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# California Restoration of Rights, Pardon, Expungement & Sealing

Topics

* [I.  Restoration of Civil Rights/Firearms Privileges](#I_Restoration_of_Civil_RightsFirearms_Privileges)
	+ [A.  Civil Rights](#A_Civil_Rights)
	+ [B.  Firearms](#B_Firearms)
	+ [C.  Summary of California Relief Mechanisms](#C_Summary_of_California_Relief_Mechanisms)
* [II.  Discretionary Restoration Mechanisms](#II_Discretionary_Restoration_Mechanisms)
	+ [A.  Governor’s Pardon](#A_Governors_Pardon)
		- [Authority](#Authority)
		- [Administration](#Administration)
		- [Eligibility](#Eligibility)
		- [Effect](#Effect)
		- [Process](#Process)
			* [Certificate of Rehabilitation](#Certificate_of_Rehabilitation)
			* [“Traditional pardon” applications:](#Traditional_pardon_applications)
		- [Frequency of Grants](#Frequency_of_Grants)
		- [Contact](#Contact)
	+ [B.  Judicial set-aside and sealing](#B_Judicial_set-aside_and_sealing)
		- [1.  Set-Aside of Conviction](#1_Set-Aside_of_Conviction)
			* [Eligibility](#Eligibility-2)
			* [Effect of set-aside](#Effect_of_set-aside)
			* [Set-aside procedure](#Set-aside_procedure)
		- [2.  Sealing](#2_Sealing)
			* [Under-age first offender misdemeanants](#Under-age_first_offender_misdemeanants)
			* [Juvenile adjudications](#Juvenile_adjudications)
			* [Nonconviction records](#Nonconviction_records)
		- [3.  Certificate of Rehabilitation](#3_Certificate_of_Rehabilitation)
			* [Eligibility](#Eligibility-3)
			* [Effect of certificate](#Effect_of_certificate)
			* [Procedure for Applying](#Procedure_for_Applying)
			* [Representation](#Representation)
			* [Standards](#Standards)
		- [4. Felony treated as misdemeanor (“Wobbler” offenses)](#4_Felony_treated_as_misdemeanor_Wobbler_offenses)
* [III.  Nondiscrimination in Licensing and Employment](#III_Nondiscrimination_in_Licensing_and_Employment)
	+ [A.  Licensing](#A_Licensing)
		- [Denial of License – Effect of Certificate of Rehabilitation](#Denial_of_License_8211_Effect_of_Certificate_of_Rehabilitation)
		- [Suspension and Revocation of Licensee – Substantial Relationship Standard](#Suspension_and_Revocation_of_Licensee_8211_Substantial_Relationship_Standard)
		- [Recognition of prison training in qualifications for license](#Recognition_of_prison_training_in_qualifications_for_license)
	+ [B.  Employment](#B_Employment)
		- [Inquiry into certain criminal records](#Inquiry_into_certain_criminal_records)
		- [Ban-the-Box](#Ban-the-Box)
		- [Regulation of background-checking](#Regulation_of_background-checking)
		- [Notice of reasons for denial of public employment](#Notice_of_reasons_for_denial_of_public_employment)

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### I.  Restoration of Civil Rights/Firearms Privileges

#### A.  Civil Rights

The right to vote is suspended while a person is “imprisoned or on parole for the conviction of a felony.” [Cal. Const. art. II, § 4](http://www.leginfo.ca.gov/.const/.article_2).  A person whose prison sentence is suspended does not lose the right to vote unless and until actually incarcerated.  Those serving a term of “mandatory supervision” or “post-relief community supervision” may also vote, though the voting rights of people serving a term in county jail have not yet been formally recognized.**[1](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-1" \o " </strong>The  Criminal  Justice  Realignment  Act  of  2011   (CJRA)  created  three  new  categories  of   sentencing  for  people  convicted  of  low-­‐level   felonies:  mandatory  supervision,  post-­‐release   community  supervision (PRCS), and  a  term  in  county  jail.<strong>  </strong>In 2014 <em>, </em>a California court held that those on mandatory supervision and PRCS must be permitted to vote, and the State agreed to recognize the voting rights of more than 50,000 people in these two categories. <em><em>See </em>Briefs and Orders in Scott v. Bowen</em> at <a href="https://www.brennancenter.org/legal-work/scott-v-bowen">https://www.brennancenter.org/legal-work/scott-v-bowen</a>; Press Release, California Secretary of State, Secretary Padilla Ends Appeal of Scott v. Bowen Case (Aug. 4, 2014), <a href="http://www.sos.ca.gov/administration/news-releases-and-advisories/2015-news-releases-and-advisories/secretary-padilla-ends-appeal-scott-v-bowen-case/">http://www.sos.ca.gov/administration/news-releases-and-advisories/2015-news-releases-and-advisories/secretary-padilla-ends-appeal-scott-v-bowen-case/</a>.   A bill pending in the California legislature AB  2466  amends  the  Elections  Code  to  reflect   the  decision  in  Scott  v.  Bowen  and  clarifies  that   the  third  category  of  CJRA  sentencing  –  a  term   in  county  jail  –  likewise  does  not  strip  people  of   their   constitutional   right  to  vote.  <strong>)**Presumably, federal offenders on supervised release would be regarded as similarly situated.**[2](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-2" \o "</strong>In an opinion dated October 31, 2008, the General Counsel, Administrative Office for U.S. Courts, opined that federal supervised release, as a penalty imposed separately from a prison sentence, is analogous to probation as opposed to parole.   (Opinion on file with author.)<strong>)**

Persons convicted of a felony or malfeasance in office may not serve on a jury.  [Cal. Civ. Proc. § 203(a)(5)](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CCP&division=&title=3.&part=1.&chapter=1.&article=).  The California Constitution disqualifies from office anyone convicted of vote-buying, and authorizes laws disqualifying from public office anyone convicted of bribery, perjury, forgery, malfeasance in office, and other “high crimes.”  [Cal. Const. art VII, § 8](http://www.leginfo.ca.gov/.const/.article_7); *See* [Cal. Gov’t § 1021](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=GOV&division=4.&title=1.&part=&chapter=1.&article=2.); [Cal. Penal §§ 67, 68, 74](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=5.&part=1.&chapter=&article=), [88](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=1.&chapter=&article=), [98](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=7.&part=1.&chapter=1.&article=).  If lost, these civil rights may be regained only by a governor’s pardon.

