JANUARY 17, 2007

FEDERAL[*]

I. Automatic Restoration of Rights:

- Vote: Right to vote depends upon state law, for both state and federal offenders. *See Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). Most states that do not restore the right to vote automatically give federal offenders access to their restoration procedures. *See* Resource Guide, Part V.

- Jury: Eligibility for federal jury service is lost upon conviction in state or federal court of a crime punishable by more than one year if a person's "civil rights have not been restored." 28 U.S.C. § 1865(b)(5). The courts and the Administrative Office of United States Courts interpret this provision to require an affirmative act (such as a pardon or expungement) to restore federal jury eligibility. *See, e.g., United States v. Hefner*, 842 F.2d 731, 732 (4th Cir. 1988) (legislative history of § 1865(b)(5) indicates that "some affirmative act recognized in law must first take place to restore one's civil rights to meet the eligibility requirements of section 1865(b)(5)"). Thus the automatic restoration of rights that takes place in many states upon completion of sentence will not be sufficient. *See* Paul J. Komives & Peggy S. Blotner, *Loss and Restoration of Civil Rights Affecting Disqualification for Federal Jury Service*, 70 MICH. BUS. L.J. 542 (1991).

- Office-holding: The U.S. Constitution does not prohibit convicted persons from holding office, but some statutes provide that conviction will result in the loss of office. *See, e.g.,* 18 U.S.C. § 201(b) (sentencing court may order disqualification from federal office of official convicted for bribery); "Federal Statutes Imposing Collateral Consequences Upon Conviction," U.S. Department of Justice, Office of the Pardon Attorney, at 2-3 ("OPA Federal Summary"), available at http://www.usdoj.gov/pardon/collateral_consequences.pdf (hereinafter OPA Federal Summary). A felony conviction does not disqualify a person from federal employment, but may be considered in connection with determining suitability.

- Labor organizations: Prohibitions relating to office-holding in labor organizations and employee benefit plans last 13 years, but may be removed earlier if civil rights have been "fully restored" or if a federal court or the Parole Commission so directs. 29 U.S.C. §§ 504, 1111.

- Federal defense contractors:

  - Defense Contractor Personnel: Persons convicted of fraud or any felony arising out of a contract with the Department of Defense are prohibited for a period of "not less than five years after the date of conviction" from working in a management or supervisory capacity with a defense contractor, or from serving on

[*] Includes military cases prosecuted under the UCMJ.

the board of directors or acting as a consultant for any company that is a defense contractor. 10 U.S.C. § 2408(a). (Waiver prior to five years available from Secretary of Defense "in the interests of national security." § 2408(a)(3).)

- DOD Security Clearance: *See* part III, *infra.*
- Discretionary relief may be available from a variety of other federal collateral disabilities from responsible agency officials. *See* OPA Federal Summary, *supra*, at 15-16; *see also* parts IIC and III, *infra.*

