



CENTER FOR SURVIVOR
AGENCY & JUSTICE

GUIDEBOOK ON CONSUMER & ECONOMIC CIVIL LEGAL ADVOCACY FOR SURVIVORS

A COMPREHENSIVE AND SURVIVOR-CENTERED GUIDE FOR
DOMESTIC VIOLENCE ATTORNEYS AND LEGAL ADVOCATES



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The Center for Survivor Agency and Justice is a national organization dedicated to enhancing advocacy for survivors of intimate partner violence. CSAJ envisions a world where all people have equal access to physical safety, economic security, and human dignity. CSAJ develops and promotes advocacy approaches that remove systemic barriers, enhance organizational responses, and improve professional practices to meet the self-defined needs of domestic and sexual violence survivors.

The Consumer Rights for Domestic and Sexual Violence Survivors Initiative (Consumer Rights Initiative) is a national project of CSAJ that seeks to enhance consumer rights for domestic and sexual violence survivors by enhancing the capacity of and partnerships between domestic/sexual violence and consumer law and advocacy. Consumer and other economic civil legal remedies have the potential to provide survivors with the legal tools to address issues such as debt collection, credit discrimination, bankruptcy, damaged credit, tax liability, and foreclosure. To achieve survivors' joint goals of physical and economic safety also requires purposeful cross-training, networking, and sustained partnership building on the local and national levels. Therefore, CSAJ's Consumer Rights Initiative offers technical assistance to lawyers, advocates, programs, and communities across the nation through: advocacy tools and resources, webinar trainings, national conferences, individual technical assistance, and Building Partnerships Demonstration Sites.

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Fifteen



Criminal Records & Employment Rights for Survivors

By Erika Sussman^{1, 2}

Introduction

Many survivors of domestic violence find themselves with criminal records. Often 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). And still other times, this arises from a criminal justice system that has a disparate impact on poor people and communities of color. Whatever the reasons for a particular individual, survivors who have a criminal record face enormous challenges in accessing employment and economic security, which exposes them to increased risk of physical violence. This chapter aims to help advocates and attorneys better understand the employment rights of survivors who have criminal records and to 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.

Domestic Violence and Criminal Records

While the criminal justice system is touted as a source of *protection* for survivors, it often presents survivors with negative experiences and dangerous outcomes. Survivors often

¹ With critical contributions by Beth Johnson, Director of Legal Programs, and Nikki Donnelly, Criminal Records Fellow, with Cabrini Green Legal Aid

² This chapter is updated from 2013 tools on employment rights for survivors with criminal records: <https://csaj.org/library/view/criminal-records-employment-rights-a-tool-for-advocates-working-with-domest>

Ardenia's Story

Ardenia is a 39-year-old, African-American woman. She met her partner Andre when they were both in high school. At the beginning of their relationship, Andre was very affectionate and caring. About a year or so after they started dating, Andre began complaining that Ardenia was not spending enough time with him. Andre often harassed Ardenia when she chose to go to class over hanging out with him. Ardenia was frustrated with Andre, but she thought that once she graduated she would have more time to spend with Andre and the problem would be solved. Unfortunately, the emotional abuse did not stop after graduation.

Not long after Ardenia graduated, she became pregnant and gave birth to her daughter Kayla, and Ardenia and Andre decided to move in together. Soon after, Andre became physically abusive. Now, Ardenia cares for their daughter, while working as a customer service representative and fitting-in a couple of classes at dental hygiene school, and she often has to take-on a double shift or second job. Although Andre works part-time at a temp agency, he has been unable to secure full-time employment.

Over the years, Ardenia has called the police at least a dozen times. Several times, when the police responded to these calls, Ardenia was arrested, despite the fact that Andre initiated the violence. On the occasions when Andre was arrested and charged, Ardenia has not shown-up at court to testify. Ardenia is reluctant to testify against Andre out of fear that he will retaliate against her and her daughter. Ardenia also fears that, if Andre is criminally prosecuted, he will be unable to contribute to their household financially. Although Ardenia is the primary financial provider of the household, she relies on Andre's income to supplement her earnings.

