

An Overview of Criminal Record Classifications and Sanctions

This article is a reprint of a portion of Chapter 13 of *The Safe Hiring Manual*, written by Mr. Lester Rosen. Mr. Rosen is also the founder and president of [Employment Screening Resources](#). We sincerely thank Mr. Rosen for allowing us to reproduce his copyrighted text at this web page.

Classifying Crimes by Seriousness

Criminal acts can be classified into three distinct categories based upon the potential sentence:

1. Felony

A **Felony** is a serious offense that is punishable by a sentence to a state prison. Note the use of the word punishable, as opposed to actually punished. The distinction is important because a person can be convicted of a felony but may not go to prison. How does that work? Depending upon the state and the crime, there are certain felonies wherein a judge can give a defendant felony probation. This typically occurs with a relatively less-serious felony committed by a relatively less-serious offender. An example may be a first time felony drug offender convicted of a less-serious drug offense such as possession of a small amount of drugs for sale. If a defendant receives felony probation, the court can still sentence him/her to custody but in the local county jail. If the defendant violates his/her probation, the court then has the option of sending the defendant to state prison. That obviously creates a great deal of incentive for a felony defendant to not violate probation.

2. Misdemeanor

A **Misdemeanor** is a less serious offense that is only punishable by local jail time at the county level. Typically a misdemeanor may be punishable by up to one year in the county jail in the custody of the local county sheriff and a fine up to \$1,000. A court can also impose terms and conditions of probation such as discussed above. However, there are drawbacks to assuming that a misdemeanor is less serious in all cases than a felony. As noted below, misdemeanors can be extremely serious.

3. Infraction

An **Infraction** is a public offense punishable only by a fine. This is typically a traffic violation such as an illegal left turn, speeding, or seat belt not fastened.

There are two reasons that a misdemeanor can still be a very serious matter, even though it carries the possibility of a lower sentence than a felony:

Wobbler or Hybrid Crime

Criminal laws become even more complicated because there are a number of offenses that can be charged as EITHER a felony or a misdemeanor. For example, grand theft is typically a felony that involves a larger amount of money stolen than a petty theft. However, in many states, a District Attorney can choose to charge such an offense as a misdemeanor instead of a felony. In some states, a judge can also reduce a felony to a misdemeanor if the offense is a wobbler. This decision can be based upon a number of factors, including mitigating information about the accused, the alleged crime, the behavior, or the harm. For example, a person who has no record and faced some degree of provocation commits assault with the intent to commit great bodily injury could be charged with a misdemeanor offense instead of a felony.

Plea Bargaining

To add to the complication, in many states, a defendant may be able to plea bargain a felony to a misdemeanor. This can happen for any number of reasons, including overcrowded court calendars, witness problems for the District Attorney, a prosecutor who is just not inclined to prosecute the case to a jury, or some equitable facts about the crime or the defendant that convinces a District Attorney to plea bargain. The importance of understanding the role of pleas escalated with the 2012 EEOC Guidance on the use of criminal records. The problem is that the eventual disposition in terms of either being a felony or misdemeanor may have nothing to do with the seriousness of the underlying conduct.

Understanding that misdemeanors can in fact reflect very serious conduct becomes important in the context of evaluating criminal matters pursuant to the EEOC updated Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 issued April 25, 2012. The EEOC Guidance provides:

Careful consideration of the nature and gravity of the offense or conduct is the first step in determining whether a specific crime may be relevant to concerns about risks in a particular position. The nature of the offense or conduct may be assessed with reference to the harm caused by the crime (e.g., theft causes property loss). The legal elements of a crime also may be instructive. For example, a conviction for felony theft may involve deception, threat, or intimidation.¹¹⁵ With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies.

It is noteworthy that the EEOC does recognize that misdemeanors “may” be less serious than felonies. The table below indicates how state court offenses are carried out.

