



HAWAI‘I CIVIL RIGHTS COMMISSION

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HAWAI‘I STATE LAW PROHIBITS EMPLOYMENT DISCRIMINATION BECAUSE OF ARREST AND COURT RECORD

WHAT IS AN “ARREST AND COURT RECORD”?

Under Hawai‘i Revised Statutes (HRS) § 378-1, “Arrest and Court Record” includes 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.”

WHAT IS A “CONVICTION”?

Under Hawai‘i Revised Statutes (HRS) § 378-2.5 (c), “Conviction” means an adjudication by a court of competent jurisdiction that the defendant committed a crime and does not include confidential final judgments such as a DAG or DANC plea not ultimately resulting in a conviction. Unless an employer has a statutory exemption, a Hawai‘i employer may only inquire about or consider a felony conviction that occurred no more than seven years in the past, or a misdemeanor conviction that occurred no more than five years in the past, excluding any period of incarceration.

WHEN MAY AN EMPLOYER INQUIRE ABOUT OR CONSIDER A CONVICTION?

HRS § 378-2.5 and HRS §§ 378-3 (8) and (9) provide several exceptions to the arrest and court record protection which allow Hawai‘i employers and Hawai‘i employment agencies to engage in limited inquiry or consideration of a current employee or applicant’s conviction as follows:

- May **only** inquire about or consider a **conviction**
 - of a current employee or of an applicant for employment who **has already** received a conditional offer of employment.
 - a **felony conviction** that occurred no more than seven years before the date of application, or a **misdemeanor conviction** that occurred no more than five years before the application, not including any period of incarceration.
- May **only** consider a **conviction** if it has a **rational relationship** to the core duties and responsibilities of the job.
- May withdraw a conditional offer of employment after it has determined a conviction bears a rational relationship to the core duties of the job to be performed.

Any category of Hawai‘i employer expressly listed in HRS § 378-2.5(d) as permitted to inquire into and consider an applicant’s conviction record may do so to the extent allowed by statutory exemption.

WHAT DOES HAWAI‘I ARREST AND COURT RECORD LAW PROHIBIT?

- Pre-offer inquiries into and consideration of applicant’s conviction records are prohibited, with the exceptions discussed in the preceding section above.
- Consideration of conviction records beyond the seven or five year look back periods, excluding periods of incarceration, is prohibited, with the exceptions discussed in the preceding section above.
- Consideration of criminal convictions records that do not bear a **rational relationship** to the duties and responsibilities of the job position is prohibited.
- Inquiry into and consideration of records of arrest without conviction are prohibited. Delayed Acceptance of Guilty (DAG) and Delayed Acceptance of No Contest (DANC) pleas are **not** convictions under state law and cannot be considered for employment purposes.

WHAT DOES A “RATIONAL RELATIONSHIP” MEAN?

- Proof that a *rational relationship* exists between a conviction and a particular job requires a showing that there is an *understandable or rational connection showing that a conviction of a particular criminal offense would affect the individual’s ability to perform the core job duties and functions*.
- The connection between a conviction and the core job duties and functions cannot be speculative or remote.
- Disqualification from employment of anyone with a “felony record” is too broad because proof that there is a *rational relationship* between a conviction and employment requires the comparison of a particular conviction and its relationship to the performance of core duties and responsibilities of a specific job position.
- Broad “character” considerations based on a person’s criminal history will not usually be sufficient to prove a rational relationship. Further, negative attitudes toward ex-offenders will not, standing alone, justify a negative employment action.

EXAMPLE 1: In 2016 Charles applies for a clerk position at a convenience store. The job involves stocking shelves and occasionally working the cash register handling electronic transactions, and cash transactions. Charles is given an offer of employment, conditioned on a criminal background check. The background check reveals that Charles has a 2012 conviction for theft in the second degree, a felony. The employer withdraws the offer of employment. In this case, the employer made a post-offer inquiry into Charles’ conviction record, which occurred within the seven year period prior to the application, and the theft conviction was rationally related to the duties and responsibilities of the job position, so there is no violation of the arrest and court record protection.

EXAMPLE 2: In 2015, Sarah applies for a waitress position in a bar. The job involves serving food and drinks and dealing with customers. Sarah is given an offer of employment, conditioned on a criminal background check. The background check reveals that Sarah has a 2003 conviction for misdemeanor assault, for which she was incarcerated for six months and was released in March 2004. The employer withdraws the offer of employment. The Courts have not issued guidance on whether there is a rational relationship between assault and customer service duties. However, the employer cannot consider a record of conviction beyond the seven or five year look back periods. Therefore, consideration of the 2003 conviction is a violation of the arrest and court record protection.

EXAMPLE 3: Joseph fills out an online application for employment at a new national chain big box store opening on Maui. The application includes this question: “Do you have any record of felony convictions? If yes, please indicate the year of the conviction, the state in which it occurred, and a brief description of the offense.” This pre-offer inquiry is a violation of the arrest and court record protection. Even if the store can ask the question in other states, it cannot do so in Hawai‘i.

DO FEDERAL EQUAL EMPLOYMENT OPPORTUNITY LAWS PROHIBIT EMPLOYMENT DISCRIMINATION BASED ON ARREST OR CONVICTION RECORD?

There is no federal law specifically prohibiting consideration of arrest or conviction records in employment. However, in 2012 the U.S. Equal Employment Opportunity Commission (EEOC) updated its enforcement guidance clarifying that a policy or practice of excluding people based on arrest or conviction records may violate Title VII of the Civil Rights Act of 1964 if it has a disparate impact based on race, national origin, or other protected bases. Discriminatory application of any policy is also prohibited.

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