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# I. Is It Illegal for Employers to Discriminate?

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While the answer is not as simple as the question, the answer is often “yes.”

## Protections for People in Recovery from Alcohol or Drug Dependence

Two federal laws address directly the issue of employment discrimination against individuals with past or current alcohol or drug problems. They are the federal **Rehabilitation Act** of 1973<sup>1</sup> and the **Americans with Disabilities Act** of 1990.<sup>2</sup> These laws encompass all areas of employment discrimination, including the hiring and firing of employees and terms and conditions of employment. The Rehabilitation Act prohibits discrimination against persons with a past or current “**disability**” (as well as those who are perceived to have a disability) who are otherwise qualified to perform the job they seek or hold. Under this Act (like the Americans with Disabilities Act described below), a “disability” is defined as a physical or mental impairment that substantially limits one or more of an individual’s major life activities, including working, learning, performing manual tasks, and caring for one’s self. Both the federal agencies responsible for implementing and enforcing the Act, and federal courts in a number of cases, have

ruled that individuals in recovery from alcoholism or drug dependence, including those in methadone treatment, are covered by the law’s definition of individuals with “disabilities,” and that the Act forbids employers from discriminating against job applicants and employees because of their history of or treatment for alcohol or drug dependence, if those individuals are qualified to perform their jobs. Being “qualified” for employment means being able, with or without a reasonable accommodation, to perform the essential functions of a job.

In 1990, the Act was amended to exclude individuals who “**currently** engage in the **illegal use of drugs**” from protection. While the Act states that individuals in recovery, including those in treatment (both drug-free and in methadone treatment) who are no longer illegally using drugs, are protected, courts have held that there needs to be a sufficient period of time that someone is in recovery before they can be protected under the Act. The Act continues to protect individuals with current as well as past alcohol problems who satisfy the definition of disability and are qualified for the jobs they hold or seek.

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<sup>1</sup> 29 U.S.C. §§ 701 *et seq.*

<sup>2</sup> 42 U.S.C. §§ 12101 *et seq.*

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The Rehabilitation Act applies to private employers who hold federal government contracts, and to both private and public employers who receive federal grants or aid. The Act also applies to the federal government itself.<sup>3</sup>

The Americans with Disabilities Act (ADA) extends the Rehabilitation Act's prohibition against disability-based discrimination to most employers, private and public.

The ADA prohibits employers from discriminating against a “qualified individual with a disability” and requires, as does the Rehabilitation Act, that employers make “reasonable accommodations” to the known physical or mental limitations of a qualified individual with a disability. Title I of the ADA covers private employers and state

and local government agencies with more than fifteen employees.

Although Title II of the ADA generally applies to public employers (without regard to the number of employees they have), the Ninth Circuit Court of Appeals, whose jurisdiction includes California, has held that Title II does not apply to

employment.<sup>4</sup> Therefore, in California, employment discrimination claims are covered under Title I of the ADA alone.

The ADA defines a “disability” as a past, current or perceived “mental or physical impairment” that “substantially limits” one or more of an individual’s major life activities, such as those as noted above. The federal agencies charged with implementing and enforcing the ADA and a number of federal courts have ruled that alcohol and drug dependence are — or in individual cases can constitute — substantially limiting impairments under this definition. The law requires this determination to be made on an individualized, case-by-case basis, examining how the condition affects the particular person’s functioning.

As in the Rehabilitation Act, the ADA’s definition of an individual with a “disability” does not include an employee or job applicant who currently engages in illegal drug use.

In sum, individuals in recovery from drug dependence (including those enrolled in rehabilitation programs), and those erroneously perceived to be drug dependent, have been and in many, if not most, cases will be recognized as individuals with a “disability” under the ADA. This is also the case with recovered, current and perceived alcoholics. If these individuals are “qualified” for the job in question — which, like the Rehabilitation Act, means able to perform the essential duties of that job, with or without reasonable accommodation — the ADA protects them from discrimination.

*The ADA requires disability determinations to be made on an individualized, case-by-case basis, examining how the condition affects the particular person’s functioning.*

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<sup>3</sup> The law’s nondiscrimination provisions are contained in sections 501 through 504 of the Act, 29 U.S.C. §§ 791-794.

<sup>4</sup> Zimmerman v. Oregon Dept. of Justice, 170 F.3d 1169 (9<sup>th</sup> Cir. 1999).

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California has its own antidiscrimination law, the **California Fair Employment and Housing Act (FEHA)**.<sup>5</sup> The FEHA offers important protections to people in California with past, current, and perceived alcohol or drug problems. Specifically, it reaches more employers and protects a broader range of people affected by drug- or alcohol-related discrimination than the federal laws just described. The FEHA applies to most public and private employers with five or more employees, including training programs, occupational licensing agencies, labor organizations, and employment agencies in California.<sup>6</sup> However, nonprofit religious associations are exempted from the FEHA.

Two other state laws, the **Unruh Civil Rights Act (UCRA)**, applicable to business associations and contracts, and the **Government Code**, applicable to state civil service, also specifically prohibit discrimination on the basis of disability.<sup>7</sup> Consequently, most employers in California will be covered by one of these statutes.

The FEHA is intended to provide protections independent from, and in addition to, the ADA.<sup>8</sup> Like the ADA, the state law covers both physical and mental disabilities, and expressly excludes “disorders resulting from the current unlawful use of controlled substances or other drugs” from its definition of disability. The state law’s definition of disability is broader than the ADA’s and protects more people in several ways.

First, the FEHA definition of “disability” (which also governs these other two state laws related to civil service and business associations and contracts) includes any current disability or impairment that is “potentially” disabling, a “history or record” of a disability, or “being regarded as” having or “potentially having” a disability. The ADA does not protect individuals whose impairments are “potentially” disabling. In addition, while the ADA requires that the disability **substantially limit** an individual’s major life activities, the state law requires only that the disability **limit** those activities. Thus, under the FEHA, an individual does not have to demonstrate that his condition is of such severity that he cannot function like most other people in the particular life activity. Finally, under the state law, whether an individual’s major life activity is limited is determined without regard to mitigating measures (unless the mitigating measure itself limits a major life activity) or reasonable accommodations.<sup>9</sup> Thus, unlike the ADA, a person’s condition is examined without taking into consideration the way in which auxiliary aids, medications, or other measures assist the person’s functional abilities or lessen the effects of the person’s impairment.

The California Fair Employment and Housing Commission, the administrative agency responsible for enforcing the FEHA, has not yet issued any public opinions regarding alcoholism, but it does accept discrimination complaints from individuals with past, perceived, or current alcohol problems. In addition, a

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<sup>5</sup>CAL. GOV’T CODE §§ 12900 *et seq.*

<sup>6</sup> CAL. GOV’T CODE §§ 12940, 12944.

<sup>7</sup>CAL. GOV’T CODE § 19702 and CAL. CIV. CODE § 51.5.

<sup>8</sup> CAL. GOV’T CODE § 12926.1.

<sup>9</sup> CAL. GOV’T CODE §§ 12926.1, 12940.

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state court has held that the FEHA should be interpreted in accord with the ADA; thus it is likely that current, perceived, and recovered alcoholics are protected against discrimination under the state law.<sup>10</sup>

While no published opinion has directly addressed FEHA's coverage of past drug dependence, it appears certain that persons with such a history are protected by the state law. Like the ADA, only current use and addiction are expressly excluded by the FEHA. The Commission will accept complaints from individuals with past or perceived drug problems and individuals in treatment. The Commission has not, however, rendered any public decisions on whether past or perceived drug use or addiction is a disability. A California district court has interpreted both the ADA and the UCRA as applying to persons with a "history of addiction."<sup>11</sup> Because the FEHA and the UCRA share the same definition of "disability," and the FEHA provides at least as much protection as the ADA, it is likely that the FEHA also protects these individuals.<sup>12</sup>

A separate **California** law called the **Alcohol and Drug Rehabilitation Act (ADRA)** requires private employers of twenty-five or more employees to "reasonably accommodate" employees who voluntarily enter and participate in alcohol or drug rehabilitation programs.<sup>13</sup> However, an employer is not required to incur an undue hardship or to employ an individual who cannot perform his duties

or who is a threat to health or safety. Because this statute does not expressly prohibit any specific employer conduct, it does not support a cause of action for wrongful discharge in violation of public policy.<sup>14</sup>

The state and federal disability discrimination laws may protect a client like John who has a history of drug dependence and treatment. First, evaluate whether he is covered by one of these statutes. For example, if John is currently using illegal substances, neither the ADA nor the FEHA would protect him from discrimination based upon his current illegal drug use. But if he had a drug dependence problem that affected his ability to function in the past and is now in recovery, these laws most likely protect him against discrimination on the basis of disability.

The remedies available to persons who believe they have been subjected to discrimination in violation of the federal and state laws just discussed are described in Chapter V of this manual.

## Protections for Ex-Offenders

There is no federal statute that specifically protects ex-offenders from employment discrimination. However, a policy of denying people jobs on the basis of arrests not followed by convictions, and policies that bar those with criminal records from employment, have been ruled illegal as applied to racial minorities under **Title**

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<sup>10</sup> *Gosvener v. Coastal Corp.*, 51 Cal.App.4th Supp. 805, 813 (1996).

<sup>11</sup> *Ambrosino v. Metropolitan Life Ins. Co.*, 899 F.Supp. 438, 442 (N.D. Cal. 1995).

<sup>12</sup> CAL. GOV'T CODE § 12926.1.

<sup>13</sup> CAL. LAB. CODE § 1025.

<sup>14</sup> *Sullivan v. Delta Air Lines, Inc.*, 68 Cal.Rptr.2d 584, 589 (1997).

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## VII of the Civil Rights Act of 1964.

Since minorities are arrested and convicted at a greater rate than their percentage of the population, courts have found that such policies have a racially discriminatory effect absent a business justification. So, in some cases, a refusal to hire on the basis of a criminal record may be illegal race discrimination under federal law.

California protects individuals from discrimination based upon criminal history information by limiting access to criminal records. The **California Constitution** provides an absolute right of privacy for all Californians.<sup>15</sup> This right of privacy includes protections from the improper use of their criminal records, and for the accuracy of the information contained therein.<sup>16</sup> An individual may bring an action for invasion of privacy if his right of privacy has been breached.<sup>17</sup>

The **California Administrative and Labor Codes** also protect this privacy right by specifically limiting the types of criminal records that most employers may consider.<sup>18</sup> First, there are two categories of arrests employers may not consider. Employers may not inquire about (1) arrests that “did not lead to conviction,” or (2) arrests “for which a pretrial diversion program has been successfully completed.”

As for arrests that did lead to conviction, employers may not ask questions regarding sealed, expunged, or purged conviction records.

These rules apply to most public and private employers, occupational licensing agencies, employment agencies, and labor organizations. They do not apply to law enforcement positions, however. Under certain circumstances, health care facilities may ask about specific sex- and drug-related arrests, regardless of whether they led to pre-trial diversion or conviction.<sup>19</sup> Certain exceptions also apply to banks and other financial institutions.<sup>20</sup>

How can you use California law to assist John in his job search? The first step in preventing ex-offender employment discrimination is to obtain John’s rap sheet so you can familiarize yourself with its contents and ensure its accuracy. While employers, under California law, can deny jobs to applicants whose criminal record is not related to the job being sought, John will have the best chance of getting a job if the position is not related to his specific criminal record. This will enable you to make the most appropriate job referrals.

*Employers may not inquire about arrests that “did not lead to conviction,” or arrests “for which a pretrial diversion program has been successfully completed.”*

The remedies available for persons who believe they have been illegally denied employment or licensure based on their criminal history are discussed in Chapter V.

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<sup>15</sup> Article I, § 1.

<sup>16</sup> Central Valley v. Younger, 214 Cal.App.3d 145 (1989).

<sup>17</sup> CA. CIVIL CODE § 1798.53.

<sup>18</sup> CAL. CODE REGS. tit. 2 § 7287.4; CAL. LABOR CODE § 432.7.

<sup>19</sup> CAL. LAB. CODE § 432.7.

<sup>20</sup> 12 U.S.C. § 1829.

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## Illegal Pre-employment Inquiries

The simplest way for a prospective employer to learn about John's criminal record and substance abuse history is to ask about it on a job application or during an interview. One of the most serious practical barriers to employment John might face is the bias and stigma associated with his criminal and substance abuse history. Many employers are hesitant to hire applicants like John because of stereotypes unrelated to his ability to perform the job. However, if you and John are familiar with the legal standards that govern what employers may ask about criminal records and substance abuse history, you can prepare John for a successful job search.

### Inquiries About an Alcoholism or Drug Dependence History

The federal **Rehabilitation Act** and the **ADA** limit the kinds of pre-employment inquiries an employer can make about whether or not a job applicant has a

*“Have you ever had an alcohol or drug problem?” is therefore an illegal pre-employment inquiry under these federal laws.*

current or former disability. Employers may **not** ask job applicants about whether they have or have had a disability, or about the nature or severity of a disability, before a job offer is made. An employer may only ask questions about whether an applicant can perform the duties of the job before making that person an offer of employment.

As discussed above, the Rehabilitation Act's and the ADA's definition of “disability” includes a history of alcohol or drug dependence (see pp. 1-2). Asking job applicants a question such as “Have you ever had an alcohol or drug problem?” is therefore an illegal pre-employment inquiry under these federal laws. Employers could, however, ask about current illegal drug use because individuals with current problems are not protected against discrimination.

Pre-employment medical examinations are also prohibited by these federal laws. However, after making a job offer to an individual, an employer may make medical inquiries and/or require the individual to undergo a medical examination before beginning work. In addition, the employer may condition the job offer on the satisfactory results of such medical examinations or inquiries. But the employer may not use this information in a discriminatory manner. Remedies for violations of the Rehabilitation Act and ADA are discussed in Chapter V of this manual.

In John's case, as with all applicants, he should be advised that under the state and federal law, an employer may not lawfully ask about his history of drug or alcohol dependence and treatment prior to a conditional offer of employment. An employer may ask on an employment application whether he currently uses drugs illegally.

**NOTE:** The ADA explicitly provides that a **drug test** (such as a urinalysis) is **not** a medical examination for purposes of these provisions. This means that employers

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**may** require job applicants to undergo pre-employment drug tests and may require employees to submit to drug tests without violating the ADA (although other laws may govern whether and when such testing by employers is permitted). But if a drug test reveals information about an applicant's or employee's disability — for instance, a test may reveal an individual's participation in methadone treatment and, if so, his history of heroin addiction — it is illegal for the employer to use this information in a discriminatory manner (to refuse to hire or fire the individual based on this information). On the other hand, a test to detect alcohol use is considered a medical examination under the ADA and, therefore, cannot be performed prior to a conditional offer of employment.