Last weekend, Ardenia was arrested when the neighbors called the cops following Andre's assault. Ardenia and Andre had recently moved to a new neighborhood because they could no longer afford the rent. Ardenia's job was too far from their new home, so for the last several weeks Ardenia has been looking for a new job. Ardenia has been unsuccessful in finding new employment. Since Ardenia has been unemployed, the physical abuse has escalated. Last weekend Ardenia came home late after a long day of trying to find a job. Upset about her late arrival and still no job prospects, "Andre lost it," she told you. While trying to defend herself, Ardenia hit Andre, causing his nose to bleed. The neighbors called the cops, and both Ardenia and Andre were arrested. She asks you, "How am I supposed to find a job? And what do I do about Andre?"

Think About It

What else do you need to know about Ardenia? What else do you want to know about the most recent arrest and her criminal record? What risks does Andre pose to Ardenia's safety? What are some of your reactions and ideas for moving forward?

must contend with the consequences of their abusive partners' experience with the criminal justice system. Many times, survivors are coerced or forced into criminal activity (fraud, drug use, prostitution) by their abusive partners for financial gain or as a method of control. Even if the abuser is the only one involved in criminal activity, it is common for the survivor to be arrested instead of or along with their partner. This is more likely to be the case for immigrant survivors, LGBTQ survivors, and survivors of color. Indeed, research shows that African American women are disproportionately impacted by so-called neutral criminal justice policies. They are more frequently the subject of dual arrests and are more likely to be prosecuted as a result of intimate partner violence. And, African American women are disproportionately impacted by seemingly neutral child protection policies (specifically, they are more likely to have their children removed when domestic violence is involved).³

Many times, survivors are mistakenly identified as the abuser by the police in response to calls about domestic violence, which can lead to their arrest and possible conviction. This problem is exacerbated by the tendency of abusers to file false allegations of abuse against the survivor, making the survivor appear to be the aggressor. Often the survivor's acts of self-defense are misidentified by law enforcement as unprovoked attacks.

Trauma caused by domestic violence can also result in survivors participating in acts that constitute criminal activity. Survivors may begin abusing drugs or alcohol, or may participate in other behaviors to cope with their abuse. The combination of the criminalization of symptoms of trauma, along with inadequate mental health resources and substance abuse treatment, almost guarantees that these coping mechanisms will result in the arrest or incarceration of survivors. In a 2009 study conducted by the Criminal Justice Authority of Women in the Illinois Department of Corrections, 77% of the women surveyed reported being abused by intimate partners.⁴

Intake assessment for survivors with criminal histories

Because of complicated experiences and feelings for many survivors surrounding the criminal justice system and their experience with it, advocacy requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting ("intake questions"), are not meant to be prescriptive, and conversations around criminal histories should not be limited to these questions. For a fuller description of a survivor-centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Consider the following screening questions (these are not all required nor should your conversations be limited by these questions). Note that these questions should only be explored after you have established a relationship with the survivor and offered context about your reason for asking them:

1. Do you have a copy of your state police criminal history report or FBI criminal history report?
2. Have you ever been taken to a police station?
 - A. If so, what county were you in at the time?
 - B. Did you go to court? Where was court located?

³ Bent-Goodley, T. B. (2007). Health disparities and violence against women: why and how cultural and societal influences matter. *Trauma, Violence & Abuse*, 8(2), 90–104. <http://doi.org/10.1177/1524838007301160>

⁴ Bostwick, Lindsey (2009). Prior Victimization of Incarcerated Women in Illinois. Illinois Criminal Justice Information Authority.

http://www.jrsa.org/events/conference/presentations-09/Lindsay_Bostwick.pdf.

- C. If you went to court, do you remember pleading guilty to a crime or receiving a sentence? If so, what was the sentence you received?
- 3. Have you ever received a summons to come to court?
 - A. If so, where was the court you were summoned to?
 - B. If you went to court, do you remember pleading guilty to a crime or receiving a sentence? If so, what was the sentence you received?
- 4. Have you ever been denied employment because of your criminal records?
 - A. If so, how did you know it was because of your criminal record?
 - B. Has a potential employer ever provided you a copy of your criminal background check?
- 5. Have you ever been denied housing because of your criminal record?
 - A. If so, how did you know it was because of your criminal records?
- 6. What type of employment are you seeking?
- 7. What are your long-term employment or education goals?

