

# DIRECTIVE

## WORKFORCE SERVICES

Number: WSD12-9

Date: September 14, 2012

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TO: WORKFORCE DEVELOPMENT COMMUNITY

SUBJECT: CRIMINAL RECORD RESTRICTIONS AND IMPACT BASED ON RACE  
AND NATIONALITY

### EXECUTIVE SUMMARY:

#### Purpose:

This directive is intended to help the public workforce system and other entities, including covered entities (see the definition under the Policy and Procedures section of this directive) that receive federal financial assistance, comply with their nondiscrimination obligations when serving individuals with criminal records. It is also intended to ensure that exclusionary policies do not conflict with efforts to promote employment opportunities for such individuals. This directive 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. This directive also reiterates relevant information located in WIA Section 188(a)(1) which prohibits discrimination on the basis of age, disability, sex, race, color, or national origin for programs and activities receiving federal financial assistance.

#### Scope:

This directive applies to all entities receiving federal financial assistance.

#### Effective Date:

This directive is effective upon release.

### REFERENCES:

- Workforce Investment Act (WIA) Section 188(a)(1)
- Title VI and VII of the Civil Rights Act of 1964, as amended
- Title 20 Code of Federal Regulations (CFR) Sections 652.8(j)(1) and 652.8(j)(2)
- Title 29 CFR Parts 31.3(b)(2), 31.3(c)(1), 31.3(d)(1), 37.2(a)(2), and 37.6(d)(1)

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- Department of Labor (DOL) Training and Employment Guidance Letter (TEGL) 31-11, Update on Complying with Nondiscrimination Provisions: Criminal Record Restrictions and Disparate Impact Based on Race and National Origin (May 25, 2012)
- California Fair Employment and Housing Act (FEHA) Section 12926(d)
- U.S. Equal Employment Opportunity Commission, 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.

#### **STATE-IMPOSED REQUIREMENTS:**

This directive contains no State imposed requirements.

#### **FILING INSTRUCTIONS:**

This directive finalizes Workforce Services Draft Directive WSDD-75, issued for comment on August 3, 2012. The Workforce Services Division received six comments during the draft comment period. This resulted in one substantive change to the directive which is viewed as highlighted text. The highlighted text will remain on the Internet for 30 days from the issuance date. A summary of the comments is provided as an Attachment. Retain this directive until further notice.

#### **BACKGROUND:**

In recent decades, the number of Americans who have had contact with the criminal justice system has drastically increased. In California, it is estimated that about one in four adults now has a criminal history record which often consists of an arrest that did not lead to conviction, a conviction without incarceration, or a conviction for a non-violent crime. Because of this increase, racial and ethnic disparities have arisen, which may be reflected in incarceration rates, as well as in other criminal history records. Federal and state programs have devoted significant resources to reducing barriers to employment of people with criminal records in an effort to also increase public safety.

#### **POLICY AND PROCEDURES:**

For the purposes of this directive, "covered entities" include One-Stop Career Centers, State Workforce Agencies, State Workforce Administrators, State Workforce Liaisons, State and Local Workforce Board Chairs and Directors, State and Locals Equal Opportunities 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 Administrative Regional Administrators, Job Corps Contractors, Sub-Recipients of Department of Labor Financial Assistance.

Employers and agencies within the public workforce system should be aware of federal antidiscrimination laws if they choose to rely on job applicants' criminal history records to help assess potential risk to employees, customers, and business assets. Hiring policies and practices that exclude individuals with criminal records may conflict with laws which prohibit intentional discrimination on the basis of race, national origin, or other protected groups, 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 individuals from employment or other services based on the existence of a criminal history record, and do not take into account the age and nature of an offense, or the relationship of the record to the specific job duties, 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. Covered entities may also wish to direct employers to the Equal Employment Opportunity Commission (EEOC) Reentry Myth Buster (Attachment 1) which clarifies that an arrest or conviction record will not automatically bar individuals from employment.

The nondiscrimination provisions that apply to the federally-assisted workforce system prohibit:

- Disparate treatment - intentionally treating members of protected groups differently based on their protected status.
- 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.

Title VII of the Civil Rights Act of 1964, as amended applies to employers with 15 or more employees, and prohibits employment discrimination based on race, color, religion, sex, or national origin. Title VII also contains provisions that specifically address employment agency activities. Entities within the public workforce system like One-Stop Career Centers, may be regarded as "employment agencies" under the law and are not permitted to:

- Print, 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.
- Refuse to refer an individual for employment or otherwise to discriminate against any individual based on race, color, religion, sex, or national origin.