The **California Fair Employment and Housing Act (FEHA)** also limits the kinds of inquiries employers may legally make about job applicants' disabilities, which include a history of or treatment for alcoholism or addiction (see p. 3). The law is designed to prevent employers from discriminating against any individual on the basis of any past or present disability that does not prevent that person from reasonably performing the duties of a job.

Prior to an offer of employment, the FEHA limits employers' inquiries to "job-related" questions regarding disability. Consequently, questions such as "How many sick days did you take last year?" or "Have you ever been treated for drug or alcohol problems?" would ordinarily violate the law. After an offer has been made, an employer may ask questions

regarding disability and require a medical examination only if the employer can show they are "job-related and consistent with business necessity." All applicants and employees in the same job classification must be subject to the same questions and examinations. Employers are prohibited from using disability-related information in a discriminatory manner when making promotion or other employment decisions.<sup>21</sup>

It is unclear how **pre-employment drug and alcohol tests** would be handled under the FEHA because neither the California courts nor the Department of Fair Employment and Housing (DFEH), the administrative agency responsible for enforcing this law, has addressed this issue. Because the FEHA prohibits pre-employment medical examinations like the ADA, it is possible that the FEHA would prohibit pre-employment tests that detect alcohol use, but would not prohibit tests that detect the use of controlled substances.

Persons who believe they have been subjected to, or denied employment because of, illegal pre-employment inquiries about their alcohol or drug problems may file complaints with the federal or state agencies charged with enforcing these anti-discrimination laws or in state or federal court, as discussed on p. 43.

## **Inquiries About a Criminal History**

No federal law limits pre-employment inquiries based upon criminal history. California law limits the arrest and

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<sup>21</sup> CAL. GOV'T CODE §12940.

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conviction records employers may consider, but generally permits employers to consider many of an applicant's conviction(s) in making hiring decisions. Consequently, if an applicant provides false information about his criminal history either on an application or in an interview, and the employer discovers the deception, the employer can deny employment or fire the individual.

The **California Administrative Code** makes it illegal for almost all public and private employers, occupational licensing authorities, employment agencies, and labor organizations in California to make pre-employment inquiries regarding **arrests** that did not finally result in conviction or for which a pre-trial diversion program was successfully completed. This means that most employers may not legally ask applicants (in job application forms, interviews, or otherwise) such questions as "Have you ever been arrested?" or require them to "list all arrests."<sup>22</sup>

Most employers also may not seek information about sealed, "expunged," or purged **conviction** records.<sup>23</sup>

An exception is made for agencies that are given specific statutory authority to ask about and consider arrests that did not result in conviction or pre-trial diversion. Few agencies have such statutory authority, but law enforcement agencies are authorized to ask applicants for police and "peace officer" positions about all

arrests, whether or not they led to conviction or pre-trial diversion.<sup>24</sup> In addition, health care facilities may ask about and consider certain sex- and drug-related offenses, regardless of whether they led to conviction or pre-trial diversion.

Finally, specific banks and financial institutions can inquire about and exclude applicants based upon some arrests relating to dishonesty, breach of trust, or money-laundering if the charges resulted in a conviction or pre-trial diversion. Under certain circumstances, these employers are required by law to reject such applicants. However, if the employer wishes to hire the individual, it may seek a waiver from the sentencing court. For most offenses, this exception applies when the case was disposed of within ten years of the employment application.<sup>25</sup>

In John's case, he should be advised that most employers are prohibited from asking him questions about his arrest that did not lead to conviction. In addition, he may apply for expungement of his drug possession conviction (see p. 19 for more information on expungement). If the court grants expungement, employers would then be prohibited from asking John questions or denying him employment based upon his criminal history.

Individuals who have been asked unlawful questions may file complaints with the state's Department of Fair Employment and Housing (DFEH) (see p. 50-51).

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<sup>22</sup> CAL. CODE REGS. tit. 2 § 7287.4.

<sup>23</sup> CAL. CODE REGS. tit. 2 § 7287.4.

<sup>24</sup> CAL. LAB. CODE § 432.7.

<sup>25</sup> 12 U.S.C.A. § 1829.

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# II. Dealing with a Criminal Record

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## Kinds of Offenses

Being familiar with your client's criminal record will help you make appropriate job referrals for your client. It is, therefore, important to understand the process for obtaining a rap sheet in California, as well as what it contains.

In particular, it is useful to know the type of offense(s) your client has been convicted of, as employment restrictions are sometimes defined by the class or severity of offense. For the sake of this discussion, let us assume that John, in addition to being convicted for drug possession (a felony) two years ago, was arrested for, but not convicted of, disorderly conduct (a misdemeanor) five years ago. For instance, although not considered criminal in nature, non-traffic infractions appear on an individual's rap sheet. An "offense" is any disposition for which a fine or imprisonment may be ordered. In California, "criminal" offenses are limited to misdemeanors and felonies.<sup>26</sup> California recognizes the following types of offenses:

**Infraction:** A noncriminal case usually disposed of in a Superior Court of limited jurisdiction. The penalty may consist of a

fine, but not imprisonment. Common non-traffic infractions include a first conviction for loitering in a transit facility and a first conviction for trespass. An infraction is **not** considered to be conviction of a crime.<sup>27</sup>

**Misdemeanor:** A lesser criminal offense usually dealt with by a Superior Court of limited or general jurisdiction.

Misdemeanors may result in a fine and a maximum of six months imprisonment in state prison or county jail, unless a particular statute specifies a different punishment. Common misdemeanors include possession of small amounts of marijuana, disorderly conduct, and misdemeanor assault. Conviction of a misdemeanor offense is considered conviction of a crime.<sup>28</sup>

**Felony:** A serious criminal offense punishable by imprisonment in the state prison for more than six months (although the person may not serve any time in jail or prison) or death. Felony charges come under the general jurisdiction of the Superior Court. Some common felony charges are possession with intent to sell controlled substances, burglary, robbery, arson, carjacking, felony driving under the influence with bodily injury to another person, and felony assault. Conviction of

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<sup>26</sup> CAL. PENAL CODE § 13125; *People v. Sava*, 190 Cal.App.3d 935, 939 (1987).

<sup>27</sup> CAL. PENAL CODE §§ 19.6, 602.8, 1462; CAL. PUB. UTIL. CODE § 120451; *People v. Sava*, 190 Cal.App.3d 935, 939 (1987).

<sup>28</sup> CAL. PENAL CODE §§ 17, 19, 647, 1462, 23152; CAL. HEALTH AND SAFETY CODE § 11357.

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a felony offense is considered conviction of a crime.<sup>29</sup>

**“Wobbler”:** A criminal offense that can be classified as a misdemeanor or a felony and thus “wobbles” between these two categories of offenses. Judges can choose between sentencing an individual who is convicted of a wobbler to county jail or state prison. This classification is important because only certain wobblers can be “expunged” (see p. 20). Common wobblers include driving under the influence, battery with serious bodily injury, petty and simple grand theft, and receiving stolen property. Conviction of a wobbler is considered conviction of a crime.<sup>30</sup>

## Special Dispositions of Charges

After a criminal case has been resolved, the court contacts the State Department of Justice (DOJ), the agency responsible for maintaining the centralized file of such records in California, to report the outcome. This information is also known as the “disposition” of the case. There are many possible dispositions that could appear on a rap sheet. Some common dispositions include “NOT CONVICTED,” “DISMISSED,” “ACQUITTED,” and “CONVICTED.”

A conviction is a **guilty plea or a court’s finding of guilt** for a “crime” or an “offense.”

The following is a list of dispositions that may appear on an individual’s rap sheet:

**Dismissal:** The equivalent of an acquittal. All charges are dropped and the accused retains the same status he had prior to the arrest.<sup>31</sup>

**Deferred Entry of Judgment:** If the individual is charged with certain drug offenses and meets certain criteria, such as no prior convictions for offenses involving controlled substances and the offense charged does not involve violence, he may be eligible, with the agreement of the prosecutor, for a deferred entry of judgment. If the individual pleads guilty and waives the right to a speedy trial, the court defers judgment and places the individual on probation or into treatment. If he successfully completes probation or treatment, the guilty plea will not be a conviction.<sup>32</sup>

**Vacating or Setting Aside a Verdict:** As a result of a successful appeal, upon fulfillment of all conditions of probation, or whenever justice requires, a guilty verdict (conviction) may be “set aside” or “vacated” by the court. This action is considered “expungement.” This procedure results in a notation to an individual’s rap sheet indicating that the conviction has been “dismissed [in] furtherance of justice.” Although the case is not erased from an individual’s rap sheet, expungement is still helpful because individuals are not required to

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<sup>29</sup> CAL. CONST. art. 6, § 10; CAL. PENAL CODE §§ 17, 241, 12021.1; CAL. HEALTH & SAFETY § 11351; CAL. VEH. CODE § 23153.

<sup>30</sup> CAL. PENAL CODE §§ 243, 489, 490, 496, 666, 23152; CAL. VEH. CODE § 20001(a).

<sup>31</sup> CAL. PENAL CODE § 1385.

<sup>32</sup> CAL. PENAL CODE §§ 1000, 1000.1.

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identify on employment applications any criminal conviction that has been expunged. It also allows individuals to apply for a Certificate of Rehabilitation and a pardon (see p. 23 for more information).<sup>33</sup>

## Alternative Sentences

**Conditional Sentence:** A conviction for which the jail sentence is suspended. Discharge is conditioned upon satisfaction of certain requirements such as attendance in an alcohol or drug treatment program.<sup>34</sup>

**Probation:** A sentence in which the court places an individual under the supervision of a probation officer for a specified period of time. When the court places an individual on probation, it may require him to comply with certain conditions such as participating in a drug or alcohol treatment program or making restitution. If the individual violates the conditions of probation, the court may order him to prison for the remainder of the sentence.<sup>35</sup>

**Pre-plea Drug Diversion Programs:** A program within the California Drug Court Project which allows the criminal proceedings to be adjourned while the individual participates in a program involving counseling, drug testing, education, and possibly other conditions. The individual's criminal charges are dismissed upon successful completion of the program. If the court finds any one of the following, the criminal charge(s) will be reinstated:

- unsatisfactory performance in the program;
- lack of benefit gained from the program; or
- continued criminal activity.<sup>36</sup>

## Proceedings Involving Minors

Under California's Penal Code, "infancy" is a valid defense to most criminal charges. Consequently, a person less than eighteen years of age (a "juvenile" or "minor") is **not** criminally responsible for his conduct, except for the two situations described below. When a minor engages in conduct that would otherwise subject him to criminal liability his case is processed in the juvenile court. The juvenile court determines whether to declare the individual a ward of the juvenile court. If the juvenile is found to have violated the law, he will be adjudicated a ward of the court. The court issues orders regarding treatment, restitution, and fine(s). The minor may also be sentenced to probation or be committed to the Department of the Youth Authority. Under California law, an order declaring an individual a ward of the juvenile court is not considered a criminal conviction or proceeding. However, because these adjudications will appear on rap sheets, it may be wise for the individual to consider disclosing his record to prospective employers.<sup>37</sup> Thus, the individual should petition to have his records sealed and destroyed, if possible, to eliminate the need to disclose it to most employers.

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<sup>33</sup> CAL. PENAL CODE § 1203.4.

<sup>34</sup> CAL. PENAL CODE § 1203.

<sup>35</sup> CAL. PENAL CODE § 1203.

<sup>36</sup> California Courts: Programs: Drug Courts: Background Information (March 28, 2001), available at <http://www.courtinfo.ca.gov/programs/drugcourts/about.htm>; CAL. PENAL CODE § 1000.5.

<sup>37</sup> CAL. WELF. & INST. CODE §§ 203, 604, 731; CAL. CODE REGS. tit. 2 § 7287.4; CAL. PENAL CODE § 13125.

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Juveniles may be transferred to criminal court in two instances. First, any minor sixteen years of age or older who is found an unfit subject for the juvenile court may be transferred. In addition, individuals fourteen years of age or older who have committed murder or violent sexual offenses are required to be prosecuted as adults in criminal court. If convicted, these individuals are considered to have felony convictions (which will appear on their rap sheets), and are obligated to reveal these convictions if asked about them on employment applications or in job interviews.<sup>38</sup>

## Getting and Cleaning Up Arrest and Conviction Records

As part of the pre-application process for clients with criminal histories, your client should obtain copies of arrest and conviction records and become familiar with the reported information. This is extremely important for several reasons. First, although restrictions exist on the release of criminal records by DOJ (see next page), employers often obtain this information from several sources, including local law enforcement agencies, the Federal Bureau of Investigation (FBI), and consumer reporting agencies. It is important to ascertain exactly what information the employer will obtain so that problem areas can be addressed directly. This is especially crucial if the criminal record reveals a history of alcohol or drug dependence. Some

examples might be a criminal record that reveals a conviction for possession of drugs or driving while intoxicated, or shows that an individual was required to enter or remain in a treatment program as a condition of probation or in lieu of other punishment.

Second, arrest and conviction records can contain errors or information that should not be reported. If your client discovers this in time, steps can be taken to correct the records before the employer sees them.

Third, often your client will not know the disposition of certain charges or will have forgotten some arrests or convictions. Finding out the details will enable the client to present his criminal record to employers in the most accurate and straightforward way possible. Clients who present inaccurate information to employers are frequently rejected or fired for “lying” during the application process, even though they did not intend to mislead. There is often little anyone can do to help a client in this situation (see p. 40).

**NOTE:** Obtaining and cleaning up criminal records may take a long time. Clients, like John, should begin the process as early as possible in the search

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<sup>38</sup> CAL. WELF. & INST. CODE §§ 602, 707, 707.1; CAL. CODE REGS. tit. 2 § 7287.4.

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for employment — perhaps even before beginning the actual job hunt.

## How to Get Copies of Arrest and Conviction Records

Approximately two million arrests are reported to and processed by California’s DOJ annually. (Criminal Justice Statistics Center (CJSC) Databases (April 22, 2001), available at <http://caag.state.ca.us/cjsc/databss.htm>.) If an individual has ever been arrested and fingerprinted for violating a state or local law in California, he has a “rap sheet” permanently on file at the DOJ. This is true even if the arrest did not lead to conviction. A variety of criminal justice agencies (such as police departments, courts, probation offices, and prosecutors), certain employers, and others have the right, under California law, to view these records.

A DOJ record contains information about arrest(s), disposition(s), and sentence(s). Clients throughout California can obtain their rap sheets from the DOJ offices in Sacramento. Clients can request their records by filing an “Application to Obtain Copy of State Summary Criminal History Record” form accompanied by a complete set of fingerprints (which can be obtained from any law enforcement agency) and a \$25 fee. Personal checks drawn on a California bank, certified checks, money orders, and cashier’s checks will be accepted as payment. DOJ may waive the application fee for persons with “financial hardship” or inmates upon completion of a form and proof of inability to pay, such as a public assistance benefit or MediCal card.

