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ADVISORY: TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 31-11

TO: ONE-STOP CAREER CENTERS
STATE WORKFORCE AGENCIES
STATE WORKFORCE ADMINISTRATORS
STATE WORKFORCE LIAISONS
STATE AND LOCAL WORKFORCE BOARD CHAIRS AND DIRECTORS
STATE AND LOCAL EQUAL OPPORTUNITY OFFICERS
STATE LABOR COMMISSIONERS
WORKFORCE INVESTMENT ACT SECTION 166 INDIAN AND NATIVE AMERICAN GRANTEES
WORKFORCE INVESTMENT ACT SECTION 167 MIGRANT AND NATIONAL FARMWORKER JOBS PROGRAM GRANTEES
SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM GRANTEES
EMPLOYMENT AND TRAINING ADMINISTRATION REGIONAL ADMINISTRATORS
JOB CORPS CONTRACTORS
SUB-RECIPIENTS OF DEPARTMENT OF LABOR FINANCIAL ASSISTANCE

FROM: JANE OATES
Assistant Secretary
Employment and Training Administration

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Acting Director
Civil Rights Center

SUBJECT: Update on Complying with Nondiscrimination Provisions: Criminal Record Restrictions and Disparate Impact Based on Race and National Origin

1. **Purpose.** The purpose of this Training and Employment Guidance Letter (TEGL) is to provide information about exclusions based on criminal records, and how they are relevant to the existing nondiscrimination obligations for the public workforce system and other entities (including the "covered entities" listed above) that receive federal financial assistance to operate Job Banks, to provide assistance to job seekers in locating and obtaining employment, and to assist employers by screening and referring qualified applicants. As explained in this TEGL, restrictions based on criminal history records may have a disparate impact on members of a particular race or national origin, in violation of federal antidiscrimination laws.

RESCISSIONS None	EXPIRATION DATE Continuing

This guidance is being issued by the Employment and Training Administration (ETA), in conjunction with the Civil Rights Center (CRC).

2. **References.**[1]

- Title VII of the Civil Rights Act of 1964, as amended: 42 U.S.C. 2000e-2(a) (disparate treatment), 2000e-2(b) (employment agency practices), 2000e-2(a)(2) and 2000e-2(k) (disparate impact by employers and employment agencies), 2000e-3(b) (employment agency job postings)
  - *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 EMP'T OPPORTUNITY COMM'N (April 25, 2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf

- Title VI of the Civil Rights Act of 1964: 42 U.S.C. 2000d (nondiscrimination by recipients of federal financial assistance)
  - 29 C.F.R. 31.3(b)(2) (disparate impact), 31.3(c)(1) (nondiscrimination in employment practices), 31.3(d)(1) (selection and referral for employment or training)

- Workforce Investment Act (WIA): 29 U.S.C. 2938 (nondiscrimination by recipients of federal financial assistance under WIA)
  - 29 C.F.R. 37.2(a)(2) (programs operated by One-Stop partners as part of the One-Stop system must comply with nondiscrimination regulations), 37.6(d)(1) (administration of programs cannot have discriminatory purpose or effect)

- Wagner-Peyser Act: 20 C.F.R. 652.8(j)(1) (nondiscrimination by recipients of federal financial assistance under Wagner-Peyser), 652.8(j)(2) (States must assure that discriminatory job orders will not be accepted except where there is a bona fide occupational qualification (BFOQ))

3. **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[2] – 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. On any given day, about 2.3 million people are incarcerated.[3] And each year 700,000 people are released from prison[4] and almost 13 million are admitted to – and released from – local jails.[5]

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.[6] Additionally, on average one in 31 adults are 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.[7] 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,[8] they

account for 28 percent of those arrested[9] and almost 40 percent of the incarcerated population.[10]

Because of these racial and ethnic disparities, employers and agencies within the public workforce system should be mindful of federal antidiscrimination laws if they choose to rely on job applicants' criminal history records as a tool to help assess potential risk to employees, customers, and business assets. Hiring policies and practices that exclude workers with criminal records may run afoul of such laws, which prohibit both 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 or other services 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 and, due to racial and ethnic disparities in the criminal justice system, are likely to violate federal antidiscrimination law. Accordingly, employers and agencies should carefully consider their legal obligations before adopting such policies.