The impact of criminal records

A criminal record has long-term implications for survivors' economic security and physical safety: employers and landlords rely on criminal records to make hiring and rental decisions, court fines and court fees can accumulate, re-entry models are few and rarely tailored for survivors (particularly survivors with children), and probation and other restrictions can constrain survivors' options for long-term stability. Therefore, it is essential that advocates understand how a criminal record impacts a survivor's housing and employment access, consumer rights, and options for safety.

Key Terms & Concepts: Criminal Arrests Versus Criminal Convictions

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.

For example, a “conditional discharge” in Illinois *is* a conviction. Supervision *is not*. Probation *is* a conviction in most states, while a “qualified” probation *is not*. It all depends on how a state defines a sentence.

A **conviction**, on the other hand, follows 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 discharge jail time. A **discharge** is a type of

sentence for which 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. Every state differs on what type of sentence is considered a conviction.

Also, a person can be found guilty but not convicted, if they receive a deferred sentence. 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 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.

Practice Tip

This varies by jurisdiction. If a survivor with whom you work is uncertain about whether their criminal history includes a conviction, they should consult with a qualified attorney in their state with expertise in criminal records. The hardest parts are (1) knowing what is on a person's record and (2) understanding what the record means.

Case Scenario: *Before you find out whether or not Ardenia was convicted and what exactly she was convicted of, what information do you need from her? What questions come to mind?*

After talking with Ardenia, you find that she was arrested and convicted of criminal damage to property four years ago and that she has several domestic battery arrests that resulted in the charges being dismissed. You begin to discuss the steps Ardenia must take to seal her criminal record.

Key Terms

Arrest: When an individual is taken into police custody and held for some period of time.

Conviction: The court's finding of guilt for a crime, or follows a guilty plea for a crime.

Discharge: A type of sentence where there is no punishment.

Absolute discharge: The defendant is not punished, and the case is over unconditionally.

Conditional discharge: A sentence where the defendant is not punished, as long as they comply with certain conditions set by the court.

Deferred sentence: When the court gives a defendant an opportunity to complete a probationary period before sentencing.

Criminal record: A record of a person's criminal history, generally used by potential employers, lenders etc. to assess his or her trustworthiness. The information varies by state and jurisdiction, but in most cases it lists all non-expunged criminal offences and may also include traffic offences such as speeding and drunk driving.⁵

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.

Expungement: Also called "sealing of arrests." While meanings vary by state, they are remedies whereby a court sets aside a conviction or arrest so the information is no longer publically accessible.

⁵ Definition retrieved from: https://en.wikipedia.org/wiki/Criminal_record

Employment Rights

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**.”⁶ 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.

Think About It: Is it Legal for an Employer to Consider an Applicant’s Criminal Record?

This Varies by State Law:

- A total of 24 states have adopted various “ban the box” policies.⁷
 - Nine states and the District of Columbia—Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont—have removed the conviction history question from job applications for public and private employers, banning all employers from inquiring about a prospective employees criminal history until later in the hiring process.
 - 13 states – California, Delaware, Georgia, Louisiana, Maryland, Missouri, Nebraska, New York, Ohio, Oklahoma, Tennessee, Virginia, Wisconsin – prohibit public employers (including city and county employers in some states) from inquiring about conviction history from job applicants, but not private employers. Missouri extends this to occupational licensing agencies as well.
 - 11 states⁸ – Florida, Louisiana, Michigan, Minnesota, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Texas – 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.
 - Hawaii and the District of Columbia are the only states that also limit the use of background checks until after conditional offers have been made.
- The remaining 26 states allow all employers and occupational licensing agencies to inquire about, consider, and make hiring decisions based on arrests that never led to a conviction. However, many major cities in 13 of these states – Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Kentucky, Michigan, Nevada, North Carolina, Pennsylvania, Texas and Washington – have adopted policies and laws that extend employment protections to job applicants or limit the use of criminal records in employment decisions.

⁶ 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>

⁷ See state map tool summarizing state polices: <http://www.nelp.org/campaign/ensuring-fair-chance-to-work/>; also see: Rodriguez, M.N. & Avery, B. of National Employment Law Project, “Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions,” December 2016, visit: <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>;

⁸ See the National Employment Law Project factsheet: <http://www.nelp.org/publication/the-consideration-of-criminal-records-in-occupational-licensing/>; also see state report cards on occupational licensing agencies and criminal records: <http://www.nelp.org/content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>

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.

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 their advocate that can optimize their chances of obtaining employment.