State Court Offenses Table

	Sentence	Supervisor
Felony	State prison or local jail time or felony probation	If sentenced to prison – placed upon parole upon release from state prison and supervised by a parole officer. If given probation – supervised by local probation office.
Misdemeanor	Up to one year in a local county jail	If probation – supervised by local probation officer who works for the county where the sentence is imposed.
Infraction	A fine only.	No custody or supervision.



Dispositions

One word that appears in this chapter frequently is “disposition,” which means the final outcome in a criminal case. For example, if a case is dismissed, the defendant pleads guilty, or a judge or jury finds the defendant guilty, that is the disposition of the case. The word can also be used more broadly to include the terms and conditions of a sentence, if the person is found guilty. An example of disposition may be that a “defendant was found guilty, given three years informal probation the terms and conditions of which are to serve 10 days in the county jail with 3 days credit for time served, perform 50 hours of community service, and during the three year probation period break no law or ordinance, and not use or possess alcohol or a controlled substance.” Sometimes criminal lawyers will use the short hand term “dispo,” such as “what was the dispo in that case?”

Classifying Crimes by Types

Another way to classify criminal behavior is by the type of crimes. Although there is no one accepted standard, a typical breakdown of types of crimes is shown below:

Crimes against the Person

A crime that is committed using direct harm or force against the victim is a crime against the person. These crimes are typically the most serious and include acts such as murder, robbery, child molestation, kidnapping, or rape. Because of the seriousness or potential harm, these offenses are typically felonies. However, there are a number of offenses that can be wobbler/hybrid so that they can be either a felony or misdemeanor. For example, assault crimes can vary widely in their seriousness and can be either a felony or misdemeanor depending upon factors such as the nature of the offender, the degree of harm, and the details surrounding the offenses. Some authorities place sexual offenses in a separate category.

Crimes against Property

A crime committed by damaging, destroying, or intruding on the property of another is a crime against the property victim. Example can be arson, vandalism, burglary, or trespassing. Some property crimes also carry with them elements of crimes against the person or theft. For example, a burglary committed for the purposes of harming someone inside of a house, can be both a crime against property and a person. A burglary committed with the intent to steal from inside the house, carries an element of theft. Many property crimes that only involved a threat to property, and do not involve a threat of harm or an element of theft, can be misdemeanors. Other offenses such as arson are typically classified as felonies because of the large potential dangers involved.

Theft and Fraud Crimes

Theft is the taking of another person's property without that person's permission or consent with the intent to deprive the rightful owner of it. **Fraud** is an intentional deception made for personal gain or to damage another individual. A related offense is embezzlement which is the act of dishonestly appropriating assets by one or more individuals to whom such assets have been entrusted. There are a great many such crimes, all revolving around dishonesty. These crimes are categorized as a felony or misdemeanor depending upon factors such as the value of the stolen property, the sophistication involved, the method used, and the history of the offender. A related offense is robbery, which is the taking of money or goods in the possession of another, from his or her person or immediate presence, by force or intimidation. Robbery involves elements of both theft and a crime against persons and

is typically a felony. Armed robbery means a weapon was used. The difference between petty theft and grand theft is the amount taken. However some jurisdictions provide that a person with a previous petty theft can be charged with a felony if there is a second petty theft. Robbery, which is the taking of property from another using force, is classified as a felony.

Crimes against the Public Order, Health, and Morals

There are crimes based upon acts that have been determined by a legislature to be needed to preserve public order, health, and morals. Some examples include prostitution, disorderly conduct, vagrancy, public lewdness, and prostitution. Crimes against public order are generally considered misdemeanors. However, if a child is involved, crimes in the category may be considered more serious and could be a felony level offense. This is a broad catch-all category that can include traffic related offenses, as well as violation of health or licensing ordinances. A Failure to Appear (FTA) in court after an arrest including a traffic ticket may be another example.