II. Discretionary Restoration Mechanisms:

A. Executive pardon:

- *Authority*: Exclusively in President, cannot be limited or regulated by Congress. U.S. Const. Art. II, sec. 2. By Executive Order, Attorney General is charged with providing advice on pardon policy and investigating and making recommendations on all applications for pardon and commutation. *See* 28 C.F.R. Part 1.
- *Eligibility*: Five years after completion of sentence, beginning upon release from prison, or date of sentencing if not incarcerated. Waiver possible. Ordinarily must have completed parole. 28 C.F.R. Part 1. Offenders whose convictions were prosecuted under the Uniform Code of Military Justice are eligible to apply for a presidential pardon, as are D.C. Code offenders.
- *Effect*: A pardon "in no way reverses the legal conclusion of the courts; it "'does not blot out guilt or expunge a judgment of conviction.'" *Hirschberg v. Commodity Futures Trading Com'n*, 414 F. 2d 679, 682 (7th Cir. 2005), *citing In re North,* 62 F.3d 1434, 1437 (D.C.Cir.1994). S*ee also Nixon v. United States,* 506 U.S. 224, 232 (1993) ("a pardon is in no sense an overturning of a judgment of conviction by some other tribunal"); *Burdick v. United States,* 236 U.S. 79, 94 (1915) (a pardon "carries an imputation of guilt"). The effect of a presidential pardon is not to prohibit all consequences of a pardoned conviction, but rather to preclude future punishment for the conviction. *See Nixon,* 506 U.S. at 232; *Bjerkan v. United States,* 529 F.2d 125, 127-28 (7th Cir.1975). Thus a pardon relieves legal disabilities arising under state or federal law solely by virtue of the conviction, but it does not preclude adverse action taken on the basis of the conduct underlying the conviction. *See* Effects of a Presidential Pardon, 19 Op. Off. Legal Counsel No. 160, 1995 WL 861618 (June 19, 1995). In this regard, a pardon may be taken as evidence of rehabilitation and good character.
- *Process*: Application to Office of the Pardon Attorney (OPA), U.S. Department of Justice, on a form provided by that office. *See* http://www.usdoj.gov/pardon/pardon_petition.htm. Investigation by OPA, which in meritorious cases will include an FBI background investigation and inquiry to U.S. Attorney and sentencing judge, recommendation through Deputy Attorney General to President. No formal hearing. Official pardon recommendations and OPA advice to

President are confidential. Pardon recommendations handled in White House by Office of White House Counsel. Processing time varies in ordinary cases from 18 months upwards: there is no time limit on the consideration of federal pardon cases, and as of August 2005 some applications had been pending since the Clinton Administration.

- *Criteria*: Standards applicable to Justice Department review of pardon applications are set forth in § 1-2.112 of United States Attorneys Manual. http://www.usdoj.gov/pardon/petitions.htm. Factors to be considered include
  - 1) **Post-conviction conduct, character, and reputation (“**An individual's demonstrated ability to lead a responsible and productive life for a significant period after conviction or release from confinement is strong evidence of rehabilitation and worthiness for pardon. The background investigation customarily conducted by the FBI in pardon cases focuses on the petitioner's financial and employment stability, responsibility toward family, reputation in the community, participation in community service, charitable or other meritorious activities and, if applicable, military record. In assessing post-conviction accomplishments, each petitioner's life circumstances are considered in their totality: it may not be appropriate or realistic to expect "extraordinary" post-conviction achievements from individuals who are less fortunately situated in terms of cultural, educational, or economic background.”
  - **2. Seriousness and relative recentness of the offense: “**When an offense is very serious (e.g., a violent crime, major drug trafficking, breach of public trust, or white collar fraud involving substantial sums of money), a suitable length of time should have elapsed in order to avoid denigrating the seriousness of the offense or undermining the deterrent effect of the conviction. In the case of a prominent individual or notorious crime, the likely effect of a pardon on law enforcement interests or upon the general public should be taken into account. Victim impact may also be a relevant consideration. When an offense is very old and relatively minor, the equities may weigh more heavily in favor of forgiveness, provided the petitioner is otherwise a suitable candidate for pardon.”
  - **3. Acceptance of responsibility, remorse, and atonement. “**The extent to which a petitioner has accepted responsibility for his or her criminal conduct and made restitution to its victims are important considerations. A petitioner should be genuinely desirous of forgiveness rather than vindication. While the absence of expressions of remorse should not preclude favorable consideration, a petitioner's attempt to minimize or rationalize culpability does not advance the case for pardon. In this regard, statements made in mitigation (e.g., "everybody was doing it," or "I didn't realize it was illegal") should be judged in context. Persons seeking a pardon on grounds of innocence or miscarriage of justice bear a formidable burden of persuasion.”
  - **4. Need for relief. “**The purpose for which pardon is sought may influence disposition of the petition. A felony conviction may result in a wide variety of

legal disabilities under state or federal law, some of which can provide persuasive grounds for recommending a pardon. For example, a specific employment-related need for pardon, such as removal of a bar to licensure or bonding, may make an otherwise marginal case sufficiently compelling to warrant a grant in aid of the individual's continuing rehabilitation. On the other hand, the absence of a specific need should not be held against an otherwise deserving applicant, who may understandably be motivated solely by a strong personal desire for a sign of forgiveness."

