

Enrolled
House Bill 3168

Sponsored by COMMITTEE ON CONSUMER PROTECTION AND GOVERNMENT EFFICIENCY

CHAPTER

AN ACT

Relating to categories of individuals subject to criminal background checks; creating new provisions; and amending ORS 181.533, 181.534, 181.537 and 418.016.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) As used in this section, “direct access” means access to an individual or the personal information of an individual.

(2) The Oregon Department of Administrative Services, in consultation with the Department of State Police, shall adopt rules specifying:

(a) Categories of individuals who are subject to criminal records checks that:

(A) An authorized agency, as defined in ORS 181.533 or 181.534, may use to make fitness determinations under ORS 181.533 (4)(a) and 181.534 (11); or

(B) Qualified entities may use to make fitness determinations under ORS 181.537 (10)(c).

(b) The information, for each category, that may be required from a subject individual to permit a criminal records check.

(c) The types of crimes that may be considered in reviewing criminal offender information of a subject individual for each category.

(d) When a nationwide fingerprint-based criminal records check must be conducted.

(3) The Oregon Department of Administrative Services shall consider the additional cost of obtaining a nationwide fingerprint-based criminal records check when adopting rules under subsection (2)(d) of this section.

(4) Categories adopted under subsection (2)(a) of this section shall separate individuals into categories comprising:

(a) Individuals who have direct access to or who provide services for children;

(b) Individuals who have direct access to or who provide services for the elderly;

(c) Individuals who have direct access to or who provide services for persons with disabilities;

(d) Individuals who have direct access to or who provide services for persons with a mental illness;

(e) Individuals who have direct access to or who provide services for the general public;

(f) Individuals licensed, registered, certified or otherwise authorized to practice a profession or trade in this state and individuals applying for licensure, registration, certification or authorization to practice a profession or trade in this state; and

(g) Any other population of individuals specified by the Oregon Department of Administrative Services by rule.

SECTION 2. ORS 181.533 is amended to read:

181.533. (1) As used in this section:

(a) "Authorized agency" means the Department of State Police or other governmental agency designated by the State of Oregon to report, receive or disseminate criminal offender information.

(b) "Qualified entity" means a business or organization that:

(A) Provides care or placement services, or licenses or certifies others to provide care or placement services, for children, elderly persons or dependent persons;

(B) Is not governed by a state regulatory or licensing agency; and

(C) Has been determined by an authorized agency to meet the criteria established by the authorized agency by rule under subsection (9) of this section.

(c) "Subject individual" means a person who is employed or seeks to be employed by a qualified entity or who is providing services or seeks to provide services to a qualified entity on a contractual or volunteer basis.

(2) An entity may request from an authorized agency a criminal records check for purposes of evaluating the fitness of a subject individual as an employee, contractor or volunteer. The authorized agency may access state and federal criminal records under this subsection only through use of the subject individual's fingerprints.

(3) Before an authorized agency may conduct a criminal records check under this section:

(a) The authorized agency must determine whether the entity requesting the criminal records check is a qualified entity;

(b) The qualified entity must establish criteria, **subject to rules adopted by the Oregon Department of Administrative Services under section 1 of this 2013 Act**, to be used by the authorized agency in reviewing the criminal offender information for a final record check determination;

(c) The qualified entity must provide the criteria established under paragraph (b) of this subsection to the authorized agency; and

(d) The qualified entity must have informed the subject individual that the qualified entity might request a fingerprint-based criminal records check and that the subject individual may obtain a copy of the record check report from, or challenge the accuracy or completeness of the record check report through, the authorized agency or the Federal Bureau of Investigation.

(4)(a) Upon receipt of a subject individual's criminal offender information, the authorized agency shall *[make a final record check determination by comparing the criminal offender information with]* use the criteria provided to the authorized agency by the qualified entity under subsection (3)(c) of this section **and rules adopted by the Oregon Department of Administrative Services under section 1 of this 2013 Act to make a fitness determination**. In making the final record check determination, the authorized agency may consider only information that the Department of State Police may disclose under ORS 181.560.

