

AGENDA ITEM 2 A
Action Item

MEMORANDUM

DATE: February 6, 2020

TO: El Dorado County Transit Authority

FROM: Maria Harris, Human Resources Manager

SUBJECT: Revised Policy on Employment Background Checks

REQUESTED ACTION:
BY MOTION,

**Approve Revisions to the El Dorado County Transit Authority
Employment Background Check Policy**

BACKGROUND

El Dorado Transit is committed to providing a safe working environment in addition to safe and reliable service to the public. California law allows employers to conduct criminal background checks on potential employees, as well as current employees who are reclassified, transferred, demoted or promoted into designated job classifications. El Dorado Transit conducts background checks to help determine a candidate's suitability for employment and to manage risk relating to workplace violence and possible negligent hiring.

In September 2006, the El Dorado Transit Board adopted Resolution No. 06-13 approving the access of State and Federal Level Summary of Criminal History Information for Employment Purposes. Subsequent Board actions related to the employment background check policy include the following:

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|------------------|---|
| November 1, 2007 | El Dorado County Transit Authority (El Dorado Transit) adopted Board Policy E-4 approving Pre-Employment Background Checks |
| October 9, 2009 | El Dorado Transit approved revisions to the El Dorado County Transit Authority Personnel Policies and Procedures, including Article 4, establishing the use of background checks for current employees |
| July 1, 2014 | El Dorado Transit updated its employment application and conditional offer of employment process in accordance with Assembly Bill 218, California Labor Code §432.9 prohibiting an employer from requiring an applicant to disclose information concerning the applicant's criminal conviction history until after a conditional offer of employment is made. |

El Dorado Transit staff, with the assistance of Legal Counsel, recently reviewed the current Board Policy E-5 background check policy. The attached policy was updated in accordance with California Government Code §12952 and includes detailed guidelines for related internal procedures.

DISCUSSION

The proposed background check Policy E-5 revisions include strengthened procedures for the disclosure, assessment and considerations of an applicant's criminal and/or credit history relative to the position for which they are being considered. The revised policy establishes clear guidelines for notification to an applicant of a decision to rescind a job offer and procedures to allow the applicant to respond or challenge a final decision. In addition, the revised policy includes the responsibilities of each authorized authority, a listing of job classifications with the corresponding level of background check required, the Post Conditional Offer Criminal History Inquiry form and a Federal Consumer Reporting Act Authorization form.

Staff recommends the adoption of the attached revised Board Policy E-5 governing the legal use of background checks in employment decisions. The draft policy has been reviewed and approved as to form by Legal Counsel.

FISCAL IMPACT

None.

El Dorado County Transit Authority

Subject	Policy Number	Date Proposed
PERSONNEL	E-5	February 6, 2020

I. PURPOSE

El Dorado County Transit Authority (“El Dorado Transit” or “Agency”) is dedicated to protecting its passengers, employees, and assets by conducting background checks. At times background checks may be required by the Federal Transit Administration (FTA) for individuals under consideration for hire, as well as current employees who are reclassified, transferred, demoted or promoted into designated job classifications or designated positions within classifications. Additionally, a background check may be required for a current employee whose classification specification has been revised to include newly assigned job duties that are either safety sensitive or allow the employee new access to Agency assets.

Background checks for employment may include but are not limited to the following: review of applicants’ criminal conviction and credit histories; review of California Department of Motor Vehicle records, verification of employment qualifications and pre-employment and on-going drug testing as required by the U.S. Department of Transportation.

El Dorado Transit’s Board of Directors authorizes the Executive Director or designee to acquire state and federal criminal history and, for selected positions, pre-employment consumer credit information. Further, the Board grants the Executive Director the authority to administer and implement the policy and to adopt procedures to secure confidentiality of such information gathered during background investigations.

The Executive Director has the authority to designate a Records Security Officer that will be assigned duties as the Custodian of Records for Live Scan Service, as defined by the State of California – Department of Justice Requirements and also information gathered by any Third Party employment background screening agencies engaged by the Agency.

