

CRIMINAL RECORDS AND EMPLOYMENT

PROTECTING
YOURSELF
FROM
DISCRIMINATION



**LEGAL
ACTION
CENTER**

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WHAT DOES THIS BOOKLET COVER?

This booklet explains what New York employers may and may not ask about your criminal record, how you should describe your record, and what rights you have to be free of job discrimination because of your record.

The Legal Action Center has written other booklets that can help you get a job or housing even with a criminal record. These booklets cover topics such as how to get a copy of your criminal record; how employers and others get criminal record information; how to correct any errors on your criminal record; the few types of cases that can be sealed (there is no expungement in New York); and Certificates of Relief from Disabilities or Certificates of Good Conduct. A list of these publications is at the end.

WHAT MAY EMPLOYERS ASK ABOUT MY CRIMINAL RECORD?



It is *illegal* for most employers and licensing agencies in New York to ask about **arrests** that were not followed by a conviction. “Have you ever been arrested?” is an *illegal* question under New York law.

It also is illegal to ask about:

- Dismissed cases that were terminated in your favor—including acquittals, declines to prosecute, and voided arrests
- Juvenile delinquent and youthful offender adjudications
- Sealed convictions; including violations, infractions, and misdemeanors and felonies sealed under the conditional sealing law included in the 2009 Drug Law Reform Act.

But, the law makes exceptions for some employers. Law enforcement agencies, federal government agencies, and the Port Authority are all allowed to ask about and consider sealed information. For these jobs, you must list any arrests that you are asked about, including those that did not result in a conviction, as well as traffic summonses.

It is *legal* for ALL New York employers and licensing agencies to ask about **ANY convictions that are not sealed**. (For more information about what a “conviction” is, read the next section.)

WHAT IS A “CONVICTION”?

You can’t properly fill out a job application unless you know what a “conviction” is. A conviction is a **guilty plea** or a court’s **finding of guilt** for a “**crime**” or an “**offense**.”

CRIMES INCLUDE:

- **Felonies:**
“A” (including “AI” and “AII”), “B,” “C,” “D,” or “E.”
- **Misdemeanors:**
“A,” “B,” or “U.”

OFFENSES INCLUDE:

- **Violations:**
Non-criminal offenses that can be charged in the form of a summons (desk appearance ticket or “DAT”) or an arrest.
- **Traffic Infractions:**
Usually charged in the form of a summons and not requiring an arrest.

NOTE:
NOT EVERY ARREST
RESULTS IN A CONVICTION



NON-CONVICTION OUTCOMES INCLUDE:

- **Dismissals:**

Your case may be dismissed, you may be acquitted, the District Attorney may decline to prosecute, your charges may be dismissed because you were convicted of other charges or you may be found mentally unfit to stand trial.

- **Juvenile Delinquency Adjudications:**

Children between the ages of 7 and 16 are generally tried in Family Court (except if they are charged with certain violent felonies). A finding of guilt is called an adjudication and is not considered a conviction. The information should not be publicly available.

- **Youthful Offender Adjudications:**

Individuals between the ages of 16 and 18 who are found guilty of a crime (as well as those under 16 who are tried as adults) may be given youthful offender status by the judge. Youthful Offender status is an adjudication, not a conviction. Information about the case is confidential.

For more information about arrests that occurred when you were a youth, see Legal Action Center's publication, *"Know Your Rights: Understanding Juvenile and Criminal Records and Their Impact on Employment in New York State"* (listed at the end).

NOTE: YOU CAN HAVE A CONVICTION EVEN IF YOU NEVER SERVED TIME IN JAIL OR PRISON. If you received probation, paid a fine, did community service, or received a conditional or unconditional discharge, you generally have a conviction, unless the community service or discharge was ordered in connection with an "ACD" (Adjournment in Contemplation of Dismissal).



WHAT INFORMATION DO I HAVE TO GIVE EMPLOYERS?

Under New York State law, in order to be protected by anti-discrimination laws, you must disclose **ANY** unsealed convictions **IF** an employer asks about them. Because people are often wrong about what's on their own record, you should first get a copy of your rap sheet and correct any mistakes on it. To learn how, read "*Your New York State Rap Sheet: A Guide to Getting, Understanding and Correcting your Criminal Record.*"

What MOST New York State Employers May Legally Ask About:

Type of Offense	Yes	No
Unsealed Felony	✓	
Sealed Felony		✓
Unsealed Misdemeanor	✓	
Sealed Misdemeanor		✓
Unsealed Violation	✓	
Sealed Violation		✓
Youthful Offender		✓
Juvenile Offender	✓	
Juvenile Delinquent		✓
Sealed Dismissal		✓
Unsealed Dismissal	It depends*	

*If the case was dismissed in your favor (including acquittal, DA declined to prosecute, no true bill), employers are not allowed to ask about it when making employment decisions **EVEN** if the case is not sealed. But, employers **ARE** allowed to ask about cases that were dismissed because you were convicted on another case or were found incompetent to stand trial.



