



Complex Problems. Simple Solutions.

OD Comply: Background Checks

Samples

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Employer Background Checks Requirements & Responsibilities

. This R&R serves as a guide for private employers conducting background checks for employment purposes through a fee-paid, third-party vendor (known as a consumer reporting agency or a “CRA”). It applies to private employers in most industries. There may be additional rules for public employers, and states may have industry-specific laws for certain employers, including the banking/financial, defense contractor, medical, and transportation industries (such as requiring background checks for certain employees in these industries), which are not covered in this R&R

This R&R; the accompanying forms, letters, and documents; and the separate *Employer Background Checks: Federal Law Summary* (“FEDERAL SUMMARY”), *Employer Background Checks: State Law Summaries* (“STATE SUMMARIES”), and *Employer Background Checks: Local Law Summaries* (“LOCALITY SUMMARIES”)¹ (collectively, these “Background Check Materials”) are intended to provide general guidance on private employer obligations and restrictions regarding background checks. These Background Check Materials are created and updated following a thorough analysis of applicable law. However, because the law is often unsettled or unclear, Ogletree Deakins cannot guarantee that these Background Check Materials will, in every circumstance, ultimately meet the approval of a judicial, administrative, governmental, or other adjudicatory body, and Ogletree Deakins thus disclaims any warranty, express or implied, including any warranty for a particular purpose or implied warranty of merchantability. Additionally, there will be inevitable delays between enactment of new law (e.g., new statutory/regulatory requirements), review by Ogletree Deakins, creation of new Background Check Materials, and your receipt or review of those Background Check Materials. **OD Comply** subscribers understand and accept the consequences of those inevitable delays.

OD Comply subscribers are reminded that they should not use, distribute, or otherwise provide access to these Background Check Materials outside of their companies (except for forms and letters that are intended to be shared with certain third parties—e.g., providing background check disclosure & authorization forms and background check letters to applicants/employees) or as otherwise outlined in a separate, subscriber-specific engagement letter. Among other restrictions, this means your CRA should **not** use the Background Check Materials (e.g., the Disclosure & Authorization forms and/or background check letters) for the CRA’s other clients. Additionally, the FEDERAL SUMMARY, STATE SUMMARIES, and LOCALITY SUMMARIES should not be provided to your CRA or any other third party. Review your **OD Comply** engagement letter for additional details and restrictions.

This subscription does not cover certain topics or issues, including those described in Section IV below as outside the scope of these Background Check Materials. Among others, these include address discrepancies, motor vehicle record requirements, Department of Transportation requirements,

¹ The FEDERAL SUMMARY, STATE SUMMARIES, and LOCALITY SUMMARIES are separate documents which are part of your subscription to **OD Comply: Background Checks**. The FEDERAL SUMMARY provides an overview of federal background check law, including the Fair Credit Reporting Act (“FCRA”) and Title VII of the Civil Rights Act of 1964 (“Title VII”). The STATE SUMMARIES provide a summary of the state law restrictions on most private employers’ inquiries about, receipt of, and use/consideration of background check information in the 50 states and the District of Columbia. Lastly, the LOCALITY SUMMARIES provide an overview of local law restrictions on most private employers’ inquiries about, receipt of, and use/consideration of background check information in major United States localities.

or local requirements (except as otherwise stated)², background check requirements for DOT applicants who apply only by fax, Internet, etc. (i.e., not in person), and electronic signature and other electronic/online requirements.

We recommend you replace the forms/letters/documents you currently are using, or **which are provided by your CRA**, with these Background Check Materials, for several reasons. The federal Fair Credit Reporting Act (“FCRA”) places the obligation for form- and letter-compliance on employers. Additionally, your contract with your CRA likely places that burden on you as well.

A special note about our use and reference in these Background Check Materials to various state laws and requirements: except as otherwise noted, when we refer to the law of a particular state, we **generally** mean the law triggered by either/both of two situations: (1) an applicant is a resident of that state at the time (a) s/he completes the D&A forms, (b) the background check is conducted, or (c) the results are returned to the employer; or (2) an applicant applies to work at an employer’s facility or location in that state. For example, if California state law is discussed in these Background Check Materials, the California state law (e.g., restriction, requirement, etc.) generally would be applicable not only to a California resident applying to work in a California job site, but also to (1) a California resident applying to work at a non-California (e.g., Arizona) location, as well as (2) a non-California (e.g., Arizona) resident applying to work at a California location. As discussed in the LOCALITY SUMMARIES, local laws and requirements may be different and usually apply to only applicants/employees who will/are working in the respective locality.

