

CRIMINAL RECORD RESTRICTIONS AND IMPACT BASED ON RACE AND NATIONALITY

GENERAL INSTRUCTIONS

The attached Directive is being issued in draft to give the Workforce Development Community the opportunity to review and comment prior to final issuance.

Submit comments by email no later than **January 9, 2020**.

All comments received within the comment period will be considered before issuing the final Directive. Commenters will not be responded to individually. Rather, a summary of comments will be released with the final Directive.

Comments received after the specified due date will not be considered.

Email MelissaM.Williams@edd.ca.gov
Include "Draft Directive Comments" in the email subject line.

CRIMINAL RECORD RESTRICTIONS AND IMPACT BASED ON RACE AND NATIONALITY

EXECUTIVE SUMMARY

This policy provides the guidance and establishes the procedures regarding criminal record restrictions and impact based on race and nationality. This policy applies to all recipients of federal *Workforce Innovation and Opportunity Act* funds, and is effective immediately.

This policy contains some state-imposed requirements. All state-imposed requirements are indicated by ***bold, italic*** type.

This policy supersedes Workforce Services Directive *Criminal Record Restrictions and Impact Based on Race and Nationality* (WSD12-9), dated September 14, 2012. Retain this Directive until further notice.

REFERENCES

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- *Workforce Innovation and Opportunity Act* (WIOA) (Public Law 113-128) Section 188(a)(1)
 - *Civil Rights Act of 1964* (Public Law 88-352) Titles VI and VII
 - 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), 38.2(a)(2), and 38.6(d)(1)
 - *California Fair Employment and Housing Act* (FEHA) Sections 12926(d) and 12952(a)(1)
 - US 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.

The EDD is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities.

BACKGROUND

The nondiscrimination and equal opportunity provisions outlined in Section 188 of WIOA and 29 CFR Part 38 prohibit discrimination on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin (including Limited English Proficiency), age, disability, or political affiliation or belief, or, for beneficiaries, applicants, and participants only on the basis of citizenship status or participation in a WIOA Title I financially assisted program or activity.

In recent decades, the number of Americans involved with the criminal justice system has drastically increased. In California, it is estimated that roughly seven million individuals, or nearly one in three adults, have an arrest or conviction record that can significantly undermine their efforts to obtain gainful employment. Because of this, 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

Definitions

For purposes of this Directive, the following definitions apply:

Covered Entities – includes all America’s Job Center of CaliforniaSM (AJCC) locations, state workforce agencies, state workforce administrators, state workforce liaisons, state and Local Workforce Development Board Chairs and Directors, state and local Equal Opportunity Officers, state Labor Commissioners, WIOA Section 166 Indian and Native American Grantees, WIOA Section 167 Migrant and National Farmworker Jobs Program Grantees, Senior Community Service Employment Program Grantees, Employment and Training Administrative Regional Administrators, Job Corps Contractors, and sub-recipients of DOL financial assistance.

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

Disparate impact – 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.

General Considerations

Employers and agencies within the AJCC system should be aware of federal anti-discrimination laws if they choose to rely on the criminal history record of a job applicant in order 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. Furthermore, policies or practices that have a disparate impact on these protected groups and which cannot be justified as job related and consistent with a business necessity may also conflict with these laws. 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.

The nondiscrimination provisions that apply to the federally-assisted workforce system prohibit both disparate treatment and disparate impact.

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 AJCC's, 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.

Title VI of the *Civil Rights Act of 1964* applies to all programs or activities receiving federal financial assistance under WIOA and the *Wagner-Peyser Act*. 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.

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.***

It should also be noted that according to Section 12952(a)(1) of the FEHA, a California employer is prohibited from inquiring about or considering a job applicant's conviction history prior to a conditional offer of employment being made.

The Equal Employment Opportunity Commission (EEOC), the federal agency that administers and enforces Title VII, issued [EEOC Enforcement guidance \(PDF\)](#) on the use of arrest and conviction records in employment decisions. 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.

WIOA 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 and/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 1 when registering to use a job bank with an AJCC 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 2 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 appears as Attachment 3 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. 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 found in Attachment 1, 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 2 for job seekers along with the job announcement.

ACTION

Bring the Directive to the attention of all relevant parties.

INQUIRIES

If you have any questions, contact your [Regional Advisor](#).

/s/ JAIME L. GUTIERREZ, Chief
Central Office Workforce Services Division

Attachments are available on the internet:

1. [Notice 1 for Employers Regarding Job Bank Nondiscrimination and Criminal Record Exclusions \(DOCX\)](#)
2. [Notice 2 for Employers Regarding Job Postings Containing Criminal Record Exclusions \(DOCX\)](#)
3. [Notice 3 for Job Seekers to be attached to Job Postings with Criminal Record Exclusions \(DOCX\)](#)