

Pretrial Release – Oregon Senate Bill 48



Quick Summary

- “Pretrial” is when a person is charged with a crime and presumed innocent. The pretrial process ends when the charge is resolved, for example, when the charges are dismissed, the person enters a guilty plea, or the person is found guilty or acquitted after a trial.
- The U.S. Supreme Court has clearly stated that liberty (pretrial release) is the norm and detention in jail before trial should be the carefully limited exception.
- “Bail” may refer to the process of pretrial release or the term may refer to money bond or other financial condition of release.
- In Oregon, judges may deny pretrial release only for persons charged with certain serious offenses and only after finding that there is a danger to the victim or members of the public if the defendant is released. ORS 135.240; Or Const. Art I, Sections 14 and 42.
- Reliance on money (“security release” or “money bond”) has drawbacks for crime victims, people accused of crimes, judges, prosecutors, law enforcement and corrections officers, and the community.
- Pretrial assessment and appropriate conditions of release can improve community well-being and safety, support appearance in court, and protect the rights of criminal defendants.
- To promote safety and fairness, Oregon Senate Bill 48 – SB 48 (2021) – directs the Chief Justice to establish guidelines for pretrial release that direct courts to adopt a consistent approach that considers both the type of crime charged and factors related to the individual (e.g., pretrial assessment score/likelihood of success on pretrial release, criminal record, threats made, etc.). See www.courts.oregon.gov/rules/Documents/CJO_2022-010.pdf.
- The Chief Justice guidelines direct that any release condition imposed be the least restrictive necessary to ensure both public and victim safety, and that the defendant returns to court as required; courts must strive to ensure that release conditions are available to all defendants and not contingent upon ability to pay.

What is the purpose of SB 48?

- Promote consistent, fair, and equitable justice practices across Oregon
- Increase the likelihood that people accused of crimes show up for court
- Promote community well-being and safety and the rights of victims
- Protect constitutional rights related to pretrial release
- Maximize efficiency and best use of resources (attorney, jail, court)

How does SB 48 support those goals?

SB 48 includes provisions to:

- Establish and implement statewide guidelines for pretrial release
- Increase the use of risk-based assessments to inform decision-making
- Decrease reliance on the use of security release (money bond)
- Enhance victim notice and input

More specifically, SB 48:

- Eliminates the statutory right to immediate security release that has led to standardized security schedules across the state; allows security release when less restrictive options are unlikely to meet court appearance and community safety goals
- Requires the Chief Justice to issue guidance to circuit court presiding judges for determining who will be released on recognizance, released on conditional release, or initially held by the jail or sheriff for a release decision at arraignment, based on the charges and the individual circumstances of the defendant
- Requires the presiding judges in the state circuit courts to enter pretrial release orders that follow the Chief Justice’s guidelines



How do the guidelines deal with people charged with serious or violent crimes?

The Chief Justice’s guidelines provide that persons charged with more serious offenses – including violent felonies, sex crimes, and domestic violence felonies or misdemeanors – as well as offenses that indicate a person may not comply with court imposed conditions of release, be held for arraignment, first appearance, or a release decision by a judge. A risk-based approach, including consideration of offender-based criteria in addition to offense-based guidelines, helps ensure community and victim safety. The guidelines also encourage courts to establish or expand the use of pretrial assessments to inform decision-making.

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Background and Details

Additional Definitions

- The terms **“financial condition of release,” “financial release condition,” “financial condition,” “security,” or “money bond”** describe the requirement that an individual post money as a condition of release from jail. It is an amount of money that, if ordered by a judge, may be lost if the person fails to appear in court. An individual released on security must follow Oregon’s general conditions of release (ORS 135.250) and be subject to additional conditions as well. See below.
- **“Release on recognizance”** – signing a written agreement to appear in court as required, without paying money bond. Oregon law requires every individual released pretrial to sign an agreement promising they will return to court, not commit other crimes while awaiting trial, and meet Oregon’s general conditions of release (ORS 135.250).
- **“Release with conditions”** – signing a written agreement to appear in court as required without paying money bond, follow Oregon’s general conditions of release, and abide by any additional conditions imposed by the court (e.g., avoiding contact with a victim, not using drugs or alcohol, electronic monitoring, or other requirements to help ensure success in meeting pretrial commitments, including showing up for court and maintaining community and victim safety).

