

California Law Gang Enhancement Codes and Definitions

Penal Code 186.22 PC is part of the "California Street Terrorism Enforcement and Prevention Act" – more commonly referred to as the California "STEP Act" . . . or as California's street gang enhancement law.

Two main parts (only one of which is an actual sentence enhancement). These are:

1. Penal Code 186.22(a) PC, the crime of participation in a gang

This part of the law makes it a crime to participate in a street gang and assist in any felony criminal conduct by the gang's members.

The penalties for participation in a gang, in violation of Penal Code 186.22(a) PC, can include one (1) year in county jail . . . or a felony sentence of sixteen (16) months, two (2) years or three (3) years in state prison.¹

2. Penal Code 186.22(b) PC, the gang sentencing enhancement.

This part of the law provides that anyone who commits a felony for the benefit of a gang will receive a mandatory prison sentence . . . *in addition and consecutive to* the penalty s/he receives for the underlying felony.²

Depending on the circumstances of the offense, Penal Code 186.22(b) PC could mean an additional two (2) to fifteen (15) years, or even twenty-five (25)-years-to-life, in prison...even if you're not a gang member, and even if you aren't the individual who was most directly responsible for committing the underlying felony!³

So, as you can see, California law, through the STEP Act, punishes gang members...and those who associate with gang members...much more harshly than people who have no gang ties.

Examples

- Charles is a member of a street gang that engages in drug trafficking. He is arrested and charged with possession of a controlled substance for sale. And he is also charged with Penal Code 186.22(a) PC . . . the California crime of participation in a gang . . . which increases his total potential sentence.
- Nicole is not a gang member, but her boyfriend Raul is. One day she helps Raul threaten someone who owes money to the gang...thus committing the [California crime of extortion](#). Because she acted for the benefit of a gang...even though she is not a gang member...Nicole may face an additional sentence of up to ten (10) years *on top of* other sentence for committing extortion.⁴

Legal defenses

But just because the prosecution charges you with a street gang sentencing enhancement doesn't mean it will stick. Potentially helpful legal defenses against a Penal Code 186.22 PC charge include:

- You didn't commit the underlying felony;
- You are not an "active participant" in a gang;
- You weren't acting for the benefit of a gang;
- The prosecutor is seeking to apply the gang sentencing enhancement in an illegal way; and/or
- Imposing the gang sentencing enhancement would go against "the interests of justice."

1. The Legal Definition of the Crime of "Participation in a Gang" (Penal Code 186.22(a) PC)

Penal Code 186.22(a) PC legal definition of the California crime of "participation in a gang."⁶

In order to convict you of the offense of "participation in a street gang" under the STEP Act, a California prosecutor must prove the following three facts (otherwise known as "elements of the crime"):

1. You "actively participated" in a criminal street gang;
2. You knew that the gang's members engaged in a pattern of criminal gang activity; AND
3. You willfully assisted, furthered, or promoted felonious (felony) criminal conduct by gang members.

"Actively participated" Under California's gang enhancement law, you are considered to have "actively participated" in gang activities if you participated in those activities in a way that is not merely passive, or in name only. You can be considered to have been an active participant in a gang even if

- you didn't devote all or a substantial part of your time to the gang,
- you weren't a leader of the gang, and
- you weren't even an active member of the gang.⁸

Example: Juan is arrested for committing an armed California robbery (a California felony).

Police recognize Juan as someone they have frequently seen associating with known members of a local street gang. Juan has also admitted to police that he "kicks back" with the gang sometimes . . . even though he is not a member. Also, the robbery Juan committed resembles other robberies members of that gang have committed in the neighborhood.

Because of this, Juan is considered to have actively participated in the gang...and is convicted of Penal Code 186.22(a) PC as well as robbery.⁹

"Criminal street gang" A "criminal street gang" is defined as any organization or group of three (3) or more people that:

1. has a common name or identifying sign or symbol,
2. has, as one of its primary activities, the commission of one of a long list of California criminal offenses, and
3. whose members have engaged in a "pattern of criminal gang activity"...either alone or together.¹⁰

The definition of a "pattern of criminal gang activity" in California's gang sentencing enhancement law is extremely complicated.¹¹ But, put very simply, it means:

- the commission of two (2) or more crimes from a specific list,
- on two (2) or more separate occasions or by two (2) or more people,
- within three (3) years of each other, and
- with at least one crime committed after September 1988.¹²

And though it may seem odd, it isn't necessary for the prosecution to prove that these offenses were even gang-related.¹³

The list of criminal offenses that can establish a "pattern of criminal gang activity" . . . and thus that a group is a "criminal street gang" . . . is quite long. It includes such common offenses as:

- Robbery,

- Numerous drug offenses, including transportation and sale, possession for sale, and manufacture of drugs,
- Drive-by shootings,
- Vandalism, but only if it is chargeable as a felony,
- Assault with a deadly weapon, and
- **Murder.**¹⁴
Example: A group of teenage boys from a neighborhood called Hidden Woods form a group that they call the HW Taggers. They come up with an identifying logo and spray-paint this logo all over nearby neighborhoods...thus committing the crime of California vandalism...but don't engage in any other criminal activity.

