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Of Counsel Carl S. Silverman

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Re: New OFCCP Directive: Federal Contractors and Subcontractors are Cautioned Against  
Blanket Exclusions Based on Criminal Record

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**New OFCCP Directive:**

The U.S. Labor Department's Office of Federal Contract Compliance Programs (OFCCP) issued a February 1, 2013 directive that federal contractors and subcontractors should not adopt hiring policies or practices that exclude applicants for employment based on their criminal history records.

The OFCCP takes the position (relying on the Equal Employment Opportunity Commission's [EEOC's] April 12, 2012 enforcement guidance) that, in view of racial and ethnic "disparities" in U.S. incarceration rates, blanket hiring exclusions of individuals with criminal records may have an unlawful disparate impact on those protected groups, in violation of Executive Order 11246.

**Disparate Impact Discrimination:**

Although individuals with criminal records are not expressly identified as a protected classification under either Title VI or Executive Order 11246, OFCCP takes the position that unlawful disparate impact may take place where a contractor uses a facially neutral policy to exclude job candidates having arrest or conviction records, for example, by including "no criminal background," "clean criminal background" requirements, or the like, in job postings.

**Job Related/Business Necessity Defense:**

OFCCP states that a contractor having a policy of excluding applicants based on criminal history may avoid disparate impact liability by demonstrating that the exclusion is "job related and consistent with business necessity" - - "[T]he 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.”

A contractor may establish job relatedness and business necessity by validating its policy in accordance with the Uniform Guidelines on Employee Selection Procedures (UGESP), enforced by both EEOC and OFCCP.

Absent UGESP validation (which is extraordinarily difficult to prove), OFCCP indicated that contractors may also establish that a criminal record exclusion is job related and consistent with business necessity by carefully considering the following factors:

- the “nature and gravity” of the individual’s criminal offense or conduct;
- the amount of time between a job seeker’s criminal conduct and his/her employment application; and
- the nature of the duties and “essential functions” of the position sought.

### **Best Practices:**

OFCCP recommends that federal contractors/subcontractors embrace the “best practices” set forth in the EEOC’s above-noted guidance, to include the following:

- OFCCP takes the position (adopted by EEOC) that contractors generally should not include questions about an applicant’s criminal convictions on employment applications.
- However, if a contractor makes such a request, the inquiry should be “limited to convictions for which exclusion would be job-related for the position in question and consistent with business necessity.”
- Contractors should engage in individualized assessments if they have policies and procedures that use criminal conduct as a screening tool for applicants and employees.
- “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.”

### **Going Forward:**

While OFCCP squarely places the burden on covered employers to justify excluding any job applicant due to a past criminal record, compliance with this OFCCP directive by no means

shields employers from the bad acts of employees having conviction records who are hired pursuant to OFCCP's directive. Rather, employers may be held liable, for example, for the negligent hire or negligent supervision of any employee who later assaults, harasses, or otherwise mistreats co-workers and others who come into the workplace.

Bottom line, careful, individualized analysis and due diligence are required in the performance of OFCCP-mandated compliance activities.