

AFFIRMATIVE ACTION UPDATE

**** NEWS FLASH ****

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OFCCP ISSUES NEW DIRECTIVE ON THE USE OF CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT DECISIONS

On January 29, 2013, the Office of Federal Contract Compliance Programs (OFCCP) issued Directive 306 addressing covered contractors and sub-contractors use of criminal background checks to exclude applicants or employees from working for them. The OFCCP directive mirrors guidance provided by the Equal Employment Opportunity Commission (EEOC) in early 2012. Both the OFCCP and EEOC guidelines are based on the probability that members of a protected class have a significantly higher likelihood of having a criminal record than a non-protected individual. Both the OFCCP and the EEOC believe that a blanket prohibition of the hiring individuals with any criminal record will have a disparate impact on the basis of race.

For this reason, Directive 306 states that in order for an exclusion based on prior criminal arrest or conviction to be valid under Title VII, the exclusion must be job related and consistent with business necessity. Specifically, the contractor must “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.” This puts the burden on contractors to link certain types of conduct or convictions with valid reasons why such conduct would make the candidate unfit for a certain role.

The OFCCP provides two examples of methods in which a contractor can consistently meet the “job related and consistent with business necessity” defense. First, contractors can make sure the exclusion is in accordance with the Uniform Guidelines on Employee Selection Procedures. Second, contractors may use a “targeted screen,” utilizing the following three factors to assess the candidate: 1) the nature and gravity of the offense; 2) the time that has passed since the offense; and 3) the nature of the job held or sought. The EEOC’s “Enforcement Guidance on the Consideration of Arrest and Conviction Records,” on which Directive 306 is based, goes into further detail about these three factors, listing 8 more factors to help employers assess the “targeted screen” of candidates.

Directive 306 recommends several best practices. First, it suggests that any policy concerning criminal background checks require an individual assessment. Second, it advises that any restriction on hiring those with criminal backgrounds be narrowly tailored to fit the essential requirements of the job. This means limiting restriction to specific offenses that may demonstrate unfitness for performing the job, and defining an appropriate length of time for the exclusion based on criminal conduct. The OFCCP also recommends contractors avoid asking about convictions on applications, and limit inquiries about convictions to those that have been identified as ones which would exclude a candidate from that specific position. It is important to note that this is a recommendation and not a

requirement. Contractors are still free to ask about criminal convictions on an employment application. Lastly, Directive 306 emphasizes that information on criminal records obtained through background checks be kept confidential and used only for the purposes for which it was intended.

Contractors who conduct background checks, or ask about criminal convictions on an employment application should do the following in order to comply with the new directive. One, avoid any policy that results in a blanket prohibition on hiring employees with criminal records. Two, if an applicant is excluded from hiring based on his or her criminal record, ensure that there is a valid and necessary job related reason for the exclusion. Lastly, make sure to link the criminal conduct to a danger associated with the position, and individually assess each candidate before excluding. If a contractor follows these guidelines, they should survive any inquiry into their practices.

If there are any questions or comments concerning anything contained above, they can be directed to this office at the address shown above, by calling us at 440-564-7987 or sending an email to dbb@dbbrown.com. This discussion of this matter is for the clients and friends of Douglas B. Brown, LLC and does not represent nor is intended as a substitute for professional legal advice.