- 5: **Official recommendations and reports.** "The comments and recommendations of concerned and knowledgeable officials, particularly the United States Attorney whose office prosecuted the case and the sentencing judge, are carefully considered. The likely impact of favorable action in the district or nationally, particularly on current law enforcement priorities, will always be relevant to the President's decision. Apart from their significance to the individuals who seek them, pardons can play an important part in defining and furthering the rehabilitative goals of the criminal justice system."

Frequency of Grants: Historically, American presidents have pardoned regularly and generously. Presidential pardoning has abated in recent years, however, compared to pre-1980 grant rates. *See* Margaret Colgate Love, *The Pardon Paradox: Lessons from Clinton's Last Pardons,* 32 CAPITAL LAW REVIEW 185 (2002); Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URBAN LAW JOURNAL 1483 (2000). As of January 2007, after six years in office, President George W. Bush had granted 113 pardons (and three commutations), and had denied 961 applications. As of that date, over 1000 applications for pardon remained pending, awaiting presidential action.[1] The rate of application has not abated despite the sluggish grant rate. Source: OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL

[1] The number of presidential pardons each year has steadily declined 1980, as has the percentage of applications granted. President Ronald Reagan was the last president to issue pardons regularly each year, and his 393 pardons represented only about 20% of the applications he acted on. Reagan's 393 pardons in eight years can be compared to the 534 pardons issued by his predecessor Jimmy Carter in four. (He commuted only thirteen sentences compared to Carter's 29.) Going further back in time, President Ford issued 382 pardons in two and one half years, and President Nixon 863 in eight years, Johnson 960 in four, and Kennedy 472 in three. The percentage of applications acted on favorably also steadily declined from Nixon (51%) through Ford (39%) and Carter (34%) to Reagan (20%). *See* OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION, 1945 TO PRESENT (2005). A sharper downward trend in federal pardoning began with President George H.W. Bush (68 pardons in four years, 7% of those acted upon), and continued under Clinton: excluding the last minute irregular grants on the eve of his leaving office, President Clinton issued only 178 pardons and 21 commutations (12 of which were FALN members) through the end of FY 2000, acting favorably on only 11% of the pardon applications decided during that period of time. *Id.* President George W. Bush's 113 pardons out of over 1000 cases decided yields a grant rate of about 10 %. To be fair, a majority of President Bush's pardon denials came at the beginning of his tenure, in cases left undecided by the Clinton Administration. The issuance of nine presidential pardon warrants during the two-year period from November 2004 to December 2006 is a hopeful indication that the pace of federal pardoning may pick up as President Bush nears the end of his second term, though his pardoning rate still lags considerably behind that of even his most recent predecessors.

CLEMENCY ACTIONS BY ADMINISTRATION, 1945 TO PRESENT (November 2005); W.H. Humbert, THE PARDONING POWER OF THE PRESIDENT (1941).

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B. Judicial sealing or expungement of adult felony convictions:

- *Inherent expungement authority*: There is no general federal expungement statute, and federal courts have no inherent authority to expunge records of a valid federal conviction. *See, e.g., United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004). However, some courts have held that federal courts have inherent ancillary authority to expunge criminal records where an arrest or conviction is found to be invalid or a clerical error is made. *United States v. Sumner,* 226 F.3d 1005, 1009 (9th Cir.2000).
- *Misdemeanor Marijuana Possession*: Congress has provided that where a person with no prior drug conviction is found guilty of misdemeanor marijuana possession under 21 U.S.C. § 844, courts may impose probation before entry of judgment, and subsequently dismiss the case without entry of judgment and no conviction resulting. *See* 18 U.S.C. § 3607(c). Expungement of all records is available if the defendant was less than 21 years of age at the time of offense. The effect of expungement under § 3607 is explained as follows:

  > "The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose."

