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**Nikki R. Haley**  
Governor

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Executive Director

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**STATE EMPLOYMENT AND TRAINING INSTRUCTION NUMBER: 12-01**

**TO:** DEW Area Directors  
DEW Staff Managers  
WIA Administrators  
One-Stop Operators

**SUBJECT:** Complying with Nondiscrimination Provisions: Criminal Record Restrictions and Disparate Impact Based on Race and National Origin

**ISSUANCE DATE:** August 22, 2012

**EFFECTIVE DATE:** Immediately

**PURPOSE:** To provide guidance relative to the information included in Training and Employment Guidance Letter (TEGL) 31-11 about exclusions based on criminal records, and how they are relevant to the existing nondiscrimination obligations for the public workforce system.

**REFERENCES:** TEGL 31-11

**BACKGROUND:** In recent decades, the number of Americans who have had contact with the criminal justice system has increased dramatically. Statistics indicate that racial and ethnic disparities are reflected in incarceration rates. Therefore, agencies within the public workforce system should be mindful of federal antidiscrimination laws if they choose to rely on job applicants' criminal history records as a tool to help assess potential risk to employees, customers, and business assets. Hiring policies and practices that exclude workers with criminal records may violate federal antidiscrimination laws, which prohibit policies or practices that have a disparate impact on protected groups and cannot be justified as job related and consistent with business necessity.

**POLICY:** It is the policy of the South Carolina Department of Employment and Workforce (SCDEW) to adhere to all federal antidiscrimination laws. All job orders listed in the SC Works Online Services (SCWOS) system must be free of any restrictions that may have a disparate impact on members of a particular race or national origin.

**ACTION:** SCWOS will be enhanced to facilitate the requirements of TEGL 31-11. Employers will be required to agree to the stipulations in Notice #1 of the TEGL before registration can be completed, either through staff assistance or self-service. Until SCWOS is updated, SC Works staff should email the attached notice to employers who register in SCWOS. This action will

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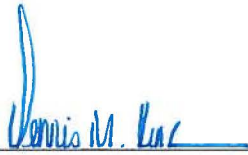
August 22, 2012

Page 2

ensure that all employers receive this information regardless of whether the employer chooses to manage their own account or if their account is managed by SC Works. Staff should complete a review of all internal job orders in their area listed in SCWOS within 45 days, to be certain that existing orders are free of any restrictions based on criminal records. If any such orders are identified, the employer must be notified and provided the opportunity to edit or remove the vacancy announcement. Explain that the public workforce system must comply with federal civil rights laws and that restrictions based on arrest and/or conviction history may violate those laws. If the employer reiterates that the criminal record exclusion must remain in the job order summary, the exclusion must be job related and consistent with business necessity. Otherwise, the job order must be deleted from SCWOS.

Please ensure that all contacts with the employer community are coordinated with the Business Services team in your area.

**INQUIRIES:** Questions may be directed to Charlie Davis at 803-737-2594 or [cdavis@dew.sc.gov](mailto:cdavis@dew.sc.gov).



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Dennis M. King  
Assistant Executive Director  
Employment Services

Attachment

## **Notice for Employers Regarding Job Bank Nondiscrimination and Criminal Record Exclusions**

The public workforce system must comply with federal civil rights laws, including those concerning nondiscrimination in employment. In addition, as explained in the information below provided by the Equal Employment Opportunity Commission (EEOC) – the agency that administers and enforces Title VII of the Civil Rights Act of 1964, as amended – an employer may be liable under Title VII for its use of criminal record information to make employment decisions, depending on the factual circumstances under which the criminal records are used.

An employer that submits a job announcement containing restrictions or exclusions based on arrest or conviction history will have an opportunity to edit or remove the announcement, to help ensure that the employer and the public workforce system are in compliance with the law. If the employer wishes to post the announcement as is, the announcement will not be entered into the SC Works Online Services system.

### **EEOC Information on Employer Consideration of Arrest and Conviction History**

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate in employment based on race, color, national origin, religion, or sex. This law does not prohibit an employer from requiring applicants to provide information about arrests, convictions or incarceration. But, employers may not treat people with the same criminal records differently because of their race, national origin or another protected characteristic. In addition, unless required by federal law or regulation, employers may not automatically bar everyone with an arrest or conviction record from employment. This is because an automatic bar to hiring everyone with a criminal record is likely to unjustifiably limit the employment opportunities of applicants or workers of certain racial or ethnic groups.

If an employer's criminal record exclusion policy or practice has a disparate impact on Title VII-protected individuals, it must be job related and consistent with business necessity. For greater detail on meeting this standard, please see the EEOC's Guidance referenced below.

Since an arrest alone does not necessarily mean that someone has committed a crime, an employer should not assume that someone who has been arrested, but not convicted, did in fact commit the offense. Instead, the employer should allow the person to explain the circumstances of the arrest to determine whether the conduct underlying the arrest justifies an adverse employment action. These rules apply to all employers that have 15 or more employees. For more information:

[http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm);

[http://www.eeoc.gov/laws/guidance/qa\\_arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm);

[http://www.nationalreentryresourcecenter.org/documents/0000/1082/Reentry\\_Council\\_Mythbuster\\_Employment.pdf](http://www.nationalreentryresourcecenter.org/documents/0000/1082/Reentry_Council_Mythbuster_Employment.pdf).

### **Relevant Information from Other Federal Agencies**

The Fair Credit Reporting Act (FCRA) imposes a number of obligations on employers that wish to use criminal background checks to screen applicants. This law requires the employer to obtain the applicant's permission before asking a background screening company for a criminal history report, and requires the employer to provide the applicant with a copy of the report and a summary of the applicant's rights before the employer takes an adverse action (such as denying an application for employment) based on information in the criminal history report. For more information: <http://business.ftc.gov>.

Employers should also be aware of the Work Opportunity Tax Credit (WOTC) and the Federal Bonding Program (FBP), two incentives that support employers' hiring of individuals with conviction histories. The WOTC provides a credit of 25-40% of first-year wages, or \$1,500-\$2,400, for employers that hire qualified individuals with felony convictions. For more information: <http://www.doleta.gov/wotc>. Through the FBP, funded and administered by the U.S. Department of Labor, fidelity insurance bonds are available to reimburse the employer for any loss due to employee theft of money or property, with no employer deductible. For more information: <http://www.bonds4jobs.com/index.html>.

The U.S. Department of Labor enforces Title VI of the Civil Rights Act of 1964 as it applies to public workforce system programs or activities receiving federal financial assistance, as well as the nondiscrimination provisions of the Workforce Investment and Wagner-Peyser Acts, which fund the public workforce system. Title VI and its implementing regulations prohibit any program or activity receiving federal financial assistance from excluding from participation in, or denying the benefits of the program, or otherwise subjecting anyone to discrimination, on the ground of race, color, or national origin. The nondiscrimination provisions in the laws that fund the public workforce system apply to discrimination on these bases, as well as discrimination on other grounds including disability, age, sex, and religion.