

Office of Federal Contract Compliance Programs

# Directive (DIR) 2013-02



**Number: 306 Date: January 29, 2013 ADM Notice**

1. **SUBJECT:** Complying with Nondiscrimination Provisions: Criminal Record Restrictions and Discrimination Based on Race and National Origin.
2. **PURPOSE:** The purpose of this Directive is to provide information to federal contractors and subcontractors and federally assisted construction contractors and subcontractors (contractors) and to OFCCP personnel about: (1) the circumstances in which exclusions of applicants or employees based on their criminal records may violate existing nondiscrimination obligations; (2) the Training and Employment Guidance Letter (TEGL) 31-11 issued on May 25, 2012 to the American Job Center network and other covered entities in the public workforce system by the Department of Labor's Employment and Training Administration (ETA) and Civil Rights Center (CRC); and (3) the Enforcement Guidance issued by the Equal Employment Opportunity Commission (EEOC) on April 25, 2012.
3. **EFFECTIVE DATE:** This directive is effective immediately.
4. **BACKGROUND:** In recent decades, the number of Americans who have had contact with the criminal justice system has increased exponentially. It is estimated that about one in three adults now has a criminal history record – which often consists of an arrest that did not lead to conviction, a conviction for which the person was not sentenced to a term of incarceration, or a conviction for a non-violent crime.<sup>1</sup> On any given day, about 2.3 million people are incarcerated<sup>2</sup> and each year 700,000 people are released from prison<sup>3</sup> and almost 13 million are admitted to – and released from – local jails.<sup>4</sup>

Racial and ethnic disparities are reflected in incarceration rates. According to the Pew Center on the States, one in 106 white men, one in 36 Hispanic men, and one in 15 African American men are incarcerated.<sup>5</sup> Additionally, on average, one in 31 adults is under correctional control (i.e., probation, parole, or incarceration), including one in 45 white adults, one in 27 Hispanic adults and one in 11 African American adults.<sup>6</sup> Racial and ethnic disparities may also be reflected in other criminal history records. For example, although African Americans constitute approximately 13 percent of the overall population,<sup>7</sup> they account for 28 percent of those arrested<sup>8</sup> and almost 40 percent of the incarcerated population.<sup>9</sup>

In light of these racial and ethnic disparities, contractors should be mindful of federal antidiscrimination laws if they choose to rely on job applicants' criminal history records for purposes of employment decisions. Hiring policies and practices that exclude workers with criminal records may run afoul of such laws, which prohibit intentional discrimination on the basis of race, national origin, or other protected bases, and policies or practices that have a disparate impact on these protected groups and cannot be justified as job related and consistent with business necessity. Policies that exclude people from employment based on the mere existence of a criminal history record and that do not take into account the age and nature of an offense, for example, are likely to unjustifiably restrict the employment opportunities of individuals with conviction histories. Due to racial and ethnic disparities in the criminal justice system, such policies are likely to violate federal antidiscrimination law. Accordingly, contractors should carefully consider their legal obligations before adopting such policies.

## 5. POLICY:

1. EEOC Enforcement Guidance. The EEOC, as the federal agency that administers and enforces Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, issued guidance<sup>10</sup> on the use of arrest and conviction records in employment decisions. This guidance consolidates and updates EEOC's prior guidance regarding the use of criminal records in employment decisions. EEOC is the lead agency for interpreting Title VII, and OFCCP follows Title VII principles in interpreting Executive Order 11246, as amended. Therefore, EEOC's guidance will assist contractors in implementing and reviewing their employment practices in compliance with the Executive Order. EEOC's guidance applies to all employers that have 15 or more employees.

