

PROTEST ARRESTS AND YOUR CALIFORNIA CRIMINAL RECORD

Arrested at a protest in California? If you are reading this then you have probably been released from the state's clutches. Congratulations! Now you may have some questions about how the arrest affects your criminal record. It's important to keep records about the arrest including: charges, outcome for each charge (also called the disposition), name and contact information of any attorney(s) on the case, and any other paperwork. If possible, it can also be helpful to keep any news stories or reports to show the matter involved a protest for an important cause or free speech activity. Keep these records in a safe and private place. You may need them later to explain the situation or to clear your record, sometimes years later.

How your criminal record is affected by a protest arrest depends on several things: How you were arrested, what you were charged with, and the disposition of the case. Below are answers to questions about each.

WHAT IS MY CRIMINAL RECORD?

Historically it was called your "RAP Sheet" and it was literally a paper record of your Arrests and Prosecutions in a given jurisdiction. It is still common to use the term, but a RAP sheet is really a thing of the past. In modern times, your criminal history is kept in databases that record various contacts with law enforcement. What is now called your RAP sheet is typically a printout of a search of that collection of databases for your records of arrests, prosecutions, and bench warrants.

WHERE IS MY CRIMINAL RECORD?

Criminal history information about you may be kept at three levels of government: local, state, and federal.

- **LOCAL CRIMINAL HISTORY.** Sometimes called your local RAP sheet. In most cases, an arrest starts with a law enforcement agency, typically a local police or sheriff's department. Each agency has its own procedures for keeping information of arrests and other types of contacts and is subject to county or municipal policy about storing and releasing information. Counties may share this information with law enforcement and courts in neighboring counties. Not every record of contact with local law enforcement is reported to the state.
- **STATE CRIMINAL HISTORY.** When most people refer to your "RAP" sheet this is generally what they mean. The California Department of Justice (DOJ) maintains a database of your criminal history throughout the state. An arrest record is reported to the state DOJ if you were booked and fingerprinted.¹
- **NCIC/ FEDERAL CRIMINAL HISTORY.** Ordinarily, records on your state RAP are also reported to National Crime Information Center which collects information from all U.S. jurisdictions. If you have been pulled over and waited for a long time while the police sat in their car with your license, most likely what they were doing was running your name through NCIC to see if you had warrants or a criminal record in other states. NCIC will keep information about any federal charges you may have had. Although maintained it is maintained by the FBI, your NCIC record is not the same as an FBI file. The FBI also keeps records of people who were subjects, targets, or persons of interest in an agency investigation, but that information would not appear on your NCIC record.

WHAT TYPE OF CONTACTS ARE LIKELY TO APPEAR ON MY CRIMINAL RECORD?

You may have various kinds of contacts with law enforcement. The Fourth Amendment defines a detention as a "brief" investigatory stop by police and requires reasonable suspicion of criminal activity.² An arrest is a more significant restraint and requires probable cause. A detention can ripen into an arrest in several ways, typically

by handcuffing and removal from the scene.³ Not all contacts with the police will appear on your criminal record. The most likely to appear are:

- **FULL ARRESTS.** If you were booked into county jail typically that includes fingerprinting, mugshots, and in felony cases a DNA swab. If you are booked, the arrest record will appear as part of your criminal history.
- **CRIMINAL PROSECUTIONS.** Any time a case is filed against you for a felony or misdemeanor, that record will appear as part of your criminal history, unless as part of the proceedings, the court ordered the record sealed.
- **MISDEMEANOR CITATIONS.** These are common during protests. With non-violent misdemeanors the police are required to cite and release rather than take you to jail.⁴ After Jan. 01, 2021, this release requirement will expand to include most misdemeanors with a few exceptions. A citation is a written notice of the charges and your signature at the bottom is a promise to appear in court later (not an admission of guilt). Citation can occur at the scene or later at a holding facility if the police decide not to book you into jail. A citation will usually be part of your criminal record only if you were booked, or misdemeanor or a felony charges are filed from that citation.⁵

WHAT TYPE OF CONTACTS MIGHT NOT APPEAR ON MY CRIMINAL RECORD?

