



FACT SHEET FOR IMMIGRANTS WITH CRIMINAL RECORDS: 5 THINGS TO KNOW IN CALIFORNIA

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DISCLAIMER – YOUR RESPONSIBILITY WHEN USING THIS FACT SHEET:

The laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to this informational material every time the law changes. If you use information from this fact sheet, it is your responsibility to make sure that the law has not changed and applies to your particular situation. If you are incarcerated, most of the materials you need should be available in your institution’s law library. This fact sheet is intending to give general legal information and NOT legal advice. No attorney-client relationship is created by using any information in this resource. You should always consult your own attorney if you need legal advice specific to your situation.

Overview

Root & Rebound (R&R) is a nonprofit reentry legal resource center that provides legal education, resources and toolkits to people with criminal records, their loved ones, and those who support them across California. With the support and expertise of the **Immigrant Legal Resource Center (ILRC)**, R&R created this informational fact sheet for immigrants and their loved ones in response to increasing concerns about the rights of immigrants with criminal records under the new U.S. administration.

The goal of this fact sheet is to clarify the rights of immigrants with criminal records in California. We will do our best to continue to update this fact sheet as the Trump Administration and Congress put laws and policies in place.

While the overlap between our country’s criminal justice and immigration systems is nothing new, President Trump’s policies are extremely worrisome because they *expand immigration enforcement and widen the net of immigrants being targeted for deportation*. This means it is more important than ever to know your rights and take action, especially regarding how your past criminal convictions or pending charges could potentially impact your immigration status. At the end of this fact sheet, we have provided a list of legal resources and legal services organizations, many of which can help you with the immigration consequences of criminal justice system involvement.

IMPORTANT TO UNDERSTAND: Immigration law is set by federal law, meaning that the United States government makes the laws and enforces them. Criminal charges are set by both state and federal law, but typically it is state governments that set and enforce the majority of criminal laws. Because criminal law and immigration law are at the intersection of state and federal laws, this fact sheet describes both California state law and U.S. federal law.



Here are 5 Things to Know in California for Immigrants with Criminal Records:

#1 - 3 address President Trump's current policies and proposed actions on immigration and deportation of people with records, and how they conflict with California state and local laws.

1. The deportation of people with criminal records is nothing new.

Although the number of deportations began to drop in 2012 after a huge increase during President Barack Obama's first term, the Obama Administration increased the deportation of people with criminal records in recent years. 92% of people living in the U.S. who were deported in 2015 had a past criminal conviction, up from 75% in 2012.¹

Many different kinds of criminal convictions and other violations of the law can make a non-citizen deportable or unable to change their immigration status. The important thing to know is that contact with the criminal justice system can have a huge impact on someone's ability to stay in the U.S. and it is very important to talk to a lawyer before applying for an immigration status, traveling, or talking to law enforcement.

IMPORTANT WARNING: If you are contacted by ICE while detained/incarcerated, you have the right to call a lawyer or a loved one/family member, and you have the right to be visited by a lawyer. You have the right to have your attorney with you at a hearing before an immigration judge. You do not have a right to a state-appointed attorney, but it is suggested that your loved one/family member contact the organizations at the end of this fact sheet if you are unable to hire one. **You must insist on using your rights and should contact an attorney or have one contacted by a loved one before signing anything with ICE – so you do not give up your rights to fight against deportation.**

2. President Donald Trump is targeting more people for deportation, especially people with criminal records and even people who have committed acts that could be charged as crimes.

Former President Obama's immigration policy publicly focused on deporting people with violent and/or serious convictions; though in fact, most people deported from 2014-2016 under Obama's administration were convicted of *nonviolent or immigration-related offenses*.²

President Trump has been even more outspoken about his plan to deport a wider range of individuals.³ This includes people arrested and charged with a crime but not actually convicted; suspected gang members; and people convicted of low-level misdemeanors.⁴

¹ ICE, *FY 2016 ICE Immigration Removals*, available at <https://www.ice.gov/removal-statistics/2016>.

