

CRIMINAL RECORDS AND EMPLOYMENT

PROTECTING
YOURSELF
FROM
DISCRIMINATION



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INTRODUCTION

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 and created videos that can help you get a job or housing even with a criminal record. They 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 materials is at the end.

WHEN MAY EMPLOYERS ASK ABOUT MY CRIMINAL RECORD?

It depends if you are applying for work in a city or area with a “ban-the-box” law. Some cities and counties in New York have passed what are known as “ban-the-box” laws. These laws require most employers to remove the criminal conviction question from job applications and to delay asking about criminal convictions or getting a background check until later in the hiring process. The purpose of these laws is to allow applicants with criminal records to get further into the application process before the employer learns about their criminal record. Below is a summary of the ban-the-box laws in New York:

- **New York City (Fair Chance Act):** This law makes it illegal for most employers in New York City to ask about a job applicant’s criminal record before making a job offer. Most employers also may not say anything about criminal records or background checks in job postings or on job applications. They also may not discuss criminal record issues before making a conditional job offer. In addition, the Fair Chance Act requires most employers to follow specific steps before denying a job because of a criminal record.

Other cities and counties: Albany, Buffalo, Dutchess County, Ithaca, Kingston, Newburgh, Rochester, Syracuse, Tompkins, Ulster County, Westchester County, Woodstock, and Yonkers. The laws in these areas generally delay when employers may ask about a criminal record, but do not provide the additional protections in New York City’s law.

Not all employers are required to follow ban-the-box laws. For more information, view NELP’s (National Employment Law Project) Ban-The-Box / Fair Chance State and Local Guide: <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>

WHAT MAY EMPLOYERS ASK ABOUT MY CRIMINAL RECORD?

Most employers and licensing agencies in New York are only allowed to ask about:

- Unsealed convictions. (Convictions are a finding of guilt for a crime or offense.)
 - **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 as part of an “ACD” (Adjournment in Contemplation of Dismissal).
- Arrests that did not “terminate in your favor,” including:
 - Cases with a finding of “not responsible due to mental disease or defect” (under Criminal Procedure Law § 330.20) or a finding that the defendant is an “incapacitated person” (under Criminal Procedure Law Article 730).
 - Arrests that were “covered by” another charge. This can happen when a charge was dismissed in exchange for pleading guilty to another charge, or the verdict after trial included a guilty finding on at least one charge even though the others were dismissed.
- Pending charges in an open case.

It is *illegal* for most employers and licensing agencies to ask about *arrests that ended in your favor, or arrests that resulted in a sealed conviction*. (To learn more about which convictions are eligible to be sealed and how, read *Your New York State Rap Sheet: A guide to getting, understanding and correcting your criminal record*.) “Have you ever been arrested?” is an *illegal* question under New York law for most employers. It is generally 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 – adjudications are not convictions.

- Sealed convictions – including violations, infractions, and misdemeanors and felonies sealed under either the 2009 Drug Law Reform Act or 2017 sealing law (CPL § 160.59).

But employers for these and certain other positions may consider sealed cases:

- Police or peace officers
- Employment or membership in law enforcement agency (may consider sealed convictions and YO adjudications, but not dismissals)
- Employers not covered by state law, including federal employers or Port Authority.

NOTE: New York employers and licensing agencies may ask about ***any convictions that are not sealed***. *But in areas with ban-the-box laws, most employers may not ask until later in the process.*

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 when legally permitted. (Remember, applications in areas with ban-the-box laws or policies may not ask about criminal records before a conditional offer. See page ---.) Because people are often mistaken about what's on their own record, you should first get a copy of your rap sheet and correct any mistakes. 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	X	
Sealed Felony		X
Unsealed Misdemeanor	X	
Sealed Misdemeanor		X
Unsealed Violation	X	
Sealed Violation		X
Youthful Offender		X
Juvenile Offender	X	
Juvenile Delinquent		X
Sealed Dismissals		X
Unsealed Dismissals	It depends*	
Pending Arrests	X	

*If the case was dismissed in your favor (including acquittal, DA declined to prosecute, no true bill), most 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 below for more details.)

SHOULD I TELL THE TRUTH ABOUT MY CRIMINAL CONVICTIONS WHEN APPLYING FOR A JOB?

Yes. Tell the truth. While it is tempting to lie in the hope that the employer will not find out about your criminal record, most employers run 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 AN EMPLOYER ASKS AN ILLEGAL QUESTION?