As recognized by the federally-assisted workforce system, which is already engaged in promoting job opportunities for people with criminal records through various reentry grants and programs, obtaining employment is critical in reducing recidivism and easing the reintegration of persons returning from incarceration. Secretary of Labor Hilda Solis recently observed that the public workforce system's mix of strategies, interventions and service partnerships must be designed and executed with the goal of helping people with criminal records obtain employment that can support them and their families. These efforts are consistent with the Federal Interagency Reentry Council's mission to make communities safer by reducing recidivism, assist those returning from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration.[11] As Secretary Solis stated recently: "When someone serves time in our penal system, they shouldn't face a lifetime sentence of unemployment when they are released. Those who want to make amends must be given the opportunity to make an honest living."[12]

This TEGL is intended to help covered entities (and their employer customers) comply with their nondiscrimination obligations when serving the population of individuals with criminal records, and to ensure that exclusionary policies are not at cross-purposes with the public workforce system's efforts to promote employment opportunities for such workers. This TEGL applies to all jobs available through a covered entity's job bank without regard to whether the job is in government or the private sector, including federal contractors and subcontractors.

4. Applicable Statutes, Regulations, and Guidance.

a. The nondiscrimination provisions that apply to the federally-assisted workforce system 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.[13] Likewise, if a One-Stop Career Center were to refer a white job seeker with a criminal record for a job, but not an equally-qualified Hispanic job seeker with the same or similar criminal record, this could constitute disparate treatment. Additionally, One-Stop Career Centers may be posting job announcements that categorically exclude people who have any kind of conviction or arrest, or screening out job seekers with criminal records by not referring them to employers who have stated that they will only accept applicants with "clean" criminal records.[14] Because of 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.[15]

b. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., applies to employers with 15 or more employees, and prohibits employment discrimination (both disparate treatment and disparate impact) based on race, color, religion, sex, or national origin.[16] Title VII also contains provisions that specifically address employment agency activities. Entities within the public workforce system like the nation's State Workforce Agencies and One-Stop Career Centers may be regarded as "employment agencies" under the law.[17] Therefore, they are not permitted to "print or publish or cause to be printed" any job announcement that discriminates based on race, color, religion, sex, or national origin unless there is a bona fide occupational qualification for a preference based on religion, sex, or national origin.[18] In addition, employment agencies are prohibited from refusing to refer an individual for employment or otherwise to discriminate against any individual based on race, color, religion, sex, or national origin.[19] The Equal Employment Opportunity Commission (EEOC), the federal agency that administers and enforces Title VII, has issued guidance on the use of arrest and conviction records in employment decisions (see attached summary and best practices; for full guidance see: http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf).[20]

c. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, applies to all programs or activities receiving federal financial assistance, such as the covered entities referred to in this TEGL that receive assistance under the Workforce Investment Act and/or the Wagner-Peyser Act. Title VI and its implementing regulations prohibit any program or activity from excluding from participation in or denying the benefits of the program, or otherwise subjecting anyone to discrimination, on the ground of race, color, or national origin.[21] As a condition of initiating or continuing federal financial assistance, recipients must provide assurances that "the program will be conducted or the facility operated in compliance with all requirements imposed by" the nondiscrimination provision in Title VI.[22]

Under the Department's Title VI regulations, recipients may not use any "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of race, color or national origin."[23] Further, the "selection, and referral of individuals for job openings or training opportunities and all other activities performed by or through employment service offices" must be done without regard to

race, color, or national origin.[24] Disparate impact claims under Title VI are analyzed using principles derived from Title VII disparate impact law.[25]

d. The Workforce Investment Act (WIA) is the key source of federal assistance for state and local workforce development activities. The relevant WIA nondiscrimination provision states that no "individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with, any such program or activity" on the basis of race, color, religion, sex, national origin, age, disability, or political affiliation or belief.[26] The regulations implementing this provision, administered and enforced by CRC, apply to all programs and activities that are operated by One-Stop partners as part of the One-Stop delivery system.[27] Similarly, under the Wagner-Peyser Act regulations, states are required to assure nondiscrimination regarding any services or activities authorized under that Act.[28]

