

OFCCP To Focus On Criminal Background Checks

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Alert to Federal contractors: The Office of Federal Contract Compliance Programs (OFCCP) has added criminal background checks to its compliance checklist.

On Jan. 29, 2013, OFCCP issued [Directive 306](#), notifying federal contractors and subcontractors that use of criminal background checks to screen applicants for open positions may violate Title VII. OFCCP noted that because racial and ethnic minorities are arrested and convicted at a higher rate than whites, excluding job seekers based upon their criminal history may be discriminatory.

OFCCP indicated its intent to follow the [EEOC's Enforcement Guidance](#) on the use of arrest and conviction records issued on April 25, 2012. In that Guidance, EEOC noted that use of criminal background checks can lead to: (1) disparate treatment (e.g., intentionally treating a white job applicant with a criminal conviction differently than a minority job applicant); or (2) disparate impact (e.g., a neutral policy of excluding job applicants with criminal histories, but such policy disproportionately screens out certain racial or ethnic groups). To avoid claims of disparate impact, an employer's policy or practice of excluding applicants based upon criminal history must be job-related and consistent with business necessity.

OFCCP stated it is aware of contractors posting job announcements that categorically exclude applicants with arrest or conviction records or require applicants to have a "clean" criminal record. OFCCP believes these practices likely violate federal discrimination laws.

Also of note, OFCCP follows EEOC's recommendation that employers not ask about criminal convictions on job applications. Further, OFCCP suggests that if an employer asks about an individual's criminal history at any point during the application process, the employer limit the inquiry to convictions that are related to the job in question and are consistent with business necessity.

Current OFCCP M.O. is to seek broad employment-related information as part of every audit, including seeking information about maternity leaves, religious accommodations, treatment of individuals with disabilities and veterans, as well as many other employment practices. Will OFCCP now add to its audit checklist information about the contractor's use of criminal background checks?

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Directive 306 was issued without advance notice from the OFCCP and is effective immediately.