As described in the Enforcement Guidance, the nondiscrimination principles of Title VII prohibit both "disparate treatment" – intentionally treating members of protected groups differently based on their protected status – and "disparate impact" – the use of policies or practices that are neutral on their face, but have a disproportionate impact on members of protected groups, and are not job-related and consistent with business necessity. Although individuals with criminal history records are not a protected group under the applicable federal laws, antidiscrimination laws may be implicated when criminal records are being considered. For example, studies have shown that employers may treat whites with a criminal record more favorably than similarly-situated African Americans with the same or similar criminal record, which would be a form of disparate treatment.<sup>11</sup> Additionally, OFCCP is aware of job announcements that categorically exclude people who have any kind of conviction or arrest and of contractors that screen out job seekers with criminal records by stating that they will only accept applicants with so-called "clean" criminal records.<sup>12</sup> Due to racial and ethnic disparities reflected in the criminal justice system, these policies or practices will likely have a disparate impact on certain protected groups, in violation of federal law.<sup>13</sup>

The following description, provided in a notice attached to the TEGL, explains these concepts further:

"EEOC Information on Employer Consideration of Arrest and Conviction History"

"Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate in employment based on race, color, national origin, religion, or sex. This law does not prohibit an employer from requiring applicants to provide information about arrests, convictions or incarceration. But, employers may not treat people with the same criminal records differently because of their race, national origin or another protected characteristic. In addition, unless required by federal law or regulation, employers may not automatically bar everyone with an arrest or conviction record from employment. This is because an automatic bar to hiring everyone with a criminal record is likely to unjustifiably limit the employment opportunities of applicants or workers of certain racial or ethnic groups."

"If an employer's criminal record exclusion policy or practice has a disparate impact on Title VII-protected individuals, it must be job-related and consistent with business necessity..."

"Since an arrest alone does not necessarily mean that someone has committed a crime, an employer should not assume that someone who has been arrested, but not convicted, did in fact commit the offense. Instead, the employer should allow the person to explain the circumstances of the arrest to determine whether the conduct underlying the arrest justifies an adverse employment action..." For more information:

[http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm);  
[http://www.eeoc.gov/laws/guidance/qa\\_arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm)

The EEOC explains in its Enforcement Guidance (page 14) that "[t]o establish that a criminal conduct exclusion that has an adverse impact is job related and consistent with business necessity under Title VII, the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." The Guidance describes two circumstances in which the Commission believes employers will consistently meet the "job related and consistent with business necessity" defense. First is when the employer validates the criminal conduct exclusion for the position in question in accordance with the Uniform Guidelines on Employee Selection Procedures (UGESP). Second, where validation in accordance with UGESP is not done, the EEOC discusses three factors that provide the starting point for analyzing how specific criminal conduct may

be linked to particular positions.<sup>14</sup>

The EEOC explains in its Enforcement Guidance (pages 15–16) the three factors that are relevant to whether a criminal conduct exclusion is “job related and consistent with business necessity” as follows:

1. “The Nature and Gravity of the Offense or Conduct – Careful consideration of the nature and gravity of the offense or conduct is the first step in determining whether a specific crime may be relevant to concerns about risks in a particular position. The nature of the offense or conduct may be assessed with reference to the harm caused by the crime (e.g., theft causes property loss). The legal elements of a crime also may be instructive. For example, a conviction for felony theft may involve deception, threat, or intimidation [citation omitted]. With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies.”
  2. “The Time That Has Passed Since the Offense, Conduct and/or Completion of the Sentence – Employer policies typically specify the duration of criminal conduct exclusion. The amount of time that has passed since [an employee’s or prospective employee’s] criminal conduct occurred [is] probative of the risk he pose[s] in the position in question. Whether the duration of an exclusion will be sufficiently tailored to satisfy the business necessity standard will depend on the particular facts and circumstances of each case. Relevant and available information to make this assessment includes, for example, studies demonstrating how much the risk of recidivism declines over a specified time.”<sup>15</sup>
  3. “The Nature of the Job Held or Sought – [I]t is important to identify the particular job(s) subject to the exclusion. While a factual inquiry may begin with identifying the job title, it also encompasses the nature of the job’s duties (e.g., data entry, lifting boxes), identification of the job’s essential functions, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job’s duties are performed (e.g., out of doors, in a warehouse, in a private home). Linking the criminal conduct to the essential functions of the position in question may assist an employer in demonstrating that its policy or practice is job related and consistent with business necessity because it ‘bear[s] a demonstrable relationship to successful performance of the jobs for which it was used’” [citation omitted].
2. Best Practices. The EEOC Enforcement Guidance recommends a number of “best practices” for employers to avoid liability for discrimination based on the use of criminal records in employment. We commend these best practices to contractors. In particular, contractors may consider ensuring that any policies and procedures that screen applicants and employees for criminal conduct require an individualized assessment. Such policies and procedures 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. Like the EEOC, OFCCP recommends that contractors, as a general rule, refrain from inquiring about convictions on job applications.<sup>16</sup> Further, OFCCP recommends, if and when contractors make such inquiries, the inquiries are limited to convictions for which exclusion would be job-related for the position in question and consistent with business necessity. Finally, information about applicants’ and employees’ criminal records should be kept confidential and only used for the purpose for which it was intended.
3. New Procedures Affecting Contractors that Utilize the Federally-Assisted Workforce System. On May 25, 2012, ETA, in conjunction with CRC, issued TEGL 31–11 about the relevance of exclusions based on criminal records to the existing nondiscrimination obligations of public workforce system entities.<sup>17</sup> The TEGL, available at [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=9230](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9230), advises these covered entities to conduct their activities using safeguards to prevent discrimination and promote employment opportunities for formerly-incarcerated individuals and other individuals with criminal records.

