

Background Checks

Applicants and employees are protected from employment discrimination under both Oregon state¹ and federal law². Employers are restricted as to what kind of questions they may ask applicants including salary history, credit history, employment status, and criminal history. There are also specific protections for employees when it comes to credit history and criminal history checks.

SALARY HISTORY

Under Oregon law³, an employer may not ask applicants or the applicant's employer about their salary history. Specifically, employers may not:

- ❖ Ask for an applicant's salary or pay history before they make an offer of employment.
- ❖ Screen job applicants based on current or past salary or pay history.
- ❖ Base compensation for a job based on the current or past compensation of a potential new employee (not including internal transfers).

Employers may ask an applicant about their preferred salary. However, employers may not take that information into consideration when offering the position. For example, a qualified applicant states that their preferred salary is \$50,000 per year. However, the position the applicant is applying to has a salary range of \$57,000 to \$67,000 per year. If the applicant offered the qualified applicant \$50,000 instead of \$57,000 to \$67,000 to save money, the employer would be in violation of Oregon law.

CREDIT HISTORY

Under Oregon law⁴, employers generally cannot obtain an applicant or employee's credit history. The following are exceptions to this law:

- ❖ The credit history information is substantially job-related and the employer's reasons for the use of such information are disclosed to the employee or prospective employee in writing.
- ❖ The employer is a federally insured bank or credit union.
- ❖ Employers who are required by state or federal law to use individual credit history for employment purposes.
- ❖ The application for employment or the employment of a public safety officer responsible for enforcing the criminal laws of this state or laws or ordinances related to airport security.

¹ [ORS 659A.030](#)

² [Title VII of the Civil Rights Act of 1964](#)

³ [ORS 659A.357](#)

⁴ [ORS 659A.320](#)



Substantially Job-Related Definition

Under Oregon law⁵, credit history information may be considered “substantially job-related” if:

- ❖ An essential function of the job requires access to financial information beyond that typically required in a retail transaction (Financial information typically provided in a retail transaction includes information related to the exchange of cash, checks, and credit or debit card numbers); or
- ❖ The employer is required to obtain credit history information as a condition of bonding or insuring the employee.

Credit History Definition

Credit history means any written or other communication of any information by a consumer reporting agency that bears on a consumer’s creditworthiness, credit standing or credit capacity.

Fair Credit Reporting Act (FCRA)

When an employer runs credit background checks through a company in the business of compiling background information, the employer must comply with the Fair Credit Reporting Act, commonly known as the FCRA (referenced below).

EMPLOYMENT HISTORY

Under Oregon law⁶, an employer or employment agency may not knowingly or purposely publish in print or online a job posting that provides the following:

- ❖ Requiring current employment as a qualification for an open position;
- ❖ A statement that the employer or employment agency will not consider or review an application of an individual who is currently unemployed; or
- ❖ A statement that the employer or employment agency will only consider or review applications for employment submitted by job applicants who are currently employed.

Oregon employers may publish the following in a job posting if it is a condition of employment:

- ❖ Setting forth qualifications for a job vacancy, including but not limited to:
 - Holding a current and valid professional or occupational license, certificate, registration, permit or another credential; or
 - A minimum level of education or training, or professional, occupational, or field experience
- ❖ A statement that only applicants who are current employees of the employer will be considered for the position.

⁵ [OAR 830-005-0080](#)

⁶ [ORS 659A.550](#)



CRIMINAL HISTORY

Oregon's Ban-the-Box

Oregon's Ban-the-Box law makes it unlawful to inquire about criminal convictions before the interview stage of the hiring process. The Oregon Ban-the-Box law applies to all employers with some exceptions.

According to Oregon law, "Ban-the-Box" does not apply when:

- ❖ Federal, state, or local law (including corresponding rules and regulations) requires the consideration of an applicant's criminal history;
- ❖ When the employer is a law enforcement agency;
- ❖ When the employer is in the criminal justice system; or
- ❖ When the employer is seeking a nonemployee volunteer.

