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Oregon Medical Board 847

Agency and Division Administrative Rules Chapter Number
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To become effective Upon filing. Rulemaking Notice was published in the August 2016 Oregon Bulletin.

RULE CAPTION

Criminal Records Checks for Employees and Volunteers

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

ADOPT:

AMEND:

847-002-0045

REPEAL:

847-002-0000, 847-002-0005, 847-002-0010, 847-002-0015, 847-002-0020, 847-002-0025, 847-002-0030, 847-002-0035, 847-002-0040

RENUMBER:

AMEND AND RENUMBER:

Statutory Authority:

ORS 181.534, 181A.195, 303, 676, 676.303, 677.280

Other Authority:

Statutes Implemented:

ORS 181.534, 181A.170, 181A.195, 181A.215, 676.175, 676.303, 677.280

RULE SUMMARY

The rulemaking (1) repeals the Oregon Medical Board's existing procedural rules on criminal background checks of employees, volunteers and applicants, (2) adds new rule language to reference new statewide rules recently adopted by the Department of Administrative Services, and (3) retains the rule language on fees that may be charged for criminal records checks. This rulemaking is required by House Bill 3168 (2013) and House Bill 2250 (2015), which gave the Department of Administrative Services the authority to adopt statewide administrative rules for criminal records checks and required other agencies to repeal or amend existing rules as needed in order to be consistent with the statewide rules.

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OREGON ADMINISTRATIVE RULES

CHAPTER 847, DIVISION 002 – OREGON MEDICAL BOARD

FINAL REVIEW – OCTOBER 2016

The rulemaking repeals existing procedural rules on criminal background checks of employees, volunteers and applicants and amends one rule to refer to new statewide rules and specify the individuals subject to the rule. This rulemaking is required by House Bill 3168 (2013) and House Bill 2250 (2015), which gave the Department of Administrative Services the authority to adopt statewide administrative rules for criminal records checks and required other agencies to repeal or amend existing rules. There is no change to the existing process.

[OAR 847-002-0000

Purpose and Intent

The purpose of these rules is to provide for the reasonable screening of subject individuals to determine if they have a history of criminal behavior such that they are not fit to work or volunteer for the Board. The fact that the Board determines that a subject individual is fit does not guarantee the individual a position as a Board employee, volunteer, or that the individual will be hired by the Board.

Stat. Auth.: ORS 181.534, 303, 676, 677.280

Stats. Implemented: ORS 181.534]

[OAR 847-002-0005

Definitions

As used in OAR 847-002-0000 through 847-002-0050, unless the context of the rule requires otherwise, the following definitions apply:

(1) “Board” means the Oregon Medical Board.

(2) “Conviction” means a final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere (no contest) or any determination of guilt entered by a court of law against a subject individual in a criminal case, unless that judgment has been reversed or set aside by a subsequent court decision.

~~(3) “Criminal offender information” means records and related data concerning physical description and vital statistics, fingerprints received and compiled by the Oregon State Police (OSP) to identify criminal offenders and alleged offenders, records of arrests and the nature and disposition of criminal charges, including sentencing, confinement, parole and release records.~~

~~(4) “Criminal records check” means one or more of the following three processes undertaken by the Board to check the criminal history of a subject individual:~~

~~(a) Law Enforcement Data System (LEDS) Check: A name-based check of criminal offender information maintained by the OSP;~~

~~(b) Oregon Criminal Records Check: A check of Oregon criminal offender information, through fingerprint identification and other means, conducted by the OSP at the Board's request;~~
~~or~~

~~(c) Nationwide Criminal Records Check: A nationwide check of federal criminal offender information, through fingerprint identification and other means, conducted by the OSP through the Federal Bureau of Investigations (FBI) or otherwise at the Board's request.~~

~~(5) “Criminal records request form” means a Board approved form, completed by a subject individual, requesting the Board to conduct a criminal records check.~~

~~(6) “False statement” means, in association with an activity governed by these rules, a subject individual either:~~

~~(a) Provided the Board with false information about the subject individual’s criminal history, including but not limited to false information about the individual’s identity or conviction record;~~
~~or~~

~~(b) Failed to provide the Board information material to determine the individual’s criminal history.~~

