

# OREGON & PORTLAND BAN THE BOX – CLEAR AS MUD

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Webinar Presented By:

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# New Oregon Laws

**Don't Panic.**



**Plan.**



# Ban the Box (State) – Overview & Key Elements

- Effective January 1, 2016
- Illegal to exclude an applicant from an initial interview because of past criminal conviction
- Bans such inquiries on applications statewide
- Applies to all employers, certain narrow exceptions
- Can consider convictions ***at the proper time***



# Ban the Box (State)

- Unlawful to inquire into or consider an applicant's conviction history:
  - On the application form
  - Prior to conducting an interview
  - Prior to making a conditional offer of employment, if no interview is conducted
  
- This does not apply:
  - Where state or federal law requires such consideration
  - To law enforcement
  - To employers seeking non-employee volunteers

# Ban the Box Exceptions – State/Federal Laws

- Examples:
  - Child care workers
  - DOT regulations covering certain drivers
  - Conviction of money laundering, dishonesty, or breach of trust disqualification for a bank employee (12 U.S.C 1818(e), (g)(1)(C))
  - Certain convictions prevent employment in certain labor organizations or employee benefits plans (U.S.C. 504,1111)



# Ban the Box (Portland)

- More stringent than state law
- No asking about convictions before a conditional offer of employment
- Then must do the same individualized assessment
- Exceptions for:
  - Services to children, elderly, persons with disabilities, mental illness, or alcohol/drug dependence/abuse disorders
  - Positions with heightened public safety concerns
  - Government program to encourage employment of those with criminal histories

## Ban the Box (Portland) – What's an Individualized Assessment?

- It is not an unlawful practice for an Employer to rescind a Conditional Offer of Employment based upon an applicant's criminal history if an Employer determines in good faith that a specific offense or conduct is job related for the position in question and consistent with business necessity.
- An Employer must conduct an individualized assessment of:
  - The nature and gravity of the criminal offense
  - The time that has elapsed since the criminal offense took place; and
  - The nature of the Employment held or sought

## Ban the Box (Portland) – Still Cannot Consider...

- An arrest not leading to a conviction, except where a crime is unresolved or charges are pending against an applicant;
- Convictions that have been judicially voided or expunged; or
- Charges that have been resolved through the completion of a diversion or deferral of judgment program for offenses not involving physical harm or attempted physical harm to a person



# EEOC Regulations and Case Law

- You can't ever automatically exclude someone because of a conviction
- Must do an individualized assessment
- Consider nature of conviction, age of offender, when was it, sentence end date, facts
- Relationship to the job duties



# EEOC Law

- Relationship to duties:
  - \* Forgery for bookkeeper who has access to company checks
  - \* Theft for cashier
  - \* Drunk driving for an Uber driver
  - \* Sex assault for someone working with those in vulnerable situation
  - \* Others?



# EEOC Law Rationale

- Members of certain races arrested and convicted in disproportionately higher numbers so conviction data disproportionately screens out members of certain racial groups creating discrimination if not rationally related to the job
- So you can probably use conviction data without the assessment for white applicants (yes or no?)
- State laws banning certain employees with certain convictions do NOT override EEOC law (argument here)

## Ban the Box – Practice Tips

- Amend application form to exclude any questions regarding criminal history
- Train recruiters and hiring managers not to seek such information prior to interview (state)/conditional job offer (city)
- Do an individualized assessment for any conviction



# What Not to Do

- Run a records check on your own before the law allows you to ask about or consider a conviction
- Ask others besides the applicant for criminal background info before law allows you to do so
- Automatically disqualify someone for a conviction even if asked at the right time (EEOC Law)
- Refuse to hire without knowing the law of the state in which the employee will be working (limitations on age of offense, etc.)



# Repercussions for Violations?

- **State**
  - Can file BOLI complaint to obtain penalties and cease/desist order
- **City of Portland**
  - Same
- **Federal Discrimination Law**
  - Title VII violations: civil suit for lost wages and other damages

## Questions?



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# About Chrys Martin, Employment Attorney

Chrys Martin focuses her practice on employment law and employee benefits issues. She offers her clients over 34 years of experience in complex employment and ERISA litigation, including class actions. Chrys applies her depth of knowledge in litigation to counseling employers and training management in pragmatic risk avoidance. Her practical approach to difficult employment issues is also grounded in prior hands-on management and human resources experience.



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