El Dorado Transit’s Board Policy E-5, and state and federal laws recognize that the individual has a right to privacy, and prohibit employees and others from seeking, using, or disclosing personal information, except within the scope of their assigned duties.

II. Affected Individuals

This Board policy applies to all Agency employees and applicants who are subject to the background investigation process.

III. Definitions

“Applicant”: A person who is being considered for employment with El Dorado Transit in one of the job classifications or positions within classifications designated in the Board Policy and Administrative Regulation, regardless of whether the person is currently employed by El Dorado Transit in a different job capacity, or has been previously employed by El Dorado Transit in any capacity.

“Volunteer”: A person who is being considered to perform work for El Dorado Transit without receiving any compensation in return.

“Background Check Report”: The process of legally obtaining and compiling, from a third party, criminal, commercial, and/or other legally permissible records for Applicants or employees transitioning to a designated job classification.

“Conviction”: A plea of guilty or no contest, or a verdict or finding of guilt, regardless of whether a sentence was imposed by the Court. (See criminal history below for further clarification)

“Consumer Credit Report History”: Any written, oral or other communication of any information by a consumer credit reporting agency bearing on a consumer’s credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected, in whole or in part, for the purpose of serving as a factor in establishing the consumer’s eligibility for employment purposes.

Jobs requiring a consumer credit report fall into three categories, subject to the limitations as set forth in California Government Code §12952

- A. All job classifications or positions with oversight of key information and technology management.
- B. All job classifications or positions with senior level financial management responsibilities.
- C. Any other positions required by law.

“Criminal History”: Records maintained by the California Department of Justice (DOJ) or by other local or federal agencies, pertaining to the identity and criminal history of any person. The Background Review Committee is limited to the consideration of convictions only and shall not consider criminal information related to conduct that did not result in a conviction. The following records are also prohibited from consideration:

- A. An arrest not followed by a conviction except under limited circumstances;
- B. Conviction information concerning a referral to, and participation in, any pretrial or post-trial diversion program;
- C. Information concerning convictions that have been judicially ordered sealed, expunged, or statutorily eradicated pursuant to law or any conviction for which the convicted person has received a full pardon or has been issued a certificate of rehabilitation

If the specific behavior at issue resulted in a conviction, the record of information may include name, date of birth, date of arrest, arresting agency, booking numbers, charges, dispositions and similar data about the person as it related to said criminal convictions.

“Designated Classification” or “Position”: Any classification or specific position within classification may be designated based upon the illustrative functions detailed in the job description, or specific functions of a position listed in the job announcement. The Human Resources Department makes all such designations, which may be reviewed by legal counsel. The current Designated Classification/Position list is attached.

“Felony”: As defined in Penal Code § 17(a), as amended.

“Fiduciary Responsibility”: A duty held by employees with access to, custody of, and/or administration of property including financial instruments (cash, checks, accounts) belonging to El Dorado Transit.

“Job Classification Specification”: A description of the job responsibilities of a position that also includes the requisite knowledge, skills, experience, and education to perform the job.

“Live Scan Criminal Background Check”: A process by which an Applicant’s or employee’s fingerprints are captured electronically, and transmitted to the California Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI), in order to determine whether an Applicant, employee, or volunteer has a criminal history.

“Master Key Access”: A key or mechanical device, such as an electronic card, allowing entry to all or many parts of a facility.

“Nexus”: The relationship between specific criminal conduct and the duties of a specific job classification, or designated position within a classification.

“Pending Charge”: A criminal charge that has not been adjudicated at the time of the first review by the Committee.

“Personally Identifiable Information”: Information that identified or describes an individual, including but not limited to name, address, telephone number, family members, social security number, credit card numbers, and physical characteristics that would make the individual’s identity easily discoverable.

“Position”: A single job held by an individual in a job classification for which the individual has been hired, or provisionally hired.

