



LABOR & EMPLOYMENT

# ALERT

## OFCCP DIRECTIVE 306 WARNS FEDERAL CONTRACTORS/SUBCONTRACTORS THAT MAINTAINING A CRIMINAL RECORD EXCLUSION WHEN MAKING EMPLOYMENT DECISIONS COULD BE UNLAWFUL

By Kenneth A. Rosenberg, Esq.

On January 29, 2013, the Office of Federal Contractor Programs (OFCCP), issued Directive 306 (the Directive). The Directive warns federal contractors and subcontractors (Contractors) that the OFCCP, effective immediately, would be carefully scrutinizing employment decisions that rely on an individual's arrest and/or criminal records ("criminal records exclusion policy"). The Directive states that a "criminal records exclusion policy" can result in minority applicants/employees being discriminated against because certain racial/ethnic minorities have substantially higher incarceration rates than the overall population<sup>1</sup>. Thus, a Contractor's use of a "criminal records exclusion policy" can violate a Contractor's non-discrimination obligations under Title VII of the Civil Rights Act of 1964 and Executive Order 11246.

The Directive, however, provides a "safe harbor" for Contractors if they can show that the "criminal record exclusion policy" is "job related and consistent with business necessity." According to the Directive, a Contractor may establish job relatedness and business necessity by validating its policy pursuant to the EEOC's Uniform Guidelines on Employee Selection Procedures. 29 C.F.R. part 1607.

Alternatively, a Contractor may establish a

"criminal records exclusion policy" is "job related and consistent with business necessity" by demonstrating that the Contractor considered:

- (1) The nature and gravity of the individual's criminal offense or conduct;
- (2) the duration between a job seeker's criminal conduct and his/her employment application; and
- (3) the nature of the duties and essential functions of the position sought.

Where these factors 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 Contractor will fall within a "safe harbor" and not deemed to have acted unlawfully.

The Directive also states that Contractors can avoid liability when using "criminal records exclusion policies" by following the EEOC's best practices<sup>2</sup> such as:

- (1) Engaging in individualized assessments if they have policies and procedures that use criminal conduct as a screening tool for applicants and employees;
- (2) ensuring their criminal record exclusion policies and procedures are 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) not including questions about job seekers' arrests/criminal convictions on employment applications;

(4) if asking about criminal convictions during the hiring process is unavoidable, limiting inquiries on the employment application to convictions for which exclusions would be job-related for the position in question and consistent with business necessity;

(5) keeping any information obtained regarding an applicant's and/or employee's criminal records confidential and using it only for the purpose for which it was intended;

(6) ensuring they comply with the Fair Credit Reporting Act's requirements when requesting a criminal history report;

(7) familiarizing themselves with any state and/or local laws that restrict an employer's use of arrest and criminal records; and

(8) familiarizing themselves with the Department of Labor's Training and Employment Guidance Letter, if they are federal financially-assisted Contractors, are subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974 or otherwise utilize the Department of Labor's American Job Center network or other public workforce system job banks.

The approaches to avoid liability under the Directive overlap and lack clarity. Indeed, the confusion engendered by the Directive, and the amount of work required to comply, and the threat of litigation, will deter employers from having such a policy, thereby encouraging employment of individuals with criminal records. Given that many Contractors use "criminal exclusion policies" as part of their employment process, we strongly recommend that all Contractors review these policies and procedures with counsel, and without delay, to avoid potential class action litigation brought by disgruntled applicants/employees and/or other enforcement actions brought by the OFCCP and EEOC.

If you have questions about this Alert, please contact Kenneth A. Rosenberg at 973.994.7510 or [krosenberg@foxrothschild.com](mailto:krosenberg@foxrothschild.com) or any member of Fox Rothschild's Labor and Employment Department.

1 A Contractor's criminal record exclusion policy could result in disparate treatment if it treats non-minorities with criminal records less harshly than similarly situated minorities. A Contractor's facially neutral policy to exclude job candidates with a criminal record history from applying for a job also may have an unlawful disparate impact where it affects minorities at a greater rate than non-minorities.  
 2 See, the EEOC's 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. EEOC (April 25, 2012).



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