



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

Office of  
Legal Counsel

December 19, 2011

Staci Ramrakha  
Environmental Protection Agency  
Policy Training and Oversight Division  
Office of Acquisition Management  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

Re: Docket ID: EPA-HQ-OARM-2011-  
0803, Background Checks for Contactor  
Employees (Renewal)

Dear Ms. Ramrakha:

This responds to the Environmental Protection Agency's (EPA) request for comments under the Paperwork Reduction Act (PRA) about the renewal of the Information Collection Request (ICR) titled *Background Checks for Contractor Employees (Renewal)*.<sup>1</sup> Pursuant to the PRA, the EPA solicited comments on several topics, including whether the ICR is "necessary for the proper performance of the functions of the Agency [and] whether the information will have practical utility."<sup>2</sup>

The Equal Employment Opportunity Commission (EEOC) offers these comments as the agency responsible for enforcing the federal equal employment opportunity (EEO) laws, with a particular focus on Title VII of the Civil Rights Act of 1964, as amended (Title VII).<sup>3</sup> Title VII prohibits employment discrimination on the basis of race, color, religion, national origin, or sex. The EPA's ICR directly impacts employment by EPA contractors at a variety of government and private sites.

The EPA's ICR requires background checks for all contractor workers before they are deemed qualified to work on an EPA contract at any "response site" or "sensitive site," assuming the workers are not subject to background checks under Homeland Security Presidential

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<sup>1</sup> See 76 Fed. Reg. 67,182 (Oct. 31, 2011).

<sup>2</sup> *Id.* at 67,183.

<sup>3</sup> Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* See also E.O. 12067 (requiring EEO coordination and making the EEOC the lead agency for enforcement of EEO statutes).

Directive-12.<sup>4</sup> The EPA states that the “[i]nformation collected by contractors for performing background checks is necessary for applying the Government-established suitability criteria” on contract employees pursuant to 5 C.F.R. Parts 731, 732, and 736.<sup>5</sup> According to the EPA,<sup>6</sup> individuals *must not* have a weapons offense in the last five years or a felony conviction in the last three years to be qualified to work on a contract at any EPA “response site.”<sup>7</sup> Furthermore, to be qualified to work on a contract at an EPA-designated “sensitive site,”<sup>8</sup> an individual *must not* have a weapons offense in the last ten years, a felony conviction in the last seven years, or a misdemeanor conviction in the last five years.<sup>9</sup>

## EEOC Comments

We understand that the EPA must ensure that its contractors’ workers will not pose an unacceptable risk of harm at sites where it has contracts, especially security-sensitive sites. At the same time, the contractors are subject to Title VII if they meet its coverage requirements.<sup>10</sup> A pre-employment inquiry concerning criminal records does not in itself violate Title VII because Title VII does not regulate inquiries by employers. However, the *use* of criminal record information by a Title VII-covered employer, employment agency, or union, may violate Title VII if it is done in a discriminatory way. Thus, an employer or other covered entity must not use criminal history information to engage in unlawful disparate treatment (*i.e.*, an employer must

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<sup>4</sup> 76 Fed. Reg. at 67,184. *See also* Homeland Security Presidential Directive 12: Policy for a Common Identification Standard for Federal Employees and Contractors, 2 PUB. PAPERS 1765 (Aug. 27, 2004) (HSPD-12). HSPD-12 does not apply to individual contractor employees “under contract to a department or agency, requiring only intermittent access to federally controlled facilities.” Memorandum from the Office of Management and Budget on the Implementation of Homeland Security Presidential Directive (HSPD) 12 - Policy for a Common Identification Standard for Federal Employees and Contractors, M-05-24 (Aug. 5, 2005). EPA implemented HSPD-12 through the “EPA Personnel Access and Security System” (EPASS). Under the system, all contractor and subcontractor employees “whose work under the contract requires on-site access to an EPA-controlled facility or logical access to an EPA information system for at least 24 hours a week for at least 6 months a year, will be required to undergo a background investigation in order to receive an [EPASS] badge.” *See* EPA Attachment to Work Statement Agency Personal Verification Procedures for Contractor Personnel (Oct. 2006). *See also* EPA Supporting Statement A for “Background Checks for Contractor Employees (Renewal)” (Feb. 2, 2009) [hereinafter “*Supporting Statement*”], available at [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=200902-2030-001](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200902-2030-001) (stating that “[t]he background checks and application of the Government’s suitability criteria must be completed prior to contract employee performance”).

<sup>5</sup> *Supporting Statement*, *supra* note 4.