The damage done by the HW Taggers' graffiti turns out to be fairly cheap to repair . . . which means that they have only committed misdemeanor vandalism.¹⁵ Because only felony vandalism counts to establish a pattern of criminal gang activity, the HW Taggers do not qualify as a criminal street gang.

"Assisted, furthered or promoted" gang criminal activity

In order to prove that you "assisted, furthered or promoted" felony criminal conduct by a gang, the prosecutor must prove that you either:

1. directly and actively committed a [felony in California law](#), or
2. [aided and abetted](#) a felony.¹⁶

In addition, in order for you to be convicted of the crime of "participation in a gang" under Penal Code 186.22(a) PC, it must be true that you committed...or aided and abetted...a felony *with other gang members*. If you commit a felony on your own, you cannot be convicted under this section of California's gang enhancement law.¹⁷

(However, even if you acted alone, you may still be subject to the criminal street gang sentencing enhancement under Penal Code 186.22(b) PC...which we discuss further in [Section 2](#) below¹⁸.)

Example: Joe is a member of a well-known gang. One night he commits an attempted robbery by himself. Members of his gang regularly commit robberies in order to intimidate other members of the community.

Joe may be charged with attempted robbery and may receive a gang sentencing enhancement...but he is NOT guilty of the separate crime of "participation in a gang" for this robbery. This is because he acted alone, rather than together with other gang members.¹⁹

1.1. Penalties for the crime of "participation in a gang"

The offense of participation in a gang under Penal Code 186.22(a) PC is a [wobbler in California law](#). This means that the prosecutor may choose to try it as *either* a [misdemeanor](#) or a felony.²⁰

The maximum sentence if you are convicted of Penal Code 186.22(a) PC as a misdemeanor is one (1) year in county jail. You may also receive a fine of up to one thousand dollars (\$1,000).²¹

If you are convicted of participation in a gang as a felony, you may face sixteen (16) months, two (2) years, or three (3) years in the [California State Prison](#).²² You may also receive a fine of up to ten thousand dollars (\$10,000).²³

2. The California Gang Sentencing Enhancement (Penal Code 186.22(b) PC)

Penal Code 186.22(b) PC sets forth the actual California criminal gang sentencing enhancement.²⁴

The way the street **gang sentencing** enhancement under the STEP Act works is this:

if you are convicted of a California crime, you will receive an enhanced sentence . . . ASSUMING the prosecutor can prove all of the "elements" of the sentencing enhancement.

These elements are:

1. You committed . . . or attempted . . . the crime for the benefit of, at the direction of, or in association with a criminal street gang; and
2. When you committed the crime, you *intended* to assist, further, or promote criminal conduct by members of the gang.²⁵

Of course, you also must be convicted of the underlying crime . . . which means the prosecutor must prove all the elements of that crime as well.²⁶

Importantly, there is *no* requirement that you be an "active participant" in a gang at the time when you committed the crime.²⁷

Example: Ramon is not a member of the well-known Norteno gang, but several of his friends are. One day, he and his friends throw a bottle at a car that is driven by an off-duty police officer. When the officer attempts to detain them, Ramon and his friends begin beating him...committing the crime of battery on a police officer.

Ramon is convicted and sentenced for that crime . . . and also receives a street gang sentencing enhancement. It doesn't matter that he wasn't a current active member of the Norteno gang, because the prosecutor proves that he committed the crime in order to assist his friends—who are gang members—in their criminal conduct.²⁸

How much will the criminal street **gang sentencing enhancement increase your sentence for a particular crime?** That depends on what the underlying crime is.

2.1. "Generic" felonies

The general rule is that...if you are convicted of a felony and the STEP Act gang enhancement applies . . . you will receive an additional prison term of two (2), three (3), or four (4) years.

This term is served *in addition and consecutive to* the penalty you receive for the underlying felony (as well as any additional charges).

However, there are numerous exceptions to this general rule.

2.2. "Serious" felonies

If the underlying felony to which the Penal Code 186.22(b) enhancement applies is a so-called "serious" felony, the additional prison term will be five (5) years.³¹

There are over 42 types of [California serious felonies](#). Examples include but are not limited to:

- [Penal Code 246 PC, California's law against shooting at an inhabited dwelling or occupied car](#),
- certain [California drug crimes](#),
- assault with a deadly weapon by a prison inmate,
- [Penal Code 245\(a\)\(1\) PC assault with a deadly weapon](#) against a peace officer,
- [Penal Code 245\(a\)\(2\) PC assault with a firearm](#) against a peace officer or firefighter, and
- [Penal Code 422 PC California's law against making criminal threats](#).³²

2.3. "Violent" felonies

If the underlying felony to which the Penal Code 186.22(b) enhancement applies is a so-called "violent" felony, committed in connection with a street gang . . . then the additional prison term will be ten (10) years.