~~(7) “Fitness determination” means a determination made by the Board, pursuant to the process established under OAR 847-002-0020, that a subject individual is fit or not fit to be a Board employee or volunteer.~~

~~(8) “OSP” means the Oregon State Police.~~

~~(9) “Subject individual” means an individual the Board may require to complete a criminal records check pursuant to these rules because the person is:~~

~~(a) A Board employee;~~

~~(b) A Board volunteer; or~~

~~(c) An applicant for employment with the Board.~~

~~Stat. Auth.: ORS 181.534, 303, 676, 677.280~~

~~Stats. Implemented: ORS 181.534]~~

[OAR 847-002-0010

Criminal Records Check Process

~~(1) A subject individual must disclose information required by the Board as described below:~~

~~(a) Before a criminal records check, a subject individual must complete and sign the Board Criminal Records Request form and a fingerprint card, both of which may include identifying information (e.g., name, birth date, social security number, physical characteristics, driver's license or identification card number and current and previous addresses).~~

~~(b) A subject individual must complete and submit to the Board the Criminal Records Request form and, if requested, a fingerprint card within five business days of receiving the forms. The deadline may be extended for good cause.~~

~~(c) Additional information may be required from the subject individual as necessary to complete the criminal records check and fitness determination, including but not limited to, proof of identity or additional criminal, judicial, or other background information.~~

~~(d) The Board may not request a fingerprint card from a subject individual under the age of 18 years unless the subject individual is emancipated pursuant to ORS 419B.550 *et seq.*, or unless the Board also requests the written consent of a parent or guardian. Such parent or guardian and youth must be informed that they are not required to consent. Notwithstanding, failure to consent may be construed as a refusal to consent under OAR 847-002-0015(4).~~

~~(2) The Board or its staff may conduct, or request the OSP to conduct, a criminal record check when:~~

~~(a) An individual meets the definition of a subject individual; or~~

~~(b) A federal law or regulation, state statute or administrative rule, or contract or written agreement with the Board requires a criminal record check.~~

~~Stat. Auth.: ORS 181.534, 303, 676, 677.280~~

~~Stats. Implemented: ORS 181.534]~~

[OAR 847-002-0015

Final Fitness Determination

~~(1) After a criminal records check, the Board or its staff must make a fitness determination about a subject individual based on information provided by the subject individual under OAR 847-002-0010(1), any criminal records check conducted, and any false statement made by the subject individual.~~

~~(2) In relation to information described in section (1) of this rule and other known information, the following factors will be considered:~~

~~(a) Whether the subject individual has been convicted, found guilty except for insanity (or a comparable disposition), or has a pending indictment for a crime listed in OAR 847-002-0020;~~

~~(b) The nature of any crime identified under section (2)(a) of this rule;~~

~~(c) The facts that support the conviction, finding of guilty except for insanity, or pending indictment;~~

~~(d) Any facts that indicate the subject individual made a false statement;~~

~~(e) The relevance, if any, of a crime identified under section (2)(a) of this rule or of a false statement made by the subject individual to the specific requirements of the subject individual's present or proposed position, services or employment; and~~

~~(f) The following intervening circumstances, to the extent that they are relevant to the responsibilities and circumstances of the position, services or employment:~~

~~(A) The passage of time since the commission or alleged commission of the crime identified under section (2)(a) of this rule;~~

~~(B) The age of the subject individual at the time of the commission or alleged commission of the crime identified under section (2)(a) of this rule;~~

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

~~(D) The subsequent commission of another crime listed in OAR 847-002-0020;~~

~~(E) Whether the conviction identified under section (2)(a) of this rule has been set aside, and the legal effect of setting aside the conviction;~~

~~(F) A recommendation of an employer;—~~

~~(G) The disposition of the pending indictment identified under section (2)(a) of this rule;~~

~~(H) Whether the subject individual has been arrested for or charged with a crime listed under OAR 847-002-0020;~~

~~(I) Whether the subject individual is being investigated, or has an outstanding warrant, for a crime listed under OAR 847-002-0020;~~

~~(J) Whether the subject individual is currently on probation, parole or another form of post-prison supervision for a crime listed under OAR 847-002-0020;~~

~~(K) Whether the subject individual has a deferred sentence or conditional discharge in connection with a crime listed under OAR 847-002-0020;~~