  18 U.S.C. § 3607(c). (Before its 1984 amendment, § 844(b) itself permitted expungement for misdemeanor marijuana possession. *See* § 219(a), Pub. L. 98-473, 98 Stat. 1837.) Congress has directed that DNA analysis be expunged from certain indices when a conviction has been overturned. 10 U.S.C. § 1565(e); 42 U.S.C. § 14132(d). *See also*18 U.S.C. § 921(a)(20), (33)(B)(ii) (defining certain crimes to exclude convictions that have been expunged).

- *Youth Corrections Act*: Between 1950 and 1984, offenders between the ages of 18 and 26 could have their convictions "set aside" after successful completion of

probation under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5056 (1984). The effect of a set-aside under this statute was never settled in the courts, and the YCA was in any event repealed in its entirely by the Sentencing Reform Act of 1984. (A companion House bill pending at that time would have extended the set-aside remedy to all federal offenders, and clarified its effect as full expungement permitting an individual to deny having been convicted. *See* Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code,* 30 FORDHAM URB. L.J. 1705, 1715-16 (2003).)

C. Administrative certificate:

While there is no general administrative relief mechanism available from federal collateral consequences, waivers in particular cases may be available from responsible agency officials for both state and federal offenders subject to disabilities under particular federal statutes. *See generally* "Federal Statutes Imposing Collateral Consequences Upon Conviction," U.S. Department of Justice, Office of the Pardon Attorney, at 15-16, available at http://www.usdoj.gov/pardon/collateral_consequences.pdf. For example, exceptions to the prohibition on military enlistment of felony offenders may be authorized by the Secretary of the service involved in "meritorious cases." 10 U.S.C. § 504. Also, persons prohibited from holding national security clearance by virtue of their conviction may be granted a waiver "in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President." 10 U.S.C. § 986. See also the waiver authority of the FDIC and TSA described in Part III.

A few federal statutes specifically incorporate a waiver provision based on state provisions for pardon or restoration of rights. For example, under the Firearms Owners Protection Act of 1986, state convictions that have been expunged, set aside, or pardoned, or for which a person has had civil rights restored, do not constitute "convictions" for purposes of prosecution as a felon in possession. 18 U.S.C. § 921(a)(20) (2000); James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 99 (1992). In certain cases, an alien may avoid deportation based on conviction if he is pardoned. *See* Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENTENCING REP. 184, 184 (2001). A felony offender is disqualified from serving on a federal jury "if his civil rights have not been restored." 28 U.S.C. § 1865(b)(5) (2000). The federal prohibitions relating to involvement in labor organizations and employee benefit plans last up to thirteen years, but may be removed earlier if an individual's civil rights have been "fully restored." 29 U.S.C. §§ 504, 1111 (1998). See also the Transportation Safety Administration regulations described in Part III, *infra,* which give effect in connection with employment in transportation-related occupations to both state pardons and state expungements.

III. Nondiscrimination in Licensing and Employment:

Civil Rights Act of 1964: There is no general provision in federal law that prohibits consideration of a criminal conviction in connection with employment or licensure. The

Equal Employment Opportunity Commission has taken the position that "an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. Consequently, the Commission has held and continues to hold that such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity." EEOC Guidance No. N-915, February 4, 1987, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., EEOC Compliance Manual, February 4, 1987 (No. 918), citing previous decisions. *See also* EEOC Guidance No. N-915-061, September 7, 1990, "Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended."
http://www.hirenetwork.org/fed_occ_restrictions.html

Fair Credit Reporting Act: Prohibits a "consumer reporting agency," including private firms that supply criminal background information to employers, from disseminating to a prospective or current employer information about arrests that are more than seven years old, for which the statute of limitations has run. *See* 15 U.S.C. § 1681c(a)(2). However, convictions of any age may be reported. 15 U.S.C. § 1681c(a)(5). Additional notice and other procedural protections required by the FCRA also apply directly to an employer, as discussed in FTC advisory letters. http://www.cardreport.com/laws/fcra/ftc-opinion/fcra-opinion.html

Federally Regulated Occupations and Employments: Federal law now authorizes or requires criminal history background checks, and mandates disqualification based on certain convictions, for a wide variety of state-licensed occupations and employments. *See* Legal Action Center, National H.I.R.E. Network, "Federal Occupational Restrictions Affecting People with Criminal Records," http://www.hirenetwork.org/fed_occ_restrictions.html. Some of these regulatory schemes contain time limits or provide for administrative waiver, as described below.