#### B.  Firearms

A person convicted of a felony in any jurisdiction, or of a misdemeanor offense involving the violent use of a firearm, cannot own, purchase, receive, possess or exercise custody or control over any firearm. *See* [Cal. Penal §§ 29800, 29805](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=9.&title=4.&part=6.&chapter=2.&article=1.). Federal offenders lose privileges under state law only if their offense would be a felony under California law or if they spent at least 30 days in prison.  [§ 29800](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=9.&title=4.&part=6.&chapter=2.&article=1.)(c). The right to possess a firearm is restored by pardon based on a certificate of rehabilitation except when the underlying offense involved the use of a dangerous weapon. [Cal. Penal § 4852.17](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).**[3](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-3" \o "</strong><a href="http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=)**  *See People* v. *Frawley,* 98 Cal. Rptr.2d 555, 563-64 (Cal. App. 2000); *People v. Ratcliff,* 273 Cal. Rptr. 253, 259 (Cal. App. 1990).   When granting a pardon, the governor may also provide for a restoration of firearm rights, except where the person was convicted of a felony involving a dangerous weapon.  [Cal. Penal § 4854](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=4.&article=).  Federal offenders may regain right to possess firearms only through full and unconditional presidential pardon, and those convicted of out-of-state convictions may regain rights by pardon expressly restoring firearms rights.  *See* 66 Op. Cal. Att’y Gen. 343 (1983).  Set-aside of conviction does not restore gun rights under state law.  *See* *Frawley,* 98 Cal. Rptr.2d at 791 (set-aside remedy under [Cal. Penal § 1203.4](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=) does not “expunge” a conviction so as to remove state firearms disabilities).  It is not entirely clear whether a California set-aside relieves federal firearms liability.**[4](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-4" \o " </strong>In 2007, the federal court of appeals for the 9<sup>th</sup> Circuit followed <em>Frawley</em> in holding that a set-aside under § 1203.4 does not “expunge” a prior conviction for purposes of eliminating liability under 18 U.S.C. § 922(g), the federal felon in possession statute.  <em>See </em><em>Jennings v. Mukasey</em>, 511 F.3d 894 (9<sup>th</sup> Cir. 2007).  However, that court had earlier held in <em>U.S. v. Laskie</em>, 258 F.3d 1047 (9th Cir. 2001) that a Nevada conviction that had been set aside could not serve as predicate felony for federal firearms prosecution.<strong>)***See also infra* Part II B.

Certain misdemeanor offenses, including domestic violence, may result in loss of firearms privileges for a period of 10 years. [§ 29805](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=9.&title=4.&part=6.&chapter=2.&article=1.).  Special relief provisions for law enforcement personnel and those convicted prior to enactment in 1991.  [§§ 29855, 29860](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=9.&title=4.&part=6.&chapter=2.&article=2.).**[5](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-5" \o "</strong>Law enforcement personnel with a single misdemeanor domestic violence conviction may petition the court to regain firearms privileges, but only once. <a href="http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=9.&title=4.&part=6.&chapter=2.&article=2."> Cal. Penal § 29855</a>(a)..  “In making its decision, the court shall consider the petitioner’s continued employment, the interest of justice, any relevant evidence, and the totality of the circumstances. The court shall require, as a condition of granting relief from the prohibition under this section, that the petitioner agree to participate in counseling as deemed appropriate by the court.”  <a href="http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=9.&title=4.&part=6.&chapter=2.&article=2.">§ 29855</a>(e).  Persons subject to this prohibition by virtue of a conviction prior to the date of enactment may also petition the court for relief, but here again only once. <a href="http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=9.&title=4.&part=6.&chapter=2.&article=2.">§ 29860</a>(a). In making its decision, the court may consider the interest of justice, any relevant evidence, and the totality of the circumstances. It is the intent of the Legislature that courts exercise broad discretion in fashioning appropriate relief under this paragraph in cases in which relief is warranted.” <a href="http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=9.&title=4.&part=6.&chapter=2.&article=2.">§ 29860</a>(e). <strong>)**

#### C.  Summary of California Relief Mechanisms

California offers a variety of routes to restoration of rights, depending on the particular type of conviction or disposition, the individual’s circumstances (including residence), and the reasons for seeking relief.  These are listed below, and most are discussed in the pages that follow.  Individuals uncertain about which type of relief best suits their needs and circumstances should seek advice of a legal aid lawyer familiar with the range of possible routes to relief.

* “Wobbler” felony reduction – [PC § 17](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=17.&lawCode=PEN)(b)
* Misdemeanor reduction – [PC § 17](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=17.&lawCode=PEN)(d)
* Early termination of probation – [PC § 1203.3](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)
* Set aside & dismissal – probation imposed\* – [PC § 1203.4](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)
* Set aside & dismissal – no probation imposed\* – [PC § 1203.4a](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)
* Set aside & dismissal – PC § 1170(h) sentence\* – [PC § 1203.41](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)
* Sealing misdemeanor adult conviction by minor – [PC § 1203.45](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)
* Certificate of Rehabilitation & Pardon – [Cal. Penal §§ 4852.01](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=) *et seq*.
* Direct Pardon (notably for out-of-state residents) –  [Cal Penal § 4852.16](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=)
* Restoration remedy for veterans – [PC § 1170.9](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=7.&part=2.&chapter=4.5.&article=1.)
* Certificate describing arrest as detention – [PC § 851.6](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=3.&part=2.&chapter=5.&article=)
* Record sealing – juvenile misdemeanor arrest – [PC § 851.7](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=3.&part=2.&chapter=5.&article=)
* Record sealing & destruction following arrest – factual innocence – [PC § 851.8](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=3.&part=2.&chapter=5.&article=)
* Record sealing following acquittal – factual innocence – [PC § 851.85](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=3.&part=2.&chapter=5.&article=)
* Record sealing following conviction – factual innocence – [PC § 851.86](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=3.&part=2.&chapter=5.&article=)
* Record sealing following non-drug DEJ (NEW 01/01/2014) – [PC § 851.87](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=3.&part=2.&chapter=5.&article=)
* Record sealing & registration following identity theft – [PC § § 530.6/530.7](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=13.&part=1.&chapter=8.&article=)
* Record sealing following drug diversion – [PC § 851.90](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=3.&part=2.&chapter=5.&article=)
* Juvenile Record Sealing & Other Juvenile Record Remedies – [W & I Code §§ 781](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=20.), [1772](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.5.&title=&part=&chapter=1.&article=4.), [1179](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=3.&article=8.), [PC § § 851.7](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=3.&part=2.&chapter=5.&article=), [1203.47](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)
* Automatic destruction of records of some marijuana arrests/convictions – [HS § 11361.5](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=10.&title=&part=&chapter=6.&article=2.)