IMPORTANT: If employers ask you an illegal question, you may still need to provide certain types of information (see pages 6 – 7).

SHOULD I TELL THE TRUTH ABOUT MY CRIMINAL CONVICTIONS ON A JOB APPLICATION?



Yes. Tell the truth. While it is tempting to lie in the hope that the employer will not find out about your criminal record, more and more employers are running criminal background checks, so they likely will find out anyway. If you lie (even if you leave out some information or leave the answer blank), the employer legally may deny you the job or fire you because you lied or did not answer completely. This is true even if your criminal record should not have disqualified you or you would have been a good employee.

WHAT SHOULD I DO IF EMPLOYERS ASK AN ILLEGAL QUESTION?

If employers ask an illegal question – for example, questions about arrests that did not lead to convictions or about sealed convictions – you are not required to “divulge” (tell) the information. BUT, New York law does not make it clear whether you can answer “no” to an illegal question. This makes answering illegal questions very difficult.

If a question asks for both information employers are allowed to ask and information they are not allowed to ask, give them the information they are allowed to ask about but leave out the information they are not allowed.

If the question only asks for information the employer is not allowed, giving the correct answer can be much more difficult. If the question asks for arrests and all your arrests were dismissed, you can answer “no.” (The one exception is if the case was dismissed due to mental incompetence, as this kind of dismissal is not a “termination in your favor.”) But, if all your convictions

are sealed or your arrest ended in a Youthful Offender adjudication, the law is more unclear. We believe you should be able to say “no,” but **no court has ruled that saying “no” is legal.**

If you are asked an illegal question, contact the Legal Action Center at:
(212) 243-1313
or through the “Need help” section of LAC’s website:
www.lac.org

SAMPLE JOB APPLICATION QUESTIONS & SUGGESTED ANSWERS

Here are some questions you may see on an employment application and appropriate answers:

1. Q: Have you ever been arrested? If so, explain.

A: If you have any arrests that ended in an unsealed conviction, answer “**YES.**”

REMEMBER: A guilty plea or finding to any offense and/or crime is a conviction but dismissals, JDs and YO’s are not.

If you have arrests, but none resulted in a conviction, you can almost always answer “**NO.**” This is because it is illegal to ask about arrests that terminated in your favor, and the law allows you to answer “no” to this illegal question. The only exceptions are for arrest(s) dismissed due to mental incapacity (sometimes referred to as “730 adjudications”) and applications for law enforcement, federal or Port Authority jobs.

If you have only sealed felony, misdemeanor or violation/infraction convictions, we believe you should be able to say “no” because the law says that an employer is not allowed to ask about this information or

use it in making employment decisions AND that you do not need to disclose the information if asked. BUT no court has ruled whether you can say “no” in response to this illegal question.

2. Q: Have you ever been convicted of a crime? If so, explain.

A: If you have any arrests that ended in an unsealed felony or misdemeanor conviction, answer “**YES**.” List all unsealed misdemeanor and felony convictions but do not list anything else.

Answer “**NO**” if all your arrests ended in offenses (violations or infractions), dismissals, or JD or YO adjudications.

If you have only sealed felony or misdemeanor convictions, we believe you should be able to say “no” because the law says that an employer is not allowed to ask about this information or use it in making employment decisions AND that you do not need to disclose the information if asked. BUT no court has ruled whether you can say “no” in response to this illegal question.

3. Q: Have you been convicted of a crime in the past 7 years? If so, explain.

A: Answer “**YES**” if you were convicted of a misdemeanor or felony during the past seven years, and the conviction is not sealed.

REMEMBER: Violations and traffic infractions are offenses, not crimes.

Answer “**NO**” if all your arrests ended in offenses (violations or infractions), dismissals, or JD or YO adjudications AND/OR if all your felony and misdemeanor convictions are over 7 years old.

If all your felony or misdemeanor convictions during the past seven years are sealed, we believe you should be able to say “no” because the law says that an employer is not allowed to ask about this information or use it in making employment decisions AND that you do not need to disclose the information if asked. BUT no court has ruled whether you can say “no” in response to this illegal question.