Clients can request the “Application to Obtain Copy of State Summary Criminal History Record” form and the financial waiver form by calling or writing the DOJ Record Review Unit (see below). The client’s completed request form, fingerprints (which can be obtained from any law enforcement agency), and payment (or proof of “financial hardship”) should be sent to:

California Department of Justice  
P.O. Box 903417  
Sacramento, CA 94203-4170  
Attn: Record Review Unit  
(916) 227-3835

The Record Review Unit will send the individual a copy of his rap sheet, along with a “Claim of Alleged Inaccuracy or Incompleteness” form within six to twelve weeks. This form can be used to correct any mistakes or problems on the rap sheet that are DOJ’s fault. Clients should also send an abstract of the judgment for the case from the court where their case was heard to DOJ. The abstract is an official court record of a criminal case that includes any charges against an individual, as well as the outcome of the case. The process for obtaining an abstract, and cleaning up a criminal record, is explained further on pp. 17-23. If DOJ contends the information is correct, the individual must next approach the “contributing agency”

*If an individual has ever been arrested and fingerprinted for violating a state or local law in California, he has a “rap sheet” permanently on file at the DOJ.*

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to fix the error. At this point, DOJ will only accept requests for corrections from the original contributing agency, such as local law enforcement officers, clerks of court, and corrections officials. Once the agency notifies DOJ of an error, its staff will initiate an audit, and coordinate corrections or modifications directly with the contributing agency. The time necessary to complete this process varies.

Clients with a criminal history in more than one state must get a rap sheet from each state in which they were arrested or request a copy of their federal rap sheet from the FBI.

Your client may obtain a copy of his **FBI rap sheet**, which contains arrest and conviction records from all fifty states plus any federal criminal history information, by requesting it in writing from:

U.S. Department of Justice  
Federal Bureau of Investigation  
1000 Custer Hollow Road  
Clarksburg, WV 26306

The letter must specify that the individual is making a request “under the Freedom of Information Act” for his FBI record. Included with the request for records should be the applicant’s name and current home address, the place and date of birth, and a set of fingerprints. Fingerprints can be obtained from a local police department or criminal court; charges for this service vary. Include a certified check or money order for the \$18

processing fee (payable to the U.S. Treasurer) with the letter. The processing fee can be waived if proof of indigence is included with the application. A stamped, self-addressed envelope should also be included.

Federal rap sheets contain state arrest and conviction records and records of federal offenses. However, your client should consider whether the information contained in the federal rap sheet is worth the time and expense involved in obtaining it. Except for banks and federal agencies, most employers will obtain only state rap sheets. In addition, FBI records are often more incomplete or inaccurate than state records. As discussed earlier, it is best to ascertain exactly what information the employer will have and plan accordingly.

**Juvenile court records** — records of offenses involving juveniles under eighteen who have been adjudicated wards of the juvenile court (see pp. 11-12) — are not available to the public. In addition, after they are sealed and destroyed, the records of juvenile delinquency proceedings are generally unavailable to occupational licensing agencies and employers. Therefore, individuals are not obligated to disclose sealed juvenile records (see pp. 20-21). However, records of youths aged fourteen to eighteen who have been tried as adults for felonies (see p. 12) are reported on DOJ rap sheets. Even if these individuals have their records expunged (see pp. 19-20), the convictions will remain on their

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rap sheets. Consequently, it may be wise to consider disclosing these records.<sup>39</sup>

## Access to, and Limits on Dissemination of, Criminal History Records and Information

Potential employers may get information about individuals' criminal records in a variety of ways.

### DOJ Reports

First, many public employers and occupational licensing agencies in California are authorized by statute to obtain copies of applicants' and employees' criminal history records from DOJ. If an employer or licensing agency fingerprints an individual during the application process or after hiring an applicant, it usually means that agency does have the necessary statutory authorization to obtain the individual's DOJ rap sheet, and will do so.

Certain private employers are also authorized to obtain criminal history information maintained by DOJ (see list below). But DOJ may **not** disseminate rap sheets or other information to the general public or to employers who have no statutory authorization to get such information. Thus, most private employers do not have access to individuals' rap sheets, although they can obtain criminal history information in other ways.

Here is a list of some employers in California who are allowed to obtain rap sheets for job applicants:

- Public employers (federal, state, and local governmental agencies), including all law enforcement agencies
- Occupational licensing agencies
- Nuclear power plants and public utilities
- Jobs with supervisory power over minors
- Security organizations
- Banks, credit unions, and savings and loans.<sup>40</sup>

### Consumer Reports

Some employers routinely screen prospective employees by obtaining background investigation reports from a consumer reporting agency. **“Consumer reporting agencies”** (also known as credit reporting or background investigation agencies) are firms that prepare reports on individuals for employment, credit, or insurance purposes. Their reports often contain information about the individual's criminal record, employment history, credit rating, and sometimes past drug or alcohol problems. The agencies gather this information by checking public records (such as court files) and by talking to former employers and others about the person.

*The consumer reporting agency has an obligation to promptly reinvestigate and correct any errors.*

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<sup>39</sup> CAL. CODE REGS. tit. 2 § 7287.4; CAL. WELF. & INST. CODE §§ 602, 707, 781, 827; CAL. PENAL CODE §§ 1203.3, 1203.4, 1203.4(a).

<sup>40</sup> CAL. PENAL CODE §§ 11105(b), 11105(9), 11105(17)(c)(1), 11105.3, 11105.4, 13300(b), 13326; CAL. FIN. CODE § 777.5.

Consumer reporting agencies are regulated by **California’s Consumer Credit Reporting Agencies Act**<sup>41</sup> and a similar, but somewhat less protective, federal law, the **Fair Credit Reporting Act**.<sup>42</sup> These laws limit the information about an individual’s criminal record history that can be included in a “consumer report.” These laws also limit the uses of consumer reports.

*Under most circumstances, these laws prohibit the reporting of criminal records and other adverse information that is more than seven years old.*

The Consumer Credit Reporting Agencies Act prohibits consumer reporting agencies from reporting any information about an arrest or criminal charge that did not result in conviction, except that such records may be reported while they are

pending judgment. Thus, a consumer report cannot include information about an arrest or charge that was ultimately dismissed. Convictions for which a full pardon has been granted must also be withheld from credit reports.<sup>43</sup>

Under most circumstances, these laws prohibit the reporting of criminal records and other adverse information that is more than seven years old. Consumer reports cannot contain information about “records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime” that from “the date of disposition, release, or parole” is more than seven years old or “any other adverse information” that is more than seven years

old. However, these restrictions on reporting old information do not apply if the job has a salary of \$75,000 or more.<sup>44</sup>

In addition, both the Consumer Credit Reporting Agencies Act and the Fair Credit Reporting Act contain protections against inaccurate reports. It is a violation of both laws for a consumer reporting agency to report any information which it has reason to know is inaccurate. For example, the federal law requires that agencies “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual.”<sup>45</sup>

Before requesting a report about a job applicant from a consumer reporting agency, an employer must notify the applicant that a report may be requested. If an “investigative consumer report” is to be obtained, the applicant must first sign a written authorization consenting to the preparation of the report. (An “investigative consumer report” is a consumer report for which information is gathered through personal interviews and written records.) If an employer does obtain a consumer report, the employer must give the individual the consumer reporting agency’s name and address upon written request. The person can then contact the consumer reporting agency, which is required to give the individual a copy of the report and any other information in the agency’s files concerning that individual.

If inaccurate or incomplete information appears in a consumer reporting agency’s

<sup>41</sup> CAL. CIVIL CODE § 1786.18.

<sup>42</sup> 15 U.S.C.A. § 1681.

<sup>43</sup> CAL. CIVIL CODE § 1786.18(a)(7).

<sup>44</sup> CAL. CIVIL CODE § 1786.18(a)(8), 18(b)(2); 15 U.S.C.A. § 1681(c).

<sup>45</sup> 15 U.S.C.A. § 1681e(b); See also CAL. CIVIL CODE § 1785.16.

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file, the individual should notify the agency. The agency has an obligation to promptly reinvestigate and correct any errors. California law requires consumer credit reporting agencies to investigate inaccurate credit reports within thirty days of a report of a dispute. If the agency finds that an item was in error, it must, upon request, notify any employer who was given the information during the previous two years about the correction. If the agency, after reinvestigating, still believes that the information is complete and correct, the individual has the right to file a statement with the consumer reporting agency concerning the dispute. The agency must notify the individual of the results of the investigation within five days of its completion. Any future reports made by the agency containing that information must state that the information is disputed and include the person's statement.<sup>46</sup>

It may be wise for John to obtain a copy of his consumer report prior to beginning his job search. First, John can familiarize himself with the contents of his report so that he will be aware of the information prospective employers are receiving. He will also be prepared to dispute any inaccurate information or items with either the consumer reporting agency or the source of the information. Correcting inaccuracies before the potential employer discovers them will alleviate the damage caused by an inaccurate report. If John certifies that he is on welfare or unemployed and planning to seek employment within sixty days, he can

receive one free report within a twelve-month period.

## **How to Correct Mistakes on a Criminal Record**

Once your clients have familiarized themselves with their criminal record, they should try to clean up any mistakes that appear on their rap sheet. Some common mistakes are arrests that have no dispositions, erroneous or incomplete sentencing information, and duplication of entries (which may make one arrest and conviction look like several). Such errors or omissions may make your client's record appear more serious than it really is.

Sometimes an employer will find out about a person's arrest, but the rap sheet will not have information about its final outcome or will contain incorrect information. In those cases, it may be useful for your client to give the employer a certified copy of an abstract of a judgment.

The abstract contains the arrest charge(s), the docket number of the case, and the disposition of the case (for example, dismissal or conviction). If the case led to conviction, it will describe the conviction charge(s) (which may be different from the arrest charges), the date of conviction, and the sentence. Abstracts of judgments can be used by your client to correct rap sheet errors or an employer's inaccurate

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<sup>46</sup> CAL. CIVIL CODE § 1785.16; 15 U.S.C.A. § 1681i.

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information about arrests or convictions. For example, while most employers are forbidden to ask applicants about any arrest that did not lead to conviction, they sometimes do. In certain cases, an employer will discover an individual's arrest, but will either have no information or wrong information regarding its final outcome. In those cases, your client might want to show the employer an abstract of judgment to confirm that the arrest did not result in conviction.

Your client can request an abstract of a judgment from the clerk of the court in which he appeared after arrest. In California, misdemeanors and infractions are generally handled in the superior courts of limited jurisdiction, and felonies are disposed of in the general superior courts. The fee for abstracts is \$7, plus \$6 to have the documents certified, for a total charge of \$13. To help the clerk locate an individual's records, the client should provide his name, the date of arrest, indictment number, or docket number. The client should have identification when seeking records from the court. If errors are detected in the DOJ records, a request for correction of the records can be made by writing a letter to DOJ's Record Review Unit (see below) or by completing and submitting the "Claim of Alleged Inaccuracy or Incompleteness" form that is attached to the rap sheet sent by DOJ. Clients should send the abstract of the judgment or other documentation showing the correct and final outcome of

cases that are mistakenly or incompletely reported on their rap sheet. (Only certified abstracts are accepted. Photocopies are not acceptable for record correction). DOJ will investigate the document under dispute and notify the applicant of the result of the investigation within sixty days.<sup>47</sup> If DOJ's internal investigation finds that the information on the rap sheet is correct and refuses to correct the error, your client must next contact the "contributing agency" (examples include local law-enforcement officers, clerks of court, corrections officials, etc.). At this point, DOJ will only accept requests for corrections from the original contributing agency. Once the agency notifies DOJ of an error, its staff will initiate an audit, and coordinate corrections or modifications directly with the contributing agency. The time necessary to complete this process varies.

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### **Getting Cases Erased from a Criminal Record**

Individuals in California may be eligible to clean up their criminal records in three ways: expunging, sealing, and purging. The process that applies depends on the nature of the charge and whether the charge resulted in a conviction.

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<sup>47</sup> CAL. PENAL CODE § 13324.

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## How to Get Criminal Records Expunged

Expungement is a limited remedy that does not erase a case from an individual's record, but rather results in a notation to the rap sheet indicating that the conviction has been "dismissed [in] furtherance of justice (DISM, FURTH OF JUST)." California law allows the courts and DOJ to expunge most adult misdemeanor and felony convictions and most convictions of a juvenile following criminal prosecution. These records cannot be sealed.<sup>48</sup> Expungement is still helpful, however, because it allows individuals to answer "no" on most employment applications that ask whether they have been convicted, and it enables individuals to apply for a Certificate of Rehabilitation and a pardon (see p. 23 for more information).

Information about many adult misdemeanor and felony convictions and juvenile convictions following adult criminal trials can be expunged. However, individuals may not petition for expungement of convictions that fall into the following categories:

- convictions with outstanding fees or restitution;
- current or expected charges for any criminal or serious traffic offense(s);
- convictions for failing to obey a police officer;

- convictions of certain sex offenses;
- convictions of non-wobbler-felony offenses without probation as part of the sentence (see p. 20); or
- convictions of infractions.<sup>49</sup>

Anyone who has access to rap sheets will see expunged cases, because expungement does not erase the conviction from the rap sheet. Under California law, once a case has been expunged, applicants are no longer required to disclose these convictions on job applications and in interviews, except on the following types of applications:

- law enforcement;<sup>50</sup>
- health care facilities if the position requires patient contact or access to medication (for certain types of convictions — see p. 8 for more information);<sup>51</sup>
- financial institutions;<sup>52</sup>
- public employment;
- public office; and
- occupational licenses.<sup>53</sup>

However, because the criminal history record information will still appear on an individual's rap sheet, it may be wise to disclose the conviction to employers who have access to rap sheets (see "Access to, and Limits on Dissemination of, Criminal History Records and Information," p. 15). The United States Immigration and Naturalization Service also has access to expunged cases.<sup>54</sup>

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<sup>48</sup> CAL. PENAL CODE §§ 17(b)(3), 1203.3, 1203.4-.4(a).

<sup>49</sup> CAL. PENAL CODE §1203.4; CAL. VEH. CODE § 2800.

<sup>50</sup> CAL. LAB. CODE § 432.7.

<sup>51</sup> CAL. LAB. CODE § 432.7.

<sup>52</sup> 12 U.S.C.A. § 1829.

<sup>53</sup> CAL. PENAL CODE §1203.4.

<sup>54</sup> Immigration and Nationality Act, 8 U.S.C.A. § 1101 *et seq.*

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The expungement process depends upon the type of offense the individual was convicted of. If the individual was convicted of a misdemeanor, the process depends upon his probation status.<sup>55</sup>

- If **probation is successfully completed**, he may apply directly for expungement.
- If he is **currently on probation**, he may petition for expungement, but a hearing in court is required.
- If **probation is not a part of the sentence**, the waiting period is one year from completion of the sentence to apply for expungement.

If the individual was convicted of a felony, the expungement procedure will differ depending upon whether he was convicted of a “wobbler.” To determine whether he was convicted of a wobbler, the individual should find the reference to the penal code section on the rap sheet, call a local public defender’s office or Legal Aid, and ask an attorney if that particular crime is a wobbler.