Contractors subject to the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA) are required to list all employment openings with “an appropriate local employment service office of the state employment security agency wherein the opening occurs” or “the appropriate employment service delivery system where the opening occurs.”<sup>18</sup> Other contractors may also utilize such covered entities to list job openings, screen job-seekers, or receive referrals of qualified applicants. All contractors using covered entities, whether required by VEVRAA to do so or not, can expect that these entities will now follow the procedures, outlined in the TEGL and summarized below, regarding (a) posting of job announcements and (b) screening and referring applicants based on criminal record restrictions:

1. Posting job announcements with American Job Centers.

- When an employer (including contractors) registers with an American Job Center (or other covered entity) to use the Job Bank, the TEGL requires the covered entity to send the employer a prescribed notice (“Notice #1 for Employers Regarding Job Bank Nondiscrimination and Criminal Record Exclusions”) explaining that the covered entity must comply with federal civil rights laws which, due to the likely adverse impact of criminal record exclusions on protected groups, generally prohibit categorical exclusions of individuals based solely on an arrest or conviction history.
- Covered entities will be required to use a system (automated or otherwise) for identifying vacancy announcements that include hiring restrictions based on arrest and/or conviction records.
- When covered entities identify job postings that exclude individuals based on arrest and/or conviction history, they must provide employers that have posted these vacancy announcements a notice (“Notice #2 for Employers Regarding Job Postings Containing Criminal Record Exclusions”<sup>19</sup>) that gives the employer the opportunity to remove or edit the vacancy announcement.

Covered entities may continue to post vacancy announcements containing language excluding candidates based on criminal history only when accompanied by a notice to job seekers (“Notice #3 for Job Seekers to be Attached to Job Postings with Criminal Record Exclusions”) explaining that the exclusions in the posting may have an adverse impact on protected groups and informing them that individuals with criminal history records are not prohibited from applying for the posted position.

2. Screening and referral based on criminal record restrictions.

- Covered entity staff should refrain from screening and refusing to make referrals because an applicant has a criminal history record. Job seekers who are referred for positions where the job posting takes criminal history into account are to be given a copy of Notice #3 For Job Seekers along with the job announcement.