If you are asked any of the following questions (or anything similar):

4. **Q: Have you ever been convicted of a crime, offense or violation of the law? If so, explain.**
5. **Q: Have you ever pled guilty or been found guilty of a crime or an offense? If so, explain.**
6. **Q: Were you ever convicted of an offense or violation of the law anywhere? If so, explain.**

A: If you have any unsealed felonies, misdemeanors, and violations, answer “**YES**” and list them.

Answer “**NO**” if all your arrests ended in dismissals, or JD or YO adjudications.

If you have only sealed felony, misdemeanor or violation/infraction convictions, we believe you should be able to say “no” because the law says that an employer is not allowed to ask about this information or use it in making employment decisions AND that you do not need to disclose the information if asked. BUT no court has ruled whether you can say “no” in response to this illegal question.

HOW MUCH SHOULD I SAY ABOUT MY CONVICTIONS?

Again, you must disclose any felonies, misdemeanors, or violations that are not sealed, but only if the employer asks. Pay close attention to the questions on the application.

If the application does not ask for every case or the employer only asks about convictions within the past five or seven years, only disclose the information requested. Most employers want to know — and are allowed to ask for — the “disposition” (outcome) of unsealed cases that resulted in a conviction but *not* those that did not. Be prepared to give basic information, such as the arrest date, disposition date, crime or offense for which you were convicted and the sentence.

Here is an example of information you can give an employer:

Arrest Date	Disposition Date	Conviction	Sentence
11/26/04	1/6/05	PL 120.14	\$150 fine

Notice that we put the New York State Penal Law citation for the charge. This is the section of the criminal code that defines the charge. Using the code, instead of the name of the charge, can be a way of answering the question truthfully without emphasizing what exactly you were convicted of, especially if your conviction was serious.

ANSWERING QUESTIONS IN AN INTERVIEW

You may have to explain your cases in detail at an interview, so you will need to understand the charges you were convicted of. This means you should review your record before an interview and know how to briefly explain the circumstances



of your convictions. You should also be prepared to highlight all of your successes and accomplishments since. You should provide evidence of rehabilitation that addresses the nature of your conviction(s). For example, if your convictions were drug-related, provide reference letters from a treatment provider or counselor who can confirm your successful recovery and from a community, clergy or family member who can say how you have changed. (See *“How to Gather Evidence of Rehabilitation”* at the end).

WILL EMPLOYERS GET MY RECORD THROUGH A BACKGROUND CHECK?

Most employers will get at least some part of your criminal record. Employers who are permitted to do fingerprint-based background checks will see any arrest that has not been sealed or made confidential. (For more information about which employers can fingerprint and about what kind of information can be sealed, see *“Your New York State Rap Sheet: A Guide to Getting, Understanding and Correcting Your Criminal Record.”*)



Most employers get criminal record information through commercial background check companies. Before running a background check on you, employers must first get your permission in writing. In New York State, commercial background check companies can only give information about arrests that led to convictions for crimes. Background check companies should not report arrests that did not lead to a conviction. They also should not report adjudications because these are not convictions. Nor should they report offenses, violations or infractions because these convictions are not crimes. (Though background check companies are not supposed to report violations, employers are still allowed to ask about violations that have not been sealed.) If you believe that a background check includes information that should not have been reported, call Legal Action Center at:

(212) 243-1313

Under New York law, if the job you are applying for pays less than \$25,000, the background check should only go back 7 years. (If your conviction was more than 7 years ago but you were still serving your sentence less than 7 years ago, the conviction is included in the 7 years.) However, employers are still allowed to ask about convictions that are more than 7 years old.

DO I HAVE THE RIGHT TO SEE MY BACKGROUND CHECK?



Yes. If an employer fingerprints you, you are entitled to a copy of the results. If an employer gets a commercial background check, the employer must give you a copy *before* denying you a job based on information in the background check. The employer must also give you a “reasonable” time to challenge any mistakes.

WHAT CAN I DO IF THE BACKGROUND CHECK IS WRONG?

If the information on the background check is wrong, try to correct it as soon as possible. You may bring proof to the employer and ask the employer to change its decision. (If the information on the background check should not have been disclosed because it is sealed or confidential, you should proceed carefully.) You will probably need a disposition from the court with the correct outcome of your case. (You may want to get dispositions from the court ahead of time, in case you need them. For more information about obtaining dispositions, see “*Your New York State Rap Sheet: A Guide to Getting, Understanding and Correcting Your Criminal Record*”). Also contact the background check company immediately (or DCJS if you were fingerprinted) and demand that they correct your report. The federal Fair Credit Reporting Act requires them to correct mistakes. For assistance, contact the Legal Action Center.