- **Non-wobbler felony convictions:** file a petition to expunge a felony.
- **Wobbler felony convictions:** file a petition to both reduce the offense to a misdemeanor and have the conviction expunged.

Each court is free to establish its own procedures for expunging cases. Your

client should call the court in which his case was heard and ask the court clerk how to apply to have a case expunged (or a conviction set aside and dismissed) in that court. The clerk will know whether the services of an attorney will be needed to file an expungement petition in that court or whether the clerk can assist the applicant.

## How to Get Criminal Records Sealed

Having a case sealed means that criminal history record information is removed from the version of the rap sheet that is sent to employers and others. Cases that can be sealed are those that did not lead to conviction and juvenile ward of the court orders.<sup>56</sup> Arrest records for infractions are the only type of “arrest-only” record that cannot be sealed.<sup>57</sup> Individuals are not eligible to have their juvenile records sealed if:

- convicted of certain violent or sex offenses;
- convicted of a felony or misdemeanor of moral turpitude; or
- their case was transferred from the juvenile court resulting in an adult criminal conviction.<sup>58</sup>

Sealed records are physically destroyed in most circumstances, **but they will still remain in a confidential file in the DOJ computer.** Sealed information for arrests that did not lead to conviction or juvenile ward of the court orders remains available in three situations:

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<sup>55</sup> CAL. PENAL CODE §§ 1203.3, 1203.4-.4(a).

<sup>56</sup> CAL. PENAL CODE § 851.8; CAL. WELF. & INST. CODE § 781.

<sup>57</sup> CAL. PENAL CODE § 851.8.

<sup>58</sup> CAL. WELF. & INST. CODE § 781.

- **Certain employers** such as law enforcement and health care facilities (if the position requires access to patients or medication) may inquire about sealed information.<sup>59</sup>
- The **Department of Motor Vehicles** has access to sealed juvenile records to determine insurance rates.<sup>60</sup>
- Sealed juvenile records may be used under the “**three strikes**” law if the juvenile was adjudicated a ward of the juvenile court when he was sixteen years of age or older for a felony or other serious offense and was later charged with a felony.<sup>61</sup>

The procedure for sealing records of arrests that did not lead to conviction differs depending upon whether an accusatory instrument, usually called an “indictment,” has been filed. For arrests occurring on or after January 1, 1981, an individual must usually petition to have his record sealed within two years of the arrest date. The court may extend this time limit if there is good reason.<sup>62</sup>

Individuals must contact the proper entity and ask for the procedure to get an “arrest-only” case sealed. If an indictment has not yet been filed, the individual must contact the law enforcement agency to which he was taken after having been arrested. If an indictment has been filed, he must contact the court that dismissed the indictment.

If an indictment has not yet been filed, a hearing is generally not required. The

records will be sealed for three years from the date of arrest, and will then be destroyed, if the individual is determined to be “factually innocent.” Individuals may request an appeal if the petition is denied. If an indictment has been filed, a hearing is required, and a judge will decide whether to approve the sealing petition. Although a court appearance is generally not required in most cases, individuals may want to attend the hearing and be ready to explain why the record should be sealed in case the probation department objects to the petition. If the individual is determined to be “factually innocent,” the court will send an order to DOJ to remove the records from the rap sheet. The records (fingerprints, photographs, court records, etc.) will then be destroyed three years later. Individuals may request an appeal if the petition is denied.

Individuals may petition the juvenile court to have juvenile ward of the court orders sealed five years after the disposition of the case, or upon reaching age eighteen (whichever comes first). A hearing date will be set after the form is processed. Although a court appearance is generally not required in most cases, individuals may want to attend the hearing and be ready to explain why the record should be sealed in case the probation department objects to the petition. If the sealing petition is approved, the court will send an order to DOJ to remove the records from the rap sheet. Most records will be destroyed five years after being sealed.

<sup>59</sup> CAL. LAB. CODE § 432.7.

<sup>60</sup> CAL. WELF. & INST. CODE § 781.

<sup>61</sup> CAL. PENAL CODE § 667(d)(3).

<sup>62</sup> CAL. PENAL CODE § 851.8.

**Remember:** A copy of sealed records will remain in the DOJ computer indefinitely.

## How to Get Criminal Records Purged

A record that is purged cannot be released under any circumstance. Cases that can be purged are limited to certain marijuana arrests and convictions.<sup>63</sup>

*When a case is purged, all criminal history record information is removed from the version of the rap sheet that will be sent to employers and others.*

Prior to July 2000, individuals could petition to purge their entire DOJ record if it consisted entirely of misdemeanor convictions and at least ten years had passed since the last conviction.

Through purging, DOJ would destroy all criminal history record information on the rap sheet.

However, DOJ decided to discontinue this practice and only purge certain minor marijuana arrest and conviction records from rap sheets. When a case is purged, all criminal history record information is removed from the version of the rap sheet that will be sent to employers and others. All records (fingerprints, photographs, court records, etc) are destroyed, and no records are retained.

Individuals arrested for or convicted of the following offenses after January 1, 1976, will have their records purged

(destroyed automatically) two years after the arrest or conviction (except juvenile records which are retained until the individual reaches age eighteen):

- possession of “not more than 28.5 grams of marijuana”;<sup>64</sup> or
- unauthorized transportation, sale, or giving away (including attempt) of “not more than 28.5” grams of marijuana.”<sup>65</sup>

Individuals arrested for or convicted of the offenses listed below before January 1, 1976, are also eligible to have their records purged. However, these individuals must apply to have these records purged because they will not be purged automatically:

- possession of “not more than 28.5 grams of marijuana”;<sup>66</sup>
- unlawful possession of marijuana paraphernalia;<sup>67</sup>
- unlawful presence in a place where marijuana is being used;<sup>68</sup> or
- unlawfully being under the influence of marijuana.<sup>69</sup>

Individuals seeking to have their records purged must obtain an “Application to Destroy Arrest/Conviction Records” form and pay a \$37.50 fee to DOJ (see address below). Money orders, certified checks, and cashier’s checks made payable to the “Department of Justice” will be accepted as payment. To have the record purged, the individual must mail the completed form and payment to:

<sup>63</sup> CAL. HEALTH & SAFETY CODE § 11361.5.

<sup>64</sup> CAL. HEALTH & SAFETY CODE §§ 11357, 11361.5.

<sup>65</sup> CAL. HEALTH & SAFETY CODE §§ 11360-11361.5.

<sup>66</sup> CAL. HEALTH & SAFETY CODE §§ 11360-11361.5.

<sup>67</sup> CAL. HEALTH & SAFETY CODE §§ 11361.5, 11364.

<sup>68</sup> CAL. HEALTH & SAFETY CODE §§ 11361.5, 11365.

<sup>69</sup> CAL. HEALTH & SAFETY CODE §§ 11361.5, 11550.

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California Department of Justice  
Bureau of Criminal Identification and  
Information  
P.O. Box 903417  
Sacramento, CA 94203-4170

Clients who require further information regarding expungement, sealing, or purging can consult [How to Get and Clean Up Your California Rap Sheet](#), a manual prepared by the Legal Action Center.

To assist John, you and he should review his rap sheet to determine if, based on the dispositions, any charge on it can be expunged, sealed, or purged. For instance, John’s recent conviction that led to his incarceration may be eligible for expungement relief, depending upon whether the underlying offense was designated as a wobbler with probation as part of the sentence. Because his previous arrest did not lead to conviction, he would be eligible to file a sealing petition.

## Certificates of Rehabilitation

Since most misdemeanor and felony convictions will always appear on a California rap sheet, is there anything an ex-offender can do to mitigate the effects of these convictions? Ex-offenders in California can obtain a Certificate of Rehabilitation which removes many of the civil disabilities they may encounter because of their convictions. For example, a number of California statutes bar persons who have been convicted of

certain offenses from getting certain jobs or occupational licenses. A Certificate of Rehabilitation may remove these bars to jobs or licenses.<sup>70</sup>

A Certificate of Rehabilitation is a court order declaring an individual “rehabilitated.” Without the evidence of rehabilitation that these certificates provide, ex-offenders are often put in the position of having to satisfy the employer that they will be reliable and trustworthy employees. This can be time-consuming and difficult under the best of circumstances, so clients should obtain certificates as soon as they are eligible to do so.

Two categories of individuals may apply for a Certificate of Rehabilitation:

1. any person convicted of a felony; and
2. any person convicted of a misdemeanor sex offense under Section 290 of the Penal Code which requires registration as a sex offender.

To be eligible, these individuals must satisfy three additional criteria:

1. they were convicted and/or incarcerated in California;
2. their conviction has been expunged; and
3. they resided at least five years in California.

If an individual has been incarcerated for any reason since his release or the

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<sup>70</sup> CAL. PENAL CODE §§ 4852 *et seq.*; CAL. LABOR CODE § 26.

expungement of his record, he will be ineligible to receive a certificate. Individuals found guilty of certain sex offenses are also ineligible. The number of misdemeanor convictions an individual has been convicted of ordinarily does not affect eligibility. The primary basis of eligibility is at least one felony conviction.

A separate Certificate of Rehabilitation must be obtained for each conviction. Individuals may apply while on probation or parole, so long as the term is not mandatory life parole. A certificate is available only to individuals who have been incarcerated in California institutions and who have been charged with California offenses. Waiting periods for application exist and vary by offense.<sup>71</sup>

To apply for a Certificate of Rehabilitation, the individual must file a petition in the Superior Court where he currently resides. The forms can usually be obtained from the clerk of the court. However, in some counties the public defender handles the process and forms will be available at that office.<sup>72</sup>

*A pardon restores the rights that are lost upon a criminal conviction, such as the right to vote, serve on a jury, or run for public office.*

Once the application is filed, the applicant might be investigated by the district attorney. Following the investigation, the district attorney will submit a report to the court, including any information regarding the applicant's

conduct, duration of California residence, and any additional known crimes.<sup>73</sup>

At the required hearing, which is usually a formality, the court will determine whether the individual has exhibited good moral character, which includes leading “an upright and honest life” and behaving “with sobriety and industry.” Individuals may, but do not need to, be represented by legal counsel at these proceedings. If a certificate is granted, the court will forward a copy to the Governor. The certificate will also serve as an application for a pardon.<sup>74</sup> Even without complications, this process often takes several months to complete.

Having a Certificate of Rehabilitation does not, however, completely protect an applicant from being denied a job or license because of a past conviction history. While these certificates offer a presumption of rehabilitation, the convictions still appear on rap sheets, and individuals must disclose their criminal history if asked about it on a job application or in an interview. Because an individual's civil rights are not restored until granted a “full and unconditional pardon by the Governor,” some employment bars are lifted only by both a certificate and a pardon.<sup>75</sup>

If he meets all the criteria, John should be advised to apply for a Certificate of Rehabilitation following expungement of his drug conviction. If he is granted a certificate, it will enable him to apply for

<sup>71</sup> CAL. PENAL CODE §§ 4852.01(a), (c), (d), 4852.03, .06.

<sup>72</sup> CAL. PENAL CODE § 4852.07.

<sup>73</sup> CAL. PENAL CODE § 4852.12.

<sup>74</sup> CAL. PENAL CODE §§ 4852.05, .08, .16.

<sup>75</sup> CAL. PENAL CODE § 4852.17.

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a pardon, once the waiting period has elapsed (see further information about “Pardons” below). A certificate and/or a pardon will serve as evidence of rehabilitation if John decides to apply for a barber’s license, for example.

## **Pardons (Executive Clemency)**

In California, pardons are rarely granted and are issued only after a rigorous investigation. A pardon (also known as executive clemency) restores the rights that are lost upon a criminal conviction, such as the right to vote, serve on a jury, or run for public office. To be eligible to apply, individuals must usually wait at least ten years after release from incarceration, probation or parole, and must refrain from further criminal activity during that time. Pardons are requested for the following reasons:

1. out-of-state ex-offenders can bypass the residency requirements for a Certificate of Rehabilitation;
2. individuals who are otherwise ineligible to apply for a certificate (because of the nature of their conviction, for example, a misdemeanor or certain sex offenses) can obtain evidence of rehabilitation; or
3. individuals can lift a specific statutory bar to employment.

If your client fits any of these categories, or has unusually good grounds, he may

apply for executive clemency by writing to the Governor at the following address:

Governor’s Office  
State Capitol  
Attention: Legal Affairs Secretary  
Sacramento, CA 95814

The pardon application must demonstrate that since release, the applicant has lived “an honest and upright life,” and conducted himself “with sobriety and industry.” He must also “exhibit a good moral character” and “conform to and obey the laws of the land.”<sup>76</sup> The following types of information are also beneficial: participation in community organizations; volunteer work; child care; elder parent care; or membership in religious organizations.

The Governor’s Legal Affairs staff will review the letter, and, upon determining that the applicant should proceed, send the applicant the forms to continue the clemency process. After the completed forms are returned, the Board of Prison Terms will conduct an investigation. Following the investigation, the Executive Board will decide whether the case should advance to the Governor. If the applicant has been convicted of more than one felony in separate proceedings, the California Supreme Court must approve the application. (Board of Prison Terms: How to Apply for a Pardon (April 27, 2001), available at [http://www.bpt.ca.gov/pardon\\_txt.html](http://www.bpt.ca.gov/pardon_txt.html).)

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<sup>76</sup> CAL. PENAL CODE § 4852.05.

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Obtaining a pardon is a long and seldom successful process. Clients should be encouraged to focus first on obtaining a Certificate of Rehabilitation and then a pardon, rather than pursuing an almost certainly fruitless attempt to obtain executive clemency alone.

## How to Upgrade a Less Than Honorable Military Discharge

Employers often request military records, especially when an applicant has little work experience. Frequently employers ask for copies of discharge papers (form DD-214) and ask about discharge status. Several types of discharges exist:

- Honorable
- General
  1. Under Honorable Conditions
  2. Administrative
- Undesirable
- Bad Conduct (determined by court martial)
- Dishonorable (determined by court martial)

Most veterans receive honorable discharges, so if your client has a less than honorable (General or Undesirable) discharge, it can pose a serious problem. Discharges are frequently upgraded, so encourage your client to apply.

Any person who leaves military service with less than an honorable discharge can file an application to have it upgraded with the appropriate branch of the service. To apply, your client will need copies of his military records, which can be obtained from:

Military Personnel Records Center  
9700 Page Avenue  
St. Louis, MO 63132  
(314) 263-3901

To facilitate the request, clients should use a Department of Defense Form 180, "Request Pertaining to Military Records." This form can be obtained by calling the Department of Defense at (703) 697-5737 or by picking one up at a veterans organization.

**Having all one's military records is essential for success.** Some veterans groups advise applicants who have not secured copies of their records to withdraw their applications and resubmit them when they have obtained their records.