- **MISDEMEANOR CITATIONS.** If you received a misdemeanor citation and were not booked and no charges were filed then it may not appear on your state RAP, although it will appear in local criminal history databases.
- **INFRACTION CITATIONS/ TRAFFIC TICKETS** are generally not considered part of your criminal history. Occasionally, police will cite protestors for jaywalking or similar infractions. An infraction is a state or local offense that involves a fine only and should not result in jail time. It is rare, but sometimes police take protestors to jail and then give them a citation for an infraction. That contact should not appear on your criminal record, but it might.
- **DETENTIONS.** Occasionally after protests, police release people without booking or charging them. Sometimes they give people a paper record of that detention, but they may also release you without any paperwork at all. Typically, a detention will not appear on your state RAP sheet, although it may appear in local criminal history databases.

ON A JOB APPLICATION, DO I HAVE TO ANSWER QUESTIONS ABOUT ARRESTS THAT DID NOT RESULT IN CONVICTION?

In California, the typical answer is NO, unless it is an application that involves state licensing (law, medical, teaching, etc.). Strong civil rights demands have led to recent improvements protecting the privacy of your criminal history information. Generally, only state licensing agencies are allowed to ask about arrests only. California law prevents private and most public employers from asking you to provide any information for an arrest that did not end in conviction. They also cannot ask about a case in which you successfully completed pre or post-trial diversion, or any case that was sealed or expunged.⁶ It is illegal for an ordinary employer to require you to provide a copy of your RAP sheet as a condition of employment.⁷ Only a limited number of agencies are legally entitled to look at and obtain your state RAP sheet.⁸

Some public employers and state licensing agencies can ask about arrests that did not result in conviction and can see your records on your RAP sheet. These include law enforcement agencies, law, medical, teaching, and similar professional licenses. In applications for these licenses you may have to answer questions about arrests and/or provide access to your state and/or federal criminal history information.

ON A JOB APPLICATION, DO I HAVE TO ANSWER QUESTIONS ABOUT CONVICTIONS?

Not on the initial application. In 2018, “Ban the Box”⁹ legislation took effect and applies to any California employer with more than five employees. It prevents employers from asking applicants about misdemeanor or felony convictions before making a conditional offer of employment. Only after the employer makes an offer, can they legally ask about conviction history. Even then, the employer cannot automatically exclude you just for having a criminal conviction. They have to do an “individualized assessment” if they intend to deny you in whole or in part because of a criminal conviction.¹⁰

Not all employers comply with Ban the Box. You have legal rights if an employer violates the law.¹¹ Larger employers may be more likely to comply because of this legal liability, but abuses still occur.

WHAT ABOUT PRIVATE CRIMINAL BACKGROUND CHECKS?

Numerous private investigative agencies and commercial background services can and do harvest criminal information to resell. Information may be scraped from online or paper court records by investigators. California law prevents most employers from using private background checks to screen out potential employees, but abuses still occur. You have rights if an employer violates the law.

WHAT ABOUT BACKGROUND CHECKS FOR OTHER REASONS?

In addition to employment, criminal background checks may be an issue for other reasons: immigration, adoption/fostering, security clearances, etc. Whatever the reason, if you face a background check you may want to order your criminal record and, if possible, clear it before the check is conducted. Although many protest arrests are for minor violations, they may come up on a background check and cause complications for you. The first step is to obtain your RAP sheet.

HOW CAN I ORDER MY CRIMINAL RECORD?

If you have an open warrant for your arrest, or think that you might, speak to a lawyer before going in person to order your criminal records! You will probably need your “state RAP” sheet for most background checks. To order your California state RAP visit: <https://oag.ca.gov/fingerprints/record-review>. Some background checks require NCIC. To order your “Identity History Summary” from NCIC visit: <https://www.fbi.gov/services/cjis/identity-history-summary-checks>

If you are interested in local records concerning a protest arrest, different counties have various ways to order your local criminal history information. Contact the sheriff’s or police department in that county for instructions on how to order a “local RAP sheet”.