Assist the survivor in obtaining a copy of their 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 their criminal record, she can learn about what their 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.

Case Scenario: *In Ardenia's case, she has one criminal conviction for criminal damage to property that can be sealed. Once her record is sealed, her criminal history will only be accessible to law enforcement. Employers (other than law enforcement) will not have access to Ardenia's misdemeanor conviction information. When asked by a potential employer whether she has been convicted of a crime, Ardenia has the legal right to answer "no" once her record has been sealed.*

Practice Tip

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 their criminal record without a business necessity, you should begin to assess whether she has a legal claim under Title VII of the Civil Rights Act. One of the things organizations can do is help prepare the applicant's response – preparing a "mitigation" packet to highlight the three factors (race, sex, ethnicity).

Practice Tip: Obtaining Criminal Records

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 an FBI record, the survivor will need to send a signed written request that includes:

- Full name,
- Date of birth,
- Place of birth,
- A full set of fingerprints (including ten 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.

The process for obtaining a set of fingerprints varies from jurisdiction to jurisdiction, but usually fingerprints 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.

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 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.⁹ 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 their criminal record.

Review the survivor's RAP sheet with them

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 in verifying the disposition of each case through the court records will be critical.

Practice Tip: Cleaning Up a RAP Sheet

To learn more about the process for cleaning up RAP sheets in your state, go to <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 your state will be helpful to the survivor.

Work with the survivor to clean-up their RAP sheet

If, after obtaining and reviewing the RAP sheet, the survivor determines that there are inaccuracies, you can help them take steps to correct them. Often, 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. For example, if Ardenia's criminal background check showed that she had been arrested for domestic battery, without showing that the case had been dismissed, it could prevent Ardenia from obtaining employment. 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.

Practice Tip

If the survivor finds mistakes on their 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 was made in order to find out how to change, correct, or update information as soon as possible.

⁹ 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 www.justice.gov/olp/ag_bgchecks_report.pdf

Having Prior Convictions or Arrests 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.

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. Attorneys should familiarize themselves with their state's specific expungement and sealing requirements and learn about the process to apply.

Practice Tip

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.

Between 2009 and 2014 thirty-one states and the District of Columbia enacted legislation that allows for or expands expungement or sealing of an arrest (where there was not a conviction); these states include:¹⁰

Alabama	Louisiana	Ohio
Arkansas	Maryland	Oklahoma
California	Massachusetts	Oregon
Colorado	Minnesota	South Carolina
Delaware	Mississippi	South Dakota
District of Columbia	Missouri	Tennessee
Georgia	Nevada	Texas
Hawaii	New Hampshire	Utah
Illinois	New Jersey	Washington
Indiana	New York	Wyoming
Iowa	North Carolina	

Expungement & Sealing of Arrests or Convictions

- To learn about the process for sealing an arrest in your state, go to Road Blocks to Re-entry for strategies, state law summaries, and model laws. <https://lac.org/roadblocks-to-reentry/main.php?view=law&subaction=2>
- To find whether your state allows for expungement or sealing of a prior conviction and the process, go here: <https://lac.org/roadblocks-to-reentry/main.php?view=question&subaction=2&qnum=1>

Practice Tip

Systems Advocacy to Address Criminal Record Barriers

There are innovative initiatives happening across the country to limit employers reliance on criminal records checks and to enable individuals to expunge prior criminal records. Think about how these models can be tailored to meet survivors' safety and employment needs. Imagine innovative models in your community that might enhance access to employment for survivors who have criminal records.

¹⁰ See Vera Institute's infographic on legislative reforms to address the collateral consequences of criminal records: https://storage.googleapis.com/vera-web-assets/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy_downloads/states-rethink-collateral-consequences-infographic-v4.jpg

Certificates of rehabilitation or waivers

Even if expungement or sealing remedies are not options for a particular survivor, you may offer other avenues to enhance their job prospects. Some states allow individuals with criminal records to obtain a “certificate of rehabilitation” or “certificate of recovery.” Definitions and application of these certificates vary greatly by state; see your state law.¹¹ 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. Certain fields, such as healthcare or the financial industry, may have their own waiver process in place to remove statutory barriers. This also varies from state-to-state but can provide relief, even when a person cannot expunge or seal their record. For example, in Illinois, Ardenia’s conviction for criminal damage to property does not require that she obtain a waiver to work as an unlicensed healthcare worker. However, had Ardenia been convicted of domestic battery, she would be required to obtain a healthcare waiver from the Illinois Department of Health, in order to work in any healthcare facility.