(b) An authorized agency is immune from civil liability that might otherwise be incurred or imposed for making the final record check determination under this subsection.

(5) An authorized agency may not transfer a fingerprint card used to conduct the criminal records check unless the public agency or person receiving the fingerprint card agrees to destroy or return the fingerprint card to the authorized agency.

(6) If the public agency or person returns a fingerprint card to the authorized agency, the authorized agency shall destroy the fingerprint card. The authorized agency may not keep a record of the fingerprints.

(7) The authorized agency shall permit a subject individual to inspect the individual's Oregon and Federal Bureau of Investigation criminal offender information after positive identification has been established based upon fingerprints.

(8) Challenges to the accuracy or completeness of information provided by the authorized agency, the Federal Bureau of Investigation and agencies reporting information to the authorized agency or the federal bureau must be made through the authorized agency or the federal bureau.

(9) The authorized agency shall adopt rules to implement this section. The rules may include but are not limited to:

(a) Criteria to be used by the authorized agency to determine whether an entity is a qualified entity; and

(b) Fees to be charged for conducting criminal records checks under this section in amounts not to exceed the actual costs of acquiring and furnishing criminal offender information.

SECTION 3. ORS 181.534, as amended by section 18, chapter 70, Oregon Laws 2012, is amended to read:

181.534. (1) As used in this section:

(a) "Authorized agency" means state government as defined in ORS 174.111 and the Oregon State Bar. "Authorized agency" does not include:

(A) The Oregon State Lottery Commission or the Oregon State Lottery; or

(B) A criminal justice agency, as defined in ORS 181.010, that is authorized by federal law to receive fingerprint-based criminal records checks from the Federal Bureau of Investigation.

(b) "Subject individual" means a person from whom an authorized agency may require fingerprints pursuant to statute for the purpose of enabling the authorized agency to request a state or nationwide criminal records check.

(2) An authorized agency may request that the Department of State Police conduct a criminal records check on a subject individual for non-criminal justice purposes. If a nationwide criminal records check of a subject individual is necessary, the authorized agency may request that the Department of State Police conduct the check, including fingerprint identification, through the Federal Bureau of Investigation.

(3) The Department of State Police shall provide the results of a criminal records check conducted pursuant to subsection (2) of this section to the authorized agency requesting the check.

(4) The Federal Bureau of Investigation shall return or destroy the fingerprint cards used to conduct the criminal records check and may not keep any record of the fingerprints. If the federal bureau policy authorizing return or destruction of the fingerprint cards is changed, the Department of State Police shall cease to send the cards to the federal bureau but shall continue to process the information through other available resources.

(5) If the Federal Bureau of Investigation returns the fingerprint cards to the Department of State Police, the department shall destroy the fingerprint cards and shall retain no facsimiles or other material from which a fingerprint can be reproduced.

(6) If only a state criminal records check is conducted, the Department of State Police shall destroy the fingerprint cards after the criminal records check is completed and the results of the criminal records check provided to the authorized agency and shall retain no facsimiles or other material from which a fingerprint can be reproduced.

(7) An authorized agency may conduct criminal records checks on subject individuals through the Law Enforcement Data System maintained by the Department of State Police in accordance with rules adopted, and procedures established, by the Department of State Police.

(8) An authorized agency and the Department of State Police shall permit a subject individual for whom a fingerprint-based criminal records check was conducted to inspect the individual's own state and national criminal offender records and, if requested by the subject individual, provide the individual with a copy of the individual's own state and national criminal offender records.

(9) Each authorized agency, in consultation with the Department of State Police, shall adopt rules to implement this section and other statutes relating to criminal offender information obtained through fingerprint-based criminal records checks. The rules shall include but need not be limited to:

(a) [*Specifying*] **Identifying applicable** categories of subject individuals **as specified by the Oregon Department of Administrative Services under section 1 of this 2013 Act** who are subject to criminal records checks **by the authorized agency**.

