

E-ALERT | Government Contracts & Employment Law

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OFCCP ISSUES DIRECTIVE REGARDING FEDERAL CONTRACTOR USE OF CRIMINAL HISTORY INFORMATION IN HIRING DECISIONS

On January 29, 2013, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a new [directive](#) concerning federal contractors' and subcontractors' use of criminal histories in making employment decisions.¹ According to the OFCCP directive, federal contractors that exclude job applicants on the basis of their criminal records without considering other factors risk violating Title VII's prohibitions against both (i) disparate treatment on the basis of a protected characteristic and (ii) disparate impact against members of a protected group. However, as a practical matter, this new mandate could create compliance complications for federal contractors, who are subject to competing federal regulations regarding some employees' criminal histories. As a result, contractors should carefully consider their legal obligations with respect to employment practices and hiring decisions.

The new OFCCP directive largely adopts [enforcement guidance](#) previously issued by the Equal Employment Opportunity Commission (EEOC) in April 2012. Recognizing the racial and ethnic disparities that exist in the criminal justice system, the EEOC guidance states that blanket or automatic exclusions of an individual from employment or promotion based simply on the individual's criminal record will be regarded as suspect, particularly when the individual is an African American or a Hispanic male. However, as a defense to a Title VII claim, an employer can show that the exclusion is job-related and consistent with business necessity and that the employer has made an individualized determination that hiring or promoting the individual in question would likely create a risk of improper conduct that would be detrimental to the employer's business or workplace.

In its recent directive, the OFCCP recommends that federal contractors ensure that policies and procedures that screen job applicants and employees for criminal conduct involve an individualized assessment. Such an assessment should focus on "whether a criminal conduct exclusion is 'job related and consistent with business necessity.'"² In particular, employment policies "should be narrowly tailored to the essential job requirements and actual circumstances under which the jobs are performed; to the specific offenses that may demonstrate unfitness for performing such jobs; and to the appropriate duration of exclusions for criminal conduct, based on all available evidence."³ When considering hiring individuals with criminal histories, contractors should evaluate the following three "Green factors":⁴

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.

¹ OFCCP Directive 306, "Complying with Nondiscrimination Provisions: Criminal Record Restrictions and Discrimination Based on Race and National Origin" (Jan. 29, 2013) (hereinafter, "Directive"), *available at* http://www.dol.gov/ofccp/regs/compliance/directives/Dir306_508c.pdf.

² *Id.* at 4.

³ *Id.* at 5.

⁴ These factors were first cited by the Eighth Circuit in its *Green v. Missouri Pacific Railroad* decision in 1975.

Such fact-based inquiries, however, may expose contractors to increased expense and greater litigation risk since these inquiries necessarily involve making judgments about the gravity of an offense and the relationship of the offense to essential job duties.

In addition, the OFCCP highlights several “best practices” identified by the EEOC. These best practices include the following:⁵

- Eliminating policies and practices that exclude individuals from employment based solely on their having a criminal record.
- Training decisionmakers about Title VII’s prohibition against discrimination in employment.
- Developing a narrowly tailored, written policy for screening potential and current employees for criminal conduct (i.e., arrests or convictions). Such a policy should, among other things, identify requirements essential to the job; enumerate specific criminal offenses that may be disqualifying; determine the necessary duration of exclusion; and provide that the employer must keep records of research that was considered in crafting the policy.
- Limiting criminal history questions to matters “for which exclusion would be job related for the position in question and consistent with business necessity.”
- Keeping criminal records information confidential.

Further, the OFCCP recommends that “contractors, as a general rule, refrain from inquiring about convictions on job applications.”⁶ In some cases, the OFCCP states that local law may actually prohibit contractors from asking job applicants about criminal convictions or arrests.⁷ Where contractors are permitted to make such inquiries, the OFCCP recommends that they be “limited to convictions for which exclusion would be job-related for the position in question and consistent with business necessity.”⁸ Finally, contractors are advised to keep criminal history information confidential.⁹

New “safeguards” will also apply to contractors using federally-assisted workforce systems to list employment openings.¹⁰ For example, all contractors that use public workforce systems, such as the federally-assisted Job Bank, will now be notified that nondiscrimination law prohibits categorical exclusions of individuals based solely on arrest or conviction histories.¹¹ Contractors subject to the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, in particular, are required to use these systems.¹²

Moreover, the OFCCP directive notes two additional federal laws that may also affect contractors’ employment practices in this context. First, the Fair Credit Reporting Act restricts an employer’s ability to conduct criminal background checks to screen applicants, requiring, among other things, that the employer obtain the applicant’s permission prior to conducting such a check.¹³ Second,

⁵ EEOC Enforcement Guidance, “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964,” at 25–26 (Apr. 25, 2012) (hereinafter, “Guidance”), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

⁶ Directive at 5.

⁷ *Id.* at 5 n.16.

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 7.

incentives programs such as the Work Opportunity Tax Credit and Federal Bonding Program encourage employers to hire individuals with criminal convictions.¹⁴

Finally, the OFCCP adds that some states and cities have enacted their own restrictions on employer consideration of criminal records. Although not expressly mentioned in the OFCCP directive, contractors should be aware that the EEOC guidance provides that compliance with federal law is a defense against a charge of discrimination under Title VII, but compliance with state or local law is not.¹⁵

In addition to new compliance requirements, the new directive may create complications for contractors in light of their competing obligations under federal regulations. For example, § 52.209-5 of the Federal Acquisition Regulation (FAR) requires contractors to make detailed certifications disclosing the criminal histories of certain employees; and § 252.203-7001 of the Defense Federal Acquisition Regulation Supplement bars individuals that have been convicted of fraud or other defense-contract-related felonies from serving in management or certain other contracting capacities, and further provides for criminal penalties of up to \$500,000 for contractors that employ individuals with such criminal histories. Further, FAR Subparts 9.1 and 9.4 add additional risk for contractors employing persons with histories of integrity-related criminal convictions because such employment, at least in significant positions, could limit a contractor's ability to demonstrate its present responsibility to receive contracts and to avoid debarment. In light of the recent OFCCP directive, contractors will need to understand and weigh carefully these additional, potentially conflicting legal obligations and practical considerations in making employment decisions.

We recommend that federal contractors and subcontractors assess their current practices in light of the new OFCCP directive in order to determine whether changes or updates are warranted for inquiring about criminal history or conducting criminal background checks of potential or current employees.

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¹⁴ *Id.*

¹⁵ Guidance at 24.