The WIA nondiscrimination regulations prohibit recipients from using "standards, procedures, criteria, or administrative methods" that have the purpose or effect of subjecting individuals to discrimination on a prohibited ground due to the recipient's administration of programs providing aid, benefits, services, training or facilities "in any manner."[29] In addition, the Wagner-Peyser Act regulations specifically require states to "[a]ssure that discriminatory job orders will not be accepted, except where the stated requirement is a bona fide occupational qualification (BFOQ)."[30]

5. **Covered Entities Should Conduct Their Activities Using Safeguards to Prevent Discrimination and Promote Employment Opportunities for Formerly-Incarcerated Individuals and Other Individuals with Criminal Records.**

In light of the legal obligations discussed above and the Department's interest, which it shares with the nation's public workforce system, in promoting employment opportunities for people with criminal records, the following guidance regarding specific activities engaged in by covered entities is being provided to enhance covered entities' compliance with nondiscrimination requirements. The Department cannot ensure that covered entities will ultimately avoid liability under the above-described laws by following this guidance, but the guidance represents practical steps to aid compliance with the law.

a. Posting job announcements in Job Banks.

When soliciting or obtaining, for posting on-site or on a covered entity's website or Job Bank, vacancy announcements from employers, Business Services Representatives, or other sources, policies and procedures should be in place to ensure that, for job postings that take criminal records into account, the steps described below are taken.

- When an employer registers with the One-Stop (or other covered entity) to use the Job Bank, it should receive the notice that appears as notice #1 attached to this TEGL. The notice explains that the covered entity must comply with federal civil rights laws which, due to the likely disparate impact of criminal record exclusions on protected groups, generally prohibit categorical exclusions of individuals based solely on an arrest or conviction history (see attached information from EEOC guidance). The notice also provides information to employers about their obligations under the Fair Credit Reporting Act, which requires employers to obtain

applicants' permission before asking a background screening company for a criminal history report and to provide applicants with a copy of the report and a summary of their rights before taking adverse action. Additionally, the notice describes the Work Opportunity Tax Credit and the Federal Bonding Program, two incentives that support employers' hiring of individuals with conviction histories.

- Covered entities should use a system (automated or otherwise) for identifying vacancy announcements that include hiring restrictions based on arrest and/or conviction records. This system may be the same system that entities already use to identify other discriminatory language in job postings.
- When job postings that exclude individuals based on arrest and/or conviction history have been identified, covered entities should provide employers that have posted these vacancy announcements the notice that appears as notice #2 attached to this TEGL, which states that in order to ensure that the employer and covered entity are in compliance with federal civil rights laws, the employer will be given the opportunity to remove or edit the vacancy announcement. The notice and opportunity to remove or edit should be provided to the employer whether the vacancy announcement has been posted directly with the covered entity or has instead been made available in the Job Bank through other means of aggregating job postings.
- Any vacancy announcements containing language excluding candidates based on criminal history should only remain posted when accompanied by the notice to job seekers that appears as notice #3 attached to this TEGL. This notice explains that the exclusions in the posting may have an adverse impact on protected groups, as set forth in the EEOC guidance. The notice further informs job seekers that individuals with criminal history records are not prohibited from applying for the posted position.
- Covered entities may wish to retain records of the notices sent to address vacancy announcements containing hiring restrictions based on arrest and/or conviction records.
- The Department recognizes that covered entities have a variety of systems in place to comply with nondiscrimination obligations, and that entities engage with employer customers in varying ways. Entities may elect to take other steps that are at least equally effective in achieving compliance with their nondiscrimination obligations.

b. Screening and referral based on criminal record restrictions.

When screening or referring individuals for vacancy announcements, job orders, training, or other employment-related services:

- 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 should receive a copy of the attached notice #3 for job seekers along with the job announcement.
- In the event that covered entity staff take into account arrest or conviction history for purposes of excluding an individual from the entity's training programs or other employment-related services, staff should follow the EEOC's arrest and conviction guidance. However, nothing in this TEGL prevents covered entity staff from taking

into account an individual's arrest or conviction history for purposes of receiving employment-related services or programs designed to aid individuals with arrest or conviction histories.

6. **Action Requested.** Program operators are directed to review their existing policies and procedures and make any changes necessary to implement the guidance discussed in this TEGL.