Preparing to Apply for Jobs

Case Scenario: *Assuming that Ardenia’s most recent arrest did not lead to a conviction, what questions must you consider before strategizing with her? It is important for example to consider the state in which Ardenia is seeking employment—does this state have laws that make it illegal for an employer to ask a job applicant about arrests that did not lead to convictions? If the state allows employers to ask about, consider and make hiring decisions based on arrests that never led to a conviction, can you have that arrest expunged or sealed in your state?*

If Ardenia has never been convicted of a crime, ask her if she has ever been denied employment because of her dismissed cases. For example, in Illinois, it is illegal to deny someone employment because of dismissed criminal cases. If Ardenia says she has been denied employment because of her dismissed cases, you should inquire as to whether she has any documentation from the potential employer that explicitly states that her dismissed cases are the reason for the denial. In Illinois, Ardenia is eligible to expunge her case dismissals, and those arrests will no longer be accessible to employers.

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

Job interview: What to do if a survivor is asked about their arrest record?

The answer to this question depends entirely upon the state (and sometimes the locality)

¹¹ This depends on definition and application of certificates of rehabilitation/recovery; see your state law. For example, The Legal Action Network summarizes six state laws that create “certificates of rehabilitation”, here: http://lac.org/toolkits/certificates/summary_state_laws.htm; The Vera Institute reports 10 states (9 unique states) that passed criminal justice reforms that included “certificates of recovery” between 2009-2014, found here: <https://www.vera.org/publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014>; also see LEGISLATING FORGIVENESS: A STUDY OF POST-CONVICTION CERTIFICATES AS POLICY TO ADDRESS THE EMPLOYMENT CONSEQUENCES OF A CONVICTION, 25 B.U. Pub. Int. L.J. 1

in which the survivor is seeking employment.¹²

- A total of 24 states have adopted various “ban the box” policies.¹³
 - Nine states and the District of Columbia—Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont—have removed the conviction history question from job applications for public and private employers, banning all employers from inquiring about a prospective employees criminal history until later in the hiring process.
 - 13 states – California, Delaware, Georgia, Louisiana, Maryland, Missouri, Nebraska, New York, Ohio, Oklahoma, Tennessee, Virginia, Wisconsin – prohibit public employers (including city and county employers in some states) from inquiring about conviction history from job applicants, but not private employers. Missouri extends this to occupational licensing agencies as well.
 - 11 states¹⁴ – Florida, Louisiana, Michigan, Minnesota, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Texas – 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.
 - Hawaii and the District of Columbia are the only states that also limit the use of background checks until after conditional offers have been made.
- The remaining 26 states allow all employers and occupational licensing agencies to inquire about, consider, and make hiring decisions based on arrests that never led to a conviction. However, many major cities in 13 of these states – Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Kentucky, Michigan, Nevada, North Carolina, Pennsylvania, Texas and Washington – have adopted policies and laws that extend employment protections to job applicants or limit the use of criminal records in employment decisions.

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 is likely to raise the employer’s suspicion and the survivor may not get the job as a result.

- *If the survivor has arrests, but none resulted in a conviction*

The survivor can answer no.

- *If the survivor has arrests that did result in a conviction*

The survivor’s answer will depend on your state laws. If

Note: Regardless of the applicant’s answer, if a potential employer runs a criminal background check, they will obtain the information.

¹² 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: www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=4.

¹³ See state map tool summarizing state policies: <http://www.nelp.org/campaign/ensuring-fair-chance-to-work/>; also see: Rodriguez, M.N. & Avery, B. of National Employment Law Project, “Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions,” December 2016, visit: <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>;

¹⁴ See the National Employment Law Project factsheet: <http://www.nelp.org/publication/the-consideration-of-criminal-records-in-occupational-licensing/>; also see state report cards on occupational licensing agencies and criminal records: <http://www.nelp.org/content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>

your state does not have laws prohibiting asking about arrests (see above), then the survivor is required to disclose. Untruthful responses to this question can result in refusal to hire or the decision to fire.

- *If the survivor's arrest resulted in a conviction that was then sealed*

The law is less clear about whether a survivor can answer no to this question. It will depend greatly upon the specific wording of your state's laws. Attorneys should help the survivor to anticipate this type of situation and plan for their response.