\* Also known as “expungement”

### II.  Discretionary Restoration Mechanisms

#### A.  Governor’s Pardon

##### *Authority*

For first offenders, pardon power exclusively in governor, who may request investigation and advisory recommendation from the Board of Parole Hearings (formerly the Board of Prison Terms). [Cal. Const. art. V, § 8](http://www.leginfo.ca.gov/.const/.article_5)(a); [Cal. Penal §§ 4800, 4812-4813](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=1.&article=).  “The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring. [Cal. Const. art. V, § 8](http://www.leginfo.ca.gov/.const/.article_5).  The governor is required by statute to refer applications from persons twice convicted of a felony to the BPH (though he is not bound by its recommendation). [Cal. Penal § 4802](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=1.&article=).  The BPH “after investigation, shall transmit its written recommendation upon such application to the Governor, together with all papers filed in connection with the application.”  [§ 4813](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=1.&article=).  Governor required by the constitution to report to the legislature “each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it.” [Cal. Const. art. V, § 8](http://www.leginfo.ca.gov/.const/.article_5); [Cal. Penal § 4852.16](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).

##### *Administration*

The BPH consists of 17 commissioners appointed by the governor to staggered three-year terms, which may be renewed. Commissioners are full-time employees, and can be removed by the governor only for misconduct or incompetence or neglect, after a full hearing. **[6](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-6" \o " </strong>Effective July 1, 2005, a new California Department of Corrections and Rehabilitation (CDCR) assumed responsibility for all correctional services.  The BPH was created by collapsing three boards into one – the BPT, Youthful Offender Parole Board, and the Narcotic Addict Evaluation Authority.  <em>See</em><a href="http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0701-0750/sb_737_bill_20050510_chaptered.html"> CA SB 737</a> (enrolled May 10, 2005.) <strong>)**[Cal Gov Code § 12838.4](http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=12001-13000&file=12838-12838.14);*see* *also* Dep’t of Corrs. & Rehab., <http://www.cdcr.ca.gov/BOPH/>.

##### *Eligibility*

Instructions issued by the Governor’s Office describe a pardon as “an honor [that is] traditionally granted only to individuals who have demonstrated exemplary behavior following conviction for a felony.” *See* Office of the Governor, *How to Apply for a Pardon, available at* <http://gov.ca.gov/docs/How_To_Apply_for_a_Pardon.pdf> (revised Sept. 5, 2013):

*“A gubernatorial pardon is an honor that may be granted to people who have demonstrated exemplary behavior following their conviction. A pardon will not be granted unless it has been earned. Obtaining a pardon is a distinct achievement based upon proof of a productive and law-abiding life following conviction. Historically, governors have granted very few pardons.”*

Absent extraordinary and compelling circumstances, an application will not be considered unless the applicant has been discharged from probation or parole for at least 10 years without further criminal activity during that period. The 10-year rule may be waived in truly exceptional circumstances (for example, factual innocence), if the applicant can demonstrate such circumstances warranting a specific need for the pardon.  (Compare the criteria for eligibility for “certificate of rehabilitation,” below.) Federal offenders and persons convicted under the laws of a state other than California are ineligible for a gubernatorial pardon, and may regain their civil rights (other than the right to vote) only through a pardon or similar action in the jurisdiction of their conviction.

##### *Effect*

A pardon restores civil rights lost and removes occupational bars, but does not seal or expunge the record of conviction.  The conviction may still be considered by a state agency in licensing proceedings.  [Cal. Penal §§ 4852.15](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=), [4853](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=4.&article=).  The right to possess a firearm is restored upon a pardon except when the underlying offense involved the use of a dangerous weapon.  [§ 4852.17](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=). Only a pardon, and not a certificate of rehabilitation (see below), restores rights and removes occupational bars.  *See* Office of the Governor, *How to Apply for a Pardon, available at* <http://gov.ca.gov/docs/How_To_Apply_for_a_Pardon.pdf>, for a comparison of the effects of pardon and certificate of rehabilitation.

##### *Process*

There are two procedural routes to pardon.  For those who reside in the state, the pardon process ordinarily starts with an application for a certificate of rehabilitation in the county of residence. Convicted persons who reside outside the state, or who are otherwise ineligible for a “certificate of rehabilitation” (e.g. misdemeanants, certain sex offenders) may apply directly to the Governor.  *See* How to Apply for a Pardon, above.