R&R outline: This R&R is designed to provide basic information on how to prepare and use the forms, letters, and documents included in your subscription. The first section (Section I) discusses (1) how to set up the disclosure and authorization forms (Section I.A.) and (2) the process for using these forms (Section I.B.). The second section (Section II) explains (1) how to set up the pre-adverse action letters, the adverse action letters, and other related letters (Section II.A.) and (2) the pre-adverse action, reasonable waiting period, and adverse action process (Section II.B.). The third section (Section III) addresses other additional background check-related documents included with the subscription. Lastly, the fourth section (Section IV) discusses the general scope of the Background Check Materials.

For a virtual table of contents and quick, convenient access to various sections and subsections, please click on the Bookmarks tab in the toolbar to the left.

I. Disclosure & Authorization Process

A. Set-Up of Forms

1. *Overview*

² The ***OD Comply: Background Checks*** subscription covers local background check laws in only the following states, counties, and cities (i.e., localities; listed alphabetically by state): Los Angeles, CA; San Francisco, CA; Chicago, IL; Cook County, IL; Baltimore, MD; Montgomery County, MD; Prince George’s County, MD; Columbia, MO; Buffalo, NY; New York City, NY; Rochester, NY; Portland, OR; Philadelphia, PA; Austin, TX; Seattle, WA; and Madison, WI.

The **Disclosure & Authorization forms** (“D&A forms”) (**Forms 1-A, 1-B, 1-C, 1-D, and 1-E**)³ are designed for conducting background checks in all 50 states and the District of Columbia. They must be provided, if applicable and as set forth below, to the applicant/employee prior to conducting a background check. (See FEDERAL SUMMARY, STATE SUMMARIES, and LOCALITY SUMMARIES for additional guidance on lawfully conducting background checks).

2. *Color-Coded Legend*

In the first page header of each of the D&A forms, there is a Legend/Key, which includes the following color-coding explanation:

- (1) Information/disclosures highlighted in **yellow** are instructions regarding the form or blanks for you to complete (e.g., the name of your CRA).
- (2) Information/disclosures highlighted in **green** are required for conducting **credit background checks** (i.e., checks on a person’s creditworthiness, credit standing, credit capacity, credit record, credit history, etc.). If you **never** intend to conduct credit background checks, all information/disclosures highlighted in green may be removed.
- (3) Information/disclosures highlighted in **blue** are required for conducting **investigative consumer reports** (as defined by the FCRA).⁴ If you **never** intend to conduct investigative consumer reports, all information/disclosures highlighted in blue may be removed.

Prior to your use of the D&A forms with applicants/employees, please follow all instructions; complete and insert requested information as necessary; remove the header, all strikethroughs, and highlighting; and convert all red typeface to black.

3. *Organization of D&A Documents*

We have organized the D&A forms required by federal and state law into five separate, but related, documents:

³ These Forms correspond to the background check documents accompanying this R&R on the OD Comply Portal. **For your convenience and ease of reference, each Form is highlighted in this R&R.**

Additionally for your reference, most documents/forms have a descriptive name, in **navy-blue** typeface, in the upper, right-hand corner on Page 1 of each respective document/form. This **navy-blue** descriptive name should be deleted before using the document/form.

⁴ Under the federal FCRA, an **investigative consumer report** is a special type of background check that is obtained through **personal interviews** with an applicant’s/employee’s neighbors, friends, associates, or others with whom the applicant/employee is acquainted. See FEDERAL SUMMARY - Section III.A.1.b. Confusingly, California law uses the term to mean background checks generally. See STATE SUMMARIES, California - Section III.b.ii.