² The Marshall Project, *Who is ICE Deporting?*, Sept. 26, 2016, available at <https://www.themarshallproject.org/2016/09/26/who-is-ice-deporting#.ETfsgc53Q>. (Between 2014-16, 19.8 percent of criminal deportations were for violent or potentially violent offenses; 21.2 percent were for non-violent offenses; and 18.7 percent were for immigration-related offenses.)

³ See Trump's immigration reform plan, available at <https://assets.donaldjtrump.com/Immigration-Reform-Trump.pdf>.

⁴ Los Angeles Times, *When Trump says he wants to deport criminals, he means something starkly different than Obama*, Nov. 14, 2016, available at <http://www.latimes.com/politics/la-na-pol-trump-immigration-criminals-20161114-story.html>.



On January 25, 2017, Trump released two Executive Orders (E.O.) describing his administration's immigration policy and how it connects to people in the criminal justice system.⁵ One E.O. said that the federal government, through the Department of Homeland Security, will now be expanding deportation efforts to more heavily target the following groups: (1) any immigrants who have been **convicted of any crime**, (2) any immigrants who have been **charged with any crime** (but not yet convicted), and (3) any immigrants who have *committed acts that are a chargeable criminal offense* (which we take to mean that immigrants who are assumed to have committed a crime are at risk of deportation under Trump's policy).

IMPORTANT NOTE: Although current federal law already allows the government to deport immigrants based on certain criminal convictions, Trump's Executive Order goes far beyond the current law to include people convicted of any crime and even people who are suspected of committing a crime. It is still unknown how the Executive Order will be carried out, when federal law does not yet permit deportation of all of the groups of people being targeted. ***While the Trump administration plans to expand who they are targeting for deportation, it is crucial that you explore options to make your criminal record more "immigration-safe" – meaning less likely to put you at risk of deportation. Contact one of the organizations listed at the end of this fact sheet for legal support.***

On February 21, 2017, the Secretary of the Department of Homeland Security, John Kelly, who works for President Trump, released two memos with the federal government's plans to carry out the January 25th E.O.s – including plans to hire thousands more immigration enforcement agents; expand the group of immigrants who are being prioritized for removal (deportation); speed up deportation hearings; and work with local law enforcement to help them make immigration-related arrests. These memos are federal guidelines that give the U.S. Immigration and Customs Enforcement (ICE) federal agency the power to more aggressively arrest, detain and deport immigrants with criminal records and undocumented immigrants living in the U.S., or trying to enter at the borders.

GET HELP! If you are personally affected or know someone who might be, please take a look at the list of legal resources and organizations listed at the end of this fact sheet. These organizations are offering assistance to immigrants and fighting back during this time. They may also be able to advise you about how to make your record more "immigration-safe."

⁵ The EO is available at

<https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>. See also a couple of helpful versions of the EO that include "annotations" breaking-down what different parts mean. The National Immigrant Justice Center's ("NIJC") annotated EO is available at https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2017-01/EO%20Interior%20Enforcement%20Annotated%202017%2001%2026%20FINAL_0.pdf and one written by a University of Virginia law professor is available at <http://www.vox.com/the-big-idea/2017/1/28/14416616/executive-order-immigrants-sanctuary-trump>.

3. President Trump's plans and recent actions conflict with California's state laws and the local practices of "sanctuary" cities and counties in our state.

"Sanctuary" defined: A "sanctuary" jurisdiction describes cities, counties, and states with policies designed to limit cooperation with or involvement in federal immigration enforcement actions.

California's Statewide Protections:

- In 2013, California Governor Jerry Brown signed the **Trust Act** into law. As a result, state police cannot detain someone with the goal of turning them over to federal immigration authorities *unless* the person has been charged with or convicted of a *serious crime*.⁶
- Similarly, in 2016, Governor Brown signed the **Truth Act**, which created a number of protections for immigrants in California, including that if ICE places a detainer on someone in jail in California, *the jail staff must serve the person with a copy of that detainer*, which allows them more time to contact family and an attorney.⁷
- In addition, California issues special AB 60 "Undocumented Person" Driver's Licenses to undocumented Californians, which allow undocumented people to legally drive in California without having their information sent to federal immigration agents.⁸ **However, these driver's licenses CANNOT be used out-of-state or in federal buildings like airports.**

Local "Sanctuary" Protections in California:

- In response to Trump's Executive Order, California "sanctuary" cities and counties are fighting back, providing even stronger protections than the state of California, with San Francisco leading the charge.⁹ To learn more about which cities and counties provide special protections for undocumented immigrants, view the "sanctuary" map here: www.ilrc.org/local-enforcement-map. Zoom into the map over your city, and if there is a colorful pin on the map, click it to learn more about local protections.

⁶ Washington Post, *Brown signs California immigration bills, wins activists' kudos in pressing for reform*, Oct. 6, 2013, available at https://www.washingtonpost.com/politics/brown-signs-california-immigration-bills-wins-activists-kudos-in-pressing-for-reform/2013/10/06/71b1dac8-2ecb-11e3-9ccc-2252bdb14df5_story.html?utm_term=.3b13d74877e4.

⁷ ILRC, *One step closer to ICE out of California, Governor Brown signs TRUTH Act*, available at <https://www.ilrc.org/one-step-closer-ice-out-california-governor-brown-signs-truth-act>.

⁸ Cal. Veh. Code § 12801.9, et. seq.

⁹ NBC Bay Area, *California lawmakers eye immigration measures to fight Trump*, available at <http://www.nbcbayarea.com/news/local/California-to-Take-Up-Sanctuary-City-Legislation-412269263.html>; Reuters, *Challenges to Trump's immigration orders spread to more U.S. states*, available at <http://www.reuters.com/article/us-usa-trump-immigration-sanfrancisco-idUSKBN15F2B1>.

#4 - 5 address ways that immigrants in California may be able to “clean up” their criminal record to decrease the likelihood of negative immigration consequences.

4. Under current law, if you entered into a plea agreement of “guilty” or “no contest” without knowing or understanding the immigration consequences of your criminal case, you may be able to get your conviction vacated.

Both state and federal law require criminal defense lawyers to advise their clients of, and defend against, the immigration consequences of a criminal conviction.¹⁰ This means you have *the right* to receive adequate advice from your criminal defense lawyer about the immigration consequences of your criminal case.¹¹ The law requires defense lawyers (including public defenders) to ask about their clients’ citizenship status; investigate potential immigration consequences; advise their clients about those immigration consequences; and plea-bargain with an eye toward avoiding them.¹² On the next page, you will find a chart that summarizes situations where immigrants have some options to challenge a plea agreement in their criminal case because you were not adequately advised on the immigration consequences.

“Vacated” – a legal term defined: “Vacate” means to erase, cancel or void. We use it in the chart, so refer back to this definition if you are unclear. But note that if your conviction has been *vacated*, the District Attorney may be able to prosecute you on the original criminal charges. For all of these, ask you attorney for advice about the best path in your case!

Because Trump is prioritizing the removal of people involved in the criminal justice system, any options for getting rid of convictions is especially critical at this point. **Consult with an attorney who specializes in criminal and immigration law to find out what makes sense under your particular circumstances.**

¹⁰ Cal. Pen. Code §§ 1016.2, 1016.3. See e.g., *People v. Bautista* (2004) 115 Cal.App.4th 229, *People v. Soriano* (1987) 194 Cal.App.3d 1470, *In re Resendiz* (2001) 25 Cal.4th 230, *People v. Martinez* (2013) 57 Cal.4th 555. See also *Padilla v. Ky* (2010) 559 U.S. 356.

¹¹ *Padilla v. Ky* (2010) 559 U.S. 356.

¹² *Ibid.*

This chart summarizes different options for challenging your plea agreement if you did not know or understand the immigration consequences of your conviction. You can share this with your lawyer to help you decide which, if any, are the best options available to you.

METHOD for Challenging a Guilty or “No Contest” Plea	WHEN to Bring this Challenge	WHAT to Challenge in your Criminal Case	TYPE OF RELIEF if Challenge is Successful
Cal. Penal Code section 1018. An application/motion in the trial court.	Before judgment, or before 6 months after a judge’s order granting probation (where the entry of judgment is suspended and has not been entered).	Criminal defense lawyer’s failure to advise you of immigration consequences before entering your plea. (This claim is called “ineffective assistance of counsel,” a violation of your Sixth Amendment right.)	You can withdraw your plea of guilty or “no contest,” and change it to a plea of not guilty.
Petition for Writ of Habeas Corpus. A petition in one of the appellate district courts.	Any time following the judge’s entry of judgment, where you are in custody (jail or prison) or on supervision (probation, parole, PRCS, etc.).	Criminal defense lawyer’s failure to advise you of immigration consequences before entering your plea. (Again, this claim is called “ineffective assistance of counsel.”)	Judge vacates the conviction. Note: You may open yourself up to re-prosecution on the original criminal charge(s).
Direct Appeal. An appeal in one of the appellate district courts.	A notice of appeal must be filed within 60 days after the judge’s entry of judgment.	Talk to your appellate attorney if your criminal defense lawyer or the criminal trial court judge did not advise you about immigration consequences.	Judge vacates the conviction. Note: You may open yourself up to re-prosecution on the original criminal charge(s).
Cal. Penal Code section 1016.5. A motion in the trial court.	Any time following the judge’s entry of your guilty or no contest plea.	Where the criminal court judge failed to advise you of the immigration consequences before accepting a plea.	You can withdraw your plea OR the judge vacates the conviction. If your conviction is vacated, you may open yourself up to re-prosecution on the original criminal charge(s).
Cal. Penal Code section 1473.7. A motion in the trial court.	Any time after the criminal trial court judge enters a judgment in your case.	Where an error hurt your ability to understand, defend against, or knowingly accept the immigration consequences of a plea, or new evidence shows innocence. ¹³	Judge vacates the conviction. Note: You may open yourself up to re-prosecution on the original criminal charge(s).

¹³ You need to show at least one of the following: (1) your attorney did not advise you properly of immigration consequences; (2) your attorney did not defend against immigration consequences of the plea; and/or (3) you did not understand the immigration consequences. In addition, you must also show a *reasonable probability that you would not have otherwise entered into the plea.*

5. Newly passed laws in California can help reduce or erase some felonies and misdemeanors, which might help you for immigration purposes.

Some of California’s “record-cleaning” or “expungement” laws may help you **reduce certain felonies to misdemeanors, and/or dismiss certain convictions** – which in some cases can also help reduce your chances of being targeted for deportation and other negative immigration consequences. Below is a summary of California’s record-cleaning laws that may help people with their immigration status.

To get help pursuing one of these “record-cleaning” options, contact your local public defender’s office or call Root & Rebound’s free and confidential Reentry Legal Hotline any Friday at (510) 279-4662 for a referral to a free expungement legal clinic.

Dismissals (also known as “expungements”):

When lawyers refer to “expungements” in California (which doesn’t really exist here), they usually mean “**dismissals,**” which allow people to dismiss a felony or misdemeanor conviction after completing any time they were sentenced to jail and/or probation.¹⁴ While dismissals can help with applying to some jobs and housing, they usually do not erase the conviction for immigration purposes.¹⁵ *However*, there is one important exception for certain first-time simple possession offenses that occurred **before July 14, 2011**, where a dismissal may help with immigration consequences.¹⁶

Reducing Felonies to Misdemeanors:

The following newer laws help people reduce felonies to misdemeanors for all purposes, including for immigration purposes.