The EEOC, the federal agency that administers and enforces Title VII, has issued guidance on the use of arrest and conviction records in employment decisions (Attachment 2). Based on this guidance:

- 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.

California's parallel law to Title VII of the Civil Rights Act of 1964 is the FEHA. It is important to note that California law is more restrictive than federal law. Section 12926(d) of the FEHA applies to employers with 5 more employees rather than the 15 or more employees described above in Title VII.

Title VI of the Civil Rights Act of 1964 applies to all programs or activities receiving federal financial assistance under WIA and the Wagner-Peyser Act (WP). Title VI and its implementing regulations prohibit any program or activity from subjecting anyone to discrimination on the grounds of race, color, or national origin.

WIA Section 188(a)(1) further reiterates that no individual may be discriminated against based on age, disability, sex, race, color, or national origin. 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.

In light of the legal obligations, all entities should conduct their activities using safeguards to prevent discrimination and promote employment opportunities for formerly-incarcerated and other individuals with criminal records via the following methods:

#### Posting job announcements in job banks

When soliciting or posting job vacancies from employers, business services representatives, or other sources, policies and procedures should be in place to ensure that the following steps are taken:

- Covered entities should provide employers with Attachment 3, titled Notice #1 for Employers Regarding Job Bank Nondiscrimination and Criminal Record Exclusions when registering to use a job bank with a One-Stop or other covered entity. First, the notice explains that the covered entity must comply with federal civil rights laws which, due to the likely disparate impact of excluding protected groups with criminal records generally prohibit rejecting individuals based solely on an arrest or conviction history. Second, the notice also provides information for employers about their obligations under the federal Fair Credit Reporting Act, which require employers to obtain applicants' permission before asking a background screening company for a criminal history report. Employers must also provide applicants with a copy of the report and a summary of their rights before taking any negative employment action (e.g. not hiring or firing). Third, the notice also provides information for employers about their obligations under the California Investigative

Consumer Reporting Agencies Act, which limits reporting by consumer reporting agencies of criminal convictions that are older than seven years, and California Labor Code § 432.7 and California Code of Regulations, Title 2, § 7287.4(d)(1), which prevents employers from asking about arrests that did not lead to conviction and about misdemeanor convictions that have been dismissed pursuant to California Penal Code § 1203.4. Finally, 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 one already in use to identify other discriminatory language in job postings.
- Covered entities should provide employers the notice that appears as Attachment 4 in this directive, when job postings have been identified that exclude individuals based on arrest and/or conviction history. The notice states that in order to ensure that the employer and covered entity are in compliance with federal civil rights law, 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.
- Vacancy announcements containing language excluding candidates based on criminal history should only remain posted when accompanied by the notice to job seekers that appear as Attachment 5 in this directive. 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 should retain records of the notices sent to address vacancy announcements containing hiring restrictions based on arrest and/or conviction records. The DOL recognizes that covered entities have a variety of systems in place to comply with nondiscrimination obligations, and that entities engage with employers in varying ways. Entities may elect to take other steps that are at least equally effective in achieving compliance with their nondiscrimination obligations.

#### 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 follow the EEOC's arrest and conviction guidance (Attachment 2), if an arrest or a conviction history is used for purposes of excluding an individual from the entity's training programs or other employment-related services. However, nothing in this directive prevents staff from taking into account

an individual's arrest or conviction history for purposes designed to help such individuals.

- Covered entities 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 Attachment 4 for job seekers along with the job announcement.

**ACTION:**

Program operators are directed to review their existing policies and procedures and make any changes necessary to implement the guidance discussed in this directive. Furthermore, please bring this directive to the attention of all relevant parties.

**INQUIRIES:**

If you have any questions, please contact your [Regional Advisor](#) at (916) 654-7799.

/S/ MICHAEL EVASHENK, Chief  
Workforce Services Division

Attachments are available on the Internet:

1. [EEOC Reentry Myth Buster](#) (493k)(PDF)
2. [Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended](#) (761k) (PDF)
3. [Notice #1 for Employers Regarding Job Bank Nondiscrimination and Criminal Record Exclusions](#) (PDF)
4. [Notice #2 for Employers Regarding Job Postings Containing Criminal Record Exclusions](#) (PDF)
5. [Notice #3 for Job Seekers to be Attached to Job Postings with Criminal Record Exclusions](#) (PDF)
6. [Summary of Comments](#) (PDF)