7. **Contact Information.** Inquiries about incentive programs and other efforts to promote employment opportunities for people with criminal records should be addressed to the appropriate ETA regional or national office. Inquiries about civil rights issues should be addressed to CRC, by phone at 202-693-6500 (voice) or 202-693-6516 (TTY); by relay at 800-877-8339 (TTY/TDD), or (877) 709-5797 or myfedvrs.tv (video); or by e-mail at CivilRightsCenter@dol.gov. Complaints alleging discrimination by entities in the public workforce system may be filed with CRC by postal mail, e-mail, or fax, addressed to Director, Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-4123, Washington, DC 20210, CRCExternalComplaints@dol.gov, 202-693-6505 (fax). Further information about the discrimination complaint process is available on CRC's website at http://www.dol.gov/oasam/programs/crc/external-enforc-complaints.htm.

Attachments:

- Notice #1 for Employers Regarding Job Bank Nondiscrimination and Criminal Record Exclusions
- Notice #2 for Employers Regarding Job Posting Containing Criminal Record Exclusions
- Notice #3 for Job Seekers to be Attached to Job Postings with Criminal Record Exclusions
- *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 EMP'T OPPORTUNITY COMM'N (April 25, 2012), Summary and Best Practices; for full guidance see: http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.
- EEOC Reentry Myth Buster
- Federal Trade Commission Reentry Myth Buster

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[1] 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:* http://www.sentencingproject.org/detail/publication.cfm?publication_id=115; Selection.com, *State Laws and Their Impact on Use of Criminal Records for Employment Purposes*, *available at*: www.selection.com/_pdfs/statelaw_criminalchecks.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* nelp.3cdn.net/abddb6b65a14826f92_n5m6bz5bp.pdf.

[2] *See* Written Testimony of Amy Solomon, Senior Advisor to the Asst. Attorney General, Office of Justice Programs, U.S. Dep't of Justice (DOJ), at 1 & nn.5-7 (July 26, 2011), submitted for Equal Employment Opportunity Commission (EEOC) Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, *available at* http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm (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/129/1/21.abstract.

[3] Lauren E. Glaze, *Correctional Population in the United States, 2010*, NCJ 236319 (Bureau of Justice Statistics Dec. 2011), *available at* http://www.bjs.gov/content/pub/pdf/cpus10.pdf.

[4] Paul Guerino, Paige M. Harrison & William J. Sabol, *Prisoners in 2010,* NCJ 236096 (Bureau of Justice Statistics Dec. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf.

[5] Todd D. Minton, *Jail Inmates at Midyear, 2010*, NCJ 233431 (Bureau of Justice Statistics Apr. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim10st.pdf.

[6] The Pew Center on the States, *One in 100: Behind Bars in America 2008* at 6 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf.

[7] The Pew Center on the States, *One in 31: The Long Reach of American Corrections* at 5, 7 (2009), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

[8] U.S. Census Bureau, *USA QuickFacts* 2010, *available at* http://quickfacts.census.gov/qfd/states/00000.html.

[9] FBI Uniform Crime Reports 2010, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43.

[10] 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* http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf. These racial disparities in the criminal justice system have been attributed primarily to disparate law enforcement practices and sentencing policies. *See, e.g.,* Mark Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, 37 Human Rights (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.

[11] *See* Federal Interagency Reentry Council, Mission Statement and Goals, *available at* http://www.nationalreentryresourcecenter.org/reentry-council/mission-and-goals.

[12] Remarks of Hilda L. Solis, Secretary of Labor, Workforce Development & Employment Strategies for the Formerly-Incarcerated (June 21, 2011), *available at* https://www.dol.gov/_sec/media/speeches/20110621_EX.htm.

[13] *See* 42 U.S.C. 2000e-2(a); Devah Pager, *The Mark of a Criminal Record*, 108 American Journal of Sociology 937, 957-60 (Mar. 2003), *available at* http://www.princeton.edu/~pager/pager_ajs.pdf. *See generally* Devah Pager & Bruce Western, *Race at Work: The Realities of Race and Criminal Record in the NYC Job Market* (NYC Commission on Human Rights 2005), *available at* http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf.