The Law

- **The Constitution says people charged with a crime are presumed innocent until proven guilty.**
- The U.S. Supreme Court has clearly stated that, “In our society, **liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.**” *United States v. Salerno*, 481 U.S. 739, 755 (1987).
- **The U.S. Supreme Court has recognized only two valid purposes for the denial of bail (pretrial release): (1) assuring an individual’s presence in court and (2) protecting public safety.** No other purposes are lawful.
- **Courts have generally held that detention can be used only as a last resort.** That is, judges can deny bail only when they find that no lawful condition of release (or combination of conditions) can provide reasonable assurance that the individual will appear in court and will not endanger the public. Oregon law permits a court to deny pretrial release resulting in “preventive detention” only for defendants charged with specific crimes (e.g., murder, aggravated murder, treason, and violent felonies including certain sex offenses) and only if the court makes certain findings regarding the danger to victim and community safety if the defendant is released.
- **Oregon Senate Bill 48 (SB 48)** – more about that below.



Why was SB 48 needed?

Pretrial release practices in Oregon vary widely across jurisdictions. A more consistent, risk-based approach will improve outcomes for the community and for people charged with crimes.

Until the implementation of SB 48, Oregon’s legal framework relied on the use of “security schedules” that set dollar amounts for immediate release, often without a systematic pretrial assessment of the likelihood of someone showing up for court, reoffending while released before trial, or causing other harm in the community. That approach could fall short in protecting the community and the rights of people charged with crimes. Use of money bail also fails to provide adequate information to the court about why someone was released/detained. Relying on money bail results in community safety coming second to the ability to pay.

Reliance on money (“security” or “bail”) has drawbacks for crime victims, people accused of crimes, judges, prosecutors, law enforcement and corrections officers, and the community.

Across the Nation:

- Only about one-third of the 740,000 people currently sitting in jails around the country have been convicted of a crime. This is because we often detain people while they are awaiting the completion of their case.
- Currently, more than half of the highest-risk defendants are released pretrial without supervision or monitoring based solely on their ability to pay. This poses a threat to law enforcement and the community because those individuals are not being adequately assessed for risk or supervised while on pretrial release.
- Currently, low-risk defendants who simply cannot afford to purchase their freedom remain in jail pending trial. This practice is unfair and has a disproportionate impact on people of color and the poor.
- Jurisdictions that rely on pre-set bond amounts enable defendants to avoid risk screening by the courts with input from prosecutors, crime victims, and defense attorneys. The shift toward a risk-based approach ensures an individualized decision regarding release, required conditions, and the setting of security, if any.
- Those with money – regardless of where they got the money or their potential danger to the community – can purchase their freedom prior to trial. By shifting away from a money-based system, justice partners can work to manage risk in their communities while maximizing efficient use of resources.
- Research demonstrates that when money determines who is released and who is detained before trial, it yields poor outcomes for community well-being and safety, fairness, and cost.
 - The inability to pay money as a condition of release can coerce people into pleading guilty to enable them to get out of jail sooner despite being innocent.
 - Keeping people in jail who do not need to be there results in *higher* re-arrest rates once they are released. This means our communities are safer when we do not detain people unnecessarily.
 - When people are not detained in jail, they can continue working, stay in their homes, and fulfill their caregiving responsibilities. These are all activities that make our communities stronger.
- Recent research in Colorado found that unsecured bonds (no money paid) are as effective as secured bonds at achieving court appearance as well as community well-being and safety; higher dollar amounts of secured bonds are associated with more pretrial jail bed use but not increased court appearance rates.



What role will offenses play in release decisions? Do the guidelines still allow for local flexibility?

SB 48 directs the Chief Justice to issue [guidelines](#) on those persons and offenses who are subject to release on recognizance, release with special conditions, and those who should be held for judicial review. The guidelines retain judicial flexibility in decision-making by including an additional guideline for ‘overriding circumstances’ – objective, nondiscretionary, person-specific criteria that can be applied to support release determinations. The Chief Justice order creates a two-step decision-making process: (1) identifying the offenses that fall into each release category; and then, if applicable, (2) identifying any “overriding circumstances.” These could include:

- A score from a risk assessment tool
- Prior criminal record
- Outstanding warrants
- A threat of violence to a victim, law enforcement officer, or anyone else connected with the case
- Prior Failure to Appear (FTA) or other violations of conditions of release

Presiding judges were encouraged to work with local public safety stakeholders to identify special conditions for certain persons or offenses and the criteria for overriding circumstances. SB 48 required that orders be in place by July 1, 2022.