People whose bad conduct or dishonorable discharges were the result of a **special court martial**, or people who received less than honorable discharges because of **disciplinary action** short of court martial, should apply to the **Discharge Review Board (DRB)** of the appropriate branch of service for a review of discharge. Your client should use Department of Defense Form 293 (DD-293). These forms are available at local Veterans Affairs regional offices or by calling the Department of Veterans Affairs at (800) 827-1000. Ordinarily, one must apply within fifteen years of the date of discharge from the service.

However, anyone wanting to upgrade a discharge that occurred more than fifteen years ago may file a motion with the **Board of Correction of Military Records (BCMR)** of the appropriate

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branch of service (see address below). Department of Defense Form 149 (DD-149) should be used if the veteran was discharged more than fifteen years ago.

Board for Correction of Military Records (C-60)  
400 7<sup>th</sup> Street SW  
Washington, DC 20590  
(202) 366-9335

If your client's discharge was the result of a **general court martial**, then he must apply to the BCMR for upgrading. There is no time limit on this application. One also applies to the BCMR to correct any errors found in the discharge papers.

After a client applies to upgrade a discharge, the appropriate panel will evaluate the case. If the DRB is handling the case, there will probably be a hearing on the application. Applicants should have some sort of representation from an attorney, legal services agency, or a lay advocate. If the BCMR is handling the case, there will probably not be a hearing. Rather, the matter is likely to be decided based upon the written materials submitted on the applicant's behalf. It is best to seek legal assistance in preparing these materials.

For further assistance, contact the following agencies:

American Red Cross  
11000 Wilshire Boulevard, Room 5200  
Los Angeles, CA 90024  
(310) 478-5743  
(or check phone book for office nearest you)

California Department of Veterans Affairs  
1227 O Street  
Sacramento, CA 95814  
(800) 952-5626

Vietnam-era veterans may also call:

Vietnam Veterans of America – California  
State Council  
2434 Conifer Lane  
Mariposa, CA 95338  
(209) 966-4039

Vietnam Veterans of San Diego  
4141 Pacific Highway  
San Diego, CA 92110  
(619) 497-0142

California also has County Veterans Service Offices in fifty-six counties. Check the phone book for the office nearest you.



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# III. Preparation to Prevent Discrimination

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Once an employer has rejected an applicant, it is much harder to get the decision reversed than it would have been to prevent it initially. Preparing your client for the hiring process can often avert a rejection based on the client's alcoholism or addiction history or criminal record. So, before your client applies for employment, learn about the applicant, his background, the prospective job, and hiring process.

## Learn About the Job and the Hiring Process

Exploring the requirements of the job in advance enables you to anticipate the employer's concerns and help your client assemble the information and documentation that will address those concerns. Many things you should learn about prospective employers are things any good job developer would ask about as a matter of course. Knowing about the hiring process can reduce the anxiety that everyone feels when applying for a job. In addition, knowing how the employer makes hiring decisions will enable you to ascertain whether an employer is treating your clients differently than other applicants. Some questions you should ask include:

- What kinds of jobs are available?
- How many positions are open?

- What duties does the job entail?
- Is there a standard application form? (The applicant should secure an extra copy whenever possible.)
- Is there an interview? Who conducts it?
- Who makes the final hiring decision?
- How long does the process usually take?
- How are applicants usually notified about hiring decisions?
- Is a medical examination required? Does it involve urine testing or other screening for drug use? What drugs will be identified?
- Are applicants fingerprinted?
- Does the employer run a routine check with law enforcement agencies for applicants' criminal records?
- Does the employer obtain reports on applicants from a consumer credit reporting agency?

## Learn About the Client

The importance of having a thorough interview with your client **before** he applies for a job cannot be overstated. The goal is, of course, to anticipate potential difficulties to help applicants present themselves in the best possible light. You should explore every aspect of a job seeker's past that an employer might want to know about. This may require digging into the person's background beyond the point dictated by

considerations of privacy or tact. Explore inconsistencies or improbabilities until you are convinced that you have the entire, unvarnished story. It is important to realize that clients may be reluctant to reveal potential problems out of fear that you will somehow disapprove or not assist them. Recognize fear and confront it in a straightforward way.

## What Questions to Ask: The Pre-application Interview

### History of Drug or Alcohol Problems

Find out the exact nature and duration of your client's past alcohol or drug problem. Review with your client all the treatment services he has participated in.

If he has undergone treatment, find out where and when, and then contact the treatment programs to discuss your client's record in the program. Confirm the client's treatment history and readiness for employment with the

treatment program's medical and counseling staff. Remember that you must obtain your client's written consent before making contact with a drug or alcohol treatment program.

Since John received substance abuse treatment while in prison, try to find out what kind of treatment he received and whether he has certification for completing the treatment program. Also, you may want to find out whether he has

or is currently receiving community-based treatment or other after-care services and, if so, obtain any available progress reports.

### Arrest and Conviction History

For each arrest, determine the date, the exact charges, and the disposition of the charges. (See "Dealing with a Criminal Record," p. 9.) If the arrest resulted in a conviction, obtain the name of the court in which the conviction was issued and sentence imposed, and learn how and where the sentence was served.

Determine whether your client is still on probation or parole and, if so, identify his supervisor.

Like many clients, John is unclear about the date, disposition, and exact nature of his first arrest. Advise him to get a copy of his official criminal record to determine this information, including whether this charge occurred when he was a juvenile. The criminal record will also refresh John's memory about other criminal charges he may have forgotten.

### Employment History

Find out about all of your client's former jobs. Determine where the client worked, for how long, and what responsibilities the job entailed. Pay special attention to the reason for leaving a position — make sure it is specific and that you know all the circumstances surrounding it. For example, ask if your client resigned instead of being terminated. Determine if your client was ever subject to disciplinary action at work. Find out if the client was ever denied unemployment compensation.

*The goal is, of course, to anticipate potential difficulties to help applicants present themselves in the best possible light.*

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## Military History

An employer may ask your client if he has served time in the military. Find out whether your client was subject to court martial or disciplinary action short of court martial. Ask whether any tours of duty were unexpectedly shortened. Determine the status of the discharge and, if possible, get a copy of the discharge papers (Form DD-214). Remember that “under honorable conditions” is **not** the same as “honorable.” (See “How to Upgrade a Less Than Honorable Military Discharge,” p. 26.)

## Unexplained Time Gaps in History

If there are substantial periods of time not accounted for by employment, education, the military, incarceration, or treatment, investigate them thoroughly. These periods are often warning flags to an employer.

A pre-application interview should also explore positive traits and accomplishments that can be worked into an interview or can be highlighted on a job application form. The most important traits are those that counterbalance the applicant’s weak spots.



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# IV. Applying for the Job

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## The Job Application

After you have learned about your client's background, the job, the hiring process, and helped him clean up his record, counseling him about how to apply for the job is crucial. Ask the job-seeker to bring in the application form so you can assist him in completing it. If the employer will not release the application, be sure your client understands how to answer all questions to his advantage.

In general, job seekers should limit their response to the scope of the inquiry. For example, if an application form asks a person to list all "convictions" or convictions of all "offenses" the applicant should list both criminal (felony and misdemeanor) and noncriminal (infractions) convictions. This question should only be answered if the employer is statutorily entitled to such complete information (see pp. 7-8). If an application form just asks about "crimes," "convictions of crimes," or "criminal offenses," only misdemeanors and felonies need to be listed. However, because non-traffic infractions will appear on rap sheets, it may be wise for the applicant to consider disclosing these records. Applicants should also consider listing juvenile adjudications that have not been sealed or destroyed, because they will appear on rap sheets (see p. 14).

Again, individuals are not required to disclose the following types of information to **most** employers:

- arrests that did not lead to conviction or for which a pretrial diversion program was successfully completed;
- sealed, expunged, or purged conviction records; or
- misdemeanor convictions that have been dismissed, including those for which probation was successfully completed.<sup>77</sup>

If an application asks about a current drug problem, an individual's past dependence should not be listed. It is, therefore, important for you and John to be familiar with his criminal record and his drug history so that you can prepare him to answer these types of questions.

When in doubt, however, it is usually more prudent to reveal than to withhold; an employer who discovers anything that the applicant has not disclosed may give it more attention than it deserves, and may even accuse your client of willful misrepresentation. Advise clients that they are under no obligation to volunteer information about their drug or alcohol histories or criminal records, or about any other troublesome aspect of their past.

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<sup>77</sup> CAL. CODE REGS. tit. 2 § 7287.4.

However, a job seeker should not attempt to evade an ambiguously worded inquiry when the questioner's intent is clear.

As discussed previously, one of the most important things many of your clients can do to dramatically increase their chances of getting a job is to clean up their criminal record. (See in Chapter I, "Illegal Pre-employment Inquiries.")

## Disclosing Alcohol or Drug Dependence or Criminal History

Employers may ask questions concerning a person's history of alcohol or drug dependence after making a conditional offer of employment. Employers may ask pre-employment questions about many criminal convictions, but not expunged, sealed, or purged cases. When preparing to discuss their alcohol or drug use or criminal history, your clients should bear in mind some common employer prejudices and beliefs about people in recovery or ex-offenders:

- the job seeker continues to abuse alcohol or drugs or is still committing crimes;
- the job seeker will relapse or revert to crime;
- drug dependence, alcoholism, or a criminal record stems from a fundamental and irremediable character flaw;
- alcoholism or drug dependence results in lasting physical and/or psychological impairment; and

- all persons with former alcohol or drug problems and ex-offenders are unreliable and irresponsible.

Your client can overcome these prejudices by minimizing the negative aspects of his record and emphasizing the positive.

Your client can minimize an addiction or criminal history by describing it honestly and succinctly. He can put it into perspective by describing briefly any family problems or other

circumstances that helped cause or foster the problem. If relevant, a client can also mention

his relative youth at the time he was using, and stress the length of time he has been drug or alcohol-free, or successfully participating in treatment.

If some of your clients have a criminal record, they should reduce its negative aspects by attempting to place it in context. Your clients **should not** try to rationalize their behavior after the fact, or assert innocence of crimes for which they have been convicted, or dispute the seriousness of any conviction. Advise clients that these tactics are usually counterproductive. The average employer will assume that the job seeker either has difficulty facing reality or thinks the employer can be conned.

Your clients **should** inform the employer of any mitigating circumstances connected with a criminal record. For example, a client can point out the

*Your client can minimize an addiction or criminal history by describing it honestly and succinctly.*

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relationship between his convictions for driving while intoxicated and his simultaneous alcoholism; this allows him to argue persuasively that, having successfully conquered one problem, he has conquered both. Another client might successfully emphasize that his last conviction was ten years ago. A third individual could note that he was only seventeen years old when he committed the only serious offense for which he was convicted.

In John's case, he should emphasize the substance abuse treatment, vocational training, and educational courses he successfully completed while incarcerated. If he has continued to participate in community-based substance abuse treatment, he should obtain letters from those providers and inform the employer of that as well.

## **Demonstrating Rehabilitation**

Your client can emphasize the positive by demonstrating his rehabilitation. Make sure your client meets an employer only when ready with a firm statement of his rehabilitation efforts. To help your client stress the positive parts of his background, look carefully at some of the following things:

### **Progress in Treatment Program**

If your client has decided to reveal his addiction or criminal history, he should consider mentioning his participation in treatment or counseling. If your client has

a good record in the program, he will almost certainly want to inform a potential employer of this. For example, your client might want to mention that he has participated voluntarily in drug treatment for three years, particularly if periodic testing at the program verifies that he has not reverted to drug or alcohol abuse during that time.

### **Previous Employment Record**

If your client had been consistently employed during any period, either before or after becoming involved with alcohol, drugs, or crime, emphasize the fact. Highlight good performance and low absenteeism in previous positions, especially if the jobs involved difficult working conditions such as irregular hours or compulsory overtime.

### **Educational Achievements**

What your client studied may not be nearly as important as the fact that he attended a school or training program. For example, if a man's two-year residence in an alcoholism treatment program appears on his resume as a two-year gap between jobs, he can stress his faithful attendance at a community college during the same two years.

### **Social and Religious Activities**

Your client should stress any such activities. If he has a conviction for larceny or embezzlement, for example, the fact that he handles the cash at a neighborhood fund-raising event will be impressive.

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## Military Achievements

A good military record, especially if it displays commendations, educational achievements, or other special accomplishments, can be helpful. It shows an ability to work well in a structured environment.

The job seeker should also include letters of recommendation from former employers who are willing to provide them. Your client should send letters of recommendation from clergy, community leaders, or anyone else who might impress an employer. Employers tend to worry about whether applicants will make stable and reliable employees, so letters of recommendation should address that issue as favorably as possible.

Finally, clients with Certificates of Rehabilitation for their conviction(s) should always offer employers copies of those certificates, because they provide additional evidence of rehabilitation which must be considered by employers in making hiring decisions about ex-offenders (see p. 23).

You should also be aware of a federal program that encourages the employment of people in recovery and ex-offenders: the **Work Opportunities (or Welfare-to-Work) Tax Credit Program**. Under the program, employers receive substantial tax credits over two years for each person hired from the target group before January 1, 2002. To find the specific requirements for the tax credit in your area, contact the California Employment Development Department at (916) 654-9715. Educating the employer about such tax advantages

could make the difference in a job decision for a marginal client.

Another federal program helps ex-offenders and individuals in recovery obtain bonding. Employers often require bonding for employees in positions as messengers, cashiers, or stockbrokers, to name just a few. The **Federal Bonding Program (FBP)** may bond a person who has been offered a job conditioned upon his being bonded, even if he has been denied bonding by a private insurance company. The FBP will insure individuals for up to \$5,000 or \$10,000 (depending on the nature of the job) for a maximum of six months. The FBP is available at no charge to either employer or employee. After the six-month period ends, the bond can be renewed through the FBP, but the employer or employee must pay for it. There are a limited number of bonds available each year. Contact the California Employment Development Department for eligibility and availability information.

## Some Special Problems

### Correcting an Employer's Misinformation

Even if your client both discloses his alcohol or drug or criminal history and presents evidence of rehabilitation to a potential employer, he may still encounter difficulties. Frequently an employer obtains criminal record information or information about a client's alcohol or drug problem from an independent source. In these cases, what the employer knows about an applicant may be more

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extensive than what the applicant has been asked to reveal.

As stated previously, the employer may obtain a rap sheet that contains errors, information that should have been purged or sealed, information about participation in alcohol or drug treatment programs, or data about alcohol- or drug-related charges that an employer may interpret as evidence of drug or alcohol dependence. This leaves the applicant in an awkward position, since he may not have an opportunity to comment on information — some of it incorrect — that may adversely affect the employer's decision.

There is no blanket prescription for handling this problem. Usually, if the applicant knows that the employer has obtained damaging misinformation, it is prudent to correct it even if the explanation carries him beyond the scope of the initial inquiry. In less clear-cut situations, what an applicant should do depends upon such factors as:

- whether he can determine what information the employer has obtained;
- whether that information is accurate;
- whether it can be explained effectively;
- whether the explanation is potentially more damaging than what the employer has already discovered.