Portland's Ban-the-Box

Portland passed its own "Ban-the-Box" Ordinance, which prohibits Portland employers with 6 or more employees from asking about an applicant's criminal history until a conditional job offer has been made. An exception to this ordinance includes the following:

- ❖ Positions involving direct access to or the provision of services to children, the elderly, persons with disabilities, persons with a mental illness, or individuals with alcohol or drug dependence or substance abuse disorders;
- ❖ Positions which have been determined by administrative rule to present heightened public safety concerns or a business necessity;
- ❖ Positions designated by the Employer as part of a federal, state or local government program designed to encourage the employment of those with criminal histories.

Additionally, under the Portland Ordinance⁷, it is unlawful for an employer to rescind a conditional offer of employment based upon an applicant's criminal history unless the employer determines in good faith that a specific offense or conduct is job-related for the position in question and consistent with business necessity.

Portland Employer Definition

The Portland ordinance covers any employer with six or more employees when they employ someone for a position being performed a majority of the time within Portland. The ordinance does not include the United States Government, State of Oregon and its offices, or any political subdivision of the state of Oregon or any county, city, district, authority, public corporation or public entity except for the City of Portland

Criminal Background Checks

Oregon employers can still conduct criminal background checks and make a job offer contingent upon consideration of an applicant's criminal background check. Oregon's Ban-the-Box law simply prevents

⁷ [Portland City Code 23.10.030](#)



employers from asking job applicants about their criminal history before the interview stage. However, employers are allowed to ask about a job applicant's criminal history during the interview process. As a reminder, Portland's Ban-the-Box states that Portland employers may only ask about an applicant's criminal history after a conditional offer has been made.

Additionally, employers may notify job applicants during the recruitment process that the job applicant's criminal background will be considered.

EEOC Guidance

The Equal Employment Opportunity Commission (EEOC) issued guidance⁸ on how employers should go about conducting criminal background checks. Specifically, the EEOC guidance states⁹ employers should take the following steps:

1. Treat applicants with similar criminal records consistently.
2. Avoid using an employment policy or practice that excludes people with certain criminal records.
3. Determine how the applicant's criminal history relates to the risks and responsibilities of the job by examining whether it is job-related and consistent with business necessity.
4. Treat arrest records differently than convictions.
5. Consider reviewing the accuracy and relevance of a conviction record before basing an employment decision on that record.
6. Give applicants an opportunity to explain their criminal history.

Employers must also comply with the FCRA when conducting criminal background checks through a company in the business of compiling background information (referenced below).

Job-Related and Consistent with Business Necessity

Employers should examine, on an individual basis, whether excluding the applicant due to their criminal history on a background check is both job-related and consistent with business necessity. Factors to consider are:

- ❖ The nature and gravity of the offense or conduct
 - For example, a conviction for felony theft may involve deception, threat, or intimidation in addition to property loss.
- ❖ The time that has passed since the offense or conduct and/or completion of the sentence
 - While a specific timeline is not stated, permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard.
- ❖ The nature of the job held or sought
 - Employers should take into account the nature of the job's duties and essential functions, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job's duties are performed (e.g., out of doors, in a warehouse, in a private home).

⁸ [EEOC Background Check Guidance; Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act](#)

⁹ [EEOC Small Employer Criminal Record Guidance](#)



EEOC on Arrests

The EEOC states that the “fact of an arrest does not establish that criminal conduct has occurred. Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed.” However, an arrest could in some circumstances result in an adverse employment action if it is job-related and consistent with business necessity.

Example:

The EEOC explained that an elementary school assistant principal, a Latino, was arrested for sexual abuse of several children. The elementary school where the assistant principal works has a policy that requires suspension or termination of any employee who engages in conduct that impacts the welfare and safety of children at the school. The assistant principal was placed on administrative leave, an investigation was conducted, and the assistant principal was not found to be credible and subsequently terminated for the conduct. The assistant principal challenged the termination on the basis of a Civil Rights Violation due to his national origin. It was found that the school's policy is linked to conduct that is relevant to the particular position at issue, and the termination was made based on descriptions of the underlying conduct, not the fact of the arrest.