What are the requirements for a local circuit court Pretrial Release Order?

The presiding judge in each judicial district* was encouraged to work collaboratively with justice partner agencies that have pretrial responsibilities and other stakeholders to take a practical approach to achieve shared goals. Each presiding judge then created a **Pretrial Release Order (PRO)** for the judicial district and structured it to utilize established local pretrial release resources. **The PRO is not intended to replace existing pretrial programs, nor does it require a county to create one.** It is instead intended to reduce the reliance on security/bail and move counties toward a risk-based approach to pretrial release and the development of pretrial programs (to include monitoring of individuals on release, use of a risk assessment tool to aid release decision making and enhancement of local pretrial release resources).

- A PRO must specify to the sheriff or the entity supervising the local correctional facility those persons and offenses:
 - Subject to release on recognizance;
 - Subject to release with special conditions as specified in the order; and
 - That are not eligible for release until a judge makes a determination at arraignment or a release hearing.
- Any release condition imposed should be the least restrictive condition necessary to ensure both public and victim safety, and that the defendant returns to court as required.
- Courts must strive to ensure that release conditions are available to all defendants and not contingent upon a defendant's ability to pay.



* Oregon has 27 judicial districts encompassing circuit courts in each of its 36 counties. Each district has one presiding judge, but it may encompass more than one county and circuit court (one circuit court in each county).

How are the courts supporting statewide and local implementation?

OJD hired a statewide pretrial release coordinator to support local jurisdictions in implementation of SB 48 and the building of pretrial programs. The statewide coordinator is working to ensure consistency in business practices, data collection, and program metrics. The legislature also funded new Release Assistance Officer (RAO) positions in some local courts across the state to support further development and implementation of pretrial release and monitoring programs and work with local sheriffs and other justice partners to integrate these changes in counties that have established pretrial programs.

Who was involved in developing recommendations for SB 48 implementation?

Pretrial justice goals can be achieved when law enforcement, prosecution, defense, courts, and others who impact or are impacted by the system work together effectively.

The Chief Justice's Criminal Justice Advisory Committee (CJAC), through its Pretrial Subcommittee, developed recommendations to comply with SB 48 and to inform the Chief Justice's pretrial release guidelines. The CJAC's Pretrial Subcommittee includes representatives from state and local courts, district attorneys, defense attorneys, community-based service providers and legal service providers for crime victims, appellate attorneys, law enforcement, community corrections, state and local government, and the Oregon State Bar. Their recommendations were mostly unanimous or consensus. The Chief Justice's guidelines also reflect input from court leadership and presiding judges.

Can the guidelines be updated?

Yes. The CJAC Pretrial Subcommittee is actively monitoring implementation of SB 48 and the new pretrial release guidelines. The subcommittee can refer recommendations for change to the full CJAC. Upon approval, the full CJAC submits recommendations to the Chief Justice for consideration. The Chief Justice generally seeks additional feedback on any recommendations and can direct changes to the release categories in the Chief Justice Order (CJO). Once the amendment is adopted, every local PRO must be modified to comply with the amended CJO release guidelines.