Substance Related Crimes

Crimes relating to substances can include simple possession of drugs for personal use, possession for purposes of sale, the sale or transportations of drugs, or the manufacturing of drugs. Driving under the influence can also be included. Again, the criteria for the punishment of such crimes as a felony, misdemeanor, or infracting depends upon the crime and the alleged criminal.

National Incident-Based Reporting System (NIBRS)

Another way of breaking down crimes is by reference to the reporting structure of the **National Incident-Based Reporting System (NIBRS)**. This is a mechanism for law enforcement reporting of criminal incidents to the FBI. (See www.policeforum.org/library/nibrs/Data_Systems_for_Policing.pdf for details on how this system was developed).

It is broken down into Category A and B offenses as follows:

Group A Offenses

- | | |
|---|---|
| 1. Arson | 12. Homicide (murder and non-negligent manslaughter, negligent manslaughter, justifiable homicide) |
| 2. Assault (Aggravated, Simple, Intimidation) | 13. Kidnapping/Abduction |
| 3. Bribery | 14. Larceny (pocket picking, purse snatching, shoplifting, theft and all other larceny) |
| 4. Burglary/Breaking and Entering | 15. Motor Vehicle Theft |
| 5. Counterfeiting/Forgery | 16. Pornography/Obscene Material |
| 6. Destruction/Damage/Vandalism of Property | 17. Prostitution Offenses (prostitution, assisting or promoting prostitution) |
| 7. Drug/Narcotic Offenses (including drug equipment violations) | 18. Robbery |
| 8. Embezzlement | 19. Sex Offenses, Forcible (forcible rape, forcible sodomy, sexual assault with an object, forcible fondling) |
| 9. Extortion/Blackmail | 20. Sex Offenses, Non-forcible (incest, statutory rape) |
| 10. Fraud (false pretenses/swindle/confidence game, credit card and ATM fraud, impersonation, welfare, and wire fraud) | 21. Stolen Property Offenses/Fence |
| 11. Gambling (betting, wagering, operating/promoting/assisting gambling, gambling equipment violations, sports tampering) | 22. Weapon Law Violations |

Group B Offenses

- | | |
|---|-------------------------------|
| 1. Bad Checks | 7. Liquor Law Violations |
| 2. Curfew/Loitering/Vagrancy Violations | 8. Peeping Tom |
| 3. Disorderly Conduct | 9. Runaway |
| 4. Driving Under the Influence | 10. Trespass of Real Property |
| 5. Drunkenness | 11. All Other Offenses |
| 6. Family Offenses, Nonviolent | |

Criminal Sanctions

There are five general purposes for criminal sanctions:

1. **Punishment.** When a person violates the rules of society, imprisonment is used for pure punishment and revenge.
2. **Deterrence of others.** By punishing an offender, there is a possibility that others will be deterred from committing criminal offenses because they can see that such behavior results in certain punishment.
3. **Deterrence of the criminal in the future.** There is also an element of personal deterrence. If a person learns that criminal activity will result in punishment, then he or she may be less likely to commit a crime in the future.
4. **Rehabilitation.** Part of any sentencing scheme can be the goal of using punishment to effect rehabilitation. With the goal of dissuading future criminal conduct, the rehabilitation can be either by means of personal deterrence as noted above or by using some program intended to actively assist an offender to resolve problems that create criminal behavior, such as a mandatory drug program or educational program.
5. **Protecting society.** Another use of punishment is to simply warehouse offenders so they cannot harm society.

Other Important Criminal Record Terms

Arrest vs. Conviction — In discussing criminal records, it is also important to note the critical difference between an **arrest**, a **conviction**, and a pending matter.

An **arrest** is an action by a police officer in taking a person into custody on suspicion of having committed a criminal violation. An arrest does not always result in a person being taken to jail. An arrest can also be a citation to appear in court. (See Chapter 15 on the limitations of using an arrests under EEOC guidelines, and Chapter 4 concerning state laws that also limit the consideration of an arrest.)

