

# PUBLICATION

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## When Hiring or Promoting, Use Caution Asking About Criminal Backgrounds

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The Department of Labor (DOL) Office of Contract Compliance Programs (OFCCP) has issued a new directive advising federal contractors and subcontractors about potential liability that could result from using employees' criminal records as a hiring and/or promotional screening device.

According to the OFCCP, policies and practices that exclude workers with criminal records without taking into account the date and nature of the violation could violate Title VII of the Civil Rights Act by adversely impacting minority candidates, particularly Hispanic and African-American men. In addition to discussing the ways in which using criminal background checks may violate anti-discrimination laws, the directive provides information on the recently updated Equal Employment Opportunity Commission enforcement guidance on this topic, as well as the Training and Employment Guidance Letter (TEGL), issued by the DOL's Employment and Training Administration, that addresses the relationship between excluding candidates with criminal records to the nondiscrimination obligations of public workforce system entities.

Specifically, the OFCCP recommends that contractors, "as a general rule, refrain from inquiring about convictions on job applications." When such inquiries are made, the OFCCP instructs that they be "limited to convictions for which exclusion would be job-related for the position in question and consistent with business necessity," and that such information be kept confidential. It also reminds contractors that are subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) that they must list job 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." Contractors who use such federally-assisted workforce systems are advised to use certain procedures outlined in the TEGL regarding posting job announcements, as well as screening and referring applications based on criminal record restrictions.

For example, when a contractor registers to use a federally-assisted Job Bank and posts a job vacancy that excludes individuals based on arrest and/or conviction records, the covered employment service is required under the TEGL to provide the contractor with a notice that enables the contractor to remove or edit the vacancy announcement. Position announcements excluding applicants with criminal histories need to be posted with a separate notice explaining that the exclusions might adversely impact certain protected groups and notifying them that individuals with criminal history records are not prohibited from applying for the posted position.

Finally, the directive provides information on two other federal laws – the Fair Credit Reporting Act (FCRA) and the Work Opportunity Tax Credit (WOTC) – which may impact contractors' use of criminal records in making employment decisions. If you have questions about how this directive may affect your business or your hiring practices, please contact any of our more than 70 Labor & Employment attorneys located in [Birmingham, Alabama](#); [Atlanta, Georgia](#); [Baton Rouge, Mandeville and New Orleans, Louisiana](#); [Jackson, Mississippi](#); [Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee](#); and [Houston, Texas](#).