(b) [*Specifying the*] **Identifying applicable** information that may be required from a subject individual to permit a criminal records check **as specified by the Oregon Department of Administrative Services under section 1 of this 2013 Act**.

(c) Specifying which programs or services are subject to this section.

[(d) Specifying the types of crimes that may be considered in reviewing criminal offender information of a subject individual.]

[(e) Specifying when a nationwide fingerprint-based criminal records check must be conducted. An authorized agency shall consider the additional cost of obtaining a nationwide fingerprint-based criminal records check when adopting rules under this subsection.]

[(f)] (d) If the authorized agency uses criminal records checks for agency employment purposes:

(A) Determining when and under what conditions a subject individual may be hired on a preliminary basis pending a criminal records check; and

(B) Defining the conditions under which a subject individual may participate in training, orientation and work activities pending completion of a criminal records check.

[(g)] (e) Establishing fees in an amount not to exceed the actual cost of acquiring and furnishing criminal offender information.

(10) The Department of State Police shall verify that an authorized agency has adopted the rules required by subsection (9) of this section.

(11)(a) Except as otherwise provided in ORS 181.612, **342.143, 342.223, 443.735 and 475.304** and paragraph (b) of this subsection, an authorized agency, using the rules adopted **by the authorized agency** under subsection (9) of this section **and the rules adopted by the Oregon Department of Administrative Services under section 1 of this 2013 Act**, shall determine whether a subject individual is fit to hold a position, provide services, be employed or be granted a license, certification, registration or permit, based on the criminal records check obtained pursuant to this section, on any false statements made by the individual regarding the criminal history of the individual and on any refusal to submit or consent to a criminal records check including fingerprint identification. If a subject individual is determined to be unfit, then the individual may not hold the position, provide services, be employed or be granted a license, certification, registration or permit.

(b) An individual prohibited from receiving public funds for employment under ORS 443.004 (3) is not entitled to a determination of fitness as a subject individual under paragraph (a) of this subsection.

(c)(A) Subject to subparagraph (B) of this paragraph, an authorized agency making a fitness determination of an individual under this subsection may request results of a previously made fitness determination from an authorized agency that has already made a fitness determination for the individual. An authorized agency that receives a request under this paragraph shall provide the requested information.

(B) An authorized agency may make a request under this paragraph only for individuals:

(i) Who are applying to hold a position, provide services, be employed or be granted a license, certification, registration or permit;

(ii) Who are in a category of individuals as specified by the Oregon Department of Administrative Services under section 1 of this 2013 Act; and

(iii) For whom a fitness determination has already been made.

(12) Except as otherwise provided in ORS 181.612, in making the fitness determination under subsection (11) of this section, the authorized agency shall consider:

(a) The nature of the crime;

(b) The facts that support the conviction or pending indictment or that indicate the making of the false statement;

(c) The relevancy, if any, of the crime or the false statement to the specific requirements of the subject individual's present or proposed position, services, employment, license, certification or registration; and

(d) Intervening circumstances relevant to the responsibilities and circumstances of the position, services, employment, license, certification, registration or permit. Intervening circumstances include but are not limited to:

(A) The passage of time since the commission of the crime;

(B) The age of the subject individual at the time of the crime;

(C) The likelihood of a repetition of offenses or of the commission of another crime;

- (D) The subsequent commission of another relevant crime;
 - (E) Whether the conviction was set aside and the legal effect of setting aside the conviction;
- and
- (F) A recommendation of an employer.