If you are asked an illegal question, contact the Legal Action Center at (212)243-1313.

If an employer asks an illegal question, you are not required to provide 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 hard.

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, answering may be more difficult. If the question asks if you were arrested and all your arrests were dismissed in your favor, you can answer “no.” (If the case was dismissed due to mental incompetence, this kind of dismissal is not a “termination in your favor so you must list it.”) But, if all your convictions are sealed or ended in a Youthful Offender adjudication, the law is more unclear. We believe you should be able to say “no,” but courts have not clearly stated that saying “no” is legal.

If an employer covered by a ban-the-box law asks a question before it is legally allowed, try to seek legal help before answering. If that is not possible, consider not responding to the question or providing the correct information. (If you do provide an accurate answer and are then denied the job, you might be able to show that the job denial was illegal.)

SAMPLE EMPLOYMENT QUESTIONS & SUGGESTED ANSWERS

Below are some questions you may see or hear when applying for a job and appropriate answers. *Remember that employers covered by ban-the-box laws or orders are not allowed to ask about criminal histories until after a conditional job offer.*

NOTE: These sample answers apply to most applications, but not applications for police and peace officer jobs, jobs with law enforcement agencies, or federal or Port Authority jobs or clearances.

Q: Have you ever been convicted of a crime? If so, please list.

A: If you have any arrests that ended in an unsealed felony or unsealed misdemeanor conviction, answer “YES.” **List all unsealed misdemeanor and felony convictions** but do not list violation convictions (they are not crimes) or youthful offender or juvenile delinquency adjudications (they are not convictions).

Answer “NO” if all your arrests ended in non-criminal offenses (violations or infractions), dismissals, or JD or YO adjudications. (But answer “yes” for police and peace officer jobs or federal or port authority clearances.)

If you have only sealed felony or misdemeanor convictions, we believe you should be able to say “no” to most employers (see exceptions on p. 4). But courts have not clearly confirmed this.

Q: Have you been convicted of a crime in the past 7 years?

A: Answer “YES” if you were convicted of a misdemeanor or felony during the past 7 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 7 years are sealed, we believe you should be able to say “no” to most employers (see exceptions on p. 4). But courts have not clearly confirmed this.

Q: Have you ever been convicted of a crime, offense or violation of the law? If so, explain.

OR: Have you ever pled guilty or been found guilty of a crime or an offense? If so, explain.

OR: 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 give provide some explanation. Try to get legal advice about how to explain your convictions.

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 most employers are 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 courts have not clearly confirmed this.

HOW MUCH SHOULD I SAY ABOUT MY CONVICTIONS?

If asked to “describe” or “list” your convictions, **you must disclose any felonies, misdemeanors, or violations that are not sealed** (if the employer asks when legally permitted). **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 5 or 7 years, only disclose the information requested. Most employers want to know—and are allowed to ask—the “disposition” (outcome) of unsealed cases that resulted in a conviction. Be ready to give basic information, such as the arrest date, disposition date, crime or offense for which you were convicted and sentence. You may want to briefly explain the circumstances of the conviction, take

responsibility for it, and describe positive things you have done since then. Here are two examples of ways you can list your convictions:

Offense Date	Disposition Date	Unsealed Convictions	Sentence
11/26/09	1/6/10	PL 120.10	5 years prison

Or

Offense Date	Disposition Date	Unsealed Convictions	Sentence
11/26/09	1/6/10	First Degree Assault	5 years prison

ANSWERING QUESTIONS IN AN INTERVIEW OR AFTER A CONDITIONAL JOB OFFER

At some point – either after a conditional offer (in places with ban-the-box laws) or earlier (in places without ban-the-box laws) you may have to explain your cases in detail, so you will need to understand the charges you were convicted of. You should review your record beforehand and know how to briefly explain the circumstances of your convictions. Be prepared to highlight all of your successes and accomplishments since. You should provide evidence of positive changes in your life (rehabilitation) that addresses the nature of your conviction(s). For example, provide evidence of trainings you have completed, or letters from employers, teachers, and / or a community, clergy or family member who can say how you have changed. See *How to Gather Evidence of Rehabilitation* (listed at the end).

WILL EMPLOYERS GET MY RECORD THROUGH A BACKGROUND CHECK?

