), so it is likely that the employer will find out about the conviction anyway.

4. Should I tell a potential employer that my arrest or conviction is related to my being a victim of domestic or sexual violence?

Maybe. If you are asked about arrests or convictions that were related to domestic or sexual violence, you may want to explain the circumstances to a potential employer. Many victims are arrested due to “mandatory arrest laws” or retaliatory charges brought by an abuser or perpetrator. Often in such cases, charges are dropped. A prospective employer may not understand that it is common for victims of domestic or sexual violence to be arrested or that an arrest alone does not

mean that the victim has done anything wrong. Victims may also be prosecuted for crimes that are related to defending themselves from abusers or perpetrators of violence, for child abuse or endangerment related to abuse by the batterer, or for other crimes related to the violence. Explaining the context may allow a potential employer to more fully understand the arrest or conviction and the circumstances surrounding it.

5. Is a potential employer allowed to ask about my current relationships?

No. There are employment laws that prevent employers from asking personal questions regarding your relationship status. However, if you choose to tell a potential employer about domestic violence that led to an arrest or conviction, you may decide that you also would also like to tell the potential employer that you have separated from the abuser. This may make the employer more comfortable with the situation.

6. Will I know if my employer is doing a background check?

Generally yes. A federal law called the Fair Credit Reporting Act (FCRA) requires potential employers to give you notice and get your permission before they arrange to have a credit check or criminal history check done on you. This notice is often included in an employment application; read employment applications carefully to see whether by signing the application you are giving permission for the employer to do a criminal background check. Additionally, if a potential employer decides not to hire you based on unfavorable information in a report, the employer must send you a copy of the report and a description of your rights under FCRA. Also, some states have credit reporting laws that provide additional protections. If you feel that an employer has not followed the law, please see Question #11, below.

7. How can I clean up my “Rap” sheet?

A “Rap” (Record of Arrest and Prosecution) sheet can be accessed by a potential or current employer with your fingerprints or other identifying information. You may want to get a copy of your Rap sheet to make sure it is accurate. Many Rap sheets contain mistakes, such as a list of arrests that does not explain the outcomes of the arrests – even if the charges were dismissed or you were acquitted (found not guilty) of the crime. Some states also allow you to seal arrest, but not conviction, records. Sometimes proceedings related to a protective order may appear on a Rap sheet – even if the order was issued on your behalf against your abuser or the perpetrator of an assault. This is not proper. If you find mistakes on your Rap sheet, you should contact the relevant agency to correct it as soon as possible.¹

8. If I have been convicted of a crime, is there anything else I can do to help myself?

Yes. Some states allow parole officers to give certificates of rehabilitation to parolees; check with your parole officer. You also may want to get letters of recommendation from a parole officer,

¹ For a list of state agencies that may be able to assist you in gaining this information, go to <http://www.hirenetwork.org/resource.html>.

counselor, religious leader, or former employer. Additionally, practicing good interviewing skills (looking an interviewer in the eye, showing confidence, explaining the circumstances surrounding the conviction, explaining why you would be good at that particular job) will always help.

9. What if I do not get a job because I have been arrested or convicted of a crime?

As noted above (see Question #2), as of January 2005, there are ten states where it is illegal to ask about arrests that did not lead to convictions. Also, as of January 2005, five states have laws that protect people with criminal records from not being hired *because* of their records. These states are: Hawaii, Kansas, New York, Pennsylvania, and Wisconsin. Employers in these states may ask about your convictions, but, as a general rule, the past crime cannot be used as a factor against you in the hiring decision unless it is in some way relevant to the job that you are seeking. However, there are additional exceptions in these states. For example, people with criminal records may not be eligible for certain occupations, such as health care or childcare. There are about ten other states with laws that apply if you work for the government but not if you work for private employers. If you live in a state with protections and suspect that your arrest or conviction record was the reason that you were not hired for a job, your rights may have been violated. If you live in any other state, there may be other legal claims (such as antidiscrimination claims) that you could bring.

10. What if I am not hired because I am a victim of domestic or sexual violence?

A few state and local laws explicitly make it illegal to discriminate against domestic or sexual violence victims in employment settings. Legal Momentum has a guide that lists relevant domestic and sexual violence discrimination laws available on our website at <http://www.legalmomentum.org/issues/vio/laws-discrim.shtml>. General sex discrimination and other laws may also apply. Legal Momentum's "Employment and Housing Rights for Survivors of Abuse" guides summarize relevant laws. These are available on our website at www.legalmomentum.org or by contacting our office.

11. Should I consult an appropriate agency or attorney about my rights?

Yes. This guide is intended to provide accurate, general information about employment rights for domestic or sexual violence victims who have been arrested or convicted of crimes related to the violence. However, because laws and legal procedures frequently change and are subject to differing interpretations, Legal Momentum cannot ensure that the information in this guide is current, nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or appropriate agency about your legal rights in your particular situation. If you need assistance in finding a lawyer, contact Legal Momentum, the bar association in your state, your local legal services office, domestic or sexual violence coalition, or service provider.

For more information or assistance, please contact 212-925-6635 or ehrsa@legalmomentum.org.

This guide is available for downloading at www.legalmomentum.org.

©2005 *Legal Momentum*.

Answering Questions from Employers About Criminal Arrests and Convictions