

# Legislation and Compliance Update



Important Information for GIS Customers

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## Oregon Legislation Regarding Limits on Credit Reports Clarified

Oregon has issued regulations that guide employers on how to apply Oregon's new prohibition against using credit checks for employment purposes.

### Law and Regulation

Earlier this year, the Oregon legislature passed Oregon Senate Bill 1045. Section 2(1) of the law prohibits an employer from obtaining or using a credit check for employment purposes. Section 2(2) provides exceptions. One of the main exceptions is:

**The obtainment or use by an employer of information in the credit history of an applicant or employee because the information is substantially job-related and the employer's reasons for the use of such information are disclosed to the employee or prospective employee in writing.**

The Oregon Bureau of Labor and Industries has issued a regulation that provides guidance on the meaning of this exception. The most relevant part of the regulation reads as follows (with the odd numbering actually appearing in the regulation):

**(1) The determination of whether credit history information is substantially job-related must be evaluated with respect to the position for which the individual is being considered or holds.**

**(2) Credit history information of an applicant or employee is substantially job-related if:**

**(a) An essential function of the position at issue requires access to financial information not customarily provided in a retail transaction that is not a loan or extension of credit;**

**(A) Financial information customarily provided in a retail transaction includes information related to the exchange of cash, checks and credit or debit card numbers;**  
**or**

**(b) The position at issue is one for which an employer is required to obtain credit history as a condition of obtaining insurance or a surety or fidelity bond.**

### Analysis

We believe that the correct way to understand this regulation is that it sets a process for evaluating the general standard in the statute, adds two safe-harbors, and adds two implications.

The general standard in the statute is simply that the information is substantially job-related. The process that the regulation adds is that the employer must consider whether a credit check is substantially job-related for each position separately. This means that company-wide policies of obtaining credit checks on every position violate the regulation.

The regulation then adds two safe-harbors, which say when a credit check definitely is "substantially job-related." This list of two is not exclusive – that is, a credit check can still be substantially job-related for a position even when the position is not within a safe-harbor. The second of the two safe-harbors is simpler, so we will deal with it first.

The second safe-harbor is for a position where the employer must obtain a credit check as a condition of insurance or a surety or fidelity bond. Typically, this will be for positions where an employee can steal significant amounts of cash or similarly liquid property.

The first safe-harbor is more complex and leads to two implications. This safe-harbor occurs when an essential function of the position requires access to financial information not customarily provided in a retail transaction other than a loan or extension of credit. This implies that loan officers are probably positions that are within the safe-harbor.

This safe-harbor then goes on to say an exchange of cash, checks, and credit and debit card numbers *are* definitely information customarily provided in a retail transaction. (Note that the list is not exclusive; there can be other types of information that are customarily exchanged in a retail transaction.) The implication of this is that cashiers are probably *not* positions that are within the safe-harbor. While an employer can argue that this express exclusion from a safe-harbor does not *automatically* mean that a credit check cannot be substantially job-related for a cashier position, the exclusion is very persuasive in the absence of any special facts that the employer shows.

#### What to Do

**Employers should review their background screening practices to determine whether they are ordering credit checks. If so, they should check – *separately for each position* – what evidence they can present that the credit check is substantially job-related.** This requires an examination of the risks the position entails. Employers should be more comfortable if those risks are comparable to those posed for a loan officer and less comfortable if the risks are comparable to those posed by a cashier. If employers believe that an essential function of the position requires access to non-retail financial information, then the written job descriptions for those positions should list those essential functions. **This portion of the law comes into effect on July 1, 2010, so employers should focus on this immediately.**

#### More Resources

- The text of the law is available at:  
<http://www.leg.state.or.us/10ss1/measpdf/sb1000.dir/sb1045.en.pdf>
- The text of the regulation is available at:  
<http://www.oregon.gov/BOLI/LEGAL/docs/RulesSoS0052010.pdf>

#### Disclaimer

We are not a law firm and thus are not able to provide legal advice. If you need legal advice on the matters discussed above, we recommend that you contact consult with your legal counsel.

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