

## OUR INSIGHTS

### Oregon Legislature Votes to “Ban the Box”

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Oregon will soon join the ranks of states with “ban the box” legislation. Provided [House Bill \(HB\) 3025](#) is signed by Governor Kate Brown (which is virtually certain), the new law will regulate when Oregon employers can ask applicants to disclose criminal convictions. The effective date for the new law would be January 1, 2016.

#### The Prohibitions

Under the legislation, most Oregon business may not require applicants to disclose criminal convictions (a) on an employment application, or (b) at any time prior to an initial interview. In situations where there is no interview, such as certain seasonal agricultural jobs, employers may not ask about criminal convictions until after extending a conditional offer of employment. In other words, asking about criminal convictions *before* an interview is prohibited, but during or after the interview is not. This achieves the legislation’s goal by ensuring that applicants are not excluded from interviews solely because of past criminal convictions.

While the legislation will regulate *when* a business may ask about criminal convictions, it does not prohibit employers from notifying applicants that they will be later be required to disclose convictions, or that a criminal background check will be performed as part of the hiring process. Likewise, the legislation has no impact on an employer’s ability to consider criminal convictions as part of the hiring process, so long as the disclosure is not required prior to an initial interview.

#### The Exceptions

While HB 3025 applies to businesses of every size, it makes exceptions for positions where federal, state, or local law requires consideration of an applicant’s criminal history, as well as for law enforcement agencies, for employers in the criminal justice system, and for employers seeking “nonemployee volunteers.” In these situations, the legislation does not apply at all, and applicants may be required to disclose criminal convictions at any stage in the hiring process.

#### Enforcement

If signed by the governor, violations of Oregon’s “ban the box” law will be handled exclusively by the Oregon Bureau of Labor and Industries. HB 3025 does not, however, create a private right of action that would allow individuals to file lawsuits.

## Portland May Pass Tighter Restrictions

Oregon's legislature may not have the final word on the subject, at least for employers in Portland. The state legislature chose not to prohibit cities from enacting their own "ban the box" ordinances, and the Portland City Council has long been considering a local ordinance. Backers of even greater limits on the ability to learn about applicants' criminal convictions have pledged to pursue a Portland ordinance that would uniformly ban the disclosure of convictions until after an employer extends a conditional offer of employment.

### How Should Employers Respond?

First, all businesses operating in Oregon should review their paper and electronic applications. If such documents seek information about criminal convictions, then most businesses should eliminate these requirements. Employers in highly-regulated industries, such as banking, securities, and healthcare, should determine whether they are legally obligated to consider an applicant's criminal history. If so, then they may ask about criminal convictions at any stage, including as part of an application.

Second, employers that plan to ask applicants about criminal convictions at the appropriate stage in the hiring process should do so using a form that includes the applicant's signed acknowledgement that the disclosure is not being required prior to an initial interview. The form should also include an affirmation that the employee is being truthful in the disclosure, and a statement that misrepresentations about criminal convictions will result in a decision not to hire or subsequent termination.

Finally, employers should train personnel who interact with applicants not to seek disclosure of criminal convictions prior to an initial interview.

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Sean Driscoll represents employers large and small in all aspects of employment litigation in federal and state courts, as well as before the EEOC and state agencies and in private and industry arbitrations. He has defended claims of discrimination and harassment, retaliation and whistleblowing, disability and leave law violations, and a wide-variety of wage & hour violations, including multi-plaintiff and class action lawsuits. In addition to litigation, Sean regularly advises employers on...

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