“Records Security Officer (RSO)” / “State of California Custodian of Records (COR)”: The Executive Director, or designee, whose responsibility it is to ensure the confidentiality and security of all criminal history information requested and received. The RSO must meet the requirements of the State of the California, Department of Justice for Custodian of Records for Live Scan.

“Suitability for Employment”: The determination of whether or not an individual meets or exceeds the hiring criteria for a position; including consideration of criminal background, and/or negative credit history, if any.

IV. Criminal History

A. Denial of Employment based on Criminal History

1. No Applicant (either internal or external) for employment with Transit will be summarily disqualified from employment based solely on criminal conviction. Transit shall consider an Applicant’s prior criminal convictions among multiple factors in making individual hiring decisions. Transit shall evaluate each Applicant on a case-by-case basis to

determine if the particular circumstances of the conviction(s) indicate whether or not the Applicant is suitable for employment.

2. Pending Charge: If a criminal charge is still pending at the time of the review, the Applicant or employee will not move forward in the hiring process until there has been a final disposition from the court and the Applicant or employee has provided adequate documentation to Human Resources, for review.

B. Criminal Convictions

1. Except as provided below, Transit shall not:
 - a. Include on any application for employment any question that seeks the disclosure of an Applicant's conviction history;
 - b. Inquire into or consider the conviction history of the Applicant until after the employer has made a conditional offer of employment
 - c. Consider, distribute or disseminate information about any of the following while conducting a conviction history background check:
 - i. An arrest not followed by a conviction, except under limited circumstances pursuant to California Labor Code §432.7;
 - ii. Referral or participation in a pretrial diversion program; or
 - iii. Convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law, or any conviction for which the convicted person has received a full pardon or has been issued a certificate of rehabilitation
2. In determining whether an Applicant should be denied employment based solely or in part because of the Applicant's conviction history, Transit shall make an individualized assessment as to whether the Applicant's conviction history has a direct and adverse relationship to the specific duties of the job that justifies denying the Applicant the position. In making such an assessment, Transit shall consider the following:
 - a. The nature and gravity of the offense;
 - b. The time that has passed since the offense or conduct and the completion of the sentence; and
 - c. The nature of the job held or sought.
3. If Transit determines that the Applicant's conviction history has a direct and adverse relationship to the specific duties of the job that justify denying the Applicant the position, Transit may deny employment to the Applicant pursuant to the procedures outlined below.

C. Procedures

1. Criminal Background Check: A criminal background check will be conducted only after a conditional offer of employment is made. The Applicant must complete the Post Conditional Offer Criminal History Inquiry form at the time they receive their offer letter and pre-employment background packet.
2. When a Background Check Reveals Negative Information: Transit will be notified when an Applicant's or employee's criminal background check lists conviction(s), will review

that information, and then make a preliminary decision regarding whether the Applicant's conviction history disqualifies the Applicant or employee. El Dorado Transit shall notify the Applicant of this preliminary decision in writing. Such notification shall contain the following:

- a. Notice of the disqualifying conviction(s) that is the basis of the preliminary decision to rescind the offer;
 - b. A copy of the conviction history report, if any;
 - c. An explanation of the Applicant's rights to respond to the notice of Transit's preliminary decision before the decision becomes final and the deadline by which to respond. The explanation shall inform the Applicant that the Applicant's response may include submission of evidence challenging the accuracy of the conviction history report and/or evidence of rehabilitation and/or mitigating circumstances.
3. The Applicant shall have five (5) business days to respond to the preliminary decision. The Applicant shall have five (5) additional business days to respond when the Applicant notifies Transit in writing that the Applicant disputes the accuracy of the conviction history report. Transit shall consider this information before making a final decision.
4. Final Decision: In making a final decision, Transit may consider among other relevant factors, the following:
- a. The nature of the criminal conduct;
 - b. The number of convictions;
 - c. Whether or not the convictions were disclosed;
 - d. The length of time since the criminal conviction in relation to the time of the job application
 - e. The degree of rehabilitation evidenced by the Applicant
 - f. The Applicant's employment history
 - g. The circumstances under which the crime(s) were committed, including any mitigating circumstances; and
 - h. Whether the nature of the conviction(s) in relationship to the particular duties of the job classification create a risk of endangerment to any person and/or property of the public, and/or Transit's employees or assets.
5. If Transit makes a final decision to deny the Applicant based solely or in part on the Applicant's conviction history, Transit shall notify the Applicant in writing of all of the following:
- a. Transit may, but is not required to, justify its reasoning for making the final disqualification;
 - b. Any existing procedure for challenging the reasoning for making the final decision or reconsiderations and;
 - c. The right to file a complaint with the Department of Fair Employment and Housing.
6. The process to rescind a job offer will be documented in the event the Applicant chooses to dispute the decision. Transit is committed to providing consistency in its hiring practices and the action is in no way discriminatory against those with any criminal history.

