Employment Rights

Your Rights as a Job-Seeker. What Employers Can and Cannot Do.

In general, Hawai‘i makes it illegal for employers “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.”1 Arrests and court records also cannot be used to discriminate in:

- Job advertisements
- Hiring practices (application forms, interviews, selection)
- Referrals by employment agencies
- Salary, job classification, work duties, working conditions, and fringe benefits
- Promotion, demotion, suspension, layoff, recall, or termination

What will show up on my background check to an employer?

When an employer runs a background check, the information contained within the report usually includes: confirmation of your social security number and the name associated with it, a credit check, driving record history, and criminal conviction record. Any criminal “conviction” is considered public record in Hawai‘i, and is accessible at Public Access sites throughout the state and at the Adult Criminal Conviction Information (eCrim) Web Site.2 Any arrest that did not end in a criminal conviction should not be included in a background report unless required by state or federal law.3

Arrest records which have resulted in non-convictions or are still pending, are considered confidential and not available to the general public. No juvenile records will be included, unless the case was transferred to adult court. Only criminal justice agencies and agencies authorized by Hawai‘i’s state law, such as the Department of Human Services for their child care program, can access non-conviction information.4

There is no particular law in Hawai‘i for when an employer may access a person’s criminal conviction record since it is public information. However, an employer must comply with the state’s “Ban the Box” law when using this information. See below for an explanation of how an employer may use a person’s criminal conviction record.

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1 Haw. Rev. Stat. § 378-2(a)(1)(A). “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.
**Your Rights Against Background Check Companies**

Employers do not have to conduct a background check into your criminal conviction record unless they are required to do so by federal or state law (for example, you must clear a background check to work a security position at an airport) in which submission of fingerprints are usually required. If an employer decides to run a background through a third-party company, they must comply with the Fair Credit Reporting Act. Since employers can only access conviction records that are made public, there is not an FCRA state law equivalent.

**Fair Credit Reporting Act (“FCRA”)**

To comply with both the federal Fair Credit Reporting Act (FCRA) Hawai‘i employers must take the following steps if collecting criminal history information from a third-party background check company (also called a background screening service, “consumer reporting agency” or CRA):

- **Notice to and Written Permission by the Applicant:** A Hawai‘i employer must provide the job applicant clear notice that it will using a background screening service AND get the applicant’s written permission before running the check.
- **If any employer is going to take a negative or “adverse” action against the job applicant or an employee based on information in a background report (e.g., not hiring the applicant or firing a recently-hired employee), it must follow these steps:**
  - **STEP 1** – Provide the applicant a “Pre-Adverse Action Notice” – which includes a copy of the report and a copy of the Federal Trade Commission document “A Summary of Rights Your Rights under FCRA” before the negative action is taken—giving the applicant a reasonable opportunity to clear up any inaccuracies in the report.
  - **STEP 2** – After a reasonable time for the applicant to correct errors and explain the report, if the employer wants to move forward with the “adverse action,” it must provide an “Adverse Action Notice” in writing – which includes 1) the reason for the adverse action; 2) the applicant’s right, and procedure, to dispute the accuracy or completeness of the report. Additionally, the employer must provide the name, address, and phone number of the CRA that sold the report and a statement that the CRA selling the report did not make the hiring decision.

**Correcting Errors in Your Background Report**

You have the right to request a copy of your background report from an agency; they must do so within 10 business days, or 30 days if there are unusual circumstances explained to you in writing. If you notice any factual errors in your background report, you have the right to have

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6 15 U.S.C. § 1661 et seq.,
9 15 U.S.C. §1681(m)(a) et seq.
it corrected and any misrepresentation or misleading entry in the record amended by the agency which is responsible for its maintenance.\textsuperscript{12} If you notice an error, take the following steps:

- **STEP 1:** Immediately notify the agency in writing that the report contained an error(s) and present evidence to support your claim. Within 20 days the agency must either (1) make the amended request, or (2) inform you of its refusal to do so, the reasoning behind its decision, and the agency procedures for review of the refusal.\textsuperscript{13}

- **STEP 2:** If the agency refuses to correct or amend an error as its final determination within 30 business days after receipt of the request, it must do so in writing and allow you to:
  - File in the record a concise statement setting forth the reasons for the individual’s disagreement with the refusal of the agency to correct or amend it; and
  - Notify you of the applicable procedures for obtaining appropriate judicial remedy.\textsuperscript{14}

**When can employers ask about my conviction record?**

In Hawai‘i, an employer cannot ask about, or otherwise inquire or take into consideration, an applicant’s criminal conviction history until after a conditional offer of employment has been made unless they are required to do so under federal or state law.\textsuperscript{15}

**What can employers ask me about my conviction record?**

Only criminal convictions\textsuperscript{16} that are “rationally” related to the duties and responsibilities of the job, and if the conviction was within the past 10 years (excluding periods of incarceration) unless state or federal law provides otherwise.\textsuperscript{17} In other words, an employer is prohibited from asking about arrests and other court records that did not end in a conviction, and any conviction must be within the last 10 years.

Only adult criminal history information is included, unless the juvenile case was transferred to the adult court. Your employer will only be able to see arrest records which have resulted in convictions (found guilty), or acquittals or dismissals by reason of physical or mental disease, disorder or defect, under Chapter 704, HRS.\textsuperscript{18}

\textsuperscript{12} Haw. Rev. Stat. §92F-24 (a).
\textsuperscript{13} Haw. Rev. Stat. §92F-24(b).
\textsuperscript{14} Haw. Rev. Stat. §92F-25.
\textsuperscript{16} Haw. Rev. Stat. § 378-2.5(c) [“For this section ‘conviction’ means an adjudication by a court of competent jurisdiction that the defendant committed a crime, not including final judgments required to be confidential... provided that the employer may consider the employee’s conviction record falling within a period that shall not exceed the most recent ten years, excluding periods of incarceration.”].
\textsuperscript{17} Haw. Rev. Stat. § 378-2.5(d).
\textsuperscript{18} See generally Haw. Rev. Stat. § 704.
How an Employer May Use Your Criminal Conviction Information

An employer cannot disqualify an applicant based on a criminal conviction unless it is rationally related to the jobs duties and responsibilities and the conviction is within the last 10 years (not including periods of incarceration). If already employed and an employer runs a background check, an employee cannot be terminated for criminal convictions that are unrelated to the duties and responsibilities of the job, and the conviction is 10 years or older.\textsuperscript{19}

\textbf{Please Note:} An offer of employment \textbf{can be} withdrawn if the conviction is within the past 10 years (excluding periods of incarceration), and “reasonably” related to the duties and responsibilities performed on the job.\textsuperscript{20}

Generally, arrests that are not followed by a conviction may not be considered in making an employment decision. However, there is a limited exception that allows employers to consider an individual’s “arrest and court record” as a bona fide occupational qualification (BFOQ), subject to certain conditions. A BFOQ must be reasonably necessary to the normal operation of the business and substantially related to the functions and responsibilities of the job.\textsuperscript{21} Agencies authorized to access criminal history that is not made public may submit fingerprints in order to obtain criminal history record checks from:

- The Federal Bureau of Investigation for a national criminal history record check; and
- The Hawai’i criminal justice data center for a state criminal history record check that shall include non-conviction data.”\textsuperscript{22}

\textsuperscript{19} Haw. Rev. Stat. § 378-2.5.
\textsuperscript{22} Haw. Rev Stat, §§ 846, 846-2.7.