~~(L) Whether the subject individual has been adjudicated in a juvenile court and found to be within the court's jurisdiction for an offense that would have constituted a crime listed in OAR 847-002-0020 if committed by an adult;~~

~~(M) Periods of incarceration of the subject individual; and~~

~~(N) The education and work history (paid or volunteer) of the subject individual since the commission or alleged commission of a crime.~~

~~(3) The subject individual must meet with the Board or its staff if requested and provide additional relevant information or authorization to obtain other relevant information within a reasonable period of time, as established by the Board.~~

~~(4) If a subject individual refuses to submit or consent to a criminal records check including fingerprint identification, the Board may deny the position, employment or services. A person may not appeal any determination made based on a refusal to consent.~~

~~(5) If a subject individual is determined to be not fit, the subject individual may not be employed by or provide services as a volunteer to the Board.~~

~~(6) A completed final fitness determination is a final order of the Board unless the affected subject individual appeals the determination by requesting a contested case hearing as provided by OAR 847-002-0035(1) or an alternative appeals process as provided by OAR 847-002-0035(6).~~

~~Stat. Auth.: ORS 181.534, 303, 676, 677.280~~

~~Stats. Implemented: ORS 181.534]~~

~~[OAR 847-002-0020~~

~~Potentially Disqualifying Crimes~~

~~(1) Crimes Relevant to a Fitness Determination:~~

~~(a) All felonies;~~

~~(b) All misdemeanors; and~~

~~(c) Any United States Military crime or international crime.~~

~~(2) A crime will be evaluated on the basis of the law of the jurisdiction in which the crime or offense occurred, as those laws are in effect at the time of the fitness determination.~~

~~(3) Under no circumstances may a subject individual be determined to be not fit under these rules on the basis of the existence or contents of a juvenile record that has been expunged pursuant to ORS 419A.260 and ORS 419A.262.~~

~~Stat. Auth.: ORS 181.534, 303, 676, 677.280~~

~~Stats. Implemented: ORS 181.534]~~

[OAR 847-002-0025

Incomplete Fitness Determination

~~(1) A preliminary or final fitness determination is incomplete when:~~

~~(a) Circumstances change so that a person no longer meets the definition of a "subject individual" under OAR 847-002-0005;~~

~~(b) The subject individual does not submit materials or information within the time required under OAR 847-001-0045;~~

~~(c) The Board cannot locate or contact the subject individual;~~

~~(d) The subject individual fails or refuses to cooperate with attempts to acquire other criminal records information under OAR 847-002-0015;~~

~~(e) The subject individual is not eligible or not qualified for the position of employee or volunteer, for a reason unrelated to the fitness determination process; or~~

~~(f) The position is no longer open.~~

~~(2) A subject individual does not have a right to a contested case hearing under OAR 847-002-0035(1) or a right to an alternative appeals process under OAR 847-002-0035(6) to challenge the closing of a fitness determination as incomplete.~~

~~Stat. Auth.: ORS 181.534, 303, 676, 677.280~~

~~Stats. Implemented: ORS 181.534]~~

[OAR 847-002-0030

Notice to Subject Individual of Fitness Determination

The Board must inform the subject individual if he or she is determined not to be fit via personal service or registered or certified mail to the most current address provided by the subject individual.

Stat. Auth.: ORS 181.534, 303, 676, 677.280

Stats. Implemented: ORS 181.534]

[OAR 847-002-0035

Appealing a Fitness Determination

(1) Appeal process:

~~(a) To request a contested case hearing, the subject individual or the subject individual's legal representative must submit a written request for a contested case within 14 calendar days of the date of the notice provided under OAR 847-002-0030 to the address specified in that notice. The Board must address a request received after expiration of the deadline as provided under OAR 137-003-0528.~~

~~(b) When a timely request is received, a contested case hearing will be conducted by an administrative law judge assigned by the Office of Administrative Hearings, pursuant to the Attorney General's Uniform and Model Rules, "Procedural Rules, Office of Administrative Hearings" OAR 137-003-0501 to 137-003-0700, as supplemented by the provisions of this rule.~~

~~(2) Discovery: The Board or the administrative law judge may protect information made confidential by ORS 181.534(15) or other applicable law as provided under OAR 137-003-0570(7) or (8).~~