V. Background Check Reports

In determining an Applicant's or employee's suitability for employment or when a change in job duties has been documented; the following will be considered:

A. Types of Back Check Investigations

1. Background checks may include, but are not limited to the following,
 - a. Review of Applicant's or employee's criminal history, pursuant to the limitations established in California Labor Code §12952;
 - b. Credit history, pursuant to the limitations established in California Labor Code § 1024.5;
 - c. Review of DMV records;
 - d. Initial and on-going drug and alcohol testing (as required under US Department of Transportation's policies and procedures);
 - e. Verification of required license, certification and/or degree; and
 - f. Verification of employment history.

B. Disclosure to the Applicant

1. Transit may obtain a background check report for employment purposes only when Transit certifies that:
 - a. Written notice will be provided to the Applicant in clear and conspicuous disclosure that a consumer report may be obtained prior to procuring the background check report, in a document that consists solely for the disclosure;
 - b. The Applicant must provide written consent for the employer to obtain a background check report; and
 - c. Information from the consumer report shall not be used in violation of any state or federal equal employment opportunity law or regulation.

C. Pre-Adverse Action (Step 1)

1. Before rejecting an Applicant based on information obtained in a background check report, Transit will follow a two-step adverse process required under the Fair Credit Reporting Act (FCRA). The first step shall include all of the following:
 - a. Provide the Applicant with a copy of the consumer report that was obtained and relied upon to make the decision;
 - b. Provide the Applicant with a copy of the FCRA's Summary of Your Rights Under the Fair Credit Reporting Act;
 - c. Provide the Applicant contact information of the consumer reporting agency (CRA) or screening agency.
 - d. The Applicant shall have five (5) business days to respond to dispute the finding within the report;
 - e. If the Applicant notifies Transit within the five (5) business days disputing the accuracy of the report and the Applicant provides specific evidence that supports

their claim, then the Applicant shall have an additional five (5) days to respond to the notice. Transit will consider the information submitted by the Applicant prior to making a final decision.

D. Adverse Action (Step 2)

1. If a final decision is made to rescind a job offer, Transit will provide the Applicant a second notice as required under FCRA, within three (3) business days that the decision was made regarding the adverse action. The second notice shall include the following information:
 - a. Written notice that the job offer is withdrawn due to results of the background check;
 - b. Contact information of the CRA or screening agency;
 - c. Notification that the CRA or screening agency did not make the decision to pursue adverse action and will not have an explanation for the adverse action;
 - d. Notification that the Applicant can request a second copy of their background check report within sixty (60) days; and
 - e. Notification that the Applicant can still dispute the results of the background report and/or file a complaint with the Department of Fair Employment and Housing
2. If the Applicant requests a copy of a consumer report from Transit, within three (3) business days of receiving the Applicant's requests, together with proper identification, Transit must provide to the Applicant a copy of the report and a copy of the Applicant's rights pursuant to 15U.S.C. §1681g(c)(3).
3. When a background check report contains information regarding an Applicant or employee's criminal history, Transit shall ensure compliance with the laws governing the consideration of an Applicant's or employee's criminal history as discussed above.

