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**A SUMMARY OF THE NEW FEDERAL
SECURITY STANDARDS REGULATING
TRANSPORTATION WORKERS**

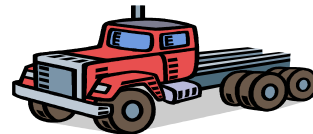
by
National Employment Law Project

Since September 11th, the nation's transportation industry has adopted a major new regime of criminal background checks intended to identify workers who may pose a terrorism security risk.

Starting with the USA Patriot Act, which passed the month after the attacks, a progression of federal laws and regulations were enacted to screen literally millions of workers employed in the aviation, maritime and ground transportation industries. Given the vast undertaking involved, implementation of these new screening systems and standards is still very much on-going. What follows is a summary of the key features of these employment screening laws, with an emphasis on their worker protections.

Although the laws themselves vary in specificity, by regulation and policy the Transportation Security Administration (TSA) has taken some steps to harmonize the different screening policies modeled in part on the Maritime Transportation Security Act of 2002 (MTSA). Of special significance, the MTSA imposes more reasonable limits on the seriousness and age of the offenses that may disqualify an individual from the required security clearance. In addition, the MTSA provides for a "waiver" process that takes into account evidence of rehabilitation in selected cases.

**Truck Drivers Licensed to
Transport Hazardous Material**



- **Who is screened for a criminal record?**

More than two million commercial drivers are licensed by the states to transport hazardous material. These drivers run the gamut from municipal trash collectors to interstate truckers hauling dangerous chemicals and biological waste. These drivers are subject to federal laws regulating their "hazardous materials endorsements" (HME), including new criminal background screening requirements imposed by the USA Patriot Act (49 U.S.C. Section 5103a). According to TSA's final regulations (69 Fed.Reg. 68720, November 24, 2004), these standards took effect January 31, 2005 for new HME applicants. Current drivers seeking to renew their HME will be covered starting May 31, 2005.

- **What offenses are disqualifying?**

Instead of listing specific disqualifying offenses, the USA Patriot Act generally mandated a criminal background check of Hazmat drivers to insure that “the individual does not pose a security risk warranting denial of the license.” Implementing this broad statutory language, TSA’s regulations impose a list of 35 “permanent” and “interim” disqualifying offenses.

“Permanent disqualifying offenses” include felony convictions for especially serious crimes, including murder, espionage, acts of terrorism and crimes related to explosive devices. These offenses are “permanent” because the TSA will consider all such convictions, no matter the age of the offense.

In contrast, the regulation’s “interim disqualifying criminal offenses” are expressly *limited to felonies* and to those convictions which *took place within the past 7 years, or where the individual was released from prison within 5 years of the application.*

The interim disqualifying offenses include various acts of violence, weapons offenses, property crimes, and a general category of crimes involving “dishonesty, fraud, or misrepresentation, including identity fraud.” Distribution of a controlled substance is also included as a disqualifying offense. However, TSA removed simple drug possession from the final list of disqualifying offenses, concluding that it “generally does not involve violence against others or reveal a pattern of deception”

- **Does the federal standard allow for a waiver of any disqualifying offenses?**

Yes. Those individuals denied a clearance due to certain permanent disqualifying offenses and any of the interim offenses can petition the TSA to “waive” the disqualification. In evaluating the waiver, the agency will take into account the circumstances surrounding the crime, restitution if any, and “other factors that indicate the applicant does not pose a security threat warranting denial of the HME.”

**Aviation
(Airport, Airline & Air Cargo Workers)**



- **Who is screened for a criminal record?**

In November 2001, Congress passed the Aviation and Transportation Security Act (ATSA) which imposed additional background checks on those workers with unescorted access to security sensitive areas of an airport, called “Security Identification Display Areas” (SIDA). (40 U.S.C. Section 44936). Major categories of workers covered by the criminal background check requirement under the ATSA and prior federal laws include airport screeners, mechanics, flight attendants, pilots, fleet service workers, and workers

handling commercial or passenger cargo in secured areas. (TSA has proposed regulations to extend a separate level of screening to workers who handle cargo in *unsecured* areas). As of November 19, 2002, all airport screeners and other covered workers were subject to the criminal background check requirements of the ATSA.

- **What offenses are disqualifying?**

Both the ATSA and TSA’s regulations include a list of disqualifying criminal offenses. While not limited to felonies as in the case of Hazmat regulations, the *disqualifications do not extend to any offense where the conviction took place more than 10 years before the individual applied for a SIDA clearance.*

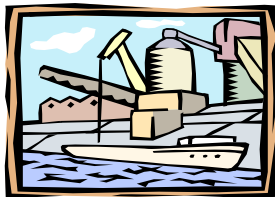
The regulations (67 Fed.Reg. 8340, February 22, 2002) detail 28 specific disqualifying offenses, covering various dangerous acts related to transportation, crimes involving espionage and treason, violent felonies, property crimes including theft and burglary that resulted in a felony conviction, and any felony related generally to “dishonesty, fraud or misrepresentation.”

In contrast to the Hazmat regulations, simple possession of a controlled substance is also a disqualifying offense. In addition, because certain offenses are not limited to felonies, some less serious crimes will also result in disqualification. Most notably, both felony and misdemeanor convictions for unlawful possession or use of a “weapon” (ranging from explosives to firearms, knives, brass knuckles, black jacks, and mace) result in disqualification.

- **Does the federal standard allow for a waiver of any disqualifying offenses?**

No. In contrast to the Hazmat regulations described above, the TSA’s regulations implementing the ATSA did not adopt a waiver standard.

**Maritime Ports
(Container Terminal Personnel, Crane
Operators, Truck Drivers)**



- **Who is screened for a criminal record?**

In November 2002, Congress passed the MTSA, which establishes a new “transportation worker identification credential” (TWIC) required of anyone with unescorted access to a “secure area” of a port facility or vessel (46 U.S.C. Section 70105). To qualify for the TWIC card, the worker must first pass the criminal background check described below.

Although the TSA has yet to propose regulations to further define the scope of those workers covered by the law, TSA implemented a pilot program in Florida and selected ports in other states covering about 200,000 workers, including crane operators, truck

drivers and various container terminal personnel. According to unofficial TSA policy, the facilities themselves are expected to control access to the areas they define as “secure,” which will then help determine the scope of the law. As part of the Intelligence reform bill enacted in December 2004, Congress required the TSA to develop a new implementation plan within 90 days which may establish new deadlines for the TWIC program.

- **What offenses are disqualifying?**

The MTSA statute provides the TSA with the discretion to determine the offenses that “could cause the individual to be a terrorism security risk to the United States.” Thus, until implementing regulations are issued by TSA, it is unclear what specific offenses will preclude port workers from qualifying for the TWIC card.

However, Congress imposed two major standards on the TSA’s regulations, which were both adopted as part of the Hazmat regulations described above. First, the MTSA expressly limits the disqualifying offenses to *felony convictions, not misdemeanors*. Second, the law states that the agency may only consider those convictions which *took place within the past 7 years, or where the individual was released from prison within 5 years of the application*.

- **Does the federal standard allow for a waiver of any disqualifying offenses?**

Yes. The MTSA requires the TSA to prescribe regulations that “establish a waiver process for issuing a transportation security card to an individual found to be otherwise ineligible for such a card. . . .” The statute requires the TSA to consider the “circumstances of any disqualifying act or offense, restitution made by the individual, Federal and State mitigation remedies, and other factors from which it may be concluded that the individual does not pose a terrorism risk warranting denial of the card.” Alternatively, a waiver may be granted if the employer establishes “alternative security arrangements acceptable to the Secretary.”