Case Scenario: *Assuming now that Ardenia's arrest **did** lead to a conviction, what questions must you consider before strategizing with her? Does it make a difference whether Ardenia was convicted of a felony or a misdemeanor? Additionally, does your state provide for certificates of rehabilitation that would give Ardenia the right to be considered for the position on an individual basis? If your state does provide of certificates of rehabilitation, what steps can Ardenia take to help prove her rehabilitation?*

If Ardenia was convicted of crime, it is important to find out what she was convicted of and whether the conviction was for a misdemeanor or felony. These distinctions could impact her ability to obtain employment. Depending on what Ardenia was convicted of, she may or may not be eligible to seal her record. In Illinois, most misdemeanor convictions and a few felony convictions can be sealed. If Ardenia's conviction cannot be sealed, she may require a certificate of rehabilitation for certain types of employment.

For example, if Ardenia has a felony drug conviction, she is statutorily barred from work in public schools under the Illinois School Code. To overcome this statutory barrier, Ardenia must ask the Presiding Judge in the district in which she was convicted for a certificate of rehabilitation. Evidence that Ardenia could show the Judge to prove she has been rehabilitated could include: evidence that Ardenia has advanced her education or is currently enrolled in an educational program; proof of prior or current employment, or participation in a workforce development program; proof of sobriety, or completion of a drug or alcohol treatment program; evidence of her involvement in a community organization or church; letters of support from family members or friends; or anything that demonstrates that Ardenia has made positive changes in her life since her last contact with law enforcement.

Job interview: What to do if a survivor is asked about their 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 their conviction took place more than seven years ago, she can answer no.

Practice Tip

If the survivor's criminal record requires that she answer yes to one of the questions, think with them 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 them 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 brainstorm strategies that are likely to mitigate the possible risks.

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

If the survivor has violations or misdemeanor convictions on their record but no felonies, she can honestly answer no to a question focused only upon felonies.

Gather evidence of “rehabilitation”

A job applicant can provide information to persuade a potential employer to hire them despite their criminal record. Evidence of “rehabilitation” aims to show the potential employer that the applicant has taken steps to improve their life, since their last conviction. If, after thinking together, you and Ardenia feel that mentioning the domestic violence and coercion she’s experienced is “too risky,” you write a letter to potential employers detailing Ardenia’s involvement in support group, therapy, the effort she’s continued to put into taking dental hygiene classes, and her involvement with Kayla’s new school.

Or, you and Ardenia talk for a while about the job and the employer, trying to assess whether the employer would be sympathetic to Ardenia’s plight. You recall that previous domestic violence survivors have worked there before and had a good experience. (Or insert other indicia of organizational readiness, e.g. the employer is an agency that works with trauma survivors, the boss has had a personal experience with domestic violence, etc.). So, you draft a letter that highlights the long history of abuse, explains the arrest (i.e. self defense, Andre’s false reporting), and then details the many ways in which she has worked to obtain economic and physical safety for herself and Kayla, pursuing an education, taking dental hygiene classes, advocating for Kayla at school, and now seeking alternative housing and legal protection against Andre’s future abuse. You further highlight how this job will provide Ardenia with an opportunity to gain greater economic stability and safety.

Practice Tip: Re-presenting Survivors

Note that, where the survivor’s criminal conduct was coerced or she was wrongly convicted, this legal language may feel condescending. Acknowledge that with the survivor, and enlist them in the practical task of evidencing the agentic (even heroic) steps that she has taken to better their life and that of their children, despite the risks of abuse. By shifting the narrative, you may persuade an employer to not only overlook their criminal record but actually to value their resilience, resourcefulness, and strength—all important qualities for an employee.

Affirmative Actions Proving Rehabilitation

- ❖ Attended school for at least sixth months, are now in school, and have a positive school record;
- ❖ Participated in a job-training program
- ❖ Has been employed for at least six months with a positive record;
- ❖ Completed or currently involved in counseling or other social service programs to deal with the problem that led to a criminal justice outcome;
- ❖ 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;
- ❖ Parole or Probation Officer recommendation (negative drug tests, compliance with requirements, character);
- ❖ Community involvement (example: letter from clergy); or
- ❖ Volunteer work for a school, non-profit, or other community groups (example: letter saying she has made a contribution and is dedicated).¹

Employers' use of consumer & credit report information to obtain criminal record information

Employers are permitted to use consumer report information for a criminal background check, as long as they comply with the federal Fair Credit Reporting Act¹⁵ (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),¹⁶ criminal information can still contain inaccuracies.