Your client should certainly correct any errors that appear on his rap sheet before the employment process begins. If that is not possible, and your client knows that the employer will obtain his rap sheet, it

is advisable to provide the potential employer with copies of court records for the items in error — even if the employer does not request them (see p. 18). Doing so at the outset will demonstrate to the employer that your client wishes to be candid about his record and should minimize the damaging effect of any erroneous information.

## Polygraph Tests

The federal **Employee Polygraph Protection Act of 1988 (EPPA)** makes it illegal for virtually all private employers to use polygraph tests on job applicants, and it severely restricts their use on employees.

Employers are generally prohibited from requiring or requesting any employee or job applicant to take a polygraph test and from discharging, disciplining, or discriminating against an employee or prospective employee for refusing to take a polygraph test. However, federal, state, and local governments are **not** affected by the law. Therefore, government employers may impose polygraph tests.

The EPPA permits polygraph tests to be administered in the private sector to prospective employees of certain companies providing security services (armored cars, alarm systems, or guards), and to certain prospective employees of pharmaceutical manufacturers or distributors. The EPPA also permits private firms to ask an individual employee to take a polygraph test when the employee is reasonably suspected of involvement in a workplace theft that resulted in economic loss to the employer.

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Where polygraph tests are permitted, they are subject to numerous strict standards concerning the conduct of the test. People being examined have a number of specific rights, including the right to written notice before testing, the right to review the questions before being hooked up to the polygraph machine, the right to refuse or discontinue the test, and the right not to have the results disclosed to unauthorized persons.

Employers who violate the EPPA are subject to civil penalties of not more than \$10,000 and injunctive actions by the Secretary of Labor. Individuals subjected to polygraph examinations in violation of the EPPA may also file civil lawsuits within three years of the violation.

The **California Labor Code** also prohibits private employers from demanding or requiring job applicants or employees to submit to polygraph examinations. Because federal, state, and local government employers are exempt from both the federal and state law, these agencies may impose polygraph tests on their employees. When such testing is authorized, the state law also requires written notice prior to testing.

Complaints must be filed with the nearest California Division of Labor Standards Enforcement (DLSE) office within one year of a violation (see contact information on next page).<sup>78</sup>

Although California law generally allows governmental employers to administer

pre-employment polygraph tests, the **California Administrative Code** prohibits most employers from asking job applicants about any arrest that did not lead to conviction or for which a pre-trial diversion program was successfully completed, or about sealed, expunged, or purged conviction records.<sup>79</sup> Inquiries about such records would, with few exceptions (see p. 5), violate the law. Pre-employment inquiries about a history of or past treatment for alcohol or drug abuse may also violate the California Fair Employment and Housing Act's prohibition against employment discrimination based upon a disability that does not prevent an applicant's reasonable performance of job duties.<sup>80</sup>

## How to Respond to Illegal Questions

Now that you know how to recognize illegal questions (see pp. 6-8), you and your client must confront the real issue: how to respond. If you anticipate the problem far enough in advance, you may be able to get the employer to eliminate an illegal question. You or an attorney can, without revealing the identity of the client, advise the employer of the illegality of the inquiry and the employer's potential legal liability.

If that approach is unsuccessful, or if time is of the essence, what should an applicant do? He can assert the legal right to refuse to answer the question, but the employer's response may be to deny employment for

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<sup>78</sup> CAL. LABOR CODE §§ 432.2, 433.

<sup>79</sup> CAL. CODE REGS. tit. 2 § 7287.4.

<sup>80</sup> CAL. GOV'T CODE § 12940.

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## California Division of Labor Standards Enforcement (DLSE) Offices

### Bakersfield District Office

5555 California Avenue, Suite 200  
Bakersfield, CA 92401  
(661) 395-2710

### Fresno District Office

770 East Shaw Avenue, Suite 315  
Fresno, CA 93710  
(559) 248-8400

### Los Angeles District Office

320 West Fourth Street, Suite 450  
Los Angeles, CA 90013  
(213) 620-6330

### Redding District Office

2115 Akard Avenue, Room 17  
Redding, CA 96001  
(916) 323-4920

### Salinas District Office

1870 Main Street, Suite 150  
Salinas, CA 93906  
(415) 557-7878

### San Diego District Office

7575 Metropolitan Drive, Room 210  
San Diego, CA 92108  
(619) 220-5451

### San Jose District Office

100 Paseo de San Antonio, Room 120  
San Jose, CA 95113  
(415) 557-7878

### Santa Barbara District Office

411 East Canon Perdido Street, Room 3  
Santa Barbara, CA 93101  
(805) 568-1222

### Stockton District Office

31 East Channel Street, Room. 317  
Stockton, CA 95202  
(209) 948-7770

### Eureka District Office

619 Second Street, Room 109  
Eureka, CA 95501  
(707) 445-9067

### Long Beach District Office

300 Ocean Gate, Third Floor  
Long Beach, CA 90802  
(213) 620-6330

### Oakland District Office

1515 Clay Street, Suite 801  
Oakland, CA 94612  
(415) 557-7878

### Sacramento District Office

2031 Howe Avenue, Suite 100  
Sacramento, CA 95825  
(916) 323-4920

### San Bernadino District Office

464 West Fourth Street, Room 348  
San Bernadino, CA 92401  
(909) 383-4334

### San Francisco District Office

P.O. Box 420603, Eighth Floor East  
San Francisco, CA 94142  
(415) 557-7878

### Santa Ana District Office

28 Civic Center Plaza, Room 625  
Santa Ana, CA 92701  
(213) 620-6330

### Santa Rosa District Office

50 "D" Street, Suite 360  
Santa Rosa, CA 95404  
(707) 445-9067

### Van Nuys District Office

6150 Van Nuys Boulevard, Room 100  
Van Nuys, CA 91401  
(213) 620-6330

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failure to cooperate. You could then elect to challenge the denial by filing a complaint or lawsuit under the laws discussed in Chapter V, “Job Rejection.” Or the applicant can simply answer the question, recognizing that doing so helps the employer defeat the very purpose of the law. When deciding which approach to take, consider:

- how badly the applicant needs the job;
- how damaging his answer would be;
- how likely it is that the applicant would prevail in a legal challenge arising from a refusal to answer the question; and
- how committed your program is to pursuing the matter to a hopefully-not-bitter end.

## Lying

Everything we have said so far presupposes that the job seeker candidly and fully responds to questions concerning alcohol or drug problems or convictions. A question that frequently comes up is, “Should my client lie about his record?” We advise clients to tell the truth. Wholly apart from ethical considerations, a number of factors militate against lying. Where statements on an application or elsewhere are made under oath, knowingly making a material misstatement leaves one open to the risk

of criminal prosecution. While it is unlikely that criminal charges would be brought against someone who lies on an employment application, the severity of the possible sanction suggests that it is a gamble not worth taking. The chances of successfully reversing such a rejection are almost non-existent. Even if a client doesn’t actually make false statements on an application, failing to answer specific questions may cause an employer to reject the person for omitting material information. These decisions are also difficult to challenge.

If your client manages to obtain the job without the employer detecting his record, his problems may not be over. Some employers do not fingerprint people until after they are hired. Others routinely encounter delays in securing criminal record information, scheduling physical examinations, and verifying statements on the application. If the criminal record or drug or alcohol history subsequently comes to light, the employer may fire your client for having lied or omitted material information on the application. Even if you suspect that your client’s history was the primary factor motivating the employer, the employer will almost certainly win an administrative hearing or lawsuit challenging the dismissal; nearly all administrative agencies and courts consider misrepresentation on an application a legitimate reason for terminating an employee.

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# V. Job Rejection

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## Informal Resolution

If a potential employer rejects your client when he applies for a job, try to determine if the client's alcohol, drug, or criminal history affected the decision. First, consider your client's qualifications for the job. For example, if your client has three years' experience as a grocery store cashier and was denied a job as a restaurant cashier after revealing a conviction for possession of drugs, you can be fairly sure that his conviction influenced the decision regardless of the reason given for rejection.

When you feel reasonably certain that your client's history contributed to his rejection, the next step is to get the employer to admit this. Without such an admission, your efforts to resolve the matter informally (without resorting to formal legal proceedings) will probably fail. Moreover, even when formal legal measures are available, pursuing them requires time, energy, and money. Attempt an informal resolution first.

Sometimes, if your client asks politely why he was not hired, he will be told that it was because of his alcohol or drug use and/or criminal history. If asking does not work, it may help for you to become directly involved. The circumstances surrounding your client's rejection will determine how you should approach the employer to learn the reason for your client's rejection. In certain cases, it may be appropriate to refer your client to

another employer. If you want to pursue the opportunity with the same employer, you may consider writing a nonthreatening letter — something on the order of “I'm anxious to do a better job preparing people for employment and would therefore like to know what it is about Mr. Doe that made you decide not to hire him.” You may want to use a more indirect approach if you suspect the employer may have an absolute ban on hiring ex-offenders. In these cases, you may send a letter stating your interest in placing former offenders in meaningful jobs, and inquiring about possible openings. Another option, to avoid alienating the employer, is to have someone unconnected with your agency (such as a legal services attorney) ask the employer about its policy toward your client groups.

If the employer is uncooperative or continues to claim that the applicant's history did not affect the decision, you may have to turn to the more formal measures discussed later. If, however, the employer admits (or the records show) that your client's record may have influenced the rejection, ask for an opportunity to discuss the matter. You are an excellent mediator for this task. You know your client well, and have researched the duties of the job. Thus, you can show the employer how close the match is between your client's abilities and the requirements of the job. Keep in mind the same employer prejudices and concerns that you had prepared the applicant to address. Stress the

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qualifications and employability of the individual who has been rejected.

Explain how your program operates.

Help the employer understand that:

- the program is designed to get at the root of the alcoholism, addiction, or criminal problem;
- persons with former problems who are drug- or alcohol-free can remain so;
- ex-offenders can stay out of trouble with the law;
- employees maintained on methadone are indistinguishable from their co-workers in every material respect; and
- other comparable employers have knowingly hired individuals in recovery and ex-offenders and have not regretted the decision.

In making a case for a particular client, don't forget to assure the employer that the applicant is in fact sober, drug-free, or successfully participating in treatment. Explain what the person has done to become job-ready and demonstrate that he is responsible, stable, and respectful of others. Demonstrating this will vary from case to case, but remember that simply asserting that the job seeker possesses these traits is usually insufficient. Highlight activities (consistently arriving on time for therapy), accomplishments (successfully completing a series of courses), and experiences (getting married) that support your assertions. Sometimes it is appropriate to remind the employer of potential legal liability if it

persists in denying your client a job.

Approach this issue carefully. If you are too heavy-handed, the employer may take offense and refuse to try to work things out amicably. If, on the other hand, you soft-pedal the issue by mentioning potential liability as "a factor that everyone must be aware of," you may succeed in engaging the employer's full attention.

If the employer is recalcitrant or if your attempt to persuade it to reverse its initial decision proves unsuccessful, decide whether it is worth it to the job seeker and to the program to press the matter further. Among the factors you should consider are:

- Is the applicant able to do the job satisfactorily?
- How strong is the applicant's evidence of rehabilitation?
- How badly does the applicant want or need this particular job?
- What other jobs are available?
- What other factors might make the applicant attractive to an employer?
- Have you sent other applicants to the same employer? How have they fared?
- How many potential jobs does this employer realistically represent?
- How much time can you devote to resolving the problem?

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## Administrative Appeals to Public Employers and Occupational Licensing Agencies

Sometime in the future, John may decide to apply for a barber’s license to make use of his vocational training in barbering. If he does, he may experience difficulties getting a license because of his criminal record. In California, applicants for a barber’s license may be denied a license based upon a criminal conviction of any crime “substantially related” to the profession. A “substantially related” conviction has a bearing on the individual’s suitability for employment in the particular position.<sup>81</sup>

Consider, for example, an applicant for a home health license who has a felony drug conviction. This individual’s conviction would be considered to be substantially related if he applies for a job as a home health aide, but would not be if he were applying for a plumbing license with no access to controlled substances. Whether a conviction is substantially related must be determined on a case-by-case basis.

The occupational licensing authority, however, may not deny a barber’s license solely because of a felony conviction if the applicant has obtained a Certificate of Rehabilitation. If the applicant has a misdemeanor conviction, he also may not be denied a license if he can demonstrate satisfactory evidence of rehabilitation,

such as a Certificate of Rehabilitation or a pardon. It is therefore advisable for John to apply for a Certificate of Rehabilitation, and later, a pardon. John would then be entitled to reapply and to a hearing before the occupational licensing authority, if he was denied a license based upon his criminal history.

On the other hand, if John is dealing with a governmental or quasi-governmental employer (for example, a state occupational licensing agency, state civil service, a public hospital, or a regional transportation authority), he may be entitled to challenge an initial decision to deny him the job in an administrative appeal to that agency or another one designated to hear such appeals, such as the California State Personnel Board (see contact information below). In addition, DFEH and the EEOC have concurrent jurisdiction, if the decision was based upon unlawful discrimination. This means he may pursue a complaint with any of the three agencies (see pp. 51-54 for more information regarding filing complaints with the EEOC and DFEH). An administrative appeal may include a hearing or it may simply be an opportunity to submit whatever documents and written statements John thinks are appropriate.

California State Personnel Board  
Appeals Division  
801 Capitol Mall, MS #22  
P.O. Box 944201  
Sacramento, CA 94244-2010  
(916) 653-0544

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<sup>81</sup> CAL. BUS. & PROF. CODE § 7404(a)(3).

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Appeals to public agencies are available to those who have been denied a job because of their alcoholism or addiction history. Complaints based upon disability discrimination in state civil service in violation of the **Government Code** may be filed with the California State Personnel Board within one year of the discriminatory act. The Board will render an initial decision, which will become final unless a petition for rehearing is filed with the Board's Appeals Division within thirty days.<sup>82</sup> Subsequent appeals may be filed in court within one year of the Board's final decision, but a court will not reverse the Board's decision absent an "abuse of discretion," which is essentially a decision with no basis in fact or in law.<sup>83</sup> Therefore, it is difficult to overturn an administrative decision. For those who obtain a favorable decision, relief may include, but is not limited to, cease and desist orders, hiring, reinstatement, promotions, back pay, and compensatory damages.<sup>84</sup>

If an administrative appeal is available, encourage John to pursue it; such appeals are frequently successful. Try to get a lawyer to represent him. If you are unable to do so, have him request the appeal anyway, making sure the request is on time. Frequently an individual has as little as thirty days to request an appeal, and sometimes even less time. Once John has requested the appeal, you can return to the question of who should represent the applicant. In most cases the answer is simple: **you** do it. You will already be familiar with the pertinent facts about

John. You are already something of an expert on drug or alcohol treatment and ex-offender issues. You will probably already have a general understanding of the applicable law. In short, you fit the bill.

If there is a hearing, it will probably be informal and legal technicalities (such as the rules of evidence) will not ordinarily apply. You should, of course, identify yourself as a lay advocate, not a lawyer. Hearing examiners are often not lawyers either, so don't be intimidated by them. Even if they are lawyers, they will probably be less interested in discussing the law than in hearing your client's version of the facts.

In general, you should treat the hearing officer as you would a private employer whom you are trying to persuade to reverse an initial decision rejecting an applicant. Educate the officer about drug or alcohol treatment (if it is an issue the appeal). Emphasize John's strengths and rehabilitation.

The hearing officer will probably allow you to choose how to present your John's case. Begin by telling the officer what areas or topics you want to cover and in what order. This will make it easier for the examiner to follow your story, and make him less inclined to cut into your presentation with a line of questions that disturbs your train of thought. This introduction will also give you an opportunity to relax by covering material with which you are relatively familiar.

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<sup>82</sup> CA. GOV'T CODE §§ 19586 and 19587.

<sup>83</sup> CA. GOV'T CODE § 19630.

<sup>84</sup> CA. GOV'T CODE § 19702.

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In presenting John’s story, identify the general topics you want to cover and, taking each topic separately, decide what to emphasize. You and John can then prepare a statement covering all the relevant points, which he can read at the hearing. However, you should give serious consideration to drawing out John’s story through questions and answers.

You and John should practice this question and answer technique in advance, so that you both feel comfortable with it. Don’t worry about framing your questions elegantly. The more conversational your questions, the more relaxed both you and John will be. Tell John not to try to memorize the answers; otherwise, he will be too nervous about “blowing a line” to concentrate on answering calmly and with assurance. The advantage of a question and answer form of presentation is that you can control what John says and in how much detail. If he responds to a question less completely than you had hoped, and you feel that the answer is important, you may simply reword the question and ask it again.

**NOTE:** You and John should remember two things about these administrative remedies. First, while John may ultimately get the job or license he wants, the appeal process takes time — sometimes months — before it results in a decision. John should not bank on a good

outcome in the meantime. This means that he should keep working or looking for work while the appeal is going forward. Also, keep in mind that the other remedies John may have the right to pursue — such as administrative complaints and/or lawsuits under the anti-discrimination laws discussed below — all have time limits of their own. Those time limits are likely to apply, and keep running, even if John has an administrative appeal pending. If he does not file a discrimination complaint or lawsuit within those time limits (see below), he may lose the right to challenge the employer’s decision under the anti-discrimination laws. So, stay mindful of those time limits even as you and your client also pursue whatever administrative appeal may be available.

Second, successful administrative appeals of this sort may get John the job or license he wants, but he may not be entitled to other remedies — like back pay or seniority retroactive to the date he was first denied the job or license. The anti-discrimination laws discussed below do offer this broader relief.

If the appeal is unsuccessful, John may be entitled to a further administrative appeal, or to challenge the administrative decision in court, under laws other than (or in addition to) the anti-discrimination laws discussed in this manual. At this point, you should get advice from a lawyer on how best to proceed.

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# Legal Challenges to Discrimination Against Individuals in Recovery from Alcoholism or Drug Dependence

## Formal Legal Challenge Under Anti-Discrimination Laws Against Public Employers

The federal and state laws that prohibit discrimination based on non-job-related “disabilities” may offer your client a variety of remedies to choose from in challenging public employers’ and agencies’ discriminatory actions.

### Federal Law

When the discriminating agency is a public employer, one or both of the federal laws that ban disability-based discrimination — the **Rehabilitation Act** of 1973 and the **Americans with Disabilities Act** of 1990 (ADA) — is likely to apply, and each of these laws gives your client a choice of remedies. If the public employer receives federal grants or other federal financial assistance (and a significant number do), or is a federal agency, your client can file a lawsuit or an administrative complaint against it under Section 504 of the Rehabilitation Act. If the employer is a state or local government or governmental unit, your client can file an administrative complaint and subsequent lawsuit against

it under Title I of the ADA, regardless of whether it receives any federal funds.

Some public employers are covered by only one of these federal laws, but many are covered by both. Though each law has somewhat different rules for filing lawsuits and administrative complaints, the federal agencies charged with enforcing them are required to coordinate their efforts to ensure that complaints charging a violation of either or both laws are processed by the proper federal agency (or agencies), and that consistent standards are applied in enforcing both laws. So if an administrative complaint charges an employer with violating the Rehabilitation Act, and the ADA also applies to that employer, the complaint will be deemed dually and simultaneously filed under both laws and will be processed accordingly; and vice versa. What follows is an overview of the rules and procedures for pursuing the remedies available under each of these laws.

Under Section 504 of the Rehabilitation Act, clients who are subjected to discrimination based on their alcohol or drug history or treatment by a public employer that receives federal grants or aid have the right to file an administrative complaint or a lawsuit against the employer. You may be able to find out whether and what federal grants or aid an employer receives by calling its financial, administrative, or public relations office.

California law is unclear regarding the time limit for filing a lawsuit under the

## FEDERAL AND STATE REMEDIES FOR EMPLOYMENT DISCRIMINATION BASED ON DISABILITY

Statute	Type of Employer		Where to File Complaint		Deadline for Filing	
	Private	Public (state/local)	Administrative Agency	Court	Agency	Court
<b>FEDERAL ADA</b>						
Title I	Yes (15 or more permanent employees)	Yes	EEOC or Department of Fair Employment and Housing (DFEH)	Following Right to Sue Letter	180 days if proceed directly to EEOC 300 days if filed FEHA claim first	90 days after Right to Sue Letter
Title II	N/A	N/A	N/A	N/A	N/A	N/A
<b>Rehabilitation Act</b>						
Sections 501 & 504 (Federal employer)	Federal gov't only	Federal gov't only	Federal agency	Exhaustion required	Generally 180 days	90 days - if final agency action 180 days - if no final agency action
Section 503	Federal contract	Federal contract	Dept. of Labor OFCCP	No private action	300 days	N/A
Section 504 (Non-federal employer)	Federal assistance	Federal assistance	DOJ or funding agency	No exhaustion requirement	180 days	1 or 3 years (Courts have ruled both ways)
<b>CALIFORNIA</b>						
<b>Fair Employment and Housing Act (FEHA)</b>	Yes (5 or more employees)	Yes (5 or more employees)	DFEH	Following Right to Sue Letter	1 year	1 year following Right to Sue Letter
<b>Government Code</b>	No	State Civil Service	State Personnel Board	Following Board's final decision	1 year	1 year following Board's final decision
<b>Unruh Civil Rights Act (UCRA)</b>	Yes	Yes	DFEH	No exhaustion requirement	1 year	1 year
<b>Alcohol and Drug Rehabilitation Act (ADRA)</b>	Yes	No	DLSE or DOL	Following dismissal	DLSE – 6 months DOL – 30 days	1 or 3 years (Courts have ruled both ways)

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Rehabilitation Act. The time limit is either one year or three years from the discriminatory act.<sup>85</sup> Because of this ambiguity, and for many other reasons, pursuing a claim in court is most effective if done by a lawyer. Individuals do not have to pursue an administrative complaint before filing a lawsuit under Section 504 of the Act.

Administrative complaints under Section 504 of the Rehabilitation Act must be filed with the federal agency that provides the federal grants or other funds to the discriminating employer or agency within 180 days of the discriminatory act. To find out where and when to file such administrative complaints, call the federal funding agency's headquarters in Washington, DC, or its regional office in this area. The Federal Information Center at (800) 688-9889 will know where the various federal funding agencies' regional offices are located.

One advantage of filing an administrative complaint under the Rehabilitation Act is that you do not need a lawyer. The complaint can be submitted in the form of a simple letter to the head of the federal agency that gives grants or aid to the employer. The letter should include:

- a statement that the letter is intended to be a complaint under the Rehabilitation Act of 1973;
- the name, address, and telephone number of the person who has been discriminated against;

- a statement that the person has a history of or is in treatment for alcoholism or drug dependence and is not engaging in the illegal use of a drug;
- the name and address of the employer who is being charged with discrimination;
- a description of exactly how the discrimination occurred, including a description of the job being sought, the qualifications of the person who was discriminated against, and how that person was treated differently from other job candidates;
- a statement of the date(s) the discriminatory act(s) occurred;
- a list of any questions about past or current alcohol or drug use, dependence or treatment, or other health conditions, that appeared on the employment application or medical questionnaire;
- a description of what happened at any pre-employment medical examinations that may have taken place;
- the name, address, and telephone number of the job developer or counselor who may be helping with the complaint; and
- the signature of the person who has been discriminated against.

At the top of this letter write "Complaint under Rehabilitation Act of 1973." Write

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<sup>85</sup> *West Shield Investigations & Security Consultants v. Superior Court*, 82 Cal.App.4th 935, 98, Cal.Rptr.2d 612; *Kramer v. Regents of Univ. of Cal.*, 81 F.Supp.2d 972 (N.D. Cal. 1999).

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the same thing on the envelope in which you mail the complaint. Once the complaint is filed, the government may ask for additional information or may request that the complainant fill out some simple forms.

If a federal agency is the discriminating employer, your client can file a complaint under the Rehabilitation Act with the equal employment opportunity (EEO) office of that agency. This must be done within thirty days of the discriminatory act being challenged. The Federal Information Center at (800) 688-9889 can direct you to the proper official. Some agencies may require written complaints; with others, you may be able to state your complaint orally. Check with the agency involved to be sure.

The Americans with Disabilities Act (ADA) does not apply to the federal government, but does apply to all other public employers and agencies, including all state and local governments and governmental units, like occupational licensing agencies and vocational rehabilitation and job training programs, regardless of the size of the employer or agency. Clients claiming disability-based discrimination by one of these public agencies or employers in California must file an administrative complaint against it under the ADA with the federal Equal Employment Opportunity Commission (EEOC) (or with the U.S. Department of Justice, as described below). In California, claims against public employers may not be filed under Title II

of the ADA because the Ninth Circuit Court of Appeals has held Title II does not apply to employment. In addition, please be advised that your client cannot recover monetary damages in a Title I lawsuit against a state employer because of a United States Supreme Court decision issued in 2001. These lawsuits will also be more promising if pursued with legal representation.

Your clients do not need a lawyer to file an administrative complaint under the ADA. The time limit for filing an ADA complaint with the EEOC is ordinarily 180 days after the discriminatory act occurred. However, in California and other states that have laws that parallel the ADA, if the individual first files a complaint under state law with the state agency, the time limit for filing a complaint in the EEOC is 300 days after the discriminatory act. Clients can file complaints with the EEOC in person, by phone, or by mail. The EEOC will request the same kind of information that is set out above for Rehabilitation Act complaints (see p. 50). Your client should have that information at hand when he writes, calls, or goes to the EEOC to file a complaint. A list of the EEOC offices in California follows on page 50.

The U.S. Department of Justice will also accept complaints charging state and local government employers and agencies with violating the ADA, and will refer them to the EEOC. ADA complaints filed with the Department of Justice may be sent to:

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## Equal Employment Opportunity Commission (EEOC) Offices

### Fresno Local Office

1265 West Shaw Avenue, Suite 103  
Fresno, CA 93711  
(559) 487-5793

### Los Angeles Local Office

255 East Temple, 4<sup>th</sup> Floor  
Los Angeles, CA 90012  
(213) 894-1000

### Oakland Local Office

1301 Clay Street, Suite 1170-N  
Oakland, CA 94612  
(510) 637-3230

### San Diego Local Office

401 B Street, Suite 1550  
San Diego, CA 92101  
(619) 557-7235

### San Francisco Local Office

901 Market Street, Suite 500  
San Francisco, CA 94103  
(415) 356-5100

### San Jose Local Office

96 North 3<sup>rd</sup> Street, Suite 200  
San Jose, CA 95112  
(408) 291-7352

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### Coordination and Review Section

P.O. Box 6118  
Civil Rights Division  
U.S. Department of Justice  
Washington, DC 20035-6118

Clients with questions about the ADA and its remedies and enforcement procedures can also call the Department of Justice's ADA Information Line at (202) 514-0301.

California's Department of Fair Employment and Housing (DFEH) (whose addresses and phone numbers are listed on p. 52) has concurrent jurisdiction with the EEOC, and it will also take ADA complaints and refer them to the EEOC. Clients have the option of going directly to DFEH and asking it to take and refer their ADA complaints to the EEOC while they file a discrimination complaint under FEHA.

### State Law

In addition to or in place of a federal Rehabilitation Act or ADA complaint, your client may pursue the remedies available under **FEHA** to victims of discrimination based on non-job-related history of or treatment for alcoholism or addiction. Because FEHA applies to most state and local public employers and occupational licensing agencies with more than five employees (except nonprofit religious organizations), its remedies are available against employers and agencies that may not be subject to the federal Rehabilitation Act (which applies only to recipients of federal funds or contracts) or the ADA (which applies to employers with fifteen or more permanent employees). In addition, FEHA expressly states its intent to afford protections "independent from those" in the ADA.<sup>86</sup>

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<sup>86</sup> CA. GOV'T CODE § 12926.1(a).

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For instance, FEHA might encompass more individuals than the ADA by disregarding mitigating measures in considering whether an individual is disabled. Consequently, FEHA may offer clients some important advantages.

Individuals have a choice of either filing a lawsuit in state court or filing a complaint with the DFEH. If clients wish to proceed directly to court, they must first obtain a “right to sue” letter from DFEH. The time limit for filing a complaint is one year from the discriminatory act. To file a complaint, your client does not need a lawyer. Once DFEH is reasonably convinced that your client has been discriminated against, it will take over and will, in effect, act as your client’s lawyer.

Complaint forms can be obtained from the nearest DFEH office (see p. 52).

Administrative proceedings are relatively informal and complainants normally do not have legal representation. Your client should bring copies of any relevant documents he may have, for example, a letter detailing the reasons for rejection. After a complaint is filed, an investigation of the charges will be made by the agency. If the DFEH is reasonably convinced that discrimination has occurred, they will usually attempt to reconcile the matter informally. If the employer is still not cooperative, the Fair Employment and Housing Commission will hold a hearing. If they find in favor of your client, the Commission may issue an order to stop the discrimination and/or remedy the

harms it caused. You should be aware that this process is often a slow one (for example, the DFEH has a year to investigate and determine whether a hearing is necessary).

To file a state complaint alleging discrimination based on an alcohol/drug history or treatment, your client should contact DFEH at one of its offices (see p. 52).

DFEH will also accept claims of disability discrimination based upon violations of the **Unruh Civil Rights Act (UCRA)**. This law also has a wide reach, because it prohibits discrimination in business contracts and associations by business establishments of “any kind.”<sup>87</sup> Individuals have a choice of filing with DFEH or proceeding directly to court within one year of the discriminatory act.