###### Certificate of Rehabilitation

A California resident ordinarily starts pardon application by applying to the Superior Court of his county of residence for a “Certificate of Rehabilitation.” [Cal. Penal §§ 4852.06, 4852.19](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).  The certificate is an order embodying a court’s finding that the defendant is rehabilitated and its recommendation that he be pardoned.  [§ 4852.13](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).**[7](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-7" \o "</strong>A certificate of rehabilitation is given independent legal effect to avoid exemption from employment in certain professions. <em> See, e.g.</em>, <a href="http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=2.&title=&part=&chapter=3.&article=2.">Cal. Health & Safety § 1522</a>, subd. (g)(1)(A)(ii) (licensed community care facilities);<a href="https://govt.westlaw.com/calregs/Document/I201DE0E09C0711E3A1909FA8497C9481?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)"> Cal. Admin. Code tit. 10, § 3723</a> (real estate license); <em>Newland v. Board of Governors </em>(1977) 19 Cal.3d 705, 712-714 (Cal. 1977) (teaching certificate).<strong>)** Prison warden is required to advise prisoners of their right to apply for this certificate upon their release from prison. [§ 4852.21](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=)(a).  A person may apply to court after completion of “period of rehabilitation” running from release from prison or release on probation:  five years residence in CA plus four years for serious offenses and two years for less serious – court may order additional years in case of concurrent sentences.  (Sex offenders who are required to register, except for indecent exposure, have an additional five-year waiting period, for a total necessary rehabilitation period of 10 years*.)* [§ 4852.03](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).  Petitioner must contact DA where petitioner resides and where petitioner was convicted.

Petitioner is entitled to the assistance of all state rehabilitative agencies, and to be represented by public defender.  [§ 4852.04](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).  The public defender has a duty to appear for court proceedings.  *Ligda v. Superior Court of Solano County*, 85 Cal. Rptr. 744, 752 (Cal. Ct. App. 1970).

Court holds hearing – may require investigation by DA.  If Court finds that the petitioner has demonstrated rehabilitation, court issues certificate and forwards to Governor (and Supreme Court in the case of recidivists) with a recommendation that the individual be pardoned.  [§ 4852.14](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).

Investigation by BPH:  Upon receipt of certificate of rehabilitation and recommendation from court, Governor may request BPH to conduct further investigation and make recommendation. DA and court are asked for views. [§ 4803](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=1.&article=).  BPH may sit in panels of three, decides by majority of those present.

###### “Traditional pardon” applications:

(Persons ineligible for Certificate of Rehabilitation) – process explained in “How to Apply for a Pardon,” *supra*.

Supreme Court consideration – For recidivists CA Supreme Court must hold hearing and at least four justices must concur.  The governor then has the option of granting or denying the pardon.  [Cal Penal § 4852.16](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).   Notice must be given to DA at least 10 days before action.  [§ 4804](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=1.&article=).  Pardon applications from recidivists treated like a case, assigned a number.  Cal. Sup. Ct., Internal Operating Practices and Procedures, § XIVA, XV.  If indigent, applicant assigned counsel.

Whenever a person is issued a certificate of rehabilitation or pardon, it must be recorded on the person’s criminal record and reported to the FBI. [§ 4852.17](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).

##### *Frequency of Grants*

As of April 5, 2015, Governor Jerry Brown had issued 521 pardons in his second time as governor, at Christmas and Easter.  (During his first two terms (1976-1984) he issued 403 pardons.)  A majority of the convictions pardoned were drug offenses, almost all more than two decades old, and all recipients residing in the state first received a certificate of rehabilitation from a court, in accordance with the established process.**[8](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-8" \o "</strong>See Margaret Colgate Love, <em>Governor’s pardon power used too rarely, </em>San Francisco Chron. Dec. 31, 2012, <a href="http://www.sfgate.com/opinion/openforum/article/Governor-s-pardon-power-used-too-rarely-4153130.php#page-1">http://www.sfgate.com/opinion/openforum/article/Governor-s-pardon-power-used-too-rarely-4153130.php#page-1</a>.  In February 2012 he rejected parole for 71 first- and second-degree murderers who had been recommended for release by the parole board, and approved one parole.<strong>)** Governor Schwarzenegger issued only 16 pardons during his two terms, two to the same person.**[9](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-9" \o "</strong><em>See </em>Office of the Governor, <em>Gov. Schwarzenegger Grants Eight Pardons and one Conditional Pardon</em>, <em>available at </em> <a href="http://gov.ca.gov/news.php?id=16864">http://gov.ca.gov/news.php?id=16864</a>.  Kevin Joseph Martino was pardoned in 2007, and was subsequently issued an amended pardon in 2008, for the same 2004 misdemeanor offense, to facilitate his employment in law enforcement.  Also in 2009 Governor Schwarzenegger pardoned Merle Haggard, celebrated country music star, who sought restoration of firearms privileges that had not been restored by his 1970 pardon by then-Governor Reagan.  <em>See</em> Chris Richards, <em>Merle Haggard was Pardoned for the Second Time by Gov. Schwarzenegger in 2009, </em>Wash. Post (Dec. 3, 2010), <a href="http://blog.washingtonpost.com/clicktrack/2010/12/merle_haggard_was_pardoned_for.html">http://blog.washingtonpost.com/clicktrack/2010/12/merle_haggard_was_pardoned_for.html</a>.  Governor Schwarzenegger approved parole for over 300 persons serving life sentences.<strong>)** There are several thousand pardon applications filed each year through court-issued certificates of rehabilitation.  Pardoning record of previous governors is as follows: Governor Davis granted none; Governor Wilson granted 13; Governor Deukmejian, 328; Governor Brown, 403; Governor Reagan, 575.   Source: California Board of Parole Hearings.

##### *Contact*

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#### B.  Judicial set-aside and sealing

##### *1.  Set-Aside of Conviction*

###### Eligibility

Probationers:  In any case where a person sentenced to probation (including felony offenders, but not including any sex offenders) has successfully completed the sentence and has no charges pending, “or in any other case in which a court, in its discretion and in the interests of justice, determines that a defendant should be granted the relief available under this section,” the person may apply to the court to withdraw the plea and the court must (“shall”) “set aside” the verdict of guilty. [Cal. Penal § 1203.4](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)(a)(1).  This has the effect of releasing the offender “from all penalties and disabilities resulting from the offense of which he or she has been convicted.” [§ 1203.4](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)(a) also provides that “the probationer shall be informed, in his or her probation papers, of this right and privilege and his or her right, if any, to petition for a certificate of rehabilitation and pardon.”   No relief shall be granted under [§ 1203.4](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=) unless the prosecuting attorney has been given 15 days’ notice of the petition for relief. [§ 1203.4](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)(e)(1).