Most employers will get at least some part of your criminal record. (*This may occur after a conditional offer if the job is covered by a ban-the-box law or order.*) Employers who do

fingerprint-based background checks will see any arrest that has not been sealed or made confidential. A few employers, like law enforcement agencies, will see sealed information as well. (For more information about which employers can fingerprint and which 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. But employers must get your permission in writing beforehand. In New York State, commercial background check companies may only give information about arrests that led to **convictions for crimes**. Background check companies may not report:

- arrests that did not lead to a conviction;
- adjudications; or
- violations or infractions **because these convictions are not crimes**. (Though background check companies are not allowed 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 the 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. However, employers are still allowed to ask about convictions more than 7 years old.

DO I HAVE THE RIGHT TO SEE MY BACKGROUND CHECK?

Yes. If an employer gets a commercial background check, the employer must give you a copy before denying you a job based on the background check. The employer must also give you a “reasonable” time to challenge any mistakes.

** For most jobs in New York City, the Fair Chance Act gives job applicants the right to see any criminal background search the covered employer conducted. For example, the employer would need to share a google search about your criminal record.*

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. Bring proof to the employer and ask the employer to change its decision. (If the information on the background check is sealed or confidential, you may want legal advice about what to tell the employer.) You will probably need a disposition from the court with the correct outcome of your case. It is a good idea to get dispositions ahead of time, in case you need them. For more information, see *Your New York State Rap Sheet: A guide to getting, understanding and correcting your criminal record* (listed at the end). 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 help, call the Legal Action Center.

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

It is illegal for most employers in New York State to deny you a job, fire you, or discriminate against you because of past arrests that terminated in your favor, sealed violations, sealed misdemeanors, sealed felonies, or youthful offender (YO) adjudications. This also applies to occupational licenses.

When deciding whether to hire or license you, employers must look at your age when convicted, the number of years passed, the job duties, and evidence of positive changes since your conviction. Employers who will not hire anyone with a conviction or a certain type of conviction are likely violating the law!

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?

What can you do if you were denied a job or fired because of your criminal record?

Step 1: If there are ban-the-box laws where you applied for a job, did the employer violate them? If so, see Step 5.

Step 2: Ask why you were denied the job. It helps to know if it was because of your criminal record, and not something else. New York law gives you the right to ask the employer for a letter explaining why it denied you the job. For a sample, see *Model Letter Asking for Written Explanation for Job Denial and Copy of Background Check* (listed at the end).

Step 3: Ask the employer for a copy of any background report used to deny you the job. Employers are required to give you the report before denying you the job or firing you, but employers often fail to do this. The employer also must give you the name, address and phone number of the background check company that wrote the report. That company must give you the report free of charge if you ask within 60 days of being denied the job or fired. For a sample, see *Model Letter Asking for Written Explanation for Job Denial and Copy of Background Check* (listed at the end).

Step 4: Make sure the information the employer used was correct! If the background report gave wrong information about your criminal record, bring proof to the employer and ask the employer to change its decision. Also call the background check company and demand that it correct your report. Provide proof if you can. Background check companies do not always do a proper investigation, even though the law requires them to investigate and correct mistakes. For help, contact the Legal Action Center.

Step 5: Consider filing a complaint. Even if the criminal record information is correct, the employer might have violated Article 23-A of the New York Correction Law or the Human Rights Laws, described above. If you think a private employer violated any of these laws, call the New York State Division

of Human Rights at (888) 392-3644 or the New York City Commission on Human Rights at (212) 306-7450. Contact the Legal Action Center if you think a government employer violated these laws.

The employer may also have violated federal race discrimination laws. You may call the U.S. Equal Employment Opportunity Commission at (800) 669-4000 to file a complaint.

You also may call the Legal Action Center at (212) 243-1313 for help with any of these issues.

WHERE CAN I GET MORE INFORMATION?

The following Legal Action Center resources are all available for free at our website, www.lac.org.

- *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;
- *Criminal Procedure Law § 160.59 - New Law To Seal NY Convictions*
- *Are You Somebody With HIV / AIDS? Alcohol or Drug Addiction? A Criminal Record?* – a guide for avoiding job discrimination based on these issues;
- *How to Gather Evidence of Rehabilitation* – a list of evidence you can use to convince employers and others about the positive changes you have made in your life.
- *Moving Forward with a Criminal Record in New York State* – a four-part webinar series ranging from 13-17 minutes each.



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.

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225 Varick Street, New York, NY 10014
WWW.LAC.ORG
(212) 243-1313