A **conviction** occurs where there has been a factual adjudication of guilt. That can be done by a jury trial where 12 jurors make a finding of guilt beyond a reasonable doubt (NOTE: typically there are 12 jurors, but certain courts allow less). Or, a person can be found guilty by a judge in a court trial, where a judge makes the decision if the defendant waives the right to a jury trial. Guilt can also be judicially established where a defendant admits his or her guilt. This can occur when a defendant pleads guilty to the criminal charge. It can also occur if a defendant pleads no contest. In criminal courts, a no contest is the same as a guilty plea, but gives a defendant some protection in the event of a civil law suit.

A **pending matter** is where an arrest is still pending in court because the prosecuting attorney has filed a charge, but no facts have yet been adjudicated, and there is no disposition. This is a gray area status since the case has not either been terminated in favor of the defendant, but there has also been no factual adjudication by either a jury or court trial, or a guilty plea. In California, for example, Labor Code Section 432.7 appears to allow consideration of a pending case, since an essential function of any job is to show up, an unresolved criminal matter presents an issue for an employer since there is no certainty about the outcome. Of course, the more minor the charge, the less likely it is that a person will have substantial jail sentence. The 2012 EEOC Guidance mentioned previously does not appear to address this issue when discussing arrests.

Delayed Adjudication/First Offender Programs — Numerous states have case disposition rules that are somewhere between an arrest and a conviction. These can occur in a number of situations.

For example, some states have a disposition called a *Diversion Program*. This occurs where a first offender for a relatively less serious offense is literally “diverted” from the criminal justice system and allowed to escape the criminal charge if he or she participates in and successfully completes certain court assigned tasks such as a counseling program or volunteer service. One of the most famous diversion case participants is O.J. Simpson. Prior to the death of his wife, Simpson was charged with domestic violence and allowed to participate in a domestic violence diversion program.

States also have diversion programs for such offenses as petty theft or drug use. If there is a violation of the terms of the program or a new arrest, then the court may terminate the diversion and reinstate charges, and the criminal case begins again.

A variation of the diversion program is a *delayed entry of judgment program*. In that program, the defendant actually enters a guilty plea to the offense. However, the court delays entry of the judgment in order to allow the defendant to participate in a prescribed program, which may include a course of counseling and volunteer work. Upon the successful completion of the court’s requirements without having any additional violations, the criminal matter is dismissed. In some jurisdictions, there are special drug courts where defendants are given the opportunity to by-pass criminal drug charges if they participate in one or various programs.

Many jurisdictions have first offender programs where a court will discharge the defendant and set aside the conviction upon completion of various conditions, as though the arrest and/or conviction had never occurred. The primary condition is often that the defendant must not get arrested again or must stay away from a particular person. This is often used as a means of dealing with less serious misdemeanor offenses.

Post-Offender Programs — Many states also have various provisions to seal, expunge, or somehow erase a criminal conviction after it occurs. Some states have procedures by which an offender can receive some sort of state pardon or a governor's pardon. There are procedures to have criminal records legally sealed, expunged, or judicially erased in some other fashion.

California has a provision called Penal Code section 1203.4, under which a misdemeanor offender who successfully completes probation can move to have his conviction set-aside and to be relieved of all penalties and dualities. Under California law, an employer may not consider the offense when making an employment decisions.

Under another California law, Labor Code Section 432.7, an employer has the following restrictions:

No employer, whether a public agency or private individual or corporation, shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or post trial diversion program, nor shall any employer seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record of arrest or detention that did not result in conviction, or any record regarding a referral to, and participation in, any pretrial or post trial program.

Another type of program is called **deferred adjudication**. Texas, for example, has a system whereby a person enters a guilty plea, and a judge may defer the adjudication of guilt pending completion of a probation period. Upon completion of the deferred adjudication, the individual may request that the case be set aside. *Tex. Code Crim. Proc. art. 42.12* provides further that the dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense.