



## California Defines Misdemeanor as Maximum 364 Days

On July 21, 2014, Governor Brown signed into law a provision that will make a California misdemeanor have a **maximum possible sentence of 364 days**. See text of SB 1310, creating Cal Penal Code § 18.5, below. It appears that the statutory effective date is **January 1, 2015**. Congratulations and thanks to State Sen. Ricardo Lara and the advocates who made this happen.

This will provide crucial help to immigrants convicted of minor offenses, in at least three ways:

**Deportable.** A noncitizen is deportable for a single conviction of a crime involving moral turpitude committed within five years of admission, if the offense has a *potential* sentence of one year or more. INA § 237(a)(2)(A), 8 USC § 1227(a)(2)(A). As of the effective date, a single California misdemeanor conviction will not cause deportability under this ground, because it will carry a maximum possible sentence of 364 days.

**Relief.** Currently, conviction of a single crime involving moral turpitude is a bar to “10-year” cancellation for non-permanent residents, unless the person has committed only one moral turpitude offense, and the offense carries a *potential* sentence of *less* than a year. See *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010), discussing INA 240A(b)(1), 8 USC § 1229b(b)(1). As of the effective date, a single California misdemeanor conviction will not be a bar under this provision because it will carry a maximum possible sentence of 364 days.

**Aggravated Felony.** Conviction of certain offenses becomes an aggravated felony only if a sentence of a year or more is *imposed*. This includes, among others, a federally-defined crime of violence, theft, receipt of stolen property, obstruction of justice, forgery, etc. See INA 101(a)(43), 8 USC 1101(a)(43). California misdemeanors will not have the potential to become aggravated felonies because a sentence of a year cannot be legally imposed. In addition, a RICO offense becomes an aggravated felony if it carries a potential sentence of a year. INA § 101(a)(43)(J).

The new Penal C § 18.5 states: “Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days.” Thus, California code sections that describe the penalty for individual offenses will continue to have the “one year” language, but they all are subject to Penal C § 18.5, providing that no more than 364-day sentence can be imposed.

The new law will control “wobbler” offenses that are defined as misdemeanors. Under California law, an alternate felony-misdemeanor (“wobbler”) offense can be designated as a misdemeanor, which under those statutes carries a maximum sentence of a year. Cal Penal C § 17. The Ninth Circuit specifically recognizes that when this is done, the conviction carries the maximum possible sentence provided for the misdemeanor, not the felony, for immigration purposes. *Ceron v. Holder*, 747 F.3d 773, 777-778 (9th Cir. 2014) (*en banc*), partially overruling

*Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9<sup>th</sup> Cir. 2003); see also *LaFarga v. INS*, 170 F.3d 1213 (9<sup>th</sup> Cir 1999). Under the new law, that maximum possible sentence will be 364 days.

Note that some California misdemeanors have a maximum sentence of six months rather than a year. See Cal Penal C § 19, defining a misdemeanor as having a potential sentence of six months unless the statute provides otherwise. The new law does not affect these six-month misdemeanors.

While there are arguments that new Penal C § 18.5 should be applied beginning now or even retroactively, California criminal defenders should assume conservatively that the new law is not in effect until January 1, 2015. Defenders should continue to use strategies such as pleading to “attempt” to commit a moral turpitude offense, or pleading to a six-month misdemeanor or other alternate offense, in order to avoid the one-year potential sentence on a crime involving moral turpitude, until further notice.

#### TEXT OF SB 1301

Section 18.5 is added to the Penal Code, to read:

**18.5.** Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days.

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