1. **Security Regulation of the Transportation Industry:** Since 9/11, the nation's transportation industry has adopted a new regime of criminal background checks intended to identify workers who may pose a terrorism security risk. Starting with the USA Patriot Act, 49 U.S.C. § 5103a, a progression of federal laws and regulations have been enacted to screen workers employed in the air, sea and ground transportation industries. Although the laws themselves vary in specificity, by regulation and policy the Transportation Security Administration (TSA) has attempted to harmonize the different screening policies, though the Aviation and Transportation Security Act of 2001 imposes more stringent limits on airport employment than those applicable to maritime employees and commercial drivers.

- **Airport Employment:** The Aviation and Transportation Security Act of 2001 (ATSA), denies "unescorted access" authority to anyone convicted of disqualifying offenses within the past ten years. 49 U.S.C. § 44936(b)(1). Major categories of workers covered by the ATSA include airport screeners, mechanics, flight attendants and pilots, fleet service workers, and workers handling commercial or passenger

cargo in secured areas. § 44936(a)(1)(B). (TSA has proposed regulations to extend a separate level of screening to workers who handle cargo in *unsecured* areas). The ATSA itself includes a list of disqualifying criminal 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." *See* 49 U.S.C. § 44936(b)(1)(B); *see also* TSA regulations at 49 C.F.R. §§ 1542.209, 1544.229, and 1544.230. In addition, some misdemeanors may also be disqualifying. 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. *See United States v. Baer*, 324 F.3d 282, 284-86 (4th Cir. 2003) (misdemeanor firearms offense is disqualifying under § 44936). In contrast to the Hazmat regulations (below), the TSA regulations make simple possession of a controlled substance also a disqualifying offense. 49 C.F.R. § 1542.229. There is no provision for waiver.

Expunged and Pardoned Offenses: The TSA has taken the position that a "conviction" does not include offenses that have been discharged or set-aside after successful completion of probation, or convictions that have been expunged or pardoned. *See* May 28, 2004, Memorandum from the Office of the TSA Chief Counsel, "Legal Guidance on Criminal History Records Checks" at 4, http://www.tsa.gov/interweb/assetlibrary/CHRCMay04.pdf. *See also* http://www.tsa.gov/interweb/assetlibrary/TSA_CHRC_Legal_Guidance.doc; http://www.hirenetwork.org/patriot_act.htm. Expungement must "nullify" the conviction, which means it "must remove the criminal record from the applicant's file and cannot impose any restrictions or disabilities on the applicant." Examples of restrictions specifically mentioned in the TSA memorandum include limitations on ownership of a firearm, and limitations on employment as law enforcement officer, teacher, or health care provider. Therefore "some expungements remove the disabling effect of the underlying conviction and some do not." The memorandum also takes the position that "*all pardons will act to nullify the underlying conviction"* for purposes of the airport "unescorted access" authority. May 28 memo at 4. The credentialing authority may take into account convictions outside the 10-year period in making a suitability determination. *See* May 28 memo at 4-5.

Waiver: Unlike the regulations applicable to commercial drivers, the TSA regulations implementing the ATSA do not provide for waiver.