## **Formal Legal Challenge Under Anti-Discrimination Laws Against Private Employers**

### **Federal Law**

As with public employers, the federal **Rehabilitation Act** reaches some, and the **Americans with Disabilities Act** reaches many more (but not all), private employers. Again, because both federal laws cover some private employers, your client may have the option of filing a formal administrative complaint against the discriminating employer under either or both the Rehabilitation Act and the ADA. The federal agencies charged with

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<sup>87</sup> CA. CIVIL CODE § 51.5.

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## California's Department of Fair Employment and Housing (DFEH) Offices

### Bakersfield District Office

1001 Tower Way, Suite 250  
Bakersfield, CA 93309  
(661) 395-2729

### Los Angeles District Office

611 West Sixth Street, Suite 1500  
Los Angeles, CA 90017  
(213) 439-6799

### Sacramento District Office

2000 O Street, Suite 120  
Sacramento, CA 95814  
(916) 455-5523

### San Diego District Office

350 West Ash Street, Suite 950  
San Diego, CA 92101  
(619) 645-2681

### San Jose District Office

111 North Market Street, Suite 810  
San Jose, CA 95113  
(408) 277-1277

### Ventura District Office

1732 Palma Drive, Suite 200  
Ventura, CA 93003  
(805) 654-4514

### Fresno District Office

1320 East Shaw Avenue, Suite 150  
Fresno, CA 93710  
(559) 244-4760

### Oakland District Office

1515 Clay Street, Suite 701  
Oakland, CA 94612  
(510) 622-2941

### San Bernadino District Office

1845 S. Business Ctr. Dr., Suite 127  
San Bernadino, CA 92408-3426  
(909) 383-4373

### San Francisco District Office

455 Golden Gate Avenue, Suite 7600  
San Francisco, CA 94102  
(415) 703-4175

### Santa Ana District Office

28 Civic Center Plaza, Suite 538  
Santa Ana, CA 92701  
(714) 558-4266

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enforcing these two laws (see below) are coordinating their enforcement efforts so that complaints against private employers filed under either or both laws with any of the federal enforcement agencies will end up being referred to the proper agency for processing.

If the employer is a private company that holds a federal contract or receives federal funds, like the employer John applied to, your client can file a formal administrative complaint against it under the

Rehabilitation Act. The form of the complaint can be a letter like that described on p. 48.

In the case of a federal contractor (Section 503 of the Rehabilitation Act applies to those who hold federal contracts of \$2,500 or more), the client must file a complaint with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) within 300 days of the discriminatory act. Address the complaint to:

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U.S. Department of Labor  
O.F.C.C.P./E.S.A.  
71 Stevenson Street, Suite 1700  
San Francisco, CA 94105  
(415) 975-4720

To determine whether an employer is a federal contractor, contact the OFCCP at the number listed above.

Individuals claiming discrimination by federal contractors in violation of Section 503 of the Rehabilitation Act do not have the right to file a lawsuit in court against the employer. But if the ADA also applies to that employer — and it will if the company employs more fifteen or more permanent employees — a lawsuit is permitted after an administrative complaint has been filed (see below).

If the private employer receives federal grants or aid (Section 504 of the Rehabilitation Act applies to these employers), your client should file a complaint with the regional office of the federal agency that provides the funds to the employer within 180 days of the discriminatory act. Your client can find the regional office of the various federal agencies by calling the Federal Information Center at (800) 688-9889. If the funding agency does not have a regional office, file the complaint with the agency's national headquarters in Washington, DC.

Regardless of whether a private employer is covered by the Rehabilitation Act (because it receives federal contracts or funds), your client may file an administrative complaint against that employer under Title I of the Americans with Disabilities Act if it employs fifteen

or more people on a permanent basis. ADA complaints against private employers must be filed with the EEOC or DFEH (see pp. 50 and 52 for contact information). Individuals charging a private employer with violating the ADA can also file a lawsuit, but only after first filing a complaint with the EEOC. The EEOC will issue a “right-to-sue” letter to the complainant after a certain period of time.

Thus, in John's case, if he believes the employer rejected him for a job he is qualified to perform because of his past drug dependence, he could challenge that decision by filing a complaint with the EEOC alleging a violation of the ADA.

### **State Law**

Most private employers in California with five or more employees, including employment agencies and labor organizations (except religious organizations), are subject to the requirements of **FEHA**. The **UCRA** also covers most private employers because it applies to business establishments of any kind.

Filing an administrative complaint with these federal or state agencies can have a relatively immediate effect, although it often takes time to resolve the legal issues involved. Employers do not welcome an investigation by a federal or state agency because the agency may seek the testimony of employees involved in the hiring process, compel the production of corporate books and records, and require the employer to answer a seemingly endless series of questions. Since the prudent employer will retain an attorney

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to represent it in dealing with these agencies, an investigation can cost the employer a great deal both in attorneys' fees and in time spent complying with agency requests. Moreover, the employer runs the risk that an agency will, during the course of its inquiry, uncover a pattern and practice of discriminatory activity for which the employer can additionally be held liable. It is, therefore, often in the employer's interest to settle a claim if it is actively pursued.

Finally, if your client is faced with an employer who fails to reasonably accommodate participation in a treatment program in violation of the **Alcohol and Drug Rehabilitation Act (ADRA)**, the client must file a complaint with the California Labor Commissioner at the nearest DLSE office (see p. 39) within six months of the violation. Individuals may also simultaneously file a separate complaint with the United States Department of Labor (DOL) at DLSE within thirty days of the violation. If the Labor Commissioner finds a violation has occurred, relief may include cease and desist orders, rehiring or reinstatement, back pay, attorney's fees, and notice to employees. The Labor Commissioner will dismiss the complaint upon finding no violation occurred. For those who have also filed with the DOL, the dismissal will be stayed until the United States Secretary of Labor makes a determination of whether to reconsider the complaint or sustain the dismissal. Appeals of the Labor Commissioner's findings may be filed within ten days of

notification of the decision with the Director of Industrial Relations. Following dismissal, your client may also file an action in state court.<sup>88</sup> Because this statute is relatively new, the time limit for filing an action is unclear. It is either one year or three years.<sup>89</sup> Again, this type of action will also be most fruitful if pursued with the help of an attorney.

## Legal Challenges to Discrimination Against Ex-Offenders

As discussed earlier in this manual, there is no federal law that specifically prohibits employment discrimination against ex-offenders, but discrimination based on an arrest or conviction record may in some cases constitute illegal race discrimination. If your client is African-American or Hispanic and has been rejected by a private or public employer because of a criminal record, he may be able to bring a race discrimination claim under **Title VII of the 1964 Civil Rights Act**.

Title VII prohibits private employers and state and local governments from discriminating in employment based upon race, color, gender, national origin, or religion. The EEOC has ruled that employment policies that exclude individuals based upon their criminal history may violate the Civil Rights Act because such policies disproportionately impact minorities, who are arrested and

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<sup>88</sup> CAL. LAB. CODE § 98.7.

<sup>89</sup> CAL. LAB. CODE § 1025; Kramer v. Regents of Univ. of Cal., 81 F.Supp.2d 972 (N.D. Cal. 1999); CAL. CIV. PRO. § 340.

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convicted at a significantly higher rate than their percentage in the population.

According to the EEOC, exclusion based upon a criminal conviction must be justified by a **business necessity**. To establish business necessity, the employer must show that three factors were taken into consideration in the hiring decision:

1. the nature and gravity of the offense(s);
2. the time that has elapsed since the conviction and/or completion of the sentence; and
3. the nature of the job held or sought. For example, business necessity exists where the applicant has a fairly recent conviction for a serious offense that is job-related.

Employers are also prohibited from excluding individuals based upon their arrest records absent a **business justification**. A “business justification” is demonstrated by showing the applicant engaged in the conduct for which he was arrested, and that the conduct is both job-related and fairly recent. The EEOC guidance requires employers to provide applicants a chance to explain their arrest records before they are disqualified from employment.

For further details, you may see a lawyer or contact the EEOC at (800) 669-4000.

Depending upon the type of discriminatory action taken, the remedies available to ex-

offenders under California law vary. The **California Administrative and Labor Codes** provide protection to individuals who believe they have been asked illegal pre-employment inquiries about arrests that did not lead to conviction, or for which a pre-trial diversion program has been successfully completed. The Administrative Code also prohibits inquiries regarding sealed, expunged, or conviction records, or misdemeanor convictions that have been otherwise dismissed, or for which probation has been successfully completed (see p. 53 for a list of exempt employers).<sup>90</sup>

Complaints under the Administrative Code must be filed with DFEH within one year of the violation. (See pp. 50-51) procedure for filing complaints with DFEH.) Complaints under the Labor Code must be filed with DLSE within six months of the violation. (See p. 39 for a list of DLSE district offices.) Civil and criminal penalties exist for violations of the Labor Code. Remedies may include reinstatement, lost wages, costs, and attorney’s fees.

In John’s case, he could file a complaint if asked about his arrest that did not lead to conviction, or if asked about his felony drug possession conviction to the extent it had been expunged.

Individuals may have a cause of action for invasion of privacy under the **California Constitution** if their criminal history record information is misused. The State Constitution provides an absolute right of privacy, which includes protection from

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<sup>90</sup> CAL. CODE REGS. tit. 2 § 7287.4; CAL. LABOR CODE 432.7.

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the improper use of criminal records. The time limit for filing a lawsuit for invasion of privacy, which is most effective if done by a lawyer, is one year from the date of the breach of privacy.<sup>91</sup>

As discussed previously, **California's Consumer Credit Reporting Agencies Act** and the **Federal Fair Credit Reporting Act** restrict the scope of information about arrests, convictions, alcohol or drug history, and other matters that may be included in reports that consumer reporting agencies provide to employers (see pp. 15-17). If a consumer reporting agency violates any of the requirements of the California Consumer Credit Reporting Agencies Act, the person about whom the report was made can bring an action

against the agency in state court. A lawsuit must be brought within two years of the violation. The consumer reporting agency can be sued for any actual damages (such as loss of employment) caused by the violation, plus the costs of bringing the lawsuit, including reasonable attorneys' fees. If the agency's violation of the law was knowing and willful, the agency may also be required to pay punitive damages.<sup>92</sup>

If the agency's actions violated the Federal Fair Credit Reporting Act, the individual also has the option of suing in federal court or filing a complaint with the Federal Trade Commission. You may contact the Federal Trade Commission toll-free at (877) FTC-HELP.

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<sup>91</sup> CA. CIVIL § 1798.53; CAL. CIV. PROC. CODE § 340.

<sup>92</sup> CAL. CIVIL CODE § 1785.31.

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# When to Consult an Attorney

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It is important to consult an attorney if clients like John intend to pursue any kind of formal legal action, including filing an administrative complaint and/or a lawsuit. A lawyer can advise your client on the appropriate place to file a claim. Also, since legal standards can change, it is important to have the most current information. Because there is a growing national trend toward expanding access to criminal records, procedures and rules governing this area, in particular, are subject to change.

If John, on the other hand, wants to act as his own counsel in a suit, he may proceed pro se. Some courts have a pro se clerk who provides limited legal assistance. Otherwise, contact the clerk of the court in which the suit is to be filed for information about how to do so. Given the importance and complexity of these actions, a client who proceeds pro se should still consult with an attorney for advice.

If lawyers are not easily available, contact a local law school, a legal services office, or Bar Association office. You may be able to find a law student, paralegal, or attorney willing to help for little or no charge. Sometimes larger law firms will make limited resources available to help agencies as part of their pro bono contribution to the community. At the very least, you should be able to enlist the assistance of a local law library (in a law firm, Bar Association, or law school) to help you look up laws and regulations.

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# Conclusion

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This manual provides guidance in dealing with clients who want to obtain employment. You are now equipped to advise your clients about the kinds of questions employers are permitted to ask about drug and alcohol history, criminal records, and the kind of information they are obligated to divulge. You are also prepared to help your clients become familiar with the contents of their rap sheets so that they know how to correct information and answer pre-employment inquiries directly and completely. This information also helps you make appropriate job referrals. Finally, we hope this manual gives you and all your clients a better understanding of employment rights and the state and federal laws that may protect them against discrimination.

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# **Employment Discrimination**

**and**

# **What to Do About It**

A Guide for California Counselors of Individuals  
with Criminal Records or in Recovery from  
Alcohol and Drug Dependence

**LEGAL  
ACTION  
CENTER**



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This booklet was made possible through the generous support of the **Charles Stewart Mott Foundation**.

The Legal Action Center would also like to thank **Public/Private Ventures** for its advice and assistance in preparing this manual.

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The **Legal Action Center** is the only nonprofit law and policy organization in the United States whose sole mission is to fight discrimination against people with histories of alcohol and drug dependence, HIV/AIDS, or criminal records, and to advocate for sound public policies in these areas.

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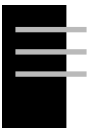
# Foreword

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This manual was prepared by the Legal Action Center, a nonprofit law and policy office whose mission is to fight discrimination against and protect the privacy of people in recovery from drug dependence or alcoholism, individuals living with HIV/AIDS, and people with criminal records. It is based on the Center's experience advocating for policies that help people in recovery from alcohol and drug dependence and ex-offenders get and retain jobs, and assisting those who face employment discrimination because of their background. Over the years, our efforts have gone a long way toward helping employees and job applicants become aware of their rights and responsibilities, while increasing employers' awareness of theirs.

Discrimination in employment remains a problem. This manual describes what can be done to maximize an individual's ability to get employment and challenge discriminatory employment decisions. Many public and private job opportunities which appear, at first, to be closed to people in recovery or those with criminal histories can be opened with the right preparation. This assistance need not come from lawyers. People like you can make the difference between an individual getting the job instead of the cold shoulder. This manual serves as a guide for people who want to help individuals with criminal records and histories of alcoholism and drug dependence find and retain jobs in California.

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# Introduction

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Those who work with individuals with criminal records and histories of substance abuse know the challenge of helping them find appropriate employment. Often this challenge begins with identifying and understanding the legal standards that apply to the hiring of individuals with criminal records and histories of substance abuse. The following typical scenario will guide you through the applicable legal standards discussed in this manual.

## **Scenario:**

*John Doe comes to your office looking for a job. He tells you that he has been turned down for several jobs and he is convinced that it is because he has a drug-related criminal record. You ask him about his criminal history and he tells you that he was arrested four or five years ago but he cannot remember the charge. He also tells you that he was incarcerated for two years for a drug possession conviction and was released four months ago. While in prison, he received substance abuse treatment for heroin dependence. His work history is sporadic and mostly includes food services jobs, although he did get some vocational training in barbering while he was in prison. He is frustrated and thinks it is unfair that he is being discriminated against based on his criminal record and his past drug dependence. You are familiar with the employer, which is a large government contractor, and you know that the company regularly has positions available that include a generous benefit package.*

## **What should you do?**

The starting point for assisting clients like John is to understand the federal and state laws that prohibit discrimination on the basis of disability and criminal justice status.