VI. Employer Use of Consumer Credit Reports

- A. Transit shall not use a consumer credit report for employment purposes unless the position of the person for whom the report is sought is any of the following
 1. A managerial position
 2. That of a sworn peace officer or other law enforcement position;
 3. A position for which the information contained in the report is required by law to be disclosed or obtained;
 4. A position that involved regular access to all of the following types of information of any one person;
 - a. Bank or credit card account information
 - b. Social security number(s)
 - c. Date of birth;
 - d. A position in which the person is, or would be, any of the following'
 - i. A named signatory on the bank or credit card account of the employer;
 - ii. Authorized to transfer money on behalf of the employer; and/or
 - iii. Authorized to enter into financial contracts on behalf of the employer
 - e. A position that involves access to confidential or proprietary information, including a formula, pattern, compilation, program, device, method, technique, process or trade

secret that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons, who may obtain economic value from the disclosure or use of the information, and (ii) is the subject of an effort that is reasonable under the circumstances to maintain secrecy of the information

5. A position that involves a regular access to cash totaling ten thousand dollars (\$10,000) or more of the employer, a customer, or client, during the workday.

VII. Failure to Disclose by Prospective Employees

When a background investigation reveals that a prospective employee who has applied for a position with Transit was dishonest by failing to disclose a conviction on their Post Conditional Offer Criminal History Inquiry Form, the prospective employee will no longer be eligible for employment.

VIII. Addition of Job Classifications

Addition of New Job Classifications

A position that is not included in the list attached to this Board Policy shall be considered added if it is established by the Board of Directors at the time it adopts the job classification specification for the position that a DMV, Criminal Background Investigations or Credit check is required.

IX. Responsible Authorities

A. Board of Directors:

The Board of Directors is responsible for reviewing and adopting all procedures within the Board Policy E-5. The policy establishes the types of background checks appropriate for specific job classifications, or positions within a classification, and the categories of crimes and consumer credit reports for which certain job applicants may be determined ineligible for employment by Transit.

B. Executive Director:

The Executive Director is responsible for periodic updates of the policy and for designating a Records Security Officer (RSO) who meets the State of California – DOJ, Custodian of Records for Live Scan Service requirements.

C. Human Resources:

The Human Resources Department is responsible for:

1. Ensuring that Transit's employment application process complies with applicable laws regarding the disclosure of criminal background information / credit check.
2. Procuring a third party to administer fingerprinting of designated applicants on Live Scan equipment and obtain background screening reports for applicants and employees.
3. Ensuring written permission is obtained from individuals prior to obtaining a copy of their criminal history or credit report.

4. Provide written notification to individuals regarding their status in the hiring process.
5. Obtaining and maintaining the budget to support background checks.
6. Determining which job classifications and positions within classifications will be subjected to credit and/or criminal background checks.

X. Attachments

Attachment A- Job Classifications and Level of Background Check Required

Attachment B – Post Conditional Offer Criminal History Inquiry Form

Attachment C – FCRA Authorization to Obtain Consumer Report

(Background or Credit Check)

Job Classifications and Level of Background Check Required

<u>Job Classification:</u>	<u>Reason:</u>	<u>Type:</u>
Administrative Coordinator	Access to IT and other agency confidential information	Credit Check/Criminal Background/Drug Testing
Custodian	Safety Sensitive	Criminal Background/DMV Drug Testing
Equipment Technician I/II	Safety Sensitive	Criminal Background/DMV Drug Testing
Executive Director	Signatory on bank account/Master Key Access	Credit Check/Criminal Background/Drug Testing
Finance Manager	Fiduciary responsibility	Credit Check/Criminal Background/Drug Testing
Fiscal Technician I/II	Fiduciary responsibility	Credit Check/Criminal Background/Drug Testing
Human Resources Manager	Custodian of Records; Drug & Alcohol Program Manager/Master Key Access	Credit Check/Criminal Background/Drug Testing
Maintenance & Facilities Supervisor	Safety Sensitive	Criminal Background/DMV Drug Testing
Maintenance Technician	Safety Sensitive	Criminal Background/DMV Drug Testing
Office Assistant I/II	Access to confidential public information	Drug Testing/ Criminal Background
Operations Manager	Safety Sensitive/Master Key Access	Drug Testing/Criminal Background/Credit Check/DMV
Planning & Marketing Manager	Safety Sensitive	Criminal Background/DMV Drug Testing
Safety Coordinator	Safety Sensitive	Criminal Background/DMV Drug Testing
Transit Dispatcher	Safety Sensitive	Criminal Background/DMV Drug Testing
Extra Help Transit Dispatcher	Safety Sensitive	Criminal Background/DMV Drug Testing
Transit Operator	Safety Sensitive	Criminal Background/DMV Drug Testing
Extra Help Transit Operator	Safety Sensitive	Criminal Background/DMV Drug Testing
Transit Operations Supervisor	Safety Sensitive	Criminal Background/DMV Drug Testing