- **Hazmat Licenses for Commercial Drivers:** Under the USA Patriot Act, commercial drivers licensed by the states to transport hazardous material 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. § 5103a) to insure that "the individual does not pose a security risk warranting denial of the license." Drivers requiring HME endorsements range from municipal trash collectors carrying items like bleach and batteries, to interstate truckers carrying nuclear and biological waste. Unlike the ATSA, the

Patriot Act does not list disqualifying offenses or impose any time limits on their consideration. TSA's final regulations (49 C.F.R. §§ 1572.103 *et seq.*, 69 Fed. Reg. 68720 (Nov. 24, 2004)), list 35 "permanent" and "interim" disqualifying offenses. "Permanent disqualifying offenses" include convictions for especially serious crimes, including murder, espionage, acts of terrorism and crimes related to explosive devices. These offenses, whether felonies or misdemeanors, will be considered disqualifying no matter how dated. (Misdemeanor offenses are disqualifying only if they are of a "terroristic nature," such as sale of explosives, weapons.) The regulation's "interim disqualifying criminal offenses" are expressly limited to felonies and to those convictions that took place within the past seven years, or where the individual was released from prison within five years of the application. These include various acts of violence, weapons offenses, property crimes, and a general category of crimes involving "dishonesty, fraud, or misrepresentation, including identify 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 . . . ."

The law permits states to enact their own Hazmat standards. As of August 2005, four states had done so. New York's law is stricter than the federal TSA regulations, disqualifying drivers for convictions within the past ten years, and for ten years following release from prison. *See* McKinneys Veh. & Traf. Law § 501(6). New York's law makes no provision for waiver.

<u>Expunged and Pardoned Offenses</u>: 49 C.F.R. § 1572.3 excludes from the definition of "conviction" any offense that has been discharged or set aside pursuant to a "first offender" or other similar authority, and any offense that has been expunged or pardoned. "For purposes of this part, a conviction is expunged when the conviction is removed from the individual's criminal history record and there are no legal disabilities or restrictions associated with the expunged conviction, other than the fact that the conviction may be used for sentencing purposes for subsequent convictions." The commentary to the TSA regulations refers to the May 28, 2004 policy memorandum applicable to airport personnel, discussed above, which notes that to be effective an expungement cannot place limits on hiring as a police officer, teacher, or health care worker. "TSA believes it is necessary to include this level of detail in the definition to ensure that applicants are treated consistently across the country. Procedures on expungements vary from state to state, and may change at any time. Therefore, TSA hopes to avoid inconsistent application of the law against hazmat drivers by providing the new definition." Commentary, 69 Fed. Reg. at 68730. Thus pardons and some expungements will be given effect even prior to the waiver stage (below).

<u>Waiver</u>: An individual denied a clearance due to a disqualifying conviction may petition the TSA for a waiver. In determining whether to grant a waiver, "TSA will consider the following factors: (i) The circumstances of the disqualifying act or offense; (ii) Restitution made by the applicant; (iii) Any Federal or State mitigation

remedies; (iv) Court records or official medical release documents indicating that the individual no longer lacks mental capacity; (v) Other factors that indicate the applicant does not pose a security threat warranting denial of the HME." 49 C.F.R. § 1572.143.

- **Maritime Employees**: The Maritime Transportation Security Act of 2002 (MTSA) 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. § 70105. Persons are ineligible for a TWIC if they have been convicted within the preceding 7-year period of a felony that "the Secretary believes could cause the individual to be a terrorism security risk to the United States" or if they have been released from incarceration within the preceding 5-year period for committing such a felony. (Note that these expiration dates have been adopted by the TSA for "interim" disqualifying offenses, but not for "permanent" disqualifying offenses, while the ATSA imposes a ten-year rule on all disqualifying offenses.) (As of February 2005 no implementing regulations had been issued by TSA to identify disqualifying offenses, or to define a "conviction.") Privacy protections written right into the law – individual employers may be informed only of the results.

  Waiver: The MTSA requires a "waiver" process that will "give consideration to 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." § 70105(c)(2). The TSA must also establish an appeals process that requires notice and a hearing. § 70105(c)(3).