(13) An authorized agency and an employee of an authorized agency acting within the course and scope of employment are immune from any civil liability that might otherwise be incurred or imposed for determining, pursuant to subsection (11) of this section, that a subject individual is fit or not fit to hold a position, provide services, be employed or be granted a license, certification, registration or permit. An authorized agency and an employee of an authorized agency acting within the course and scope of employment who in good faith comply with this section are not liable for employment-related decisions based on determinations made under subsection (11) of this section. An authorized agency or an employee of an authorized agency acting within the course and scope of employment is not liable for defamation or invasion of privacy in connection with the lawful dissemination of information lawfully obtained under this section.

(14)(a) Each authorized agency shall establish by rule a contested case process by which a subject individual may appeal the determination that the individual is fit or not fit to hold a position, provide services, be employed or be granted a license, certification, registration or permit on the basis of information obtained as the result of a criminal records check conducted pursuant to this section. Challenges to the accuracy or completeness of information provided by the Department of State Police, the Federal Bureau of Investigation and agencies reporting information to the Department of State Police or Federal Bureau of Investigation must be made through the Department of State Police, Federal Bureau of Investigation or reporting agency and not through the contested case process required by this paragraph.

(b) A subject individual who is employed by an authorized agency and who is determined not to be fit for a position on the basis of information obtained as the result of a criminal records check conducted pursuant to this section may appeal the determination through the contested case process adopted under this subsection or applicable personnel rules, policies and collective bargaining provisions. An individual's decision to appeal a determination through personnel rules, policies and collective bargaining provisions is an election of remedies as to the rights of the individual with respect to the fitness determination and is a waiver of the contested case process.

(c) An individual prohibited from receiving public funds for employment under ORS 443.004 (3) is not entitled to appeal a determination under paragraph (a) or (b) of this subsection.

(15) Criminal offender information is confidential. Authorized agencies and the Department of State Police shall adopt rules to restrict dissemination of information received under this section to persons with a demonstrated and legitimate need to know the information.

(16) If a subject individual refuses to consent to the criminal records check or refuses to be fingerprinted, the authorized agency shall deny the employment of the individual, or revoke or deny any applicable position, authority to provide services, license, certification, registration or permit.

(17) If an authorized agency requires a criminal records check of employees, prospective employees, contractors, vendors or volunteers or applicants for a license, certification, registration or permit, the application forms of the authorized agency must contain a notice that the person is subject to fingerprinting and a criminal records check.

SECTION 4. ORS 181.537, as amended by section 19, chapter 70, Oregon Laws 2012, is amended to read:

181.537. (1) As used in this section:

(a) "Care" means the provision of care, treatment, education, training, instruction, supervision, placement services, recreation or support to children, the elderly or persons with disabilities.

(b) "Qualified entity" means a community mental health program, a community developmental disabilities program, a local health department or an individual or business or organization, whether public, private, for-profit, nonprofit or voluntary, that provides care, including a business or organization that licenses, certifies or registers others to provide care.

(2) For the purpose of requesting a state or nationwide criminal records check under ORS 181.534, the Department of Human Services, the Oregon Health Authority and the Employment Department may require the fingerprints of a person:

(a) Who is employed by or is applying for employment with either department or the authority;
(b) Who provides or seeks to provide services to either department or the authority as a contractor, subcontractor, vendor or volunteer who:

(A) May have contact with recipients of care;

(B) Has access to personal information about employees of either department or the authority, recipients of care from either department or the authority or members of the public, including Social Security numbers, dates of birth, driver license numbers, medical information, personal financial information or criminal background information;

(C) Has access to information the disclosure of which is prohibited by state or federal laws, rules or regulations, or information that is defined as confidential under state or federal laws, rules or regulations;

(D) Has access to property held in trust or to private property in the temporary custody of the state;

(E) Has payroll or fiscal functions or responsibility for:

(i) Receiving, receipting or depositing money or negotiable instruments;

(ii) Billing, collections, setting up financial accounts or other financial transactions; or

(iii) Purchasing or selling property;

(F) Provides security, design or construction services for government buildings, grounds or facilities;