MAY AN EMPLOYER DENY ME A JOB BECAUSE OF MY CRIMINAL RECORD?

It is illegal under New York State and City law for an employer to deny you a job, fire you, or discriminate against you because of your past arrests that did not lead to a conviction, sealed violations, youthful offender (YO) adjudications, or felony or misdemeanor that is currently sealed under the recent reforms to the Rockefeller Drug Laws. This also applies to agencies that issue occupational licenses.

These same laws also make it illegal for employers to unfairly deny you a job or fire you because of past unsealed criminal convictions. They may only deny you a job or fire you because of your criminal convictions if:

- they are “directly related” to the job (or license) in question
- OR
- if your conviction history indicates that hiring you would pose an unreasonable risk to property or to the safety of others

When deciding whether to hire or license you, an employer or licensing agency should consider such factors as how long ago your conviction(s) were, how old you were at the time, what you have been doing since, etc.

For more information about this law, about employment discrimination in general, and on tips for getting jobs even if you have a criminal record, see “Where Can I Get More Information?” at the end of this booklet.

WHAT CAN I DO IF AN EMPLOYER DENIED ME A JOB OR FIRED ME BECAUSE OF MY CRIMINAL RECORD?

STEP 1:

Try to find out if you were denied the job because of your criminal record (not something else). New York law gives you the right to ask the employer for a letter stating why it denied you the job. For a sample request, see *Sample letter requesting reason for job denial and copy of background report* which can be found at Legal Action Center's website,

www.lac.org.

STEP 2:

If the employer denied you a job or fired you because of criminal record information on a consumer report, ask the employer for a copy of the consumer report. Federal law requires the employer to give you the report *before* the job denial or termination, but employers often do not. The employer also must give you the name, address and phone number of the credit reporting agency that issued the report. That agency must give you the report for free, if you ask for it, within 60 days of the job denial or termination.

STEP 3:

Make sure the criminal record information the employer was using was correct! If the background report gave wrong information about your criminal record, follow the steps described above, in "What Can I Do if the Background Check is Wrong?"

Even if the criminal record information was correct, the employer might have violated New York State and City Law, described above, in “May an Employer Deny Me a Job Because of My Criminal Record?”

If you believe a private employer (not a government agency) violated this law, call the New York State Division of Human Rights at:

(212) 870-8400

or the New York City Commission on Human Rights (if the employer is located in New York City) at:

(212) 306-7500

Or call the Legal Action Center at:

(212) 243-1313

or visit the “Need Help” section of our website:

www.lac.org

and fill out the form that allows you to get help right away.

If the employer was a government agency, call the Legal Action Center or visit the “Need Help” section of our website.

WHERE CAN I GET MORE INFORMATION?

The following Legal Action Center publications are all available for free at our website:

www.lac.org

Click on “free publications” and then “criminal justice.” Also visit the “Need Help” section of our website.

Your New York State Rap Sheet: A Guide to Getting, Understanding and Correcting Your Criminal Record

Explains how to get a copy of your criminal record and correct any errors it contains, as well as how employers get information about your record and what they are able to see

Lowering Criminal Record Barriers: Certificates of Relief/Good Conduct and Record Sealing

Explains what cases are eligible to be sealed and how to seal them, as well as who is eligible for a Certificate of Relief from Disabilities or a Certificate of Good Conduct and how to apply for them

Are You . . .

A guide for avoiding job discrimination based on HIV/AIDS, an alcohol/drug history, or a criminal record

Employment Laws Affecting Persons with Criminal Convictions

Discusses federal laws

How to Gather Evidence of Rehabilitation

A list of evidence you can use to convince employers and others of your rehabilitation

How to Obtain Important Documents

Information on getting important documents, including driver's licenses, non-driver I.D. cards, social security cards, birth certificates, voter registration, naturalization cards and passports

Know Your Rights: Understanding Juvenile & Criminal Records and Their Impact on Employment in New York State

Information about arrests that happened before you turned 19

Occupational Licensing Survey

A chart detailing criteria for eligibility and applying for various job-related licenses.

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The Legal Action Center is a non-profit, public interest organization that works on legal issues involving criminal records, alcohol and drug problems, and HIV/AIDS.

This publication was made possible through the generous support of the New York State Division of Criminal Justice Services and the Office of Probation and Correctional Alternatives.

The Legal Action Center would like to thank Kate Rubin of the Bronx Defenders, Judith Whiting of the Community Service Society, and Nicholas Posada and the clients at the Fortune Society for their help in reviewing this publication.

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