4. Other Relevant Laws. The Notices attached to the TEGL describe two other federal laws that might affect contractors’ employment practices regarding the use of criminal records in making hiring decisions. As described in Notice #1 and Notice #2:

1. “The Fair Credit Reporting Act (FCRA) imposes a number of obligations on employers that wish to use criminal background checks to screen applicants. This law requires the employer to obtain the applicant’s permission before asking a background screening company for a criminal history report, and requires the employer to provide the applicant with a copy of the report and a summary of the applicant’s rights before the employer takes an adverse action (such as denying an application for employment) based on information in the criminal history report.
2. “[T]he Work Opportunity Tax Credit (WOTC) and the Federal Bonding Program (FBP) [are] two incentives to support employers’ hiring of individuals with conviction histories. The WOTC provides a credit of 25–40% of first-year wages, or \$1,500–\$2,400, for employers that hire qualified individuals with felony convictions. For more information: <https://www.doleta.gov/wotc>.

The TEGL also includes an endnote (Endnote 1) regarding state and local restrictions on employer consideration of arrest and conviction records, as follows:

“Many states and cities have enacted restrictions on employer consideration of arrest and conviction records. See, e.g., Cal. Lab. Code § 432.7(a); N.Y. Correct. Law §§ 750–755; 18 Pa. Cons. Stat. § 9125; City of Boston Municipal Code 4–7. Covered entities should familiarize themselves with their state and local laws as well. The Department of Labor is aware of the following resources on state and local laws that may be helpful (though the Department cannot guarantee the accuracy of or otherwise endorse these resources): Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (June 2008), available at: <https://www.nacdl.org/Content/ProjectIntroduction>; Selection.com, *State Laws and Their Impact on Use of Criminal Records for Employment Purposes*, available at: [http://hr.4act.com/documents/State\\_Laws\\_and\\_Their\\_Impact\\_on\\_Use\\_of\\_Criminal\\_Records\\_for\\_Emplo.pdf](http://hr.4act.com/documents/State_Laws_and_Their_Impact_on_Use_of_Criminal_Records_for_Emplo.pdf); National Employment Law Project, *Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records* (Feb. 6, 2012), available at [http://nelp.3cdn.net/abddb6b65a14826f92\\_n5m6bz5bp.pdf](http://nelp.3cdn.net/abddb6b65a14826f92_n5m6bz5bp.pdf).

#### 6. **FILING INSTRUCTIONS:**

Holders of ADM and LEG Binders: File this ADM Notice under the “Other” tab in your Administrative Practices Binder.

District and Area Offices EOSs and EOAs: File this ADM Notice behind the tab for administrative directives in your FCCM Binder.

#### 7. **DISTRIBUTION:**

A, B, and C electronically.

#### 8. **EXPIRATION DATE:**

This directive remains in effect until it is revised or rescinded.

<sup>1</sup> See Written Testimony of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice (DOJ), submitted for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier (July 26, 2011), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm> (last accessed January 25, 2013) (citing DOJ Bureau of Justice Statistics data that over 92 million people have a criminal history on file in state criminal history repositories and comparing that to Census data on the number of adults in the U.S.); see also Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, “Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample,” 129 *Pediatrics* 21–27 (Jan. 1, 2012), abstract available at <http://pediatrics.aappublications.org/content/129/1> (last accessed January 25, 2013).

<sup>2</sup> Lauren E. Glaze, *Correctional Populations in the United States, 2010*, NCJ 236319 (Bureau of Justice Statistics Dec. 2011), available at <https://www.bjs.gov/content/pub/pdf/cpus10.pdf> (last accessed January 25, 2013).

<sup>3</sup> Paul Guerino, Paige M. Harrison & William J. Sabol, *Prisoners in 2010*, NCJ 236096 (Bureau of Justice Statistics Dec. 2011), available at <https://www.bjs.gov/content/pub/pdf/p10.pdf> (last accessed January 25, 2013).

<sup>4</sup> Todd D. Minton, *Jail Inmates at Midyear 2010 – Statistical*, NCJ 233431 (Bureau of Justice Statistics April 2011), available at <https://www.bjs.gov/content/pub/pdf/jim10st.pdf> (last accessed January 25, 2013).

<sup>5</sup> The Pew Center on the States, *One in 31: The Long Reach of American Corrections* at 5, 7 (2009), available at [https://www.pewtrusts.org/-/media/assets/2009/03/02/pspp\\_1in31\\_report\\_final\\_web\\_32609.pdf](https://www.pewtrusts.org/-/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf) (last accessed January 25, 2013).