The list of crimes that count as ["violent" felonies in California](#) is also long—well over 20. Examples include (but are not limited to):

- [Penal Code 187 PC murder](#),
- any felony in which the defendant inflicts [great bodily injury](#) upon a victim,
- [Penal Code 203 and 205 PC, California's mayhem laws](#), and specific [California sex crimes](#).

2.4. Specific felonies

Finally, Penal Code 186.22(b) PC sets out a few specific felonies that . . . if committed with the intent to assist or promote a gang will lead to an even longer gang sentencing enhancement.

If the underlying felony that you are convicted of is:

- [Penal Code 213 PC home invasion robbery](#),
- [Penal Code 215 PC California carjacking](#),
- a felony violation of Penal Code 246 PC, California's law against shooting at an inhabited dwelling or occupied car, or
- Penal Code 12022.55 PC – discharging a firearm from a motor vehicle (more commonly referred to as a "drive-by" shooting that causes death or great bodily injury, then you face an additional fifteen (15) years to life in the [California state prison](#).³⁵

If you are convicted of either:

- [Penal Code 518 PC extortion](#) committed by force or fear, or
- [Penal Code 136.1 PC dissuading a witness](#),

then you face seven (7) years to life in the state prison.

And, finally, if your underlying conviction is for a felony that is punishable by life imprisonment, you will be sentenced to a life term. And in this case, you will not earn credit towards your [California parole eligibility](#) until you have served a minimum of fifteen (15) years.³⁷

2.5. Misdemeanors

Penal Code 186.22(d) PC provides **one more way that criminal gang involvement can increase your sentence for a particular crime.**

This part of California's gang enhancement law allows the prosecution to turn *any* misdemeanor crime into a felony . . . if the misdemeanor is committed:

1. for the benefit of, at the direction of, or in association with any criminal street gang, and
2. with the specific intent to promote, further, or assist in criminal conduct by gang members.³⁸ This means that . . . instead of the normal maximum misdemeanor sentence of one (1) year in county jail . . . you may face one (1), two (2) or three (3) years in state prison.³⁹

Example: Tony waves around a gun in front of a rival gang member and calls out the name of a gang he belongs to as he does so.

He is arrested for violating [Penal Code 417 PC](#), California's "brandishing a weapon" law - ordinarily a misdemeanor. But prosecutors may be able to charge Tony with Penal Code 417 PC as a felony because he committed the offense for the benefit of his gang.

However, if prosecutors elect this option, they are not allowed to then take the "new" felony and add one of the enhancements under Penal Code 186.22(b) PC.⁴⁰

In other words, the sentence for a felony that has been converted from a misdemeanor cannot also include the normal street gang sentencing enhancement. California courts have recognized that that would be far too harsh a penalty.⁴¹

2.6. Other sentencing considerations

Offense took place in a school zone

In addition to the gang sentencing enhancement calculations described above, under the STEP Act, judges will also look at whether the underlying offense took place

1. in a "school zone" (that is, on the campus of ... or within one thousand (1,000) feet of . . . a public or private school),

2. during hours when the school was in session or minors were on the grounds.⁴² If the offense did take place in a school zone, that will be an "aggravating circumstance" that the judge may take into consideration when determining the length of your sentence.⁴³ In other words, that could lead to you receiving a sentence on the higher end of the range.

Striking the gang enhancement in the interests of justice

Under Penal Code 186.22 PC, California judges may . . . at their discretion . . . strike the gang enhancement altogether . . . IF a skilled California criminal defense lawyer can persuade the judge that it is "in the interests of justice" to do so.⁴⁴

This is supposed to happen only in unusual cases...but with the help of a good lawyer, you may be able to convince the judge that yours is just such an unusual case.

Multiple gang enhancements

Generally speaking, California law only allows an individual to suffer one sentencing enhancement for a single criminal act...even if that criminal act results in multiple charges.⁴⁵

However, if a defendant commits several criminal acts that

1. involve multiple victims, and
2. are separated by time and distance,

...then s/he may face criminal charges for *both* acts...and the criminal street gang sentencing enhancement may apply to both.

Example: Arthur is a gang member. One night, he and several other members of his gang rob a man in his apartment. They then drive to another apartment building and rob a second man in his unit. The jury determines that both robberies were committed for the benefit of the gang.

Because the two robberies had different victims . . . and were separated by time and distance . . . Arthur may be convicted of and serve time for both. AND he will receive a separate STEP Act sentencing enhancement for each robbery.