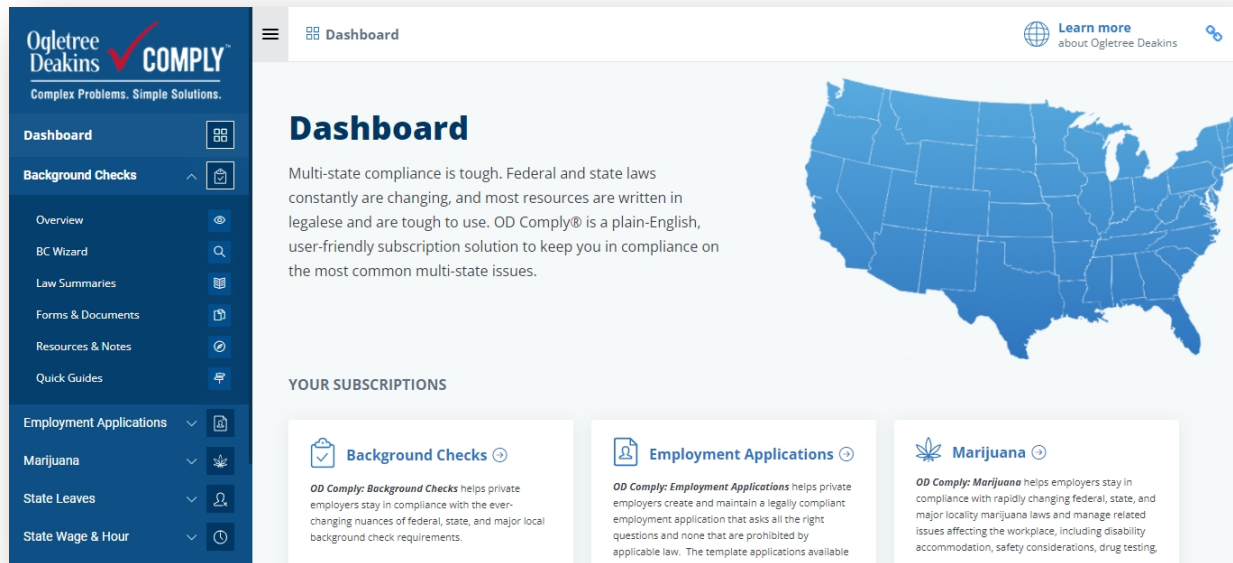


## OD Comply: Background Checks



## SAMPLES FROM THE ONLINE PORTAL



**Overview of Subscription**



**Forms and Documents (excerpts)**



**Law Summaries (excerpts)**



**Quick Guides (excerpts)**



## OVERVIEW OF SUBSCRIPTION

The *OD Comply: Background Checks* subscription includes the following features (all of which are available via an online portal):

### **FORMS AND DOCUMENTS**

*OD Comply: Background Checks* provides disclosures and authorization screens, letters, and other documents to authorize, order, and use background checks in compliance with federal, state, and major locality laws.

### **LAW SUMMARIES**

The Law Summaries provide rich summaries of federal, state, and major locality requirements and restrictions on employer requests for, use of, and evaluation of background check information.

### **QUICK GUIDES**

The Quick Guides help you through each step of the background check process and direct you to applicable subscription resources.

### **BC WIZARD** (no sample available because of interactive nature; online demo available)

The Background Check Wizard (BC Wizard) allows you to input information for a particular scenario and obtain situation-specific information and documents. For instance, you can input the residence and work location of a specific applicant or employee, the type(s) of background checks you are conducting, whether you are obtaining the information from a background check company or another source, and the background check topic or step in which you are interested (e.g., disclosure and authorization screens, employer use and evaluation of information, etc.), to yield jurisdiction-specific information and documents tailored to your situation.



## FORMS AND DOCUMENTS—Sample Excerpts

### Screen 1 | Background Check Disclosure

Published: 11/09/21

[Download](#)

#### BACKGROUND CHECK DISCLOSURE

A consumer report is a background check in which information (which may include, but is not limited to, creditworthiness, credit standing, credit capacity, criminal background, driving background, character, general reputation, personal characteristics, and mode of living) about you is gathered and communicated by a consumer reporting agency ("CRA") to ABC Corporation and/or its subsidiaries, affiliates, other related entities, successors, and/or assigns (the "Company").