<sup>7</sup> U.S. Census Bureau, *USA QuickFacts 2010*, available at <https://www.bls.gov/>.

<sup>8</sup> FBI Uniform Crime Reports 2010, available at <https://ucr.fbi.gov/crime-in-the-u.s> (last accessed January 25, 2013).

<sup>9</sup> William J. Sabol, Todd D. Minton, & Paige M. Harrison, *Prison and Jail Inmates at Midyear 2006*, NCJ 217675 (Bureau of Justice Statistics June 2007), available at <https://www.bjs.gov/content/pub/pdf/pjim06.pdf> (last accessed January 25, 2013). These racial disparities in the criminal justice system have been attributed primarily to disparate law enforcement practices and sentencing

policies. See, e.g., Mark Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, 37 Human Rights 4 (A.B.A. Sec. Individual Rights & Responsibilities Fall 2010), available at [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol37\\_2010/fall2010/justice\\_for\\_all\\_challenging\\_racial\\_disparities\\_criminal\\_justice\\_system.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/justice_for_all_challenging_racial_disparities_criminal_justice_system.html) (last accessed January 25, 2013).

<sup>10</sup> *Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, U.S. Equal Employment Opportunity Commission (April 25, 2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions> (last accessed January 25, 2013) (Enforcement Guidance).

<sup>12</sup> Examples of such job announcements that were recently found posted in One Stop Job Banks included the following criminal record exclusions: “No criminal background”; “Have no criminal history”; “CLEAN criminal background (NO felonies or misdemeanors).”

<sup>13</sup> See 42 U.S.C. 2000e-2(k)(1)(A)(i).

<sup>14</sup> The EEOC describes these factors as the “Green factors.” See *Green v. Mo. Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977) (approving employer’s use of these factors in making hiring decisions).

<sup>15</sup> See, e.g., Keith Soothill & Brian Francis, *When Do Ex-Offenders Become Like Non-Offenders?*, 48 HOWARD J. OF CRIM. JUST. 373, 380–81 (2009) (examining conviction data from Britain and Wales, a 2009 study found that the risk of recidivism declined for the groups with prior records and eventually converged within 10 to 15 years with the risk of those of the nonoffending comparison groups); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009) (concluding that there may be a “point of redemption” (i.e., a point in time where an individual’s risk of re-offending or re-arrest is reasonably comparable to individuals with no prior criminal record) for individuals arrested for certain offenses if they remain crime free for a certain number of years); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64 (2007) (analyzing juvenile police contacts and Racine, Wisconsin police contacts for an aggregate of crimes for 670 males born in 1942 and concluding that, after seven years, the risk of a new offense approximates that of a person without a criminal record); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483 (2006) (evaluating juvenile police contacts and arrest dates from Philadelphia police records for an aggregate of crimes for individuals born in 1958, a 2006 study concluded that the risk of recidivism decreases over time and that, six or seven years after an arrest, an individual’s risk of re-arrest approximates that of an individual who has never been arrested).

<sup>16</sup> Many contractors are prohibited from inquiring about convictions or arrests on job applications by local law. See National Employment Law Project, *Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records* (Feb. 6, 2012), available at: [http://nelp.3cdn.net/abddb6b65a14826f92\\_n5m6bz5bp.pdf](http://nelp.3cdn.net/abddb6b65a14826f92_n5m6bz5bp.pdf) (last accessed January 25, 2013).

<sup>17</sup> The “covered entities” to which the TEGE is addressed are the public workforce system and other entities that receive federal financial assistance to operate Job Banks; to help job seekers in locating and obtaining employment; and/or to assist employers by screening and referring qualified applicants. They include the American Job Centers, formerly known as One-Stop Career Centers.

<sup>18</sup> See 41 CFR §60-250.5(a)2 and §60-300.5(a)3.

<sup>19</sup> This and the other required notices are attachments to the TEGE.

*The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.*

*Last updated on September 16, 2013*

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