[14] Examples of such job announcements recently found posted in One-Stop Career Center Job Banks were announcements with the following criminal record exclusions: "No criminal background"; "Have no criminal history"; "CLEAN criminal background (NO felonies or misdemeanors)."

[15] *See* 42 U.S.C. 2000e-2(k)(1)(A)(i).

[16] *See* 42 U.S.C. 2000e, 2000e-2.

[17] *See* 42 U.S.C. 2000e(c) (defining "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer"); EEOC Decision No. N-917.002, 1991 WL 11665181, at *1-2 & n.1 (Sept. 20, 1991) (EEOC policy guidance on "[w]hat constitutes an employment agency under Title VII," explaining that a government entity that "regularly refers potential employees to employers or provides employers with the names of potential employees" is subject to Title VII as long as at least one of the employers is covered under Title VII).

[18] 42 U.S.C. 2000e-3(b). Under the Communications Decency Act of 1996 (CDA), 47 U.S.C. 230, providers of an "interactive computer service," which could include Internet-based Job Banks, are shielded from civil liability for posting content created by third parties. In addition, such services are not liable for taking steps to restrict the availability of third-party material that the provider considers to be objectionable. *See* 47 U.S.C. 230(c). Under this statutory safe harbor, providers such as Craigslist have not been held liable for third-party housing postings that were alleged to be discriminatory under a posting provision in the Fair Housing Act, 42 U.S.C. 3604(a), that is similar to the Title VII posting provision. *See Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008). The CDA's liability shield is only available where the service provider does not create the content; where the service provider is "responsible, in whole or in part, for the creation or development" of the content, it can no longer avail itself of the safe-harbor provision. *See* 47 U.S.C. 230(c)(1) and (f)(3); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009). Irrespective whether covered entities may ultimately be able to invoke the CDA's safe-harbor provision in litigation,

the Department advises that they follow the guidance in this TEGL to ensure compliance with the applicable nondiscrimination provisions.

[19] 42 U.S.C. 2000e-2(b).

[20] The Department's Office of Federal Contract Compliance Programs (OFCCP) administers Executive Order 11246, which, similar to Title VII, prohibits covered federal contractors, federally-assisted construction contractors, and covered subcontractors from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. *See* Executive Order 11246, as amended. OFCCP enforces the nondiscrimination requirements of Executive Order 11246 in accordance with Title VII. OFCCP also administers and enforces the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended (VEVRAA), which requires covered federal government contractors to post certain categories of job announcements in the state workforce agency job bank or with the local employment service delivery system (One-Stop). *See* 38 U.S.C. 4212(a)(2).

[21] 42 U.S.C. 2000d.

[22] 29 C.F.R. 31.6(a) and (b).

[23] 29 C.F.R. 31.3(b)(2).

[24] 29 C.F.R. 31.3(d)(1)(i).

[25] *See New York Urban League, Inc. v. State of New York*, 71 F.3d 1031, 1036 (2d Cir. 1995).

[26] 29 U.S.C. 2938(a)(2).

[27] 29 C.F.R. 37.2(a)(2).

[28] 20 C.F.R. 652.8(j)(1).

[29] 29 C.F.R. 37.6(d).

[30] 20 C.F.R. 652.8(j)(2).

Notice #1 for Employers Regarding Job Bank Nondiscrimination and Criminal Record Exclusions

The public workforce system must comply with federal civil rights laws, including those concerning nondiscrimination in employment. In addition, as explained in the information below provided by the Equal Employment Opportunity Commission (EEOC) – the agency that administers and enforces Title VII of the Civil Rights Act of 1964, as amended – an employer may be liable under Title VII for its use of criminal record information to make employment decisions, depending on the factual circumstances under which the criminal records are used.

An employer that submits a job announcement containing restrictions or exclusions based on arrest or conviction history will have an opportunity to edit or remove the announcement, to help ensure that the employer and the public workforce system are in compliance with the law.

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. For greater detail on meeting this standard, please see the EEOC's Guidance referenced below.

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. These rules apply to all employers that have 15 or more employees. For more information: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm; http://www.nationalreentryresourcecenter.org/documents/0000/1082/Reentry_Council_Mythbuster_Employment.pdf.