- Under **Cal. Penal Code section 17(b)(3)**, the court can reduce felony “wobblers” – offenses that originally could have been charged as either felonies or misdemeanors – down to misdemeanors if you were not sentenced to state prison.
- Under California’s **Proposition 47**, you can petition the court to reduce a felony conviction for simple drug possession or a lower-level theft offense to a misdemeanor (called “redesignation”).¹⁷
- Under California’s **Proposition 64**, you may be able to change your record (called “reclassification”) if you have a conviction for a marijuana offense, which means you might be able to reduce or dismiss prior marijuana-related convictions.¹⁸

¹⁴ See Cal. Pen. Code §§ 1203.4, 1203.41, 1203.43.

¹⁵ *Matter of Roldan*, 22 I&N Dec 512 (BIA 1999); but note: one exception is for convictions with a deferred entry of judgment granted on or after January 1, 1997. Dismissal in such cases under Penal Code section 1203.43 can potentially eliminate immigration consequences.

¹⁶ *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). See a discussion of this decision by ILRC, available at https://www.ilrc.org/sites/default/files/resources/practice_advisory_lujan_and_nunez_10.11.pdf.

¹⁷ Cal. Pen. Code § 1170.18.

¹⁸ Cal. Health & Saf. Code § 11361.8.

A Warning about “Legalized Marijuana” under Prop. 64 in California: Although California state law permits some use and cultivation of marijuana, federal law does NOT allow this – and remember, immigration is run by the federal government! So please read and share the warnings below!

- Don’t use marijuana until you are a U.S. citizen. Don’t work in a marijuana shop.
- If you have a real medical need and there is no good substitute for medical marijuana, get legal counsel.
- Never leave the house carrying marijuana, a medical marijuana card, paraphernalia (like a pipe), or accessories like marijuana T-shirts or stickers. Don’t have photos or text about you and marijuana on your phone, Facebook, or anywhere else.
- Most importantly, **never admit to any immigration or border official that you ever have used or possessed marijuana**, unless you have expert legal advice that this is OK. If a federal official asks you about marijuana, say that you don’t want to talk to them and you want to speak to a lawyer. You have the right to remain silent. Stay strong – once you admit it, you can’t take it back. If you did admit this to a federal officer, get legal help quickly.

SPECIAL NOTE: Cal. Penal Code section 18.5(b) (effective January 1, 2017) is a recent state law that reduces the *maximum possible sentence* for any California misdemeanor from 365 to 364 days retroactively. This is important because under federal law, certain offenses can lead to deportation if they carry even a potential sentence of one year or more.¹⁹ This new law is²⁰ retroactive, meaning it applies to old misdemeanors as well those current and future cases.

However, if you were convicted of a misdemeanor before January 1, 2015, and were sentenced to a term of one year, you must proactively ask (“petition”) the criminal court that sentenced you to change your sentence under this law.²¹

Completing a Drug Diversion Program:

In addition, under **Cal. Penal Code Section 1203.43**, someone with a drug offense who received a “deferred entry of judgment” (DEJ) can get rid of the conviction for immigration purposes. You are considered to have a conviction for immigration purposes if you entered a plea of guilty even *if the charges were later dismissed through a diversion program*; so getting relief through Section 1203.43 gets rid of your guilty plea for immigration purposes as well. Upon completion of the court-ordered DEJ program, you must file papers with the court to ask the judge to withdraw the guilty plea and dismiss the charges once again under Section 1203.43.²²

¹⁹ INA § 237(a)(2)(A); 8 U.S.C. § 1227(a)(2)(A). See also Immigrant Legal Resource Center, California Defines Misdemeanor as Maximum 364 Days, July 2014, available at https://www.ilrc.org/sites/default/files/resources/cal_misd_364_days_7_2014_pdf.pdf.