Company may obtain a consumer report on you to be used for employment purposes.

### General | Adverse Action Letter

Published: 10/12/21

[Download](#)

General | Adverse Action Letter  
Published 10/01/21

- To review additional helpful notes/comments, you should download this document—after which notes/comments should show in the Word document, in bubble format to the right of the text.

[DATE]

ABC Corporation  
Address of COMPANY Location

JOHN DOE  
189 Main Ave  
Nowhere, STATE 00000

RE: Consumer Report

Dear John Doe:

As you know, ABC Corporation obtained a consumer report (also known as a background check report) for employment purposes on you from a consumer reporting agency. Based in whole or in part on information contained in that background check report, we [choose as applicable: have denied your application for employment; are not



## LAW SUMMARIES—Sample Excerpts

### Federal Law

D&A Screens > General > Requirements

#### a. Generally

Federal

**FCRA.** Before procuring a background check report under the federal FCRA for employment purposes,<sup>1</sup> an employer must ensure that it has provided an applicant/employee with appropriate disclosures and obtained authorization to obtain the report.

**Disclosure Requirements.** The FCRA prohibits an employer from procuring a background check report unless the employer first has provided the applicant/employee (on whom the employer is conducting the background check) with a disclosure stating “that a consumer report may be obtained for employment purposes.” *Id.* at (b)(2)(A)(i). Importantly, this federal disclosure must be (1) **in writing**, (2) **clear and conspicuous**, and (3) in a document that **consists solely of the required disclosure**. *Id.* The language provided in [Screen 1 | Background Check Disclosure](#) complies with these requirements.

Many FCRA class action lawsuits against employers allege that the FCRA disclosure either is not “clear and conspicuous” or contains extraneous information (*i.e.*, statements beyond the specific, simple disclosure required by the FCRA) in violation of the “consists solely” requirement. In order to comply with the FCRA’s “clear and conspicuous” and “consists solely” requirements, we advise the following:

1. Language should **not** be added to or removed from [Screen 1 | Background Check Disclosure](#), absent a specific discussion with or guidance from Ogletree Deakins.<sup>2</sup>
  - a. In addition to the required federal disclosure, [Screen 1 | Background Check Disclosure](#) contains additional language briefly describing the nature of the consumer report(s). The Federal Trade Commission (“FTC”), a federal agency that enforces portions of the FCRA, has opined that such additions are acceptable, so long as the description does not confuse the individual or detract from the disclosure. *See 40 Years of Experience with the FCRA* p. 51.
  - b. Some FCRA disclosure forms (including from some background check vendors/CRA’s) incorrectly include a “liability release” sentence/paragraph (*e.g.*, “Applicant releases the employer, the background check company, and all sources of information from any liability arising from their providing such information”) and/or other extraneous information. The presence of a “liability release” and/or any other extraneous information in the disclosure form may violate the FCRA’s “consist solely” requirement and, therefore, calls into question the validity of that form. A number of FCRA cases have focused on this issue. Accordingly, [Screen 1 | Background Check Disclosure](#) does not contain a “liability release” sentence/paragraph or other extraneous information.
2. [Screen 1 | Background Check Disclosure](#) **cannot** be combined with or be a part of any other document/screen.<sup>3</sup>
  - a. For **hard-copy use**, this means [Screen 1 | Background Check Disclosure](#) should not be stapled or otherwise bound to other documents. We also recommend the use of non-consecutive pagination and different fonts for the respective, different D&A forms, including [Screen 1 |](#)



## LAW SUMMARIES—Sample Excerpts cont'd.

### State Law [sample = Hawaii]

Use & Evaluation Of Information > Criminal > Use Prohibitions > Convictions

Hawaii

#### (1) Generally

An employer cannot (1) refuse to hire or employ, (2) bar or discharge from employment, or (3) otherwise discriminate against any individual because of his or her **arrest and court record**. Haw. Rev. Stat. § 378-2(a)(1)(A); *see also* Haw. Civil Rights Comm'n, *Pre-Employment Inquiries (Application Forms and Job Interviews)*, October 15, 2013, p. 2. **Arrest and court record** is defined broadly to include any information about an individual having been convicted. Haw. Rev. Stat. § 378-1. There is **individual** (e.g., supervisor, manager, owner, decision-maker, etc.) liability for aiding, abetting, inciting, compelling, or coercing discrimination based on an individual's **arrest and court records**. Haw. Rev. Stat. § 378-2(a)(3); *see also* *Begley v. County of Kauai*, 2018 WL 3638083 \*4 (D. Haw. July 31, 2018); *see also* *White v. Pacific Media Group, Inc.*, 322 F. Supp. 2d 1101, 1114-1115 (D. Hawaii 2004) (finding a supervisor, in his individual capacity, can be liable for aiding and abetting discrimination).