Relevant Information from Other Federal Agencies

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. For more information: http://business.ftc.gov/documents/bus08-using-consumer-reportswhat-employers-need-know.

Employers should also be aware of the Work Opportunity Tax Credit (WOTC) and the Federal Bonding Program (FBP), two incentives that 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: http://www.doleta.gov/wotc. Through the FBP, funded and administered by the U.S. Department of Labor, fidelity insurance bonds are available to reimburse the employer for any loss due to employee theft of money or property, with no employer deductible. For more information: http://www.bonds4jobs.com/index.html.

The U.S. Department of Labor enforces Title VI of the Civil Rights Act of 1964 as it applies to public workforce system programs or activities receiving federal financial assistance, as well as the nondiscrimination provisions of the Workforce Investment and Wagner-Peyser Acts, which fund the public workforce system. Title VI and its implementing regulations prohibit any program or activity receiving federal financial assistance from excluding from participation in, or denying the benefits of the program, or otherwise subjecting anyone to discrimination, on the ground of race, color, or national origin. The nondiscrimination provisions in the laws that fund the public workforce system apply to discrimination on these bases, as well as discrimination on other grounds including disability, age, sex, and religion.

Notice #2 for Employers Regarding Job Postings Containing Criminal Record Exclusions

The public workforce system must comply with federal civil rights laws, including those concerning nondiscrimination in employment. In addition, as explained in the information below provided by the Equal Employment Opportunity Commission (EEOC) – the agency that administers and enforces Title VII of the Civil Rights Act of 1964, as amended – an employer may be liable under Title VII for its use of criminal record information to make employment decisions depending on the factual circumstances under which the criminal records are used. The workforce system has identified criminal record exclusions or restrictions in the job announcement submitted for posting by this employer or in a job announcement referenced in a Job Bank.

The employer should take this opportunity to remove or edit the posting as needed to ensure that the employer and the public workforce system are in compliance with the law. If the employer wishes to post the announcement as is, the announcement will be posted along with information about the civil rights laws that may apply to such restrictions.

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. For greater detail on meeting this standard, please see the EEOC's Guidance referenced below.

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. These rules apply to all employers that have 15 or more employees. For more information: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm;
http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm;
http://www.nationalreentryresourcecenter.org/documents/0000/1082/Reentry_Council_Mythbuster_Employment.pdf.

Relevant Information from Other Federal Agencies

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. For more information: http://business.ftc.gov/documents/bus08-using-consumer-reportswhat-employers-need-know.

Employers should also be aware of the Work Opportunity Tax Credit (WOTC) and the Federal Bonding Program (FBP), two incentives that 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: http://www.doleta.gov/wotc. Through the FBP, funded and administered by the U.S. Department of Labor, fidelity insurance bonds are available to reimburse the employer for any loss due to employee theft of money or property, with no employer deductible. For more information: http://www.bonds4jobs.com/index.html.

The U.S. Department of Labor enforces Title VI of the Civil Rights Act of 1964 as it applies to public workforce system programs or activities receiving federal financial assistance, as well as the nondiscrimination provisions of the Workforce Investment and Wagner-Peyser Acts, which fund the public workforce system. Title VI and its implementing regulations prohibit any program or activity receiving federal financial assistance from excluding from

participation in, or denying the benefits of the program, or otherwise subjecting anyone to discrimination, on the ground of race, color, or national origin. The nondiscrimination provisions in the laws that fund the public workforce system apply to discrimination on these bases, as well as discrimination on other grounds including disability, age, sex, and religion.

Notice #3 for Job Seekers to be Attached to Job Postings with Criminal Record Exclusions

Individuals with conviction or arrest histories are not prohibited from applying for this job. The public workforce system has identified criminal record exclusions or restrictions in the attached job announcement. These exclusions or restrictions may be unlawful under certain circumstances. Therefore, the system is providing this notice to job seekers. Please see below for more information.

Information from the Equal Employment Opportunity Commission (EEOC) 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. For greater detail on this standard, please see the EEOC's Guidance referenced below.

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. These rules apply to all employers that have 15 or more employees, as well as employment agencies that regularly refer potential employees to at least one employer covered under Title VII. For more information:
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm;
http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm;
http://www.nationalreentryresourcecenter.org/documents/0000/1082/Reentry_Council_Mythbuster_Employment.pdf.