Example:

The EEOC explained that a middle-aged Black man was driving to church in a predominantly white town. An officer stops him and interrogates him about his destination and when he becomes annoyed and comments the offense was simply "driving while Black," the officer arrests him for disorderly conduct. Charges were never filed but the arrest remains on the man's background check 15 years later when he applied for a promotion. The employer's practice is to deny such promotions to individuals with arrest records, even without a conviction, because it views an arrest record as an indicator of untrustworthiness and irresponsibility. If the man were to file a Civil Rights Violation, it would be found that based on the facts, disparate impact based on race were established, the EEOC would find reasonable cause to believe that his employer violated Title VII.

EEOC on Convictions

The EEOC states a record of a conviction usually serves as sufficient evidence that a person engaged in a particular conduct due to the procedural safeguards in the legal system. However, the EEOC cautions that there may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction. Specifically, the EEOC gives the example that a database may continue to report a conviction that was later expunged or may continue to report as a felony an offense that was subsequently downgraded to a misdemeanor.

FAIR CREDIT REPORTING ACT (FCRA)

When an employer runs criminal and/or credit history background checks through a company in the business of compiling background information, the employer must comply with the FCRA¹⁰. Specifically, employers must:

1. **Get Written Consent:** Employers need to get the applicant or employee's written permission to do the background check. If using a third-party for background checks, certify that the company notified the applicant and got their permission to get a background report; complied with all of the FCRA requirements; and won't discriminate against the applicant or employee, or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.
2. **Provide Disclosure and Get Consent:** Once a background check is completed, if any of its findings may be grounds for declining the position, the employer must let the applicant employee know via a notice called a pre-adverse action letter. (Background check company should have a sample.) Employers should keep a copy of the letter and attachments, and also document the date the pre-adverse action letter was sent. Along with the pre-adverse action notice, the employer, or the company it has hired to conduct the background check, also must provide each applicant or employee with a copy of the background check report and a summary of rights under the FCRA.
3. **Send the Pre-adverse Action Notice:** The employer needs to give the applicant or employee reasonable time to review the background check report, and allow them to address any information they consider inaccurate. The employer also must give the employee a chance to offer clarifying information to correct the record or otherwise explain the report's findings. No specific waiting period is specified under FCRA, but courts have accepted five days as a reasonable amount of time for this process.
4. **Review the Results Again:** If, after considering the applicant or employee's response and any corrections to the record, the employer still decides to terminate the employee or not hire an applicant based on the background check contents, the employer must issue an adverse action notice that explains their decision. The adverse action notice may be delivered in hard-copy form or electronically.
5. **Provide Notice of the Adverse Action:** The adverse action notice must inform the applicant or employee their right to dispute the decision, and offer them a chance to get another copy of their background check report any time within 60 days of receiving the notice. If the employer outsourced the background check to an outside company, such as a Consumer Reporting Agency (CRA), the notice must specify that the termination decision was made by the employer, not the contractor, and include the name, address, and phone number of the CRA. Employers should keep a copy of the letter and attachments, and document the date sent.
6. **Dispose of Sensitive Documents:** The FCRA requires that the employer securely dispose of the background check results. Paper copies must be shredded or incinerated, and all digital copies must be irretrievably erased.

¹⁰ [15 U.S.C. § 1681 et seq](#)



Remember, in considering determining the pre-adverse action with criminal history, employers will want to consider how much time has passed since the conviction; inquire into whether the applicant has a certificate of rehabilitation; closely analyze the conviction's relationship to the essential functions and nature of the job; consider the overall job environment and nature of other employees; and consider the level of supervision of the position applied for.