However, Hawaii allows an employer to consider an applicant's/employee's conviction record for employment purposes provided that:

1. the conviction record bears a rational relationship to the duties and responsibilities of the position; and
2. the conviction is within the past seven years for felonies and within five years for misdemeanors, excluding periods of incarceration.<sup>1</sup>

Haw. Rev. Stat. §§ 378-2.5(a) & (c)<sup>2</sup>; *see also* *Kahumoku v. United Airlines*, 584 Fed. Appx. 295, 296 (9th Cir. 2014) (finding that in determining whether a conviction was properly considered within the look-back window, courts should look to when the employer considered the conviction and made the original decision to take an adverse action, and not to when an employee appeal to the employer was completed).

Also, there is **individual** (e.g., supervisor, manager, owner, decision-maker, etc.) **liability** for aiding, abetting, inciting, compelling, or coercing discrimination based on an individual's **arrest and court records**. Haw. Rev. Stat. § 378-2(a)(3); *see also* *Begley v. County of Kauai*, 2018 WL 3638083 \*4 (D. Haw. July 31, 2018); *see also* *White v. Pacific Media Group, Inc.*, 322 F. Supp. 2d 1101, 1114-1115 (D. Hawaii 2004) (finding a supervisor, in his individual capacity, can be liable for aiding and abetting discrimination).

<sup>1</sup> If the applicant/employee claims that the period of incarceration was less than what is shown on the individual's conviction record, the employer shall provide the individual with an opportunity to present documentary evidence of a date of release to establish a period of incarceration that is shorter than the actual sentence imposed. Haw. Rev. Stat. § 378-2.5(c).

<sup>2</sup> The employer seven- and five-year look-back restrictions do not apply to employers expressly permitted to inquire into an individual's criminal history for employment purposes pursuant to federal or state law, such as armed security services, providers of developmental disabilities domiciliary homes, private schools, federally-insured financial institutions, detective agencies and security guard agencies, insurance companies, certain airport-security personnel, and certain individuals affiliated with cooperative housing corporations or condominium associations. Haw. Rev. Stat. § 378-2.5(d).





## LAW SUMMARIES—Sample Excerpts cont'd.

### Locality Law [sample = New York City]

Initial Groundwork > Criminal > Timing/Ban the Box > Restrictions

New York City,   
NY

#### (1) Arrest & Conviction Inquiry Limitations

An employer may not make any **inquiry**<sup>1</sup> or **statement**<sup>2</sup> related to the pending arrest or criminal conviction record of any person who is in the process of applying for a position (including current employees applying for a new position) until the employer has extended a **conditional offer of employment**.<sup>3</sup> N.Y.C. Admin. Code § 8-107(11-a)(a)(3); 47 RCNY § 2-04(a)(3). Specifically, employment applications and other pre-offer documents<sup>4</sup> may not include inquiries or statements regarding an individual's criminal history (including any pending criminal cases) or communicated to the applicant for purposes of obtaining information regarding arrests, convictions, or criminal checks. N.Y.C. Admin. Code § 8-107(11-a)(a)(3); *see also* 47 RCNY § 2-04(a)(1),(2),(3),(4) & (b)(1)(iv). Simply put, employers should not make any pre-offer mention of criminal background checks. Importantly, employers are prohibited from asking criminal history questions on an employment application **even if New York City applicants/employees are advised that they need not answer the question** (*i.e.*, unlike other jurisdictions, a "do not respond disclaimer" is not enough). 47 RCNY § 2-04(a)(4).

An applicant/employee may refuse to answer any prohibited inquiry without being disqualified from a prospective position. N.Y.C. Admin. Code § 8-107(11-a)(f); *see also* New York Commission on Human Rights, [Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History](#), 7/15/21, p. 12.