Practice Tip

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.¹⁷ The employer must obtain written authorization from the job candidate. Standard notification language that appears on an application for employment is not acceptable. See the **Credit Reporting & Repair** and **Debt** chapters in this Guidebook for more details.

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 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.

¹⁵ 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

¹⁶ See 15 U.S.C. §§1681 et seq.

¹⁷ 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.

- Access to a file is limited to people with a need recognized by the FCRA. This includes employers.

Discrimination in employment

Case Scenario: Ardenia applied for a job as an office assistant at Kayla's school where the specific job requirements have nothing to do with her conviction. However, Ardenia was not hired. She suspects that the employer did not hire her because of her criminal record. How might you counsel Ardenia in this situation? What information do you need before you can give her advice? What steps can you begin to take in order to determine why Ardenia was denied employment?

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

Request criminal background report: If she is unable to confirm that the employer did, in fact, deny employment based on their 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 them know that nothing in the record will affect their services with your program or be entered into your files.

Dispute inaccuracies: 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.

Assess legality of decision: If she finds that the employer based his/her job decision upon an accurate criminal report, you can help them 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.*

File complaint with EEOC: 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 advise them on whether she has a case of employment discrimination. See the Workplace Discrimination chapter in this Guidebook for more here.

Conclusion

For many reasons, survivors may find themselves with a criminal record. A criminal record poses barriers to employment, housing, education, public assistance, and other resources necessary for long-term safety and stability. Advocates should partner with survivors, advocate with employers, and implement innovative models that address survivors' safety and employment needs and enhance their access to opportunities for economic security and physical safety.

Additional Resources

- State Law Guides
 - National Employment Law Project (2016), Ban the Box State & Local Law Guide: <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>
 - Legal Action Center (2009), Roadblocks to Reentry State Law Search Tool: <http://lac.org/roadblocks-to-reentry/main.php?view=law>
 - Vera Institute for Justice (2014), Collateral Consequences Reform Legislation Report (including expungement, certificates of relief, and innovative reforms for discrete collateral consequences): <https://www.vera.org/publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014>
- For Survivors:
 - The Legal Action Network created a booklet for people with criminal records: Lowering Criminal Record Barriers: Certificates of Relief/Good Conduct and Record Sealing: http://lac.org/wp-content/uploads/2014/12/LoweringCriminalRecordBarriers_rev3.pdf
 - CSAJ (2009), Criminal Records & Employment Rights: A Tool for Survivors of Domestic Violence: <https://csaj.org/library/view/criminal-records-and-employment-rights-a-tool-for-survivors-of-domestic-vio>
- For Programs and Advocates
 - Equal Employment Opportunity Commission
 - Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions (2012): https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
 - Reentry Resources from the National Clearinghouse for the Defense of Battered Women: http://www.ncdbw.org/reentry_resources.htm
 - Reentry Webinar Series: http://www.ncdbw.org/reentry_recordings.htm
 - Start your own initiative: Fair Chance/Ban the Box Toolkit from the National Employment Law Project (2015): <http://www.nelp.org/content/uploads/NELP-Fair-Chance-Ban-the-Box-Toolkit.pdf>
 - Michigan Coalition Against Domestic & Sexual Violence: Best Practice Toolkit for Working with Domestic Violence Survivors with Criminal Histories (2011): http://www.mcadsv.org/projects/Toolkit/Files/Best_Practice_Toolkit_Entire_Document.pdf
 - Open Doors Project: Innovative demonstration project to enhance advocacy for survivors with criminal histories, or who's abusive partners have criminal histories: <http://www.mcedsv.org/about-us/our-work/open-doors-project.html>



GUIDEBOOK ON CONSUMER & ECONOMIC CIVIL LEGAL ADVOCACY FOR SURVIVORS

A COMPREHENSIVE AND SURVIVOR-CENTERED GUIDE FOR
DOMESTIC VIOLENCE ATTORNEYS AND LEGAL ADVOCATES



**CENTER FOR SURVIVOR
AGENCY & JUSTICE**

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