~~(3) Contested case hearings on fitness determinations are closed to non-participants.~~

(4) Proposed and Final Order:

~~(a) After a hearing, the administrative law judge will issue a proposed order.~~

~~(b) Exceptions, if any, must be filed within 14 calendar days after service of the proposed order. The proposed order must provide an address to which exceptions must be sent.~~

~~(c) A completed final fitness determination made under OAR 847-002-0015 becomes final:~~

~~(A) Unless the subject individual makes a timely request for a hearing; or~~

~~(B) When a party withdraws a hearing request, notifies the Board or the Administrative Law Judge that the party will not appear, or fails to appear at the hearing.~~

~~(5) The only remedy that may be awarded is a determination that the subject individual is fit or not fit. Under no circumstances may the Board be required to place a subject individual in any position, nor may the Board be required to accept services or enter into a contractual agreement with a subject individual.~~

~~(6) Alternative Process: A subject individual currently employed by the Board may choose to appeal a fitness determination either under the process made available in sections (1) to (5) of this rule or through a process made available by applicable personnel rules, policies and collective bargaining provisions. A subject individual's decision to appeal a fitness determination through applicable 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 made available by this rule.~~

~~(7) A subject individual may not use the appeals process established by this rule to challenge the accuracy or completeness of information provided by the OSP, the FBI, or agencies reporting information to the OSP or the FBI.~~

~~(a) To challenge such information, a subject individual may use any process made available by the agency that provided the information.~~

~~(b) If the subject individual successfully challenges the accuracy or completeness of such information and the position for which the original criminal history check was conducted is vacant and available, the subject individual may request that the Board conduct a new criminal records check and re-evaluate the original fitness determination made under OAR 847-002-0015 by submitting a new Board Criminal Records Request form.~~

~~(8) Appealing a fitness determination under section (1) or section (6) of this rule, challenging criminal offender information with the agency that provided the information, or requesting a new criminal records check and re-evaluation of the original fitness determination under section (7)(b) of this rule, will not delay or postpone the Board's hiring process or employment decisions.~~

Stat. Auth.: ORS 181.534, 303, 676, 677.280

Stats. Implemented: ORS 181.534]

[OAR 847-002-0040

Recordkeeping and Confidentiality

~~Any information obtained in the criminal records check is confidential. The Board must restrict the access and dissemination of information obtained in the criminal records check to only those persons with a demonstrated and legitimate need to know the information.~~

Stat. Auth.: ORS 181.534, 303, 676, 677.280

Stats. Implemented: ~~ORS 181.534]~~

OAR 847-002-0045

[Fees] **Criminal Records Checks for Employees, Volunteers and Applicants**

(1) The Board requires a criminal records check and fitness determination for Board employees, volunteers or applicants for employment with the Board.

(2) Criminal records checks and fitness determinations are conducted pursuant to ORS 181A.170 to 181A.215 and OAR 125-007-0200 to 125-007-0310.

(a) To complete the criminal records check and fitness determination, the Board may require additional information from the employee, volunteer or applicant, such as, but not limited to, proof of identity or additional criminal, judicial or other background information.

(b) If the employee, volunteer or applicant has potentially disqualifying criminal offender information, the Board will consider factors listed in ORS 181A.195 before making a fitness determination.

(c) An approved fitness determination does not guarantee employment.

(d) An incomplete fitness determination does not entitle the employee, volunteer or applicant the right to appeal under OAR 125-007-0300.

(3) Pursuant to ORS 181A.195, ORS 676.175, and OAR 125-007-0310, information obtained in the criminal records check is confidential and will not be disseminated by the Board except to persons with a demonstrated and legitimate need to know the information.

~~(4)~~ **(4)** The Board may charge a fee **to the employee, volunteer or applicant** for ~~[acquiring] the criminal [offender information] records check. [for use in making a fitness determination that]~~ **The fee** will not exceed the fee charged the Board by the OSP and the FBI to obtain such information.

~~(2) The Board may charge the fee to the subject individual on whom criminal offender information is sought.]~~

Stat. Auth.: ORS ~~[181.534, 303, 676, 677.280]~~ **181A.195, 676.303**

Stats. Implemented: ORS [~~181.534~~] **181A.170, 181A.195, 181A.215, 676.175, 676.303, 677.280**