(G) Has access to critical infrastructure or secure facilities information; or

(H) Is providing information technology services and has control over or access to information technology systems;

(c) For the purposes of licensing, certifying, registering or otherwise regulating or administering programs, persons or qualified entities that provide care;

(d) For the purposes of employment decisions by or for qualified entities that are regulated or otherwise subject to oversight by the Department of Human Services or the Oregon Health Authority and that provide care; or

(e) For the purposes of employment decisions made by a mass transit district or transportation district for qualified entities that, under contracts with the district or the Oregon Health Authority, employ persons to operate motor vehicles for the transportation of medical assistance program clients.

(3) The Department of Human Services and the Oregon Health Authority may conduct criminal records checks on a person through the Law Enforcement Data System maintained by the Department of State Police, if deemed necessary by the Department of Human Services or the Oregon Health Authority to protect children, elderly persons, persons with disabilities or other vulnerable persons.

(4) The Department of Human Services and the Oregon Health Authority may furnish to qualified entities, in accordance with the rules of the Department of Human Services or the Oregon Health Authority and the rules of the Department of State Police, information received from the Law Enforcement Data System. However, any criminal offender records and information furnished to the Department of Human Services or the Oregon Health Authority by the Federal Bureau of Investigation through the Department of State Police may not be disseminated to qualified entities.

(5)(a) **Except as otherwise provided in ORS 443.735 and 475.304**, a qualified entity, using rules adopted by the Department of Human Services or the Oregon Health Authority **under ORS 181.534 (9) and rules adopted by the Oregon Department of Administrative Services under section 1 of this 2013 Act**, shall determine under this section whether a person is fit to hold a position, provide services, be employed or, if the qualified entity has authority to make such a determination, be licensed, certified or registered, based on the criminal records check obtained pursuant to ORS 181.534, any false statements made by the person regarding the criminal history of the person and

any refusal to submit or consent to a criminal records check including fingerprint identification. If a person is determined to be unfit, then that person may not hold the position, provide services or be employed, licensed, certified or registered.

(b) A person prohibited from receiving public funds for employment under ORS 443.004 (3) is not entitled to a determination of fitness under paragraph (a) of this subsection.

(6) In making the fitness determination under subsection (5) of this section, the qualified entity shall consider:

(a) The nature of the crime;

(b) The facts that support the conviction or pending indictment or indicate the making of the false statement;

(c) The relevancy, if any, of the crime or the false statement to the specific requirements of the person's present or proposed position, services, employment, license, certification or registration; and

(d) Intervening circumstances relevant to the responsibilities and circumstances of the position, services, employment, license, certification or registration. Intervening circumstances include but are not limited to the passage of time since the commission of the crime, the age of the person at the time of the crime, the likelihood of a repetition of offenses, the subsequent commission of another relevant crime and a recommendation of an employer.

(7) The Department of Human Services, the Oregon Health Authority and the Employment Department may make fitness determinations based on criminal offender records and information furnished by the Federal Bureau of Investigation through the Department of State Police only as [provided] **described** in ORS 181.534.

(8) A qualified entity and an employee of a qualified entity acting within the course and scope of employment are immune from any civil liability that might otherwise be incurred or imposed for determining pursuant to subsection (5) of this section that a person is fit or not fit to hold a position, provide services or be employed, licensed, certified or registered. A qualified entity, employee of a qualified entity acting within the course and scope of employment and an employer or employer's agent who in good faith comply with this section and the decision of the qualified entity or employee of the qualified entity acting within the course and scope of employment are not liable for the failure to hire a prospective employee or the decision to discharge an employee on the basis of the qualified entity's decision. An employee of the state acting within the course and scope of employment is not liable for defamation or invasion of privacy in connection with the lawful dissemination of information lawfully obtained under this section.

