

## **RBE 1. GENERAL PROVISIONS**

### **RBE 1.01 Construction of Rules**

These Rules shall be liberally construed to promote the purposes of Portland City Code Chapter 23.10 (“Ordinance”) and permit the City or BOLI to accomplish its administrative duties and to secure the just and efficient determination of the merits of all complaints received.

### **RBE 1.02 Definitions**

1. “City” means the City of Portland, Oregon, or the area within the territorial City limits of the City of Portland, Oregon, and such territory outside this City over which the City has jurisdiction or control by virtue of ownership or any Constitutional or Charter provisions, or law.
2. “BOLI Commissioner” means the Commissioner of the Bureau of Labor and Industries (BOLI) of the State of Oregon.
3. “Employer” means any person or entity who directly or through an agent employs another for a position being performed a majority of the time within the City, but does not include:
  - a. The United States Government; or
  - b. The State of Oregon and any office, department, agency, authority, institution, association, society or other body of the state, including the legislature and the judiciary; or
  - c. Any political subdivision of the State of Oregon or any county, city, district, authority, public corporation or public entity other than the City; or
  - d. Any person or entity with fewer than six employees.
4. “Employ” means to engage or use the personal service of another person on a full-time, part-time, temporary or seasonal basis, where the Employer reserves the right to control the means by which such service is performed.
5. “Employee” means a person employed by an Employer.
6. “Conditional Offer of Employment” means any offer to employ another that is conditioned solely on:
  - a. The results of an Employer’s inquiry into, or gathering of information about, the Applicant’s criminal history; and/or
  - b. Some other contingency expressly communicated to the Applicant at the time of the offer.

7. “Volunteer” means any person other than one who is a participant in a work experience or school directed professional training program, or receives benefits such as insurance, tuition reimbursement, or access to professional certification.
8. “Applicant” means a person who applies or is otherwise a candidate to become an Employee.
9. “Arrest History” means information indicating that a person has been apprehended, detained, taken into custody, held for investigation, or restrained in any way by a law-enforcement agency or military authority due to an accusation or suspicion that the person may have committed a crime or that the person is a juvenile who may have committed an act that would be a crime if committed by an adult.
10. “Conviction History” means information regarding a final criminal adjudication, a final juvenile delinquency adjudication, or any other criminal or juvenile-delinquency disposition adverse to a person, including a verdict of guilt, finding of guilt, plea of guilty, plea of no-contest or *nolo contendere*, or finding that a juvenile is within the jurisdiction of the juvenile court by reason of having committed an act that would be a crime if committed by an adult.
11. “Criminal History” means Arrest History or Conviction History, or both.
12. “Criminal History Matrix” means Exhibit A attached to these Rules.

## **RBE 2 USE OF CRIMINAL HISTORY BY AN EMPLOYER**

### **RBE 2.01 In General**

Except as expressly authorized by these Rules, it is an unlawful practice for an Employer to exclude an Applicant from consideration, or to rescind a Conditional Offer of Employment, solely because of the Applicant’s Criminal History.

### **RBE 2.02 Before Conditional Offer of Employment**

1. **In General.** An Employer who gathers, obtains, or uses an Applicant’s Criminal History before making a Conditional Offer of Employment violates the Ordinance and these Rules.
2. **Gathering of Criminal History Prohibited.** Before making a Conditional Offer of Employment, an Employer shall not engage in any direct or indirect conduct that is intended or objectively likely to result in the gathering or disclosure of an Applicant’s Criminal History. This includes, but is not limited to, performing criminal background checks, requesting an Applicant to disclose his or her Criminal History in an application form or at an interview, or engaging in any conduct that is intended or objectively likely to cause an Applicant to disclose his or her Criminal History.

3. **Self-Disclosure by Applicant.** If, despite the Employer's compliance with Subsection 1 above, an Applicant discloses his or her Criminal History at any time before a Conditional Offer of Employment is made by the Employer, the Employer must disregard that information and must take reasonable steps to prevent further disclosure or dissemination of the Applicant's Criminal History. The Employer shall not base its decision to make or not make a Conditional Offer of Employment upon any Criminal History that was disclosed by the Applicant.

### **RBE 2.03 After Conditional Offer of Employment**

1. **In General.** An Employer may obtain or consider an Applicant's Criminal History only after making a Conditional Offer of Employment to the Applicant.
2. **Permissible Uses of Criminal History.** An Employer may rescind a Conditional Offer of Employment based upon an Applicant's Criminal History only if the Employer determines in good faith that a specific offense or conduct by the Applicant is job related for the position in question and consistent with business necessity.
3. **Individualized Assessment Required.** When making a good-faith determination whether a specific offense or conduct by an Applicant is job related for the position in question and consistent with business necessity to warrant rescinding a Conditional Offer of Employment, an Employer must conduct an individualized assessment of:
  - a. The nature and gravity of the Applicant's offense or conduct;
  - b. The time that has elapsed since the offense or conduct;
  - c. The position for which the Applicant is being considered.
4. **Prohibited Uses of Criminal History.** Notwithstanding Subsections 1 through 3 above, an Employer is prohibited from considering the following types of Criminal History after making a Conditional Offer of Employment:
  - a. Any Arrest History that did not lead to conviction or juvenile adjudication, unless the related crime or act that would be a crime if committed by an adult is unresolved, or related criminal charges or juvenile adjudication are still pending against the Applicant;
  - b. Any Conviction History, and related Arrest History, that has been judicially voided or expunged;
  - c. Any Criminal History that was 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.

5. **Notification Required.** If an Employer rescinds a Conditional Offer of Employment because of an Applicant's Criminal History, the Employer must notify the Applicant of that decision promptly and in writing, and must identify the specific item of Criminal History on which the rescission is based and the source of that Criminal History.
  - a. As used in this subsection, notification "in writing" includes in-person delivery of a paper document, delivery of such a paper document through the postal service or an equivalent private courier service, electronic delivery via e-mail, and any other means by which the Applicant is provided with a permanent record of the notification. It does not include telephonic voicemail or text messaging.
  - b. An Employer may use the form attached to these Rules as Exhibit B to notify an Applicant of the rescission of a Conditional Offer of Employment.

#### **RBE 2.04 Exceptions**

1. **Other Laws.** The prohibitions of the Ordinance do not apply if federal, state, or local law requires an Employer to consider an Applicant's Criminal History.
2. **Law Enforcement.** The prohibitions of the Ordinance do not apply to an Employer that is a law-enforcement agency or that is part of the criminal-justice system.
3. **Volunteers.** The prohibitions of the Ordinance do not apply to an Employer that is considering an Applicant for a non-Employee volunteer position only.
4. **Sensitive Positions.** For the following positions, an Employer may consider an Applicant's Criminal History at any point of the hiring process consistent with ORS 659A.360, and may use the Criminal History Matrix to screen Applicants, but must otherwise comply with all other requirements of the Ordinance and these Rules. The Employer must conduct the same type of individualized assessment as under RBE 2.03(3) for any Criminal History not contained in the Criminal History Matrix, or if the Employer declines to use the Criminal History Matrix.
  - a. Positions involving direct access to, or the provision of services to, children, the elderly or persons with disabilities
  - b. Positions involving direct access to, or the provision of services to, persons with mental illness, alcohol or drug dependence, or substance-abuse disorders.
  - c. Positions that require one or more of the following responsibilities:

- Master key holders, including maintenance personnel
  - Tow truck operators (may access DMV driving record as well)
  - Drivers of goods, equipment, personal property and persons (may access DMV driving record as well)
  - Access to confidential and/or sensitive info (personnel, medical, discipline records, etc.)
  - Mandatory insurance bonding
- d. 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.

## **RBE 2.05 Confidentiality and Nondisclosure**

An Employer must keep confidential any Criminal History that it obtains, unless disclosure is required by law.

## **RBE 3 ENFORCEMENT**

### **RBE 3.01 Complaints**

1. **Complaint by Applicant.** Any person claiming to be aggrieved by a violation of the Ordinance or these Rules may file a complaint with the BOLI Commissioner. Such a complaint will use the procedures outlined in ORS 659A.820, as applicable.
2. **Complaint by City, BOLI Commissioner, or Attorney General.** If the City, the BOLI Commissioner, or the Attorney General has reason to believe that any Employer has violated the Ordinance or these Rules, it may file a complaint using the procedures outlined in ORS 659A.825, as applicable.
3. **Investigation and Hearing Procedures.** In investigating complaints, conducting hearings, and enforcing the Ordinance or these Rules, the BOLI Commissioner shall have the same powers and shall follow the same procedures as under ORS 659A.820 through 659A.865 and their implementing regulations, as applicable.
4. **No Private Right of Action.** Subsections 1 and 2 above are the exclusive vehicle for initiating enforcement against an Employer, and the Ordinance does not create a private right of action by which a person claiming to be aggrieved by a violation of the Ordinance or these Rules may file an action in circuit court against an Employer.

### **RBE 3.02 Time Limitation**

A complainant has 180 days after the delivery of the notification required by RBE 2.03 (5) to file a complaint with the BOLI Commissioner. Complaints filed more than 180 days after such notification are time-barred.

### **RBE 3.04 Civil Penalties**

1. In addition to the remedies provided under ORS 659A.820 through 659A.865, if the City brings an action against an Employer who has demonstrated a pattern and practice of violating the Ordinance, the BOLI Commissioner may assess a civil penalty of up to \$5,000 for each violation of the Ordinance or these Rules.
2. Any civil penalties assessed by the BOLI Commissioner under this section shall be payable directly to the City.

### **RBE 3.05 Orders Issued**

Any order issued by the BOLI Commissioner under the Ordinance or these Rules shall be viewed as one issued by a hearings officer employed by the City within the meaning of ORS 3.136(3) and shall be fully enforceable by the City.