- San Francisco: to order a record of arrests or contacts with San Francisco law enforcement agencies go to San Francisco Police Department Identification Bureau at the Hall of Justice 850 Bryant Street, Room 475, 4th Floor San Francisco, CA (415)553-1415. It’s free but you will need a state issued I.D.
- Alameda County (including all cities: Berkeley, Fremont, Oakland, etc.): For arrests or contacts with law enforcement in Alameda county bring \$25 to the Sheriff’s sub-station at 15001 Foothill Blvd in San Leandro. They will take your fingerprints as part of this procedure. Call for an appointment (510)667-3644.

HOW CAN I CLEAR MY RECORD?

Typically, you will need with your state or NCIC rap sheet. See above for details about ordering both. Once you have all the information about what might show up on a background check you will be in a better position to answer questions about your criminal history and decide if clearing your record is a good idea. You may need to talk to a lawyer but here are a few options:

Arrest only records: Previously, the only option to seal a California arrest only record was a “motion to seal and destroy” under to Cal. Penal Code § 851.8. However, good news in 2018, the state enacted Penal Code § 851.91 which made it significantly easier to “seal” a case without conviction. Both options are still available.

Conviction without a prison commitment: If you were convicted of a California misdemeanor or a felony and were sentenced to some jail time and probation you can petition for expungement of the record Under Cal. Penal Code 1203.4 after successfully completing probation. If you were convicted of a misdemeanor and not given probation you can petition for expungement under 1203.4a.

Wobblers: A crime that may be charged as a felony or misdemeanor in California is know as wobbler. If you were convicted of a wobbler as a felony, you may be able to later petition the court under Cal. Penal Code § 17(b) to have it reduced to a misdemeanor.

Conviction with a prison commitment: If you were sentenced to time in state prison, you are not eligible for expungement but you may be able to file for a Certificate of Rehabilitation (COR) of a Pardon from the governor.

WHAT ABOUT MARIJUANA AND JUVENILE OFFENSES?

Certain arrests or convictions for simple possession of marijuana prior to July 01, 2019 may have been automatically removed from the state’s criminal history database and may not show up on your RAP sheet.¹²

The law on juvenile records has changed over time. In 2018, the law changed to allow automatic sealing of many low level juvenile offenses committed after January 01, 2015. Sealing occurs after the person turns 18 as long as they are not still serving a sentence or are on probation for the offense. Sealing is still not automatic for numerous serious or violent juvenile crimes¹³ or if you were charged as an adult. If you had a serious juvenile conviction or were convicted of any juvenile offense before 01/01/2015, you may need to file a petition to seal your juvenile record. You can find out more on the California court’s website.¹⁴

¹ Cal. Penal Code §13150

² Terry v. Ohio 392 U.S. 1 (1968)

³ Unites States v. Perea 986 F.2d 633 (2d Cir. 1993)

⁴ Cal. Penal Code 853.6(i). After Jan 01, 2021, most California misdemeanors will require cite and release.

⁵ Cal. Penal Code §13151

⁶ Cal. Labor Code § 432.7.

⁷ Cal. Penal Code § 11125 and §13326.

⁸ Complete list at Cal. Penal Code §11105.

⁹ Cal. Gov. Code § 12952 (Fair Employment and Housing Act)

¹⁰ Cal. Gov. Code § 12952 (c)(1)(B)

¹¹ <https://www.dfeh.ca.gov/Employment/>

¹² Cal. Health and Safety Code § 11361.9

¹³ For a full list of juvenile crimes that do not automatically seal see Cal. Welf. & Inst. Code § 707(b)

¹⁴ <https://www.courts.ca.gov/documents/jv595info.pdf>