<sup>6</sup> *See Performance Work Statement: Levels of Personnel Background Checks for Contractor Employees* [hereinafter “*Performance Work Statement*”], available at [http://www.reginfo.gov/public/do/PRAViewIC?ref\\_nbr=200902-2030-001&icID=23563](http://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=200902-2030-001&icID=23563).

<sup>7</sup> An “eligible response site” is defined as a site that meets the definition of a “brownfield site” in section 101(39) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). *See* 42 U.S.C. § 9601(101)(41)(A). A “brownfield site” is defined as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” *Id.* § 9601(101)(39)(A).

<sup>8</sup> “Examples of ‘sensitive sites’ include those that involve law enforcement activities, apparent or suspected terrorist activities, any indoor cleanups (including private residences), drug lab cleanups, and response actions at geographically sensitive locations such as military installations and government buildings.” *Performance Work Statement*, *supra* note 6.

<sup>9</sup> *Id.*

<sup>10</sup> *See generally* EEOC Compl. Man. No: N-915, Section 2, “Threshold Issues,” § 2-III B., *Covered Entities*, available at <http://www.eeoc.gov/policy/docs/threshold.html#2-III-B> (last modified Aug. 6, 2009) (explaining which entities are covered by Title VII).

not use criminal record information differently depending on the applicant's race, national origin, or other protected status). Moreover, because disproportionate numbers of African Americans and Hispanics are convicted of crimes, the use of conviction records to make employment decisions is likely to have a disparate impact on these groups. Where there is such an impact, an employer or other Title VII-covered entity may use criminal history information to make employment decisions only when it is job related for the position in question and consistent with business necessity.<sup>11</sup> For exclusions based on convictions, this means that the criminal conduct must be recent enough and sufficiently job-related to be predictive of performance in the position sought, given its duties and responsibilities.<sup>12</sup> The EEOC's guidance identifies three factors to consider in making this assessment:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.<sup>13</sup>

Applying these factors, we are pleased that the EPA considers the time elapsed since the convictions. However, the EPA does not target its exclusions within these time periods to specific crimes that relate to the contract work at issue. For example, we question whether it would be job related for the position in question and consistent with business necessity to exclude all people with misdemeanor convictions in the last five years from working for all EPA contractors at EPA-designated "sensitive sites."

We urge the EPA to retain time limits in its standards, but at the same time to narrow its exclusions to focus on particular misdemeanor and felony convictions that relate to the work and the site of a contract. We also recommend that the EPA implement a waiver or appeals process so that individuals or contractors can request an individualized assessment. The EPA apparently already has a waiver process for its drug screening exclusions.<sup>14</sup> Note that the Maritime Transportation Security Act, which requires criminal background checks for security reasons, includes an individualized appeal procedure for port workers.<sup>15</sup>

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<sup>11</sup> See EEOC Compl. Man. No. N-915, Section 15: "Race & Color Discrimination" (Apr. 19, 2006); EEOC Policy Guidance No. N-915-061, "Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII" (Sept. 7, 1990); EEOC Policy Guidance No. N-915, "Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964" (Feb. 4, 1987) [hereinafter "Conviction Records"]. However, when an employer demonstrates that a criminal record exclusion is job related and consistent with business necessity, the exclusion would still be unlawful under Title VII if the plaintiff demonstrates that there is an equally effective, less discriminatory alternative and the employer has refused to adopt it. See 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

<sup>12</sup> See Conviction Records, *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> See *Performance Work Statement: Drug Screening for Contractor Employees*, available at [http://www.reginfo.gov/public/do/PRAViewIC?ref\\_nbr=200902-2030-002&icID=23565](http://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=200902-2030-002&icID=23565) (stating that "[i]f the results of an employee's drug screening does not meet the [EPA's] criteria the Contractor may apply for a waiver").

<sup>15</sup> The Maritime Transportation Security Act requires all port workers who work in secure areas of a vessel or facility to undergo a criminal background check to obtain the Transportation Workers Identification Credential (TWIC). See 46 U.S.C. § 70105. Port workers may be denied the credential if they have certain convictions in their background, but they also have an opportunity to file an individualized appeal to challenge the denial decision. See 49 C.F.R. §§ 1515.5, 1515.7.

We hope that these comments are helpful. Please feel free to contact Assistant Legal Counsel Carol Miaskoff at 202.663.4645 or Acting Assistant Legal Counsel Tanisha Wilburn at 202.663.4909, if you wish to discuss them further.

Sincerely,

/s/

Peggy R. Mastroianni  
Legal Counsel