An employer may inquire into an individual's criminal history **after a conditional offer of employment**, so long as it follows the **New York City Fair Chance Process** if it revokes the individual's conditional offer of employment based on the inquiry. N.Y.C. Admin. Code § 8-107(11-a)(b). The following is an example of a permissible question **after a conditional offer** of employment:

Have you ever been convicted of a misdemeanor or felony? Answer "NO" if you received an adjournment in contemplation of dismissal ("ACD") that has not been revoked and restored to the calendar for further prosecution or if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as "disorderly conduct;" (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

New York Commission on Human Rights, [Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History](#), 7/15/21, p. 14.

It is important to note that an inadvertent disclosure of **criminal record information** by an applicant/employee **before** an employer has made a conditional offer does not automatically create employer liability. 47 RCNY § 2-04(c); *see also* New York Commission on Human Rights, [Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History](#), 7/15/21, p. 12. However, an employer should not use self-disclosed information to further explore an applicant's/employee's criminal history prior to extending a conditional offer, or use the information to determine whether to make a **conditional offer**. 47 RCNY § 2-04(c).

<sup>1</sup> **Inquiry** refers to any oral or written questions communicated to an applicant/employee for the purpose of obtaining criminal history. N.Y.C. Admin. Code § 8-107(11-a)(a)(3); *see also* 47 RCNY § 2-01.

## QUICK GUIDES—Sample Excerpts

### Quick Guide 1 - Initial Groundwork



This **Quick Guide** provides guidance on the **Initial Groundwork** that an employer should conduct **prior to ordering any type of background check**. As set forth below, you should determine the following before conducting a background check on an applicant/employee:

1. the type(s) of background check(s) you would like to request;
2. which federal, state, and/or locality law(s) apply to the particular check(s); and

### b. Credit Checks

[Copy Link](#)

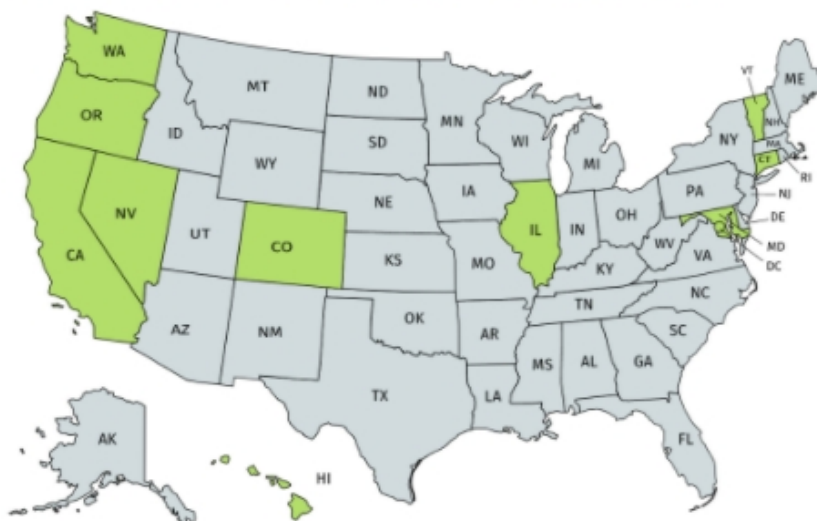
A number of states restrict employers from obtaining **credit checks**—allowing credit checks only:

1. for **certain types of positions**; and/or
2. if a credit check is **job-related**.

In these states, you should conduct a **credit check** only if the applicable law allows it. Below is a map and list summarizing states with **credit check** restrictions:

#### State Restrictions on Conducting Credit Checks (beyond general guidance or advice)

1. California
2. Colorado
3. Connecticut
4. D.C.
5. Hawaii
6. Illinois
7. Maryland
8. Nevada
9. Oregon
10. Vermont
11. Washington



For more information, please see the respective **Law Summaries** (See Quick Guides and see Law

Thanks for reviewing samples from the online portal. For a demo, questions, additional details, or subscription information, please contact [ODComply@Ogletree.com](mailto:ODComply@Ogletree.com) or the Ogletree Deakins Background Check Advice team at [BackgroundChecks@Ogletree.com](mailto:BackgroundChecks@Ogletree.com).