Misdemeanants not sentenced to probation, and those convicted of infractions: (including traffic infractions, possession of small amounts of marijuana), may apply for change of plea and dismissal of charges one year from entry of judgment, which the court “shall” grant if the petitioner can show, in addition to successful completion of probation and no charges pending, that they have, “since the pronouncement of judgment, lived an honest and upright life and ha[ve] conformed to and obeyed the laws of the land.” [§ 1203.4a](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)(a). In 2011 a provision was added providing that the court “may” grant relief to misdemeanants who do not satisfy the “honest and upright life” standards in (a).”  [§ 1203.4a](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)(b).  Anomalous higher standard under this provision compared to [§ 1203.4](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=) is noted in *People v. Bradley,* 57 Cal. Rptr. 82, 84 (Cal. Ct. App. 1967).

Minor felony offenders sentenced to county jail: In October 2013 Governor Brown signed into law a new authority for courts to set aside the conviction of defendants sentenced to county jail for a felony under the so-called Realignment legislation enacted in 2011.  A defendant so sentenced may withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty, after the lapse of one or 2 years following the defendant’s completion of the sentence, provided that the defendant is not currently serving a sentence or charged with the commission of any offense. Penal [§ 1203.41](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)(a).

Proposition 47:  Proposition 47 substantially expanded the number of offenses that are eligible for set-aside by reducing certain felonies to misdemeanors, and limiting sentences that may be imposed. A number of individuals previously convicted of felonies are permitted under this 2014 authority to return to court to have their convictions reduced to misdemeanors, and therefore become eligible for set-aside under[§ 1203.4a](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=).  *See* <http://ccresourcecenter.org/2014/11/22/stereotypes-criminal-conviction-presidents-immigration-speech/>.

###### Effect of set-aside

While these statutes are frequently characterized as authorizing “expungement,” the setting aside of a conviction does not seal or otherwise limit public access to the record.   Under [§ 1203.4](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)(a)(1), “the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission.”  *See, e.g., People v. Field,* 31 Cal. App. 4th 1778 (1995)(“Expungement, however, does not obliterate a conviction for all purposes, and records of an expunged conviction are accessible to the public”).

Under California law, convictions that are set aside may be used when sentencing petitioner for subsequent convictions, for prosecution for possession of firearm by ex-felon, for purposes of California’s “three strikes” law, and for denial of professional licenses. *See Doe v. Brown*, 177 Cal. App. 4th 408, 423 (Cal. App. 2009)(sex offender whose conviction set aside pursuant to § 1203.4 still required to register); *People v. Frawley,* 98 Cal. Rptr.2d 555, 563-64 (Cal. App. 2000**)** (set-aside does not “expunge” conviction so as to restore firearms privileges); s*ee also Jennings v. Mukasey*, 511 F.3d 894 (9th Cir. 2007)(set-aside under § 1203.4 does not “expunge” a prior conviction for purposes of eliminating liability under 18 U.S.C. § 922(g), the federal felon in possession statute).  In addition, setting aside alien’s plea of guilty, substitution of plea of not guilty and dismissal of information pursuant to[§ 1203.4](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)(a) does not expunge conviction for purposes of avoiding deportation, *Garcia-Gonzales v. Immigration and Natur. Service*, 344 F.2d 804, 806 (9th Cir. 1965), *cert. denied,* 382 U.S. 840 (1965).   Finally, the 9th Circuit has held that state convictions that were “set aside” were not “expunged” for purposes of calculating defendant’s criminal history under United States Sentencing Guidelines.  *U.S.  v. Hayden*, 255 F.3d 768, 770 (9th Cir. 2001) (California set-aside does not amount to expungement under USSG 4A1.2(j)), *cert. denied*, 534 U.S. 969, 122 S. Ct. 383 (2001).

That said, there are substantial employment benefits for individuals in having a conviction set aside. See [Cal. Labor Code § 432.7](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=LAB&division=2.&title=&part=1.&chapter=3.&article=3.)(a) and Part III infra.  In addition, under regulations of the California Fair Employment and Housing Commission, it is unlawful for a public or private employer to inquire into or seek information about a conviction that has been set-aside and dismissed pursuant to this authority.  *See* [Cal. Code Regs. tit. 2 § 7287.4](https://govt.westlaw.com/calregs/Document/IDC610D70331311E39C87E838B6ADC7D8?contextData=(sc.Search)&rank=1&originationContext=Search+Result&navigationPath=Search%2fv3%2fsearch%2fresults%2fnavigation%2fi0ad70f70000001531a4c8f5c77d35249%3fstartIndex%3d1%26Nav%3dREGULATION_PUBLICVIEW%26contextData%3d(sc.Default)&list=REGULATION_PUBLICVIEW&transitionType=SearchItem&listSource=Search&viewType=FullText&t_T1=2&t_T2=7287.4&t_S1=CA+ADC+s)(d)(1)**.**

###### Set-aside procedure

The procedure for obtaining a set-aside is explained at this advocacy website: Starting Over Strong, <http://www.startingoverstrong.com/Home_Page.php>.  See also “A Cost-Benefit Analysis of Criminal Record Expungement in Santa Clara County,” Stanford University, Public Policy Program, <http://publicpolicy.stanford.edu/system/files/A%20Cost%20Benefit%20Analysis%20of%20Criminal%20Record%20Expungement.pdf>.

##### *2.  Sealing*

###### Under-age first offender misdemeanants

Misdemeanants who were under 18 at the time their crime was committed, and who are eligible for or who received relief under either 1203.4 or 1203.4a, may petition the court to have the record sealed.[Cal. Penal § 1203.45](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=)(a).