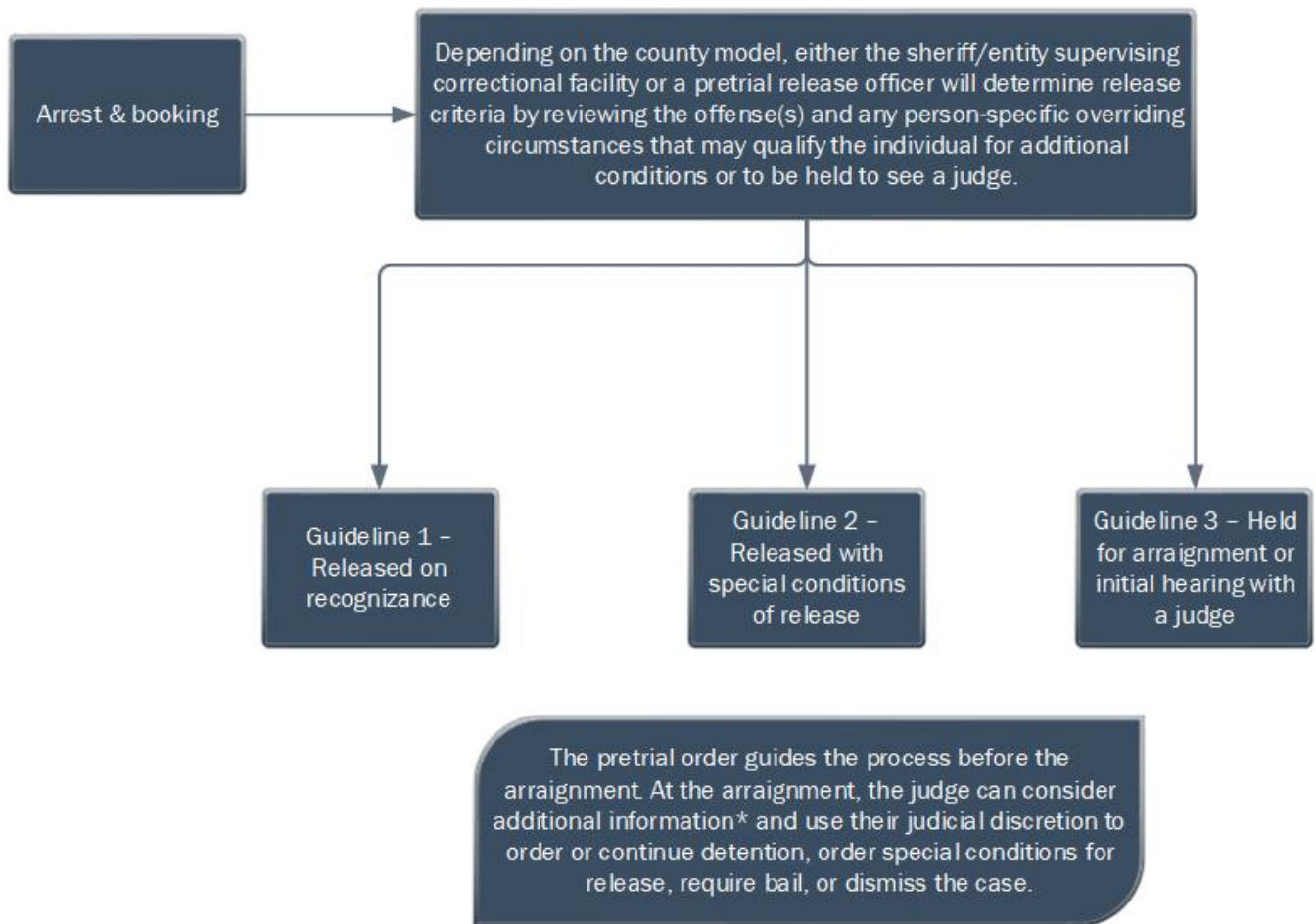
For example, the committee is reviewing the placement of bias crimes in the CJO 22-010 release guidelines. A proposal has been presented to move Bias Crime I (https://oregon.public.law/statutes/ors_166.165) and/or Bias Crime II (https://oregon.public.law/statutes/ors_166.155) to Guideline 3, which would require detention until appearance before a judge. (The individual would be held until arraignment, when a judge would make a release decision considering conditions that will ensure return to court and public/victim safety.) That review is underway, but there is no specific timeline for the decision-making process.

The Pretrial Process

SB 48 and the updated pretrial release guidelines only affect the period between arrest/booking and arraignment. At arraignment, the judge can consider additional information* and has judicial discretion to make appropriate decisions related to release or detention.

Individuals are assessed for release based on the offenses charged and the application of any person-specific overriding circumstances that may indicate a higher risk of failing to appear or reoffending while on pretrial release.

Different counties employ different pretrial program models. Depending on staffing, either the sheriff or entity supervising the correctional facility, or a Release Assistance Officer (RAO), will apply the pretrial release order criteria in determining release.



*Additional investigational information provided by the police or District Attorney (obtained after initial arrest), additional charges, any victim statements made at arraignment, answers to questions directly to the defendant or their attorney at arraignment, etc.