(9) The Department of Human Services and the Oregon Health Authority, **subject to rules adopted by the Oregon Department of Administrative Services under section 1 of this 2013 Act**, shall develop systems that maintain information regarding criminal records checks in order to minimize the administrative burden imposed by this section and ORS 181.534. Records maintained under this subsection are confidential and may not be disseminated except for the purposes of this section and in accordance with the rules of the Department of Human Services, the Oregon Health Authority and the Department of State Police. Nothing in this subsection permits the Department of Human Services to retain fingerprint cards obtained pursuant to this section.

(10) In addition to the rules required by ORS 181.534, the Department of Human Services and the Oregon Health Authority, in consultation with the Department of State Police, shall adopt rules:

(a) Specifying which qualified entities are subject to this section;

(b) Specifying which qualified entities may request criminal offender information;

(c) Specifying which qualified entities are responsible for deciding, **subject to rules adopted by the Oregon Department of Administrative Services under section 1 of this 2013 Act**, whether a subject individual is not fit for a position, service, license, certification, registration or employment; and

(d) Specifying when a qualified entity, in lieu of conducting a completely new criminal records check, may proceed to make a fitness determination under subsection (5) of this section using the

information maintained by the Department of Human Services and the Oregon Health Authority pursuant to subsection (9) of this section.

(11) If a person refuses to consent to the criminal records check or refuses to be fingerprinted, the qualified entity shall deny or terminate the employment of the person, or revoke or deny any applicable position, authority to provide services, employment, license, certification or registration.

(12) If the qualified entity requires a criminal records check of employees or other persons, the application forms of the qualified entity must contain a notice that employment is subject to fingerprinting and a criminal records check.

SECTION 5. ORS 418.016 is amended to read:

418.016. (1) To protect the health and safety of children who are in the custody of the Department of Human Services and who may be placed in a foster home or adoptive home or with a relative caregiver, the department shall adopt rules pursuant to ORS 181.534 and ORS chapter 418 to require that criminal records checks be conducted under ORS 181.534 on:

(a) All persons who seek to be foster parents, adoptive parents or relative caregivers; and

(b) Other individuals over 18 years of age who will be in the household of the foster parent, adoptive parent or relative caregiver.

(2) Rules adopted under subsection (1) of this section shall include:

[(a) A list of crimes for which a conviction disqualifies a person from becoming a foster parent, adoptive parent or relative caregiver;]

[(b)] (a) A requirement that persons who have been convicted of crimes listed in the rules **adopted by the Oregon Department of Administrative Services under section 1 of this 2013 Act** are disqualified from becoming a foster parent, adoptive parent or relative caregiver; and

[(c)] (b) A provision that the Department **of Human Services** may approve a person who has been convicted of certain crimes listed in the rules if the person demonstrates to the department that:

(A) The person possesses the qualifications to be a foster parent or adoptive parent regardless of having been convicted of a listed crime; or

(B) The disqualification would create emotional harm to the child for whom the person is seeking to become a foster parent, adoptive parent or relative caregiver and placement of the child with the person would be a safe placement that is in the best interests of the child.

SECTION 6. Notwithstanding section 1 of this 2013 Act and the amendments to ORS 181.533, 181.534, 181.537 and 418.016 by sections 2 to 5 of this 2013 Act, rules adopted by an authorized agency, as defined in ORS 181.533 or 181.534, and the Department of Human Services or the Oregon Health Authority under ORS 181.533, 181.534, 181.537 and 418.016 that are in effect on the effective date of this 2013 Act continue in effect until superseded or repealed by rules adopted by the Oregon Department of Administrative Services under section 1 of this 2013 Act.

Passed by House April 17, 2013

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Ramona J. Line, Chief Clerk of House

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Tina Kotek, Speaker of House

Passed by Senate May 23, 2013

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Peter Courtney, President of Senate

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Approved:

.....M,....., 2013

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John Kitzhaber, Governor

Filed in Office of Secretary of State:

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Kate Brown, Secretary of State