###### Juvenile adjudications

Most juvenile adjudications may be sealed after 5 years upon petition to the court, by the individual or the probation department, after jurisdiction is terminated or after the child reaches age 18.  Court must find that 1) the child has not subsequently been convicted of a felony or a misdemeanor crime of moral turpitude; and 2) that “rehabilitation has been attained to the satisfaction of the court.”  *See* [Welf. & Inst. § 781](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=20.)(a).  DA must be notified.  A sealing order may direct that a person be removed from sex offender registry.  [Id.](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=20.)  “The records shall be confidential and shall be available for inspection only by the court, jury, parties, counsel for the parties, and any other person who is authorized by the court to inspect them.”  [Id](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=20.).  “Unless for good cause the court determines that the juvenile court record shall be retained, the court shall order the destruction of a person’s juvenile court records that are sealed pursuant to this section” after five years.  [§ 781](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=20.)(d).  DMV records may not be sealed, and neither may the records of certain serious offenses committed after reaching age 14. [§ 781](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=20.)(a) and (b).   “Once the court has ordered a person’s records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed.”[§ 781](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=20.)(a).  Effective January 1, 2015, the juvenile court or probation officer must inform any person brought within their jurisdiction of the availability of sealing, and must develop explanatory materials.  See [§ 781](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=20.)(g).

###### *Nonconviction records*

[Cal. Penal § 851.8](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=3.&part=2.&chapter=5.&article=)(d):  In any case where a person has been arrested and an accusatory pleading has been filed, but where no guilty plea or conviction has occurred, the court may, with the concurrence of the prosecuting attorney, order that the records be sealed and destroyed.  Most juvenile misdemeanor arrest records may be sealed pursuant to [§ 851.7](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=3.&part=2.&chapter=5.&article=)(a).

***\*\**** *See Part III for discussion of prohibition on employer inquiry into and consideration of non-conviction records, sealed records, convictions that have been set aside* **\*\***

##### *3.  Certificate of Rehabilitation*

###### Eligibility

A California resident convicted of a state law offense may apply to the Superior Court of his county of residence for a “Certificate of Rehabilitation.”  [Cal. Penal §§ 4852.01 through .06, 4852.19](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).  The certificate is an order embodying a court’s finding that the defendant is rehabilitated and its recommendation that he be pardoned.  [§ 4852.13](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=). *See* Section IIA, above.  A certificate serves as the first step in the process of applying for a Governor’s pardon.  *See* Office of the Governor, *How to Apply for a Pardon, available at <http://publicdef.co.riverside.ca.us/opencms/relief/how_to_apply_for_a_pardon.pdf>* (revised February 1, 2008).  A COR also has some independent legal effect in connection with licensing under the California Business and Professional Code, and with employment in a number of professions. To obtain a Certificate of Rehabilitation, a convicted person must complete his or her sentence and period of parole, remain a resident of the state for a specified period (3 or 5 years) with no further violations of the law, demonstrate good conduct, and satisfy other statutory requirements.  [§§ 4852.01, 4852.03, 4852.05, 4852.06](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).   Prison wardens are required to advise prisoners of their right to apply for this certificate upon their release from prison.  [§ 4852.21](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).

A person may apply to court after completion of “period of rehabilitation” running from release from prison or release on probation:  five years residence in CA plus four years for serious offenses and two years for less serious offenses.  Court may order additional years in case of concurrent sentences.  (Sex offenders who are required to register, except for indecent exposure, have an additional five-year waiting period, for a total necessary rehabilitation period of 10 years*.)* [§ 4852.03](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).

Effective January 1, 2014, a trial court hearing an application for a certificate of rehabilitation before the applicable period of rehabilitation has elapsed may grant the application if the court, in its discretion, believes relief serves the interests of justice. [§ 4852.22](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).

Petitioner must contact DA where resides and where convicted. Persons convicted of misdemeanors are ineligible to obtain a certificate of rehabilitation, except for certain sex offenders.  *See Newland,* 19 Cal.3d at 712-714.

###### Effect of certificate

Sections [480](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=1.5.&title=&part=&chapter=2.&article=)(b) and [490](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=1.5.&title=&part=&chapter=3.&article=) of the Bus. & Prof. Code provide that no one who has been granted a COR shall be denied an occupational license “solely” on the basis that he has been convicted of a felony.**[10](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-10" \o "</strong>“Notwithstanding any other provision of this code, no person shall be denied a license solely on the basis that he has been convicted of a felony if he has obtained a certificate of rehabilitation under Section 4852.01 and following of the Penal Code or that he has been convicted of a misdemeanor if he has met all applicable requirements of the criteria of rehabilitation developed by the board to evaluate the  rehabilitation of a person when considering the denial of a license under subdivision (a) of Section 482.”<strong>)**  *See* Part III *infra*. A certificate of rehabilitation is given independent legal effect to avoid disqualification from employment in certain licensed professions.  See, e.g., [Cal. Health & Safety § 1522](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=2.&title=&part=&chapter=3.&article=2.), subd. (g)(1)(A)(ii) (licensed community care facilities); [Cal. Admin. Code tit. 10, § 3723](https://govt.westlaw.com/calregs/Document/I201DE0E09C0711E3A1909FA8497C9481?contextData=(sc.Search)&rank=1&originationContext=Search+Result&navigationPath=Search%2fv3%2fsearch%2fresults%2fnavigation%2fi0ad70f70000001531a526dd977d353ec%3fstartIndex%3d1%26Nav%3dREGULATION_PUBLICVIEW%26contextData%3d(sc.Default)&list=REGULATION_PUBLICVIEW&transitionType=SearchItem&listSource=Search&viewType=FullText&t_T1=10&t_T2=3723&t_S1=CA+ADC+s) (real estate license); *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 712-714 (Cal. 1977) (teaching certificate).  *See also Doe v. Saenz,* 45 Cal. Rptr. 3d 126, 142-43 (Cal. App. 2006) (limitation of certificate to certain serious offenses in connection with employment in community care and childcare facilities violates Equal Protection).

