

# How to Stay Legal and Avoid Risky Drivers

Guidance for practicing EEOC-compliant hiring in the transportation industry



This executive summary and the Q&A section that follows are based on a webinar titled “EEOC vs. FMCSA: No One Wins, but You Don’t Have to Lose” presented November 11, 2013, by Mark R. Waterfill, Esq., a partner in the Labor & Employment and Litigation Groups of Benesch Friedlander Coplan & Aronoff LLP, and Mark G. Gardner, CEO of Avatar Management Services, Inc. If you would like to learn more about the webinar or any of the topics presented in this summary, please contact Mark Waterfill at (317) 685-6119 or [mwaterfill@beneschlaw.com](mailto:mwaterfill@beneschlaw.com), or Mark Gardner at (800) 728-2827 x226 or [mgardner@avatarms.com](mailto:mgardner@avatarms.com).

## Executive Summary

In December 2012, the United States Commission on Civil Rights (USCCR) held hearings to discuss the Equal Employment Opportunity Commission's (EEOC's) April 2012 Policy Guidance (number 915.002) regarding businesses' use of criminal background checks in hiring. Specifically, the EEOC Guidance bars the use of blanket policies against hiring ex-offenders in general, or convicted felons in particular. The EEOC's position supports the Federal Interagency Reentry Council, established by Attorney General Holder, which aims to remove federal barriers to former prisoners' successful reentry into society and reduce recidivism.

The EEOC considers blanket policies to be in violation of Title VII of the Civil Rights Act of 1964 because they have a "disparate impact" on African American and Hispanic men, who are incarcerated at rates two to three times higher than the general population. Disparate impact theory originated in the 1971 Supreme Court case of *Griggs v. Duke Power*, in which Duke Power's policy of requiring its employees to have a high school diploma was found to have a disparate impact on African Americans.

To avoid this disparate impact, the EEOC places the burden on the employer to:

1. Show that any policy or practice of excluding applicants based on criminal conviction is job related and consistent with business necessity. Employers must analyze the nature and gravity of the offense, the time since conviction and completion of sentence, and the nature of the job. Disqualification based on conviction alone is unlawful.
2. Show "that the policy operates to effectively link *specific* criminal conduct and its dangers with the risks inherent in the duties of a particular position."
3. Conduct an "individualized assessment" for each applicant.

In its Guidance, the EEOC includes transportation-related examples. In the case of port workers, disqualification from employment based on having a criminal record is not automatic. While individuals with convictions for espionage, treason, murder, and terrorism are permanently disqualified from obtaining port worker credentials, those with convictions for firearms, distribution of controlled substances, or dishonesty-related crimes may be temporarily disqualified. Moreover, port workers who are denied transportation worker identification credentials based on their conviction record may seek a waiver for certain permanently disqualifying offenses or interim disqualifying offenses. They may also appeal the Transportation Security Administration's (TSA's) initial determination of a threat assessment based on the conviction.

In another transportation industry example, the EEOC outlines a scenario where a denial based on a driver candidate's criminal record is consistent with another federal law, and the employer has conducted an individualized assessment of the candidate's situation. In this case, the EEOC says it is lawful to deny the job to the candidate.

### EEOC-Recommended Best Practices

In concluding its Policy Guidance, the EEOC offers the following recommