

IMPACT STATEMENT

Legislation title: Add Code Removing Barriers to Employment to establish procedures for the use of criminal history information by employers within the City (Ordinance; add Code Chapter 23.10)

Contact name: Josh Alpert

Contact phone: 503-823-3579

Presenter name: Judy Prosper, City Attorney Office

Purpose of proposed legislation and background information:

The purpose of this ordinance is to establish procedures for the timing and use of criminal history information by employers within the city of Portland, for the purpose of reducing the barriers to employment experienced by applicants with a criminal background.

Financial and budgetary impacts:

In preparation for the adoption of this policy, City Council approved \$100,000 in one time resources in the Fiscal Year 2015-16 budget for education, outreach and contracting with BOLI for enforcement.

Community impacts and community involvement:

This ordinance would impact business owners and current and ex-offenders within the city of Portland.

Studies show that removing job barriers for people with criminal records helps the economy. The National Employment Law Project estimates that there are roughly 70 million people in the United States who have arrest or conviction records¹. Many employers refuse to consider any applicants with criminal records. Many help-wanted advertisements disqualify those with criminal records. Routine criminal background checks by employers have increased dramatically in recent years.

Putting formerly incarcerated people back to work increases their lifetime earnings and tax contributions and saves public funds by reducing recidivism. Employing the formerly incarcerated also improves public safety, since employment has been shown to be a major factor in reducing further illegal activity by those who have served time.

Studies show that personal contact and context can put a criminal record in perspective and give applicants with criminal histories a fair chance at employment. Many employers who conduct a qualitative assessment are willing to consider applicants with certain criminal convictions who would be screened out by a blanket prohibition on hiring those with a criminal record. Having personal contact with potential employers has been shown to measurably reduce the negative effect of a criminal record. It has been shown that in many instances, applicants can compensate for their criminal records based on their personality, qualifications and ability to make in-person contact with hiring authorities.

Many people with criminal records can be valuable employees. Employers who have hired people with records often find that they are excellent employees who are highly motivated to create better lives for themselves. Employers have noted that such employees work harder because they feel have something to prove and are appreciative of the opportunity afforded them

Additionally, waiting until the conditional offer phase provides clarity that the applicant was denied the position not because of their qualifications, skills or merits, but because of their background check results. This can be beneficial to both the employer and the applicant. By waiting until the conditional offer phase, the employer can make clear to both the applicant and the enforcement agency that the candidate was fully considered for the position.

We have reached out to businesses, business organizations, labor organizations, the Urban League of Portland, and services providers who work directly with the affected population. Following the first council hearing, the Mayor’s office convened a work group of council office staff, advocates and business representatives who met several times to review and refine the ordinance.

Budgetary Impact Worksheet

Does this action change appropriations?

- YES: Please complete the information below.
- NO: Skip this section

Fund	Fund Center	Commitment Item	Functional Area	Funded Program	Grant	Sponsored Program	Amount

DEPARTMENT OF HUMAN SERVICES
Aging & People with Disabilities and Developmental Disabilities
ORS 443.004/OAR 407-007-0275 Crimes

Public funds may not be used to support, in whole or in part, the employment in any capacity of an individual having contact with a recipient of home health or in-home care agency services or support services, or contact with a resident of a residential facility or an adult foster home, who has any of the following convictions. **ORS 443.004/OAR 407-007-0275 impacts anyone with this type of employment hired on or after 7/28/2009, or changing positions on or after 7/28/2009.**

If the individual has been convicted of any of the crimes listed below (or **attempt, conspiracy, or solicitation** for any of the crimes), THE INDIVIDUAL IS NOT ELIGIBLE FOR THE POSITION and there are no hearing rights with BCU.

- **FIVE YEAR CRIMES:** Regarding care for Vulnerable individuals 65 years or older. If the individual is exclusively caring for individuals who are 65 years or older, the crimes in the list below in underlined italics make the individual ineligible for five years from the date of conviction [If the client is under 65, the crime is PERMANENT.]. Thereafter, the conviction would be considered a permanent review crime subject to a weighing test.
- **TEN YEAR CRIMES:** Certain Drug Crimes. If the individual has a conviction for delivery (selling) of drugs or manufacture (making) of drugs (or attempt, conspiracy, or solicitation for these types of crimes) in the past 10 years.
- **PERMANENT CRIMES:** The following crimes involve violence, harm to vulnerable individuals, serious theft, and sex crimes. A conviction of one of these crimes would make an individual permanently ineligible (unless as noted above in Five Year Crimes).

ORS 163.095, Aggravated murder	<u>ORS 163.465, Public indecency</u>
ORS 163.115, Murder	<u>ORS 163.467, Private indecency</u>
ORS 163.118, Manslaughter I	ORS 163.525, Incest with a child victim
ORS 163.125, Manslaughter II	ORS 163.535, Abandonment of a child
ORS 163.145, Criminally negligent homicide	ORS 163.537, Buying or selling a person under 18 years of age
ORS 163.149, Aggravated vehicular homicide	ORS 163.547, Child neglect I
ORS 163.165, Assault III	ORS 163.670, Using a child in display of sexually explicit conduct
ORS 163.175, Assault II	ORS 163.680, Paying for viewing a child's sexually explicit conduct
ORS 163.185, Assault I	ORS 163.684, Encouraging child sexual abuse I
ORS 163.187, Strangulation	ORS 163.686, Encouraging child sexual abuse II
ORS 163.200, Criminal mistreatment II	ORS 163.687, Encouraging child sexual abuse III
ORS 163.205, Criminal mistreatment I	ORS 163.688, Possession of materials depicting sexually explicit conduct of a child I
ORS 163.225, Kidnapping II	ORS 163.689, Possession of materials depicting sexually explicit conduct of a child II
ORS 163.235, Kidnapping I	<u>ORS 163.700, Invasion of personal privacy</u>
ORS 163.263, Subjecting another person to involuntary servitude II	<u>ORS 164.055, Theft I</u>
ORS 163.264, Subjecting another person to involuntary servitude I	ORS 164.057, Aggravated theft I
ORS 163.266, Trafficking in persons	ORS 164.098, Organized retail theft
ORS 163.275, Coercion	<u>ORS 164.125, Theft of services, if charged as a felony</u>
ORS 163.355, Rape III	ORS 164.215, Burglary II
ORS 163.365, Rape II	ORS 164.225, Burglary I
ORS 163.375, Rape I	ORS 164.325, Arson I
ORS 163.385, Sodomy III	<u>ORS 164.377, Computer crime, if charged with a felony</u>
ORS 163.395, Sodomy II	ORS 164.405, Robbery II
ORS 163.405, Sodomy I	ORS 164.415, Robbery I
ORS 163.408, Unlawful sexual penetration II	ORS 165.013, Forgery I
ORS 163.411, Unlawful sexual penetration I	ORS 165.022, Criminal possession of a forged instrument I
ORS 163.415, Sexual abuse III	ORS 165.032, Criminal possession of a forgery device
ORS 163.425, Sexual abuse II	ORS 165.800, Identity theft
ORS 163.427, Sexual abuse I	ORS 165.803, Aggravated identity theft
ORS 163.432, Online sexual corruption of a child II, if the offender reasonably believed the child to be more than five years younger than the offender	ORS 167.012, Promoting prostitution
ORS 163.433, Online sexual corruption of a child I, if the offender reasonably believed the child to be more than five years younger than the offender	ORS 167.017, Compelling prostitution
ORS 163.435, Contributing to the sexual delinquency of a minor	ORS 167.057, Luring a minor
ORS 163.445, Sexual misconduct, if the offender is at least 18 years of age	ORS 167.320, Animal abuse I
	ORS 167.322, Aggravated animal abuse I
	ORS 181.594, Sex crimes, including transporting child pornography into the state

187459

Submitted by
Judy Prosper
Nov. 18, 2015

Comparison between Ban the Box State Law and Proposed City Code
(version without voluntary disclosure)

Current Oregon State Law	Proposed Portland City Code
<p>78th OREGON LEGISLATIVE ASSEMBLY – 2015 Regular Session</p> <p>Enrolled</p> <p>House Bill 3025</p> <p>CHAPTER</p> <p>AN ACT</p> <p>Sponsored by COMMITTEE ON BUSINESS AND LABOR (at the request of Oregon AFL-CIO and the Urban League of Portland)</p> <p>Relating to use of information related to certain criminal matters.</p>	<p>CHAPTER 23.10</p> <p>REMOVING BARRIERS TO EMPLOYMENT</p> <p>23.10.010 Purpose. The purpose of this Chapter is to remove barriers to employment so that people with criminal histories can provide for themselves and their families; to reduce disparate impacts on people of color that result from the use of criminal history information in hiring and employment decisions; and to reduce recidivism through the reintroduction of formerly incarcerated persons into community life.</p>

23.10.020 Definitions.

For purposes of this Chapter, the following definitions apply:

- A. "City" means the City of Portland as defined in Title 1 of the Code of the City of Portland.
- B. "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 of Portland, but does not include:
1. The United States Government;
 2. 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;
 3. Any political subdivision of the State of Oregon or any county, city, district, authority, public corporation or public entity other than the City of Portland; or
 4. Employers with fewer than six employees.
- C. "Employ" means to engage or use the personal service of another person on a full-time, part-time, temporary or seasonal basis, with or without pay, where the Employer reserves the right to control the means by which such service is performed.
- D. "Conditional Offer of Employment" means any offer for a position that is conditioned solely on:
1. The results of an Employer's inquiry into or gathering of information about a person's arrest or conviction history; and/or
 2. Some other contingency expressly communicated to the applicant at the time of the offer.

SECTION 1. (1) It is an unlawful practice for an employer to exclude an applicant from an initial interview solely because of a past criminal conviction.

(2) An employer excludes an applicant from an initial interview if the employer:

- (a) Requires an applicant to disclose on an employment application a criminal conviction;**
 - (b) Requires an applicant to disclose, prior to an initial interview, a criminal conviction;**
- or**
- (c) If no interview is conducted, requires an applicant to disclose, prior to making a conditional offer of employment, a criminal conviction.**

23.10.030 Use of Criminal History in Employment Decisions.

- A.** It is an unlawful practice for an Employer to exclude an applicant from consideration solely because of the applicant's criminal history.
- B.** An Employer may consider an applicant's criminal history in the hiring process only after making a Conditional Offer of Employment. An Employer violates this Chapter if an Employer accesses an applicant's criminal history prior to making a Conditional Offer of Employment.
- C.** 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.
- D.** In making the determination of whether an applicant's criminal history is job related for the position in question and consistent with business necessity, an Employer must conduct an individualized assessment of:
 - 1.** The nature and gravity of the criminal offense;
 - 2.** The time that has elapsed since the criminal offense took place; and
 - 3.** The nature of the Employment held or sought.

(3) Subject to subsections (1) and (2) of this section, nothing in this section prevents an employer from considering an applicant's conviction history when making a hiring decision.

- E.** Nothing in this section prevents an employer from considering an applicant's criminal history after making a conditional offer of employment, except that an employer shall not consider:
- 1.** An arrest not leading to a conviction, except where a crime is unresolved or charges are pending against an applicant;
 - 2.** Convictions that have been judicially voided or expunged; or
 - 3.** Charges that have been resolved through the completion of a diversion or deferral of judgment program.
- F.** If, after consideration of an applicant's criminal history an employer rescinds the conditional offer of employment, the employer shall notify the applicant in writing of its decision and shall identify the relevant criminal convictions on which the decision is based.

- (4) Subsections (1) and (2) of this section do not apply:**
- (a) If federal, state or local law, including corresponding rules and regulations, requires the consideration of an applicant's criminal history;**
 - (b) To an employer that is a law enforcement agency;**
 - (c) To an employer in the criminal justice system; or**
 - (d) To an employer seeking a nonemployee volunteer.**

23.10.040 Exceptions.

- A.** The prohibitions in this Chapter do not apply:
- 1. If federal, state or local law, including corresponding rules and regulations, requires the consideration of an applicant's criminal history;
 - 2. To an employer that is a law enforcement agency;
 - 3. To an employer in the criminal justice system; or
 - 4. To an employer seeking a nonemployee volunteer.
- B.** For the following positions, an Employer may consider an applicant's criminal history at any point in the hiring process, and may use the City Criminal History Matrix provided by administrative rule to screen applicants, but must nonetheless comply with all other requirements of this Chapter. An individualized assessment shall be required for any criminal convictions not contained on the City Criminal History Matrix.
- 1. Positions involving direct access to or the provision of services to children, the elderly, persons with disabilities, persons with a mental illness, or individuals with alcohol or drug dependence or substance abuse disorders;
 - 2. Positions which have been determined by administrative rule to present heightened public safety concerns or a business necessity;
 - 3. Positions designed by the Employer as part of a federal, state or local government program designed to encourage the employment of those with criminal histories.

23.10.050 Administrative Rules Implementing this Chapter.

- A.** The City Attorney may adopt rules, procedures and forms to assist in the implementation of the provisions of this Chapter.
- B.** All rules adopted to implement this Chapter shall be subject to a public review process.
- C.** Not less than ten or more than thirty days before such public review process, a notice shall be published in a newspaper of general circulation and sent to stakeholders who have requested notice. The notice shall include the place and time, when the rules will be considered and the location at which copies of the full text of the proposed rules may be obtained.
- D.** The duration of public review process shall be a minimum of 21 calendar days from the date of notification for written comment.
- E.** During the public review process a designee of the City shall hear testimony or receive written comment concerning the proposed rules.
- F.** The City shall review and consider the comments received during the public review process, and shall either adopt, modify, or reject the proposed rules.
- G.** All initial rules shall be effective _____, and all subsequent rules shall be effective 30 days after adoption by the City Attorney and shall be filed in the Office of the City Auditor.
- H.** Notice of changes in Administrative Rules shall be published in a newspaper of general circulation, sent to stakeholders who have requested notice and posted on the BOLI and City web sites.

SECTION 2. Section 1 of this 2015 Act is subject to enforcement by the Commissioner of the Bureau of Labor and Industries as provided in ORS 659A.820 to 659A.865.

23.10.060 Enforcement.

- A. The City may contract with BOLI to enforce this Chapter.
- B. Pursuant to agreement between BOLI and the City, enforcement may be governed by the procedures established pursuant to ORS 659A.820 through 859A.865, or such other procedures as may be agreed upon by BOLI and the City. Rules adopted by the City pursuant to Section 23.10.050 of this Chapter may also be used to implement enforcement and administration of this Chapter.
- C. Pursuant to agreement between BOLI and the City, any person claiming to be aggrieved by an unlawful employment practice under this Chapter, the State Attorney General or the City Attorney may file a complaint with BOLI under procedures established under ORS 659A.820 through 659A.865, or such other procedures as BOLI or the City may establish for taking complaints which shall include options for resolution of complaints through such means as mediation.
- D. Pursuant to agreement, BOLI shall have the same enforcement powers with respect to the rights established under this Chapter as are established under ORS 659A.820 through 859A.865, and if the complaint is found to be justified, the complainant may be entitled to any remedies provided under ORS 659A.820 through 859A.865, and their implementing regulations and any additional remedies, provided that those remedies are specified in the agreement between the City and the BOLI Commissioner.

	<p>23.10.070 Confidentiality and Nondisclosure.</p> <p>Any criminal history information obtained by an Employer shall remain confidential except where disclosure is required by law.</p>
	<p>23.10.080 Public Education and Outreach.</p> <p>The City shall develop and implement an outreach program to inform Employers and members of the public about the terms of this Chapter.</p>
	<p>23.10.090 Severability.</p> <p>If a provision of this Chapter or application thereof to any person or circumstance is judged invalid, the invalidity shall not affect the other provisions or application of the Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared severable.</p>
	<p>23.10.100 Application.</p> <p>This Chapter is effective immediately for drafting of the administrative rules under Section 23.10.050, contracting with BOLI under Section 23.10.060 A and public education and outreach under Section 23.10.080. Enforcement of this Chapter under Section 23.10.060 B, C & D shall commence _____.</p>

AMENDMENTS NOVEMBER 18, 2015

1208 TIME CERTAIN: 2:45 PM – Add Code Removing Barriers to Employment to establish procedures for the use of criminal history information by employers within the City (Ordinance introduced by Mayor Hales; add Code Chapter 23.10) 2 hours requested

1. **Motion to accept scrivener correction to 23.10.060 B:** Moved by Hales and seconded by Fish.
2. **Motion to amend directive c to direct City Attorney to negotiate an intergovernmental agreement, subject to Council approval, with BOLI to conduct enforcement of Chapter 23:** Moved by Hales and seconded by Fish.
[Clerk note: this amendment was presented 3rd in Mayor's package of amendments. Later in the meeting it was referred to as amendment #2 by Mayor Hales and voted on as #2.]
3. **Motion to add notification language "orally or" to 23.10.030 F:** Moved by Hales and seconded by Fish. Motion withdrawn.
4. **Motion to add directive d providing Council with a one-year report on claims:** Moved by Hales and seconded by Fritz.
5. **Motion to amend 23.10.030 E 3. to add "for offenses not involving physical harm or attempted physical harm to a person":** Moved by Novick and seconded by Hales.

Votes:

1. **Motion to accept motions 1, 2 and 4:** Moved by Hales and seconded by Fish. (Y-5)
2. **Motion to amend directive b to direct City Attorney to draft Administrative Rules for Council authorization:** Moved by Hales and seconded by Fish. (Y-5)
3. **Motion to accept motion 5:** Moved by Novick and seconded by Hales. (Y-4; N-1 Fritz)

See next page for amendment detail.

November 18, 2015
Amendment detail

Ordinance:

NOW THEREFORE, the Council Directs:

- a. That it is in the public interest to remove barriers to employment by establishing required procedures for the use of criminal history information by employers within the City of Portland as described in Code Chapter 23.10 attached as Exhibit A;
- b. That Administrative Rules governing the implementation of this Code shall be adopted-drafted by the City Attorney and brought before Council for authorization, as described in Exhibit A; and
- c. That the City may contract with the Bureau of Labor and Industries (BOLI) to forenforceenforcement of City Code Chapter 23.10. The City Attorney is directed to negotiate an intergovernmental agreement with BOLI for enforcement of Chapter 23 and to bring the agreement to Council for authorization upon completion of the negotiations. This chapter as provided in Exhibit A.
- d. That the City Attorney provide Council with a one year report on claims by individuals, or any actions brought by the BOLI Commissioner, State Attorney General or City Attorney, for both the State and City claims.

Exhibit A Code:

23.10.030 E 3.

3. 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.

23.10.050 A

- A. The City Attorney ~~may shall~~ adopt draft rules, procedures and forms to assist in the implementation of the provisions of this Chapter and bring these rules, procures and forms before Council for authorization.

23.10.060 B & D

Scrivener correction: 859A.865 is corrected to 659A.865

11-18-15
HALES

Scrivener's Error amendments 23.10.060 Enforcement

B. Pursuant to agreement between BOLI and the City, enforcement may be governed by the procedures established pursuant to ORS 659A.820 through 859A.865, or such other procedures as may be agreed upon by BOLI and the City. Rules adopted by the City pursuant to Section 23.10.050 of this Chapter may also be used to implement enforcement and administration of this Chapter.

C. Pursuant to agreement between BOLI and the City, any person claiming to be aggrieved by an unlawful employment practice under this Chapter, the State Attorney General or the City Attorney may file a complaint with BOLI under procedures established under ORS 659A.820 through 659A.865, or such other EXHIBIT A procedures as BOLI or the City may establish for taking complaints which shall include options for resolution of complaints through such means as mediation.

D. Pursuant to agreement, BOLI shall have the same enforcement powers with respect to the rights established under this Chapter as are established under ORS 659A.820 through 859A.865, and if the complaint is found to be justified, the complainant may be entitled to any remedies provided under ORS 659A.820 through 859A.865, and their implementing regulations and any additional remedies, provided that those remedies are specified in the agreement between the City and the BOLI Commissioner.

To:

B. Pursuant to agreement between BOLI and the City, enforcement may be governed by the procedures established pursuant to ORS 659A.820 through 8659A.865, or such other procedures as may be agreed upon by BOLI and the City. Rules adopted by the City pursuant to Section 23.10.050 of this Chapter may also be used to implement enforcement and administration of this Chapter.

C. Pursuant to agreement between BOLI and the City, any person claiming to be aggrieved by an unlawful employment practice under this Chapter, the State Attorney General or the City Attorney may file a complaint with BOLI under procedures established under ORS 659A.820 through 659A.865, or such other procedures as BOLI or the City may establish for taking complaints which shall include options for resolution of complaints through such means as mediation.

D. Pursuant to agreement, BOLI shall have the same enforcement powers with respect to the rights established under this Chapter as are established under ORS 659A.820 through 8659A.865, and if the complaint is found to be justified, the complainant may be entitled to any remedies provided under ORS 659A.820 through 8659A.865, and their implementing regulations and any additional remedies, provided that those remedies are specified in the agreement between the City and the BOLI Commissioner.

451

CH move
NE ZACH



187459

11-18-15

HALES

Amendment to 23.10.030 Use of Criminal History in Employment Decisions

F. If, after consideration of an applicant's criminal history an employer rescinds the conditional offer of employment, the employer shall notify the applicant in writing of its decision and shall identify the relevant criminal convictions on which the decision is based.

F. If, after consideration of an applicant's criminal history an employer rescinds the conditional offer of employment, the employer shall notify the applicant orally or in writing, of its decision and shall identify the relevant criminal convictions on which the decision is based.

2. CH move
NF 2nd
-withdrawn-

11-18-15

HALES

Directive C is amended to read as follows:

c. The City may contract with the Oregon Bureau of Labor and Industries (BOLI) for enforcement of City Code Chapter 23.10. The City Attorney is directed to negotiate an intergovernmental agreement with BOLI for enforcement of Chapter 23.10 and to return to Council for authorization of such agreement upon completion of the negotiations.

#2

C# moved
NF 2nd

Clerk note - #3 in order presented. Later referred to as motion #2 by Mayor.

187459

11-18-15

HALES

Amendment to add directive to the Ordinance:

NOW THEREFORE, the Council Directs:

d. That the City Attorney provides Council with a one year report on claims by individuals or action by the Attorney General for both the State and the City.

#4

AF 2nd

187459

11-18-15

**Amendment offered by Commissioner Novick to Agenda Item #1208
November 18, 2015**

23.10.030 Use of Criminal History in Employment Decisions.

E. Nothing in this section prevents an employer from considering an applicant's criminal history after making a conditional offer of employment, except that an employer shall not consider:

1. An arrest not leading to a conviction, except where a crime is unresolved or charges are pending against an applicant;
2. Convictions that have been judicially voided or expunged; or
3. 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.

BS

CH 2nd