###### Procedure for Applying

The petition for Certificate of Rehabilitation must be filed in the superior court of the applicant’s current county of residence. [Cal. Penal § 4852.06](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).  The petition form can usually be obtained from the court clerk, probation department, or public defender’s office. The petitioner is required to notify the district attorney in their county of residence and the district attorney of each county in which the petitioner was convicted of a felony. The notice must identify all crimes for which the person is requesting a Certificate of Rehabilitation. The form for sending these notices can also be obtained from the court clerk, probation department, or public defender.  Once a petition is filed, the court will schedule a hearing. Before the hearing, the court may require an investigation by the district attorney. [§ 4852.10](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).  At the hearing, the court may require testimony and records pertaining to the petitioner, including information about the conviction offense and the person’s conduct while incarcerated and since release.’

###### Representation

Persons applying for the Certificate of Rehabilitation are entitled to assistance in processing their petitions from the county probation office(s), state parole office(s), and for persons under the age of 30, from the California Youth Authority. The person may also be represented by counsel of his or her own selection. If the person does not have counsel, he or she may be represented by the public defender, the probation department, or the court may assign counsel.[Cal. Penal § 4852.08](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=).

###### Standards

[Cal. Penal § 4852.13](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=6.&part=3.&chapter=3.5.&article=)(a):

*“Except as otherwise provided in subdivision (b), if after hearing, the court finds that the petitioner has demonstrated by his or her course of conduct his or her rehabilitation and his or her fitness to exercise all of the civil and political rights of citizenship, the court may make an order declaring that the petitioner has been rehabilitated, and recommending that the Governor grant a full pardon to the petitioner. This order shall be filed with the clerk of the court, and shall be known as a certificate of rehabilitation.”*

(Exception in subsection (b) for registered sex offenders “if the court determines    that the petitioner presents a continuing threat to minors . . *.”).*

##### *4. Felony treated as misdemeanor (“Wobbler” offenses)*

A crime that is otherwise a felony (“punishable by either imprisonment in the state prison or the county jail”) may be treated as a misdemeanor “for all purposes” if the court imposes punishment other than a state prison term, or “grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.” [Cal. Penal §](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=17.&lawCode=PEN) [17](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=17.&lawCode=PEN)(b)(1) and (b)(3).  Also, the prosecutor may file a complaint treating the offense as a misdemeanor. [§ 17](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=17.&lawCode=PEN)(b)(4).  Upon a request by California’s Commission on Peace Officer Standards and Training, the California Attorney General opined that the Commission’s power to revoke a peace officer license when an officer is convicted of a felony did not extend to convictions under [§ 17](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=17.&lawCode=PEN)(b) which are to be treated as misdemeanors “for all purposes” unless the conduct itself involved moral turpitude or some other indication of the applicant’s unfitness to be a peace officer. 76 Op. Cal. Att’y Gen. 270, 275 (1993).  However, while a blanket prohibition would be inappropriate in light of the purposes of [§ 17](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=17.&lawCode=PEN)(b), case-by-case analysis of an applicant’s conduct would permit denial of licensure by the California Commission on an individual basis.

### III.  Nondiscrimination in Licensing and Employment

#### A.  Licensing

[California Business and Professional Code, §§ 480](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=1.5.&title=&part=&chapter=2.&article=) *[et seq](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=1.5.&title=&part=&chapter=2.&article=)*. contains detailed provisions for considering conviction in the context of licensing. The list of boards covered by these provisions is at <http://www.dca.ca.gov/about_dca/entities.shtml>.

##### *Denial of License – Effect of Certificate of Rehabilitation*

Effective January 1, 2015, [Cal. Bus. & Prof. § 480](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=1.5.&title=&part=&chapter=2.&article=)(b) prohibits denial of a license based on a felony conviction if the person has received a certificate of rehabilitation, or based on a misdemeanor conviction if the person is deemed rehabilitated:

*“(b) Notwithstanding any other provision of this code, a person shall not be denied a license solely on the basis that he or she has been convicted of a felony if he or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code or that he or she has been convicted of a misdemeanor if he or she has met all applicable requirements of the criteria of rehabilitation developed by the board to evaluate the rehabilitation of a person when considering the denial of a license under subdivision (a) of Section 482*.”

[Sections 481 and 482](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=1.5.&title=&part=&chapter=2.&article=) provide that each Board must develop criteria for determining rehabilitation, for considering rehabilitation, and for determining substantial relationship.   For example, criteria for determining rehabilitation for real estate license in [Cal. Admin. Code tit. 10, § 3723](https://govt.westlaw.com/calregs/Document/I201DE0E09C0711E3A1909FA8497C9481?contextData=(sc.Search)&rank=1&originationContext=Search+Result&navigationPath=Search%2fv3%2fsearch%2fresults%2fnavigation%2fi0ad70f70000001531a56bf6d77d3551e%3fstartIndex%3d1%26Nav%3dREGULATION_PUBLICVIEW%26contextData%3d(sc.Default)&list=REGULATION_PUBLICVIEW&transitionType=SearchItem&listSource=Search&viewType=FullText&t_T1=10&t_T2=3723&t_S1=CA+ADC+s), include passage of time, restitution to victim, judicial relief (certificate of rehabilitation), evidence of involvement in community and stability of family life, abstinence from controlled substances, testimony of affiant.  *Procedure for Denial of License Based on Conviction*: [§§ 485-489](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=1.5.&title=&part=&chapter=2.&article=).

##### *Suspension and Revocation of Licensee – Substantial Relationship Standard*

[Cal. Bus. & Prof. § 490](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=1.5.&title=&part=&chapter=3.&article=): A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime only if the crime is “substantially related” to the qualifications, functions, or duties of the business or profession for which the license was issued.  *Procedures for Suspension and Revocation*: [§ 494](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=1.5.&title=&part=&chapter=3.&article=).  *Compare Petropopulos v. Department of Real Estate*, 47 Cal. Rptr 3d 812, 822-23 (Cal. App. 2006), modified on denial of rehearing (misdemeanor domestic battery not substantially related to real estate license) *with Robbins v. Davi*, 95 Cal. Rptr. 3d 792, 797 (Cal. App. 2009) (misdemeanor building code violations substantially related to license as real estate broker).