For information on filing a discrimination charge with the EEOC: http://www.eeoc.gov/facts/howtofil.html or 800-669-4000.

Relevant Information from Other Federal Agencies

The Fair Credit Reporting Act (FCRA) requires an 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. For more information: http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre36.shtm.

The U.S. Department of Labor enforces Title VI of the Civil Rights Act of 1964 as it applies to public workforce system programs or activities receiving federal financial assistance, as well as the nondiscrimination provisions of the Workforce Investment and Wagner Peyser Acts, which fund the public workforce system. Title VI and its implementing regulations prohibit any program or activity receiving federal financial assistance from excluding from participation in, or denying the benefits of the program, or otherwise subjecting anyone to discrimination, on the ground of race, color, or national origin. The nondiscrimination provisions in the laws that fund the public workforce system apply to discrimination on these bases, as well as discrimination on other grounds including disability, age, sex, and religion. Inquiries about civil rights issues in the public workforce system should be addressed to CRC, by phone at 202-693-6500 (voice) or 202-693-6516 (TTY); by relay at 800-877-8339 (TTY/TDD), or 877-709-5797 or myfedvrs.tv (video); or by e-mail at CivilRightsCenter@dol.gov. Complaints

alleging discrimination by entities in the system may be filed with CRC by postal mail, e-mail, or fax, addressed to Director, Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-4123, Washington, DC 20210, CRCExternalComplaints@dol.gov, 202-693-6505 (fax). Further information about the discrimination complaint process is available on CRC's Web site at http://www.dol.gov/oasam/programs/crc/external-enforc-complaints.htm.

Summary and Best Practices from Equal Employment Opportunity Commission (EEOC) Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* -- *full Enforcement Guidance available at: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm*

EEOC Enforcement Guidance	**Number** 915.002 **Date** 4/25/2012

Summary

- An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.

- The Guidance builds on longstanding court decisions and existing guidance documents that the U.S. Equal Employment Opportunity Commission (Commission or EEOC) issued over twenty years ago.

- The Guidance focuses on employment discrimination based on race and national origin. The Introduction provides information about criminal records, employer practices, and Title VII.

- The Guidance discusses the differences between arrest and conviction records.

    - The fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.

    - In contrast, a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

- The Guidance discusses disparate treatment and disparate impact analysis under Title VII.

    - A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability).

- An employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability).

    - National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.

    - Two circumstances in which the Commission believes employers will consistently meet the "job related and consistent with business necessity" defense are as follows:

        - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or

        - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).

- Compliance with other federal laws and/or regulations that conflict with Title VII is a defense to a charge of discrimination under Title VII.

- State and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.

Employer Best Practices

The following are examples of best practices for employers who are considering criminal record information when making employment decisions.

General

- Eliminate policies or practices that exclude people from employment based on any criminal record.

- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

Developing a Policy

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.

    - Identify essential job requirements and the actual circumstances under which the jobs are performed.

    - Determine the specific offenses that may demonstrate unfitness for performing such jobs.

        - Identify the criminal offenses based on all available evidence.

    - Determine the duration of exclusions for criminal conduct based on all available evidence.

        - Include an individualized assessment.

    - Record the justification for the policy and procedures.

    - Note and keep a record of consultations and research considered in crafting the policy and procedures.

- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.

Questions about Criminal Records

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

Confidentiality

- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

On Hiring/Criminal Records Guidance
(Revised Oct. 2012)

REENTRY MYTH BUSTER!

A Product of the Federal Interagency Reentry Council

MYTH: People with criminal records are automatically barred from all employment.

FACT: An arrest or conviction record does NOT automatically bar individuals from all employment

On April 25, 2012, the U.S. Equal Employment Opportunity Commission issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended (Title VII), 42 U.S.C. § 2000e. The Guidance updates, consolidates, and supersedes the Commission's 1987 and 1990 policy statements on this issue, as well as the relevant discussion in the EEOC's 2006 Race and Color Discrimination Compliance Manual Chapter. These rules apply to all employers that have 15 or more employees, including private sector employers, the federal government, and federal contractors. Below are answers to common questions about the Guidance.