²⁰ Cal. Pen. Code § 18.5(a).

²¹ Cal. Pen. Code § 18.5(b).

²² ILRC, Fact sheet on penal code § 1203.43, available at https://www.ilrc.org/sites/default/files/resources/fact_sheet_and_text_pc_1203.43.pdf; ILRC, Cal PC 1203.43: New help for immigrants with past minor drug offenses, available at https://www.ilrc.org/sites/default/files/resources/pc_1203_43infographic.pdf. A Section 1203.43 form is available here: https://www.ilrc.org/sites/default/files/resources/sample_1203.43_petition_check_box-form.pdf.



Conclusion

In this time of great uncertainty, we hope this fact sheet has provided you with a helpful explanation of the overlap between the criminal justice and immigration legal systems. We also hope you learned about many of the legal options you may have to fight or avoid the immigration consequences in a criminal case. While these options will not be available to every immigrant with a record in California, we hope more people and families can advocate and stay together with this information and the resources below.

If you have any questions, please see the list of additional resources and legal organizations listed below – many help people fight deportation. You can also call Root & Rebound's free and confidential Reentry Legal Hotline any Friday at (510) 279-4662 for a referral.

Additional Resources for Immigrants

CALIFORNIA RESOURCES:

- **If you witness an ICE Raid in California:** Call the **ICE out of CA Hotline**, which connects with a confidential voicemail that is monitored by immigrant lawyers and advocates.
www.iceoutofca.org
1-844-TRUST-01 (1-844-878-7801)
- Immigrant Legal Resource Center
1663 Mission Street, Suite 602, San Francisco, CA 94103
(415) 255-9792
www.ilrc.org
Expertise in immigration and criminal law overlap
Provides pro bono post-conviction relief services
- Asian Americans Advancing Justice – Asian Law Caucus (Bay Area)
55 Columbus Avenue, San Francisco, CA 94111
(415) 896-1701
www.advancingjustice-alc.org/
Expertise in removal defense due to criminal convictions
- Centro Legal de la Raza
3400 E. 12th Street, Oakland, CA 94601
(510) 437-1554
www.centrolegal.org
Expertise in removal defense
- Dolores Street Community Services
938 Valencia St., San Francisco, CA 94110
(415) 282-6209
www.dscs.org
Expertise in removal defense



- Pangea Legal Services
360 Sansome St., #650, San Francisco, CA 94104
(415) 254-0475
www.pangealegal.org
Expertise in removal defense
- Community Legal Services of East Palo Alto
1861 Bay Rd., East Palo Alto, CA 94303
(650) 326-6440
<http://www.clsepa.org>
Expertise in removal defense
- Social Justice Collaborative
420 3rd Street, Suite 130, Oakland, CA 94607
(510) 992-3964
<http://socialjusticecollaborative.org>
Expertise in removal defense
- Oakland Law Collaborative
1736 Franklin Street, Suite 400, Oakland, CA 94612
(510) 891-1589 (Community Law Office)
<http://oaklaw.org>
Expertise in removal defense

NATIONAL RESOURCES:

- Immigration Advocates Network National Immigration Legal Services Directory
www.immigrationadvocates.org/nonprofit/legaldirectory
- Immigrant Defense Project
www.immdefense.org
- National Lawyer's Guild – National Immigration Project
www.nationalimmigrationproject.org
- Immigrant Legal Resource Center (know-your-rights cards in case of contact with ICE!)
www.ilrc.org/red-cards
- American Immigration Lawyer Search
www.aialawyer.org
- iAmerica
www.iamerica.org
Note: iAmerica's website also includes "KNOW YOUR RIGHTS" fact sheets (including how to handle encounters with immigration or police) and "RESOURCES." Their newest resource www.immi.org helps you screen yourself and your immigration options.