POST CONDITIONAL OFFER CRIMINAL HISTORY INQUIRY

Equal Employment Opportunity Policy: We are committed to providing equal employment opportunities to all employees and applicants without regard to race, ethnicity, religion, color, sex (including childbirth, breast feeding and related medical conditions), gender, gender identity or expression, sexual orientation, national origin, ancestry, citizenship status, uniform service member and veteran status, pregnancy, age, protected medical condition, genetic information, disability or any other protected status in accordance with all applicable federal, state and local laws.

Name _____
 (Print) Last First Middle

Have you ever pled guilty or “no contest” to, or been convicted of, a misdemeanor or felony?

Yes No

If yes, please give the date(s) and details:

Do not include minor traffic infractions, convictions for which the record has been sealed or expunged, any conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed, referrals to and participation in any pretrial or post trial diversion programs, any conviction that has been judicially dismissed or ordered sealed, juvenile court adjudications, and misdemeanor marijuana-related convictions that occurred over two years ago in answering these questions.

Have you been arrested for any matters for which you are currently out on bail or on your own recognizance pending trial? Yes No

If yes, please give the date (s) and details:

Answering “Yes” to the preceding questions will not result in an automatic bar to employment. Factors including the nature and gravity of the offense, the time that has passed since the offense and completion of your sentence, and the nature of the job will be considered. Further, if the Company tentatively decides to withdraw its offer of employment based on your criminal history you will be given an opportunity to submit evidence challenging the accuracy of the conviction record, to offer evidence of rehabilitation or mitigating circumstances, or both, before the decision becomes final.

I hereby state that all the information that I have provided on this form is true, complete and accurate. I understand that if the information I have provided is found to be false or incomplete in any respect, the conditional offer of employment will be withdrawn immediately, or if I am employed, I will be subject to immediate termination.

Date

Signature of Applicant

FCRA Authorization to Obtain a Consumer Report (Background/Credit Check)

Pursuant to the federal Fair Credit Reporting Act, I hereby authorize El Dorado Transit and its designated agents and representatives to conduct a comprehensive review of my background through a consumer report and/or an investigative consumer report to be generated for employment, promotion, reassignment or retention as an employee. I understand that the scope of the consumer report/investigative consumer report may include, but is not limited to, the following areas: verification of Social Security number; current and previous residences; employment history, including all personnel files; education; references; credit history and reports; criminal history, including records from any criminal justice agency in any or all federal, state or county jurisdictions; birth records; motor vehicle records, including traffic citations and registration; and any other public records.

I, _____, authorize the complete release of these records or data pertaining to me that an individual, company, firm, corporation or public agency may have. I hereby authorize and request any present or former employer, school, police department, financial institution or other persons having personal knowledge of me to furnish El Dorado Transit Authority or its designated agents with any and all information in their possession regarding me in connection with an application of employment. I am authorizing that a photocopy of this authorization be accepted with the same authority as the original.

I understand that, pursuant to the federal Fair Credit Reporting Act, if any adverse action is to be taken based upon the consumer report, a copy of the report and a summary of the consumer's rights will be provided to me.

Signature of Applicant

Date

Printed Name of Applicant