1) Does this Guidance prohibit employers from obtaining and using criminal background reports about job applicants or employees? No, the Guidance does not prohibit employers from obtaining or using arrest or conviction records to make employment decisions. The EEOC simply seeks to ensure that such information is not used in a discriminatory way.

2) How could an employer use criminal history information in a discriminatory way? Two ways -- First, Title VII prohibits disparate treatment discrimination. Employers should not treat job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic (disparate treatment discrimination). Second, Title VII prohibits disparate impact discrimination. Employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. In legal terms, it is not "job related and consistent with business necessity."

3) How would an employer prove "job related and consistent with business necessity"? Is it burdensome? Proving that a criminal record exclusion is "job related and consistent with business necessity" is not burdensome. The employer can prove this if it (1) considers at least the nature of the crime, time since the criminal conduct occurred, and the nature of the job in question, and (2) gives an individual who may be excluded by the screen an opportunity to show why he or she should not be excluded.

4) Why should an arrest record be treated differently than a conviction record?
An arrest record does not establish that a person engaged in criminal conduct. Arrest records may also be inaccurate (e.g., mistakenly identify the arrestee) or incomplete (e.g., do not state whether charges were filed or dismissed against the arrestee). Thus, an arrest record alone should not be used by an employer to take an adverse employment action. But, an arrest may trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action.

For More Information:

EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII:
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

EEOC Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII:
http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm

What is a REENTRY MYTH BUSTER? This Myth Buster is one in a series of fact sheets intended to clarify existing federal policies that affect formerly incarcerated individuals and their families. Each year, more than 700,000 individuals are released from state and federal prisons. Another 9 million cycle through local jails. When reentry fails, the social and economic costs are high -- more crime, more victims, more family distress, and more pressure on already-strained state and municipal budgets.

Because reentry intersects with health and housing, education and employment, family, faith, and community well-being, many federal agencies are focusing on initiatives for the reentry population. Under the auspices of the Cabinet-level interagency Reentry Council, federal agencies are working together to enhance community safety and well-being, assist those returning from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration.

For more information about the Reentry Council, go to: www.nationalreentryresourcecenter.org/reentry-council

REENTRY MYTH BUSTER!

Criminal Histories and Employment Background Checks

A Product of the Federal Interagency Reentry Council

MYTH: An employer can get a copy of your criminal history from companies that do background checks without your permission.

FACT: According to the Fair Credit Reporting Act (FCRA), employers have to get your okay, usually in writing, before they can ask a background screening company for a report on your criminal history. If you don't give your permission or authorization, your application for employment may not get a second look. But if you don't get the job because of information in your report, the employer has some follow-up legal obligations.

Key Employer Obligations in the FCRA

If an employer might use your criminal history report to take an "adverse action"– say, to deny your application for employment – he must give you a copy of the report and a document called ***A Summary of Your Rights under the Fair Credit Reporting Act*** before taking the adverse action.

If an employer takes an adverse action against you based on information in your criminal history report, he must tell you – orally, in writing, or electronically:

- the name, address, and telephone number of the company that supplied the criminal history report;
- that the company that supplied the criminal history information did not make the decision to take the adverse action and can't give you specific reasons for it; and
- about your right to dispute the accuracy or completeness of any information in your report, and your right to an additional free report from the company that supplied the criminal history report if you ask for it within 60 days of learning the bad news.

If a reporting company gives an employer a criminal history report that includes negative information about you gathered from public criminal records, the company must tell you that it gave the information to the employer or that it is taking special steps to make sure the information is complete and up to date.

If you think an employer has violated the FCRA, report it to the FTC. The law allows the FTC, other federal agencies, and states to sue employers who don't comply with the law's provisions. The FCRA also allows people to sue employers in state or federal court for certain violations.

For More Information:

See ***Credit Reports and Employment Background Checks*** from the Federal Trade Commission.

The FTC works to protect consumers from violations of the FCRA and from fraudulent, deceptive and unfair business practices in the marketplace , and educate them about their rights under the FCRA and other consumer protection laws. To file a complaint or get free information on consumer issues, visit **ftc.gov** or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a video, ***How to File a Complaint***, at **ftc.gov/video** to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

What is a REENTRY MYTH BUSTER?

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