2. **Banking Industry:** Section 19 of the Federal Deposit Insurance Act prohibits people who have been convicted of a crime of dishonesty, breach of trust, or money laundering from working in, owning, or controlling a bank (an "insured depository institution") unless they obtain a waiver from the FDIC. For purposes of this law, pre-trial diversion or similar programs are considered to be convictions. 12 U.S.C. § 1829(a). Certain crimes cannot be waived for a ten-year period after conviction, absent a motion by the FDIC and court approval. *See id.*. A 1998 FDIC policy statement (http://www.fdic.gov/regulations/laws/rules/5000-1300.html)("SOP") provides that all drug crimes require FDIC waiver, but that pre-trial diversion programs will be considered on a case-by-case basis, except for those that occurred prior to November 29, 1990 which do not require a waiver. Youthful offender adjudications and "de minimis crimes" are not considered "convictions" requiring a waiver, nor are convictions that have been "completely expunged." However, a conviction for which a pardon has been granted will require a waiver. *See* SOP Section (B)(1). The FDIC generally requires the institution to submit the request for FDIC approval on behalf of the job applicant. (LAC Hire Network reports that institutions rarely seek a waiver, except for higher level positions when the candidate is someone the institution really wants to hire. Individuals can only seek FDIC approval themselves if they ask the FDIC to waive the usual

requirement. *See* http://www.hirenetwork.org/FDIC.html.) In determining whether to grant an applicant a waiver, the FDIC will consider the following factors: (1) the conviction and nature and circumstances of the offense; (2) evidence of rehabilitation, including age at conviction, and time elapsed; (3) the position to be held; (4) amount of influence and control over the management of the institution; (5) management's ability to supervise and control the person's activities; (6) degree of ownership over the institution; (7) applicability of the institution's fidelity bond coverage to the individual; (8) opinion of primary Federal and/or state regulator; and (9) any additional relevant factors. *See* SOP, Section D.

3. Defense Contracting – DOD Security Clearance: Persons convicted of a felony and actually incarcerated as a result for a period of not less than one year, are ineligible for a Department of Defense security clearance. 10 U.S.C. § 986 (c)(1). Waiver may be granted by the Secretary of Defense "if there are mitigating factors." § 986(d). Any such waiver may be authorized only in accordance with standards and procedures prescribed by Executive Order or other guidance from the President. DOD Contractor personnel subject to additional disqualifications, *see* Part I, *supra*.

4. Union Office: Certain classes of felons are barred for 13 years after one's conviction from holding any of several positions in a union or other organization that manages an employee benefit plan, including serving as an officer of the union or a director of the union's governing board. 29 U.S.C. §§ 504, 1111.

5. Healthcare: Those convicted of certain crimes from providing healthcare services for which they will receive payment from Medicare, 42 U.S.C. § 1320a-7, or from working for the generic drug industry. 21 U.S.C. § 335a.

6. Childcare: Criminal history background checks are required for individuals who provide care for children. 42 U.S.C. § 13041. In addition, the Federal Child Protection Act, 42 U.S.C. § 5119(a), authorizes states to enact statutes concerning the facilitation of criminal background checks of persons who work with children. It authorizes states to institute mandatory or voluntary fingerprinting of prospective employees in childcare fields in order to facilitate criminal background checks.

7. Prisoner Transportation (including private prisoner transportation) is federally regulated. 42 U.S.C. § 13726(b) sets "minimum standards for background checks and pre-employment drug testing for potential employees including requiring criminal background checks, to disqualify persons with a felony conviction or domestic violence conviction from employment." The purpose of the act was to provide protection against risks to the public inherent in the transportation of violent prisoners and to assure the safety of those being transported.

Additional Note on Federal Criminal Background Checks: In June 2006 the Attorney General issued a report pursuant to § 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L.108-458, 118 Stat. 3638, 3758) making recommendations to Congress for standardizing non-criminal justice access to FBI-

maintained criminal history records. *See* The Attorney General's Report on Criminal Background Checks, http://www.usdoj.gov/olp/ag_bgchecks_report.pdf. The report recommends that the FBI's national database of criminal records generally be made more widely available to private employers and private screening firms for purposes of determining suitability for employment or placement in a position of trust.[2] It also recommends that privacy protections be created (including notice to an individual whose records have been requested, and an opportunity to review and challenge the accuracy of those records), and that procedures for assuring accuracy of records be improved. Report at pp 59-63, 72-73.[3] It recommends national standards relating to disposition reporting and record completeness, including declinations to prosecute and expungement and sealing orders, so that there is uniformity in improvements by repositories nationwide. Report at 73. As to suitability criteria, the report recommends that Congress consider "whether guidance should be provided to employers on appropriate time limits that should be observed when applying criteria specifying disqualifying offenses and on providing an individual the opportunity to seek a waiver from the disqualification." Report at p. 68.[4]