##### *Recognition of prison training in qualifications for license*

[Cal. Bus. & Prof. § 23.9](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=&title=&part=&chapter=&article=):

*“[A]ny individual who, while imprisoned in a state prison or other correctional institution, is trained, in the course of a rehabilitation program approved by the particular licensing agency concerned and provided by the prison or other correctional institution, in a particular skill, occupation, or profession for which a state license, certificate, or other evidence of proficiency is required by this code shall not, when released from the prison or institution, be denied the right to take the next regularly scheduled state examination or any examination thereafter required to obtain the license, certificate, or other evidence of proficiency and shall not be denied such license, certificate, or other evidence of proficiency, because of his imprisonment or the conviction from which the imprisonment resulted, or because he obtained his training in prison or in the correctional institution, if the licensing agency, upon recommendation of the Adult Authority or the Department of the Youth Authority, as the case may be, finds that he is a fit person to be licensed.”*

#### B.  Employment

##### *Inquiry into certain criminal records*

Under amendments to [Cal. Labor Code § 432.7](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=LAB&division=2.&title=&part=1.&chapter=3.&article=3.)(a) that took effect January 1, 2014, public and private employers are prohibited in most situations from inquiring into or considering any arrest or detention that did not result in conviction, participation in any pretrial or post-trial diversion program, or any conviction that has been ordered sealed, or judicially dismissed (set aside) pursuant to [Cal. Penal § 1203.4, 1203.4a, 1203.41, or 1203.345](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=).  *See* Part II, *supra*.   *See also*[Cal. Code Regs. tit. 2 § 7287.4](https://govt.westlaw.com/calregs/Document/IDC610D70331311E39C87E838B6ADC7D8?contextData=(sc.Search)&rank=1&originationContext=Search+Result&navigationPath=Search%2fv3%2fsearch%2fresults%2fnavigation%2fi0ad70f70000001531a5ac26677d356a5%3fstartIndex%3d1%26Nav%3dREGULATION_PUBLICVIEW%26contextData%3d(sc.Default)&list=REGULATION_PUBLICVIEW&transitionType=SearchItem&listSource=Search&viewType=FullText&t_T1=2&t_T2=7287.4&t_S1=CA+ADC+s)(d)(1).  The prohibition on inquiry does not apply if the employer is required by law to obtain that information, the applicant would be required to possess or use a firearm in the course of his or her employment, an individual who has been convicted of a crime is prohibited by law from holding the position sought by the applicant, regardless of whether that conviction has been sealed, statutorily eradicated, or judicially dismissed following probation, or if the employer is prohibited by law from hiring an applicant who has been convicted of a crime.

*See also* [Cal. Labor Code § 432.7](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=LAB&division=2.&title=&part=1.&chapter=3.&article=3.) (g)(1)-(3) (law enforcement agencies and others authorized to receive criminal history information may not disclose “with intent to affect a person’s employment” any information about arrest not resulting in conviction, or about referral to pretrial or post-trial diversion program).

The California Fair Employment and Housing Commission regulations provide that it is unlawful for an employer or other covered entity to inquire or seek information regarding any applicant concerning: [. . . ] any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to Penal Code Section 1203.4 . . . .   2 CCR 7287.4(d)(1)(B).)  The California Department of Fair Employment or Housing will investigate violations of this provision, or will automatically generate a right to sue letter upon request.  See <http://esq5.houdiniesq.com/dfeh2/esq/reg/>.

##### *Ban-the-Box*

Under [Cal. Labor § 432.9](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=LAB&division=2.&title=&part=1.&chapter=3.&article=3.), a state or local agency “shall not ask an applicant for employment to disclose, orally or in writing, information concerning the conviction history of the applicant . . . until the agency has determined the applicant meets the minimum employment qualifications, as stated in any notice issued for the position.”  This section does not apply to any position for which is background check is mandated by law, to any person working on a temporary or permanent basis for a criminal justice agency.  This provision is effective July 1, 2014.  Under policies put in place under Governor Schwarzenegger, questions asking about criminal convictions were removed from the state employment form.  Even where a criminal record is “pertinent” to a particular job, the Criminal Record Supplemental Questionnaire restricts inquiries to felonies and domestic violence misdemeanors.

##### *Regulation of background-checking*

Under California’s Investigative Consumer Reporting Agencies Act, [Cal. Civ. C. § 1786](http://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=CIV&division=3.&title=1.6A.&part=4.&chapter=&article=) *et seq*. (the California analogue to FCRA), background check companies “may not make an inquiry for the purpose of preparing an investigative consumer report on a consumer for employment purposes if the making of the inquiry by an employer or prospective employer of the consumer would violate applicable federal or state equal employment opportunity law or regulation.” ([Cal. Civ. C. § 1786.20](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CIV&division=3.&title=1.6A.&part=4.&chapter=&article=2.)(c).)  Note that by inquiring into and reporting misdemeanors dismissed pursuant to [Cal. Penal §§ 1203.4, 1203.4a](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=8.&part=2.&chapter=1.&article=), the background check company is going beyond what a private employers can do.

Effective in January 2013, every entity that conducts a criminal background check under the mandate of a state or local occupational or licensing law must automatically provide the subject of the background check with a copy of his or her state and federal rap sheet whenever the agency makes a negative decision based on the record.  *See* [Cal. Penal Code § 11105](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=1.&part=4.&chapter=1.&article=3.)(t).**[11](http://ccresourcecenter.org/?post_type=tt_font_control&p=1589" \l "easy-footnote-bottom-11" \o )**

##### *Notice of reasons for denial of public employment*

[Cal. Gov. Code § 11546.6](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=GOV&division=3.&title=2.&part=1.&chapter=5.6.&article=) requires that a person, who is rejected as a result of a criminal background check by a state agency for employment, contract, or volunteer work involving confidential or sensitive information, be provided with a copy of his or her criminal record. Additionally, this law requires the state to institute a written appeals process for rejected individuals to challenge ineligibility determinations based on the individual’s criminal record.