



CIS

# Siren Call

NEWS FOR PUBLIC SAFETY PROFESSIONALS

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## THE TIMING OF LAW ENFORCEMENT HIRING PRACTICES

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### The Conditional Job Offer

Recently, CIS has received numerous calls regarding the timing of the conditional job offer for law enforcement applicants. Specifically, the question arises whether the conditional job offer should be made before or after the completion of the background investigation for a public safety professional as required by OAR 259-008-0015 (Criminal Justice Employment, Training and Certification — Background Investigations).

The U.S. Department of Justice published a document titled, "[Questions and Answers: The Americans with Disabilities Act and Hiring Police Officers](#)." The U.S. DOJ provides a great description of why the timing of the conditional job offer matters:

*In the past, people with disabilities, particularly those with hidden disabilities, were denied jobs once potential employers found out about their disabilities. The ADA seeks to prohibit discrimination by limiting an employer's knowledge of an applicant's disability to a later stage of the job application process. Under the ADA an employer may only ask about an applicant's disability or give a medical examination after the employer has made a job offer. The job offer can be conditioned on successfully passing a medical examination. Thus, if the person with a disability is denied the job because of information obtained from the medical examination or because of the applicant's disability, the reason for this decision is out in the open. This procedure should limit impermissible consideration of disability.*

Employers should pay particular attention to the U.S. DOJ's definition of "job offer." According to the DOJ, "In general, a job offer is not viewed as 'bona fide' under the ADA, unless an employer has evaluated all relevant non-medical information which, from a practical and legal perspective could reasonably have been analyzed prior to extending the offer." This concept rings equally true under Oregon's disability discrimination laws.

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The OAR requirements for a public safety professional's background investigation include non-medical categories.

The DOJ further provides the following caution: "Federal investigators will carefully scrutinize situations in which a police department withdraws an offer after a post-offer background examination to determine whether the withdrawal was based on non-medical information in the background check or on information obtained through post-offer medical examinations and disability-related inquiries."

CIS recommends law enforcement employers provide applicants a conditional job offer after completion of the background investigation. Furthermore, if an investigator encounters medical information during a background investigation, CIS recommends instructing the investigator to place the medical information in a separate tape-sealed envelope or file and not share its contents with anyone at the agency so it's not improperly considered during an evaluation of the background investigation. If the applicant successfully passes the background investigation, a conditional job offer can be made, and the confidential contents of the sealed envelope can be provided to both medical and psychological screeners. This information can then be properly evaluated during their respective evaluations. Some hypotheticals relating to this recommended process are provided on the next page.

The following resources provide details regarding the requirements of law enforcement background investigations:

- [Department of Public Safety Standards and Training \(DPSST\): Oregon Criminal Justice Background Resources](#)
- [DPSST Agency Background and Psychological Screening Guide](#)
- [DPSST Background Checklist](#)
- [DPSST Applicant Personal History Questionnaire](#)

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## **Scenario One**

An applicant reveals during the background investigation they were medically discharged from the military. The applicant further tells the background investigator it was discovered they suffered from asthma. This information is segregated as described above and the applicant passes the background phase of the hiring process. The medical provider reviews the Critical and Essential tasks for the police discipline and determines the applicant currently meets the established physical standards per OAR 259-008-0010. The applicant is hired as a probationary public safety officer.

## **Scenario Two**

An applicant reveals during the background investigation they suffer from Post Traumatic Stress Disorder (or Injury). The chief law enforcement executive hears this information from the investigator and does not want to take a risk hiring this applicant and disqualifies them from further consideration.

### **Scenario Two (A)**

The applicant files a discrimination claim against the employer because their disability (or perceived disability) was improperly considered by the chief during the hiring process.

### **Scenario Two (B)**

The psychological (medical) information was segregated, and the applicant passes the background phase of the hiring process. The psychological screener reviews the information provided by the background investigator and determines the applicant's PTSD/I is properly managed and they are recommended for employment as a law enforcement officer. The applicant is hired as a probationary public safety officer and no claim is filed.

### **Scenario Two (C)**

With the same facts above, the psychological (medical) information was segregated, and the applicant passes the background phase of the hiring process. The psychological screener reviews the information provided by the background investigator and determines the applicant is high risk and does not recommend the agency hire them. The agency consistently does not hire high risk applicants and notifies the applicant they are no longer being considered for employment. While the applicant could make a claim, the risk is mitigated through ensuring the medical information is considered at the proper stage of the hiring process and the applicant is treated consistently with other applicants (no disparate treatment).

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## Medical Screening

Through the above discussion, it should be clear the medical screening is only conducted after the applicant is provided a bona fide contingent job offer. From time to time, however, members ask about providing the medical screening after hiring the applicant. This question often occurs when the availability of medical or psychological screening is delayed, and members want to move forward with applicants in a competitive job market — and when faced with operational demands.

OAR 259-008-0010(9) reads, “To ensure that law enforcement officers and applicants meet the minimum physical standards listed in section (8) of this rule, all officers and applicants must be examined by a licensed physician or surgeon.” Section (c) reads, “The medical examination must be completed within 180 days prior to the start of employment as a law enforcement officer.”

Remember, post-employment fitness for duty exams (FFDE) can only be required if an employer has a reasonable belief, based on objective evidence, that either:

1. The employee's ability to perform his/her essential job functions is impaired by a medical condition, or
2. The employee poses a direct threat to safety of others due to a medical condition.

## Psychological Screening

The same as medical screening, this is only conducted after the applicant is provided a bona fide contingent job offer, but before hiring. OAR 259-008-0010 (11) reads, “Pre-employment Psychological Evaluation. A person may not be employed as a law enforcement officer or utilized as a reserve officer without a pre-employment psychological evaluation conducted in accordance with this rule. This requirement applies to police officers and reserve officers hired on or after Jan. 1, 2020, and corrections officers, parole and probation officers, and regulatory specialists hired on or after July 1, 2023.”

OAR 259-008-0010 (11)(h) reads, “Hiring decisions are the responsibility of each hiring agency. The hiring agency maintains the discretion to determine how the information provided in the evaluation report impacts the hiring decision.” CIS recommends agencies consistently evaluate psychological evaluation reports and make sound risk-based decisions when considering these reports during the hiring process.

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From time to time a law enforcement agency hiring someone who recently had a psychological evaluation performed during the hiring process at another law enforcement agency will request the results of the previous agency's psychological evaluation. It is understandable that agencies want to save the cost of conducting their own psychological evaluation, but CIS recommends against this practice.

The psychological evaluation is the property of the agency that requested the evaluation and should maintain its confidentiality. For purposes of law enforcement background investigations, ORS 181A.667 defines "personnel records" as "the entire personnel file of a police officer or reserve officer, including but not limited to records of complaints and disciplinary action against the officer." The psychological evaluation should be retained in a separate medical/confidential file for the applicant or employee and not considered a "personnel record." It should only be released to a third party at the direction of legal authority. Furthermore, hiring agencies should not be reviewing this type of information at an impermissible stage of their hiring process. Lastly, providing a completed background investigation report to the person conducting the psychological screening can be extremely helpful. CIS recommends discussing and encouraging this practice with the entity providing your pre-employment psychological screening.

## Conclusion

There are many regulations governing the hiring of police officers and opportunities to make mistakes. The CIS [Hire-to-Retire](#), [Pre-Loss](#), and [Public Safety Teams](#) are available to help as questions and issues arise during the hiring process.

### We're here to help!

Have questions or need assistance? Reach out to us at [publicsafety@cisoregon.org](mailto:publicsafety@cisoregon.org) – we're here to help and eager to address any inquiries you may have.