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[2] Private employers cannot now access information from the FBI's national system except in limited situations. (See list of statutes authorizing access the FBI data for non-law enforcement purposes at p. 12, infra. However, the FBI can exchange the information with "authorized officials," which includes federal and state agencies that conduct criminal background checks for employment and licensing purposes. 28 U.S.C. § 534(a)(4). New federal regulations now authorize these "authorized officials" to outsource certain administrative functions to private screening firms, thus allowing these firms to directly access the FBI's records for the first time. 69 Fed. Reg. 75243 (Dec. 16, 2004). No state can access the FBI's records for employment or licensing purposes without FBI approval of required state legislation. 28 C.F.R. §§ 20.33, 50.12. To qualify for approval, the state must provide certain minimum protections, including a system of fingerprinting, notice to the worker whenever an FBI records search is conducted, and an opportunity on the part of the individual to challenge the accuracy of the FBI's records.

[3] Section 6402 of Pub. L.108-458, codified at 28 U.S.C. § 534, authorizes states to share FBI criminal history records with private employers of security guards relating to whether particular guards have been convicted of or charged with a felony. *See* 118 Stat. 3638, 3756-57. With the guard's written permission, a private employer may submit the guard's fingerprints to the state, which in turn will inform the employer whether the guard has been convicted of a felony within the previous ten years or has been arrested for a felony within the preceding year. *See* § 534(d)(1)(D).

[4] The Report contains the following list of statutes currently authorizing fingerprint checks for non-criminal justice purposes: 28 U.S.C. § 534 (2002) Note (federally chartered or insured banking industry and, if authorized by a state statute approved by the United States Attorney General (approval authority has been delegated to the FBI), state and local employment and licensing); 42 U.S.C. § 5119a (1998) (relating to providing care to children, the elderly, or disabled persons); 28 U.S.C. § 534 (2002) (relating to the parimutuel wagering industry (horse/dog racing)); 7 U.S.C. §§ 12a and 21(b)(4)(E) (2000), (commodity futures trading industry); 42 U.S.C. § 2169 (2005) (nuclear utilization facilities (power plants)); 15 U.S.C. § 78q(f)(2) (2004) (securities industry); 49 U.S.C. §§ 44935-44936(2003) (aviation industry); 49 U.S.C. § 44939 (2003) (relating to flight school training); 28 U.S.C. § 534 (2002) Note (nursing and home health care industry); 49 U.S.C. § 5103a (2005) (relating to issuance and renewal of HAZMAT-endorsed commercial driver license); 5 U.S.C. § 9101 (2000) (relating to federal government national security background checks); 25 U.S.C. §§ 3205 and 3207 (2000) (relating to Indian child care); 42 U.S.C. § 13041(1991) (relating to federal agencies and facilities contracted by federal agencies to provide child care); 42 U.S.C. §§ 1437d(q) (1999) (relating to public housing and section 8 housing); 25 U.S.C. § 4138 (1999) (relating to Indian housing); 25 U.S.C. § 2701 (1988) (relating to Indian gaming); 42 U.S.C. § 13726 (2000) (relating to private companies transporting state or local violent prisoners); 8 U.S.C. § 1105

(2001) (relating to visa issuance or admission to the United States); Executive Order 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953) (follows 5 U.S.C. § 7311 (1966)) (relating to applicants for federal employment); Pub. L. No. 107-188 § 201 and 212 (2002), 116 Stat. 594 (2002 (relating to handling of biological agents or toxins); 46 U.S.C. §§ 70101 Note, 70105, and 70112 (2002) (relating to seaport facility and vessel security); Pub. L. No. 108-458 § 6402 (2004) (relating to private security officer employment).