- (1) **Background Check Disclosure**⁵ **(Form 1-A)**;
- (2) **Additional Disclosures** **(Form 1-B)**;
- (3) **California State Law Disclosures (Non-Credit)** **(Form 1-C)**;
- (4) **Background Check Authorization** **(Form 1-D)**; and
- (5) **California Credit Check Notice and Authorization** **(Form 1-E)**.

4. ***D&A Forms Must Be Separate and Apart from Each Other and from Other Documents/Information.***

All D&A forms should exist separate and apart from each other and other documents, and should not be stapled or otherwise bound together or with other documents (e.g., to the application, etc.). For instance, Form 1-A should never be attached to (a) Form 1-B or (b) any other forms. To this end, we recommend that you consider using completely different typefaces/fonts for each of the forms (e.g., **Form 1-A** should use a typeface/font different than the typeface/font used in each of the other forms). The version of **Forms 1-A** through **1-D** provided by **OD Comply** use different fonts for this reason.

⁵ To help improve readability, in some instances we will refer to each of these documents by the underlined portion of its name. Thus, you may see us refer to the **Background Check Disclosure (Form 1-A)** simply as “Disdosure.”

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

ADDITIONAL DISCLOSURES

All applicants/employees: ABC Corporation [for maximum flexibility, this should be the name of the highest parent company that might conduct background checks] and/or its subsidiaries, affiliates, other related entities, successors, and/or assigns (the “Company”), may obtain an investigative consumer report on you to be used for employment purposes, including your application for employment. Under federal law, an investigative consumer report is a consumer report or portion thereof in which information on your character, general reputation, personal characteristics, and mode of living is obtained through personal (including telephonic)

Colorado applicants/employees only: If the Company obtains information bearing on your credit worthiness, credit standing or credit capacity, it will be because the information is substantially related to the job for which you are being considered/are currently occupying and to evaluate whether you would present an unacceptable risk of theft or other dishonest behavior in the job for which you are being considered/are currently occupying.

Montana applicants/employee only: You have a right to request from Company disclosures of the nature, scope, and substance of any investigative consumer report.

Employer Background Checks

FEDERAL LAW SUMMARY

III. BACKGROUND CHECK PROCESS - FEDERAL LAW

A. Phase 1: Disclosure & Authorization Forms (“D&A”)⁶

Before procuring a background check report under federal law for **employment purposes**,⁷ an employer must ensure that it has provided an applicant/employee with appropriate disclosures and obtained authorization to obtain the report.

1. FCRA D&A Requirements

a. FCRA: General Disclosure Requirements⁸

The FCRA prohibits an employer from procuring a background check report unless the employer has first 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.” 15 U.S.C. § 1681b(b)(2)(A)(i). Importantly, this federal disclosure must be (1) **“clear and conspicuous”** and (2) in a document that **“consists solely” of the required disclosure**. *Id.* at § 1681b(b)(2)(A)(i). The language provided in the Background Check Disclosure (Form 1-A) complies with these requirements.

Many FCRA class action lawsuits against employers are premised on allegations 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”

⁶ A number of **states** and **localities** have separate disclosure and authorization requirements as well. For additional information, please see the respective STATE SUMMARIES and LOCALITY SUMMARIES.

⁷ **Employment purposes** is defined by the FCRA as “the purpose of evaluating a consumer for employment, promotion, reassignment or retention for employment.” 15 U.S.C. § 1681a(h). The Federal Trade Commission has interpreted this definition broadly, to include independent contractors and volunteers. *See* Federal Trade Commission, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations, p. 32 (July 2011). For this reason the term “employer,” “employee,” and “applicant,” as used in this document, should be interpreted to include the employment, as well as independent contractor and volunteer contexts.

⁸ Each respective phase in Section III (“Background Check Process – Federal Law”) discusses (i) FCRA requirements, followed by (ii) Title VII requirements.

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 the **Background Check Disclosure (Form 1-A)** without specific guidance from Ogletree Deakins.⁹
 - (a) In addition to the required federal disclosure, the **Background Check Disclosure (Form 1-A)** 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* Federal Trade Commission, [40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations](#), p. 51 (Jul 2011). It is very important that **additional** information not be added unless approved by legal counsel.
 - (b) Some FCRA disclosure forms from other sources (including from some CRAs) 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 violates the FCRA's "consist solely" requirement and, therefore, calls into question the validity of that form. A number of recent cases have focused on this issue. The **Background Check Disclosure (Form 1-A)** does not contain a "liability release" sentence/paragraph or other extraneous information for this reason.
- (2) The **Background Check Disclosure (Form 1-A)** cannot be combined with or be a part of any other document/screen.¹⁰
 - (a) For **hard-copy use**, this means that the **Background Check Disclosure (Form 1-A)** should not be stapled or otherwise bound to other documents. We also recommend the use of non-consecutive pagination and different fonts to emphasize that the different D&A forms, including the **Background Check Disclosure (Form 1-A)** are different documents. The **D&A forms** included in this subscription (**Forms 1-A, 1-B, 1-C, 1-D, and 1-E**) incorporate these suggestions.

⁹ Or other appropriate legal counsel.

¹⁰ For detailed instructions on providing the **Background Check Disclosures (Form 1-A)**, as well as the other required background check disclosure and authorization ("D&A") forms, to applicants/employees using paper/hard-copy forms and/or online screens, please see Sections IA.5 and 6 of the R&R.

- (b) For **electronic use**, this means the **Background Check Disclosure (Form 1-A)** should be provided on its own screen, separate and distinct from all other screens.
- (c) While the FCRA allows an employer to provide the disclosure at the same time as the employment application, it must remain **separate** from the application (i.e., not stapled/bound to, or on the same screen as, the application).
- (3) Although the FCRA technically allows the FCRA authorization to be combined with the FCRA disclosure, doing so arguably limits what can be included in the Authorization, given the “consists solely” requirement. Because there are a variety of items most employers need to include in the authorization (e.g., “sharing” authorization, evergreen provision, etc.), we have separated the **Background Check Disclosure (Form 1-A)** from the **Background Check Authorization (Form 1-D)**.¹¹

b. FCRA: Disclosure Requirements - *Investigative Consumer Reports*

An **investigative consumer report** is a type of background check report “in which information on a [person’s] character, general reputation, personal characteristics, or mode of living is obtained **through personal interviews** with neighbors, friends, or associates of the [person...] or with others with whom he is acquainted or who may have knowledge concerning any such items of information.” 15 U.S.C. § 1681a(e) (emphasis added). An employer must provide **additional disclosures** to the applicant/employee if it is procuring an investigative consumer report. These disclosures must:

- (1) Clearly and accurately state that the employer may obtain an investigative consumer report, including information on an individual’s character, general reputation, personal characteristics, and mode of living; and

¹¹ New Jersey and Massachusetts state laws also require that the disclosure be separate from the authorization (see the New Jersey and the Massachusetts sections of the separate STATE SUMMARIES for additional information on this separateness requirement.)

Employer Background Checks

STATE LAW SUMMARIES

12. HAWAII

I. CRIMINAL CHECKS

a. Arrest Records – Employer Inquiry or Use

Under Hawaii law, it is unlawful for an employer “to refuse to hire or employ or to bar or discharge from employment, or otherwise to 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, *Guideline for Pre-Employment Inquiries (Application Forms and Job Interviews)*, (October 15, 2013), p. 2, available at <http://labor.hawaii.gov/hcrc/publications>. “Arrest and court record” is defined broadly as “includ[ing] any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted pursuant to any law enforcement or military authority.” Haw. Rev. Stat. § 378-1.

This restriction, however, is not implicated if the employer does not make the employment decision on the “mere fact” of the employee’s arrest or court record. In *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 803 F.2d 471 (9th Cir. 1986), the Ninth Circuit reasoned that the employer did not violate section 378-2 when “[t]he discharges were not based on the ‘mere fact’ of the plaintiffs’ arrest and court record, **but instead were due to the perception that plaintiffs were involved in drug-related activity.**” *Id.* at 475 (emphasis added). Employers are cautioned not to over-rely on the *Kinoshita* decision, given its age and its limited subsequent use by other courts for this proposition.

There is **individual** (e.g., supervisor, manager, owner, decision-maker) 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 Hillhouse v. Hawaii Behavioral Health, LLC*, 2015 WL 3448706, 2015 U.S. Dist. LEXIS 69612 (D. Haw. May 29, 2015). However, the Supreme Court of Hawaii has ruled that other prohibitions in Haw. Rev. Stat. § 378-2 may **not** extend individual liability. *Lales v. Wholesale Motors Co.*, 328 P.3d 341, 352 (Haw. 2014) (finding that individual liability does not apply to Haw. Rev. Stat. § 378-2(a)(1)(A) or 378-2(a)(2)); *but see Hillhouse v. Hawaii Behavioral Health, LLC*, 2014 WL 4662378 (D. Haw. 2014) (indicating an individual owner may be liable under these provisions).

As described more fully in the Introduction to the STATE SUMMARIES, Ogletree Deakins generally advises employers not inquire about or use arrest records.

i. Expunged arrest records

Individuals who have been arrested for or charged with (but not convicted of) certain crimes, which thereafter were expunged, may obtain a certificate authorizing them to say in response to any question or inquiry (e.g., an employment application) that they have no arrest record. Haw. Rev. Stat. §§ 571-88(c) & (d) (juvenile arrest records); 831-3.2(e) (adult arrest records). Employers may not discharge/fail to hire such individuals for not revealing such an arrest. *Id.* §§ 571-88(d) & 831-3.2(e).

b. Conviction Records – Employer Inquiry or Use

See Section I.a., above, regarding the prohibition against employers' refusal to hire, discharge, or otherwise discriminate against an applicant/employee because of his/her criminal record. Haw. Rev. Stat. § 378-2(a)(1)(A).

Subject to these restrictions, Hawaii allows employers to consider an applicant's/employee's conviction record for employment purposes if employers comply with a number of specific requirements.¹² See *Id.* § 378-2.5. Typically, employers may consider an applicant's/employee's conviction record from the last ten years only, **excluding periods of incarceration.** *Id.* § 378-2.5(c); see also *Kabumoku v. United Airlines*, 584 Fed. Appx. 295 (9th Cir. 2014) (finding that in determining whether a conviction was properly considered within the ten year 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). If the applicant/employee claims that the period of incarceration was less than what is shown on the applicant's/employee's conviction record, an employer must give the applicant/employee an opportunity to present documentary evidence of a date of release to establish his/her period of incarceration. Haw. Rev. Stat. § 378-2.5(c).

Moreover, the law requires that employers inquire about or consider a conviction record only if the conviction record “bears a rational relationship to the duties and responsibilities of the position.” *Id.* § 378-2.5(a) & (b). In *Wright v. Home Depot U.S.A., Inc.*, 142 P.3d 265 (Haw. 2006), the Supreme Court of Hawaii determined that even though “rational relationship” is not defined in the statute, “the plain and obvious meaning of the phrase is found in the words themselves . . . the relationship between the conviction and the employment must be rational.” *Id.* at 275–76. See also *Kabumoku v. United Air Lines, Inc.*, 584 Fed. Appx. 295, 296 (9th Cir. 2014) (finding rational relationship between job as customer service representative, who would assist minors and disabled passengers, and conviction for sexual contact with a person who is mentally defective, mentally incapacitated, or physically helpless). The relationship must, however, not be so “remote or attenuated” that it is “arbitrary or irrational.” *Williamson v. Love's Him, Inc.*, 2015 WL 470288, *6 (D. Haw. 2015) (finding rational relationship between job as receiver/stocker and conviction for felony assault, harassment and assault in the third degree because of position's need for person to remain polite and professional while under pressure); *but see Shimose v. Hawaii Health Systems Corp.*, 345 P.3d 145, 153 (Haw. 2015) (indicating that employer failed to establish rational relationship between job as radiation technician in hospital and conviction for distribution of drugs without evidence of employee's potential access to controlled substances, or other relevant evidence).

¹² Even though this law contains a number of exemptions, many of the exemptions will not apply to most employers. These exceptions apply to employers expressly permitted or required to inquire into an individual's criminal history for employment purposes pursuant to federal or state law, such as government agencies/departments, the judiciary, 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, homeowners association, or condominium projects. Haw. Rev. Stat. § 378-2.5(d).

As set forth below, Hawaii law also sets forth specific timing requirements for background checks. As a result of Hawaii's "conditional employment offer" requirement (*see* Section I.b.ii., below), the **General Adverse Action Letter (Form 16)** includes optional language for use in Hawaii regarding **revocation of a conditional employment offer**. If you will never run criminal checks on Hawaii applicants/employees, you may omit this Hawaii-specific language from the Adverse Action Letter.

c. Job-Relatedness Requirement

In the event negative information is obtained, employers should consider only criminal conviction information that has been determined to have a "rational relationship" to job duties and responsibilities. Haw. Rev. Stat. Ann. § 378-2.5(a).

See also Section I.b., above.

d. Public Policy Regarding Conviction and/or Arrest Records – N/A

e. Disclosure Requirement – N/A

f. Selected Restrictions on Consumer Reporting Agencies

Arrest records should not be included in criminal checks provided by your CRA. Haw. Rev. Stat. § 846-9.

g. Ban the Box--Restrictions

Hawaii's Ban the Box statute allows "inquiry into" and consideration of criminal conviction records for prospective employees only **after conditional offer of employment**, which may be withdrawn if the applicant has a conviction record that bears a "rational relationship to the duties and responsibilities of the position." Haw Rev. Stat. § 378-2.5(b); Haw. Civil Rights Comm'n, *Guideline for Pre-Employment Inquiries (Application Forms and Job Interviews)*, (October 15, 2013), p. 2, available at <http://labor.hawaii.gov/hcrc/publications>. Although the law is not perfectly clear, it appears an employer may not conduct a criminal background check until after the conditional offer of employment is extended. *See* Haw Rev. Stat. § 378-2.5(b) ("inquiry into and consideration of conviction records" arguably includes conducting background checks). However, employers may still have applicants/employees complete OD Comply D&A forms (which do not inquire about criminal history) before receiving a conditional offer of employment.

h. Other – N/A

II. CREDIT CHECKS

As set forth in detail below, Hawaii law places a number of restrictions on most private employers' consideration of an applicant's/employee's credit record.¹³ See Haw. Rev. Stat. §§ 378-2(a)(8), 378-2.7.

a. Job-Relatedness Requirement

Employers may not refuse to hire or employ, bar from employment, discharge, or otherwise discriminate against any individual "because of the individual's credit history or credit report, unless the information in the individual's credit history or credit report directly relates to a bona fide occupational qualification." Haw. Rev. Stat. § 378-2(a)(8). Bona fide occupational qualification ("BFOQ") is defined as a qualification "reasonably necessary to the normal operation of a particular business or enterprise, and that [has] a substantial relationship to the functions and responsibilities of prospective or continued employment." *Id.* § 378-3(2). In short, BFOQs are qualifications that affect an employee's ability to do a job. *Sam Teague, Ltd., v. Hawaiian Civil Rights Comm.*, 971 P.2d 1104, 1115 (Haw. 1999). The Hawaii Civil Rights Commission provides the following example of a BFOQ which may justify withdrawing a conditional offer of employment based on credit history or credit report: a position which requires an employee to be bonded in order to perform the duties and responsibilities of the job. Haw. Civil Rights Comm'n, *New 2009 Law Prohibits Employment Discrimination Based On Credit History or Credit Report*, available at <http://labor.hawaii.gov/hcrc/publications>.

In the event negative credit information is obtained, employers should ensure that conditional offers are not withdrawn until the information has been determined to meet the BFOQ requirements (*see* Section II.a.i, below).

i. Timing of Credit Background Check

Under Hawaii law, "[i]nquiry into and consideration of a prospective employee's credit history or credit report may take place only **after the prospective employee has received a conditional offer of employment.**" Haw. Rev. Stat. Ann. § 378-2.7(a)(1) (emphasis added). Such a conditional offer may be withdrawn after receiving the results of the report only if information contained in the report "is directly related to a bona fide occupational qualification." *Id.* Employers should procure a credit check **only after a conditional offer of employment has been extended.**

b. Disclosure Requirement – N/A

c. Other – N/A

¹³ Exceptions to these restrictions include for (1) managerial or supervisory employees, (2) employers "expressly permitted or required to inquire into an individual's credit history for employment purposes pursuant to any federal or state law," and (3) federally insured financial institutions. Haw. Rev. Stat. § 378-2.7(a)(2)-(4). It does not appear typical employers will be able to fit within the "expressly permitted" exception.

Employer Background Checks
LOCALITY SUMMARIES

9. **BUFFALO, NEW YORK**

I. **CRIMINAL CHECKS**

a. **Application/Scope**

Buffalo's Ban the Box ordinance (the "Ordinance") limits an employer's ability to inquire into or take adverse action against an applicant/employee with a criminal record. Buffalo City Ord. § 154-25, *et seq.*

i. Companies/Employers Covered

The Ordinance applies to employers with fifteen or more employees in the City of Buffalo. Buffalo City Ord. § 154-26. However, the ordinance does not apply if:

- (1) the prohibited inquiries or adverse actions are specifically authorized by any other applicable law;
- (2) the employer is the Department of Police or Fire, or any other employer hiring for police officer and peace officer positions as defined by Criminal Procedure Law; or
- (3) the employer is any public or private school, or any public or private service provider of direct services specific to the care or supervision of children, young adults, senior citizens, or the physically or mentally disabled.

Id. § 154-28.

ii. Individuals Covered

The definition of employment covers any occupation, vocation, job, or work for pay, including temporary or seasonal work, and specifically includes contracted work. Buffalo City Ord. § 154-26.

iii. Geographic Coverage

The Ordinance only applies to jobs located in the city of Buffalo. Buffalo City Ord. § 154-27.

b. Criminal Inquiries - Limitations

The Ordinance prohibits an employer from making an inquiry regarding any criminal conviction¹⁴ during the application process (which begins when the applicant inquires about the employment sought and ends when an employer has accepted an application) and before a first interview. Buffalo City Ord. § 154-27.

c. Completion of D&A Forms – Limitations – N/A

d. Conducting Criminal Background Checks – Limitations

Although the law is not perfectly clear, it appears an employer may not conduct a criminal background check until after the first interview. *See* Buffalo City Ord. § 154-27(B) (use of the broad term “inquire” arguably includes conducting background checks). If an employer does not conduct an interview, the employer must inform the applicant whether a criminal background check will be conducted before employment is to begin. *Id.*

e. Consideration of Records – Limitations – N/A

i. Arrest Records – Employer Inquiry or Use – N/A

ii. Expunged Records/Deferral of Judgment – Employer Inquiry or Use – N/A

iii. Conviction Records – Employer Inquiry or Use – N/A

f. Job-Relatedness Requirements

Employers must comply with Article 23-A of the New York Correction Law when considering an applicant’s/employee’s prior convictions. Buffalo City Ord. § 154-27.

g. Disclosure Requirements – N/A

h. Pre-Adverse Action Requirements – N/A

i. Adverse Action Letter Requirements – N/A

j. Other

¹⁴ A “conviction” is defined as any sentence imposed by a court arising from a verdict or guilty plea including (a) a sentence of incarceration, (b) a suspended sentence, (c) a sentence of probation, (d) an unconditional discharge, or (e) a diversion program. Buffalo City Ord. § 154-26.

i. Private Cause of Action

A private cause of action is available for injunctive relief, damages, and other appropriate relief, including attorney's fees. Buffalo City Ord. § 154-29.

II. CREDIT CHECKS

- a. Application/Scope – N/A
 - i. Companies/Employers Covered - N/A*
 - ii. Individuals Covered – N/A*
 - iii. Geographic Coverage - N/A*
- b. Credit Inquiries – Limitations – N/A
- c. Completion of D&A Forms – Limitations – N/A
- d. Procurement of Credit Checks – Limitations – N/A
- e. Consideration of Credit Records – Limitations - N/A
- f. Job-Relatedness Requirement - N/A
- g. Disclosure Requirement - N/A
- h. Pre-Adverse Action Requirements - N/A
- i. Adverse Action Letter Requirements - N/A
- j. Other - N/A

III. BACKGROUND CHECKS – GENERALLY

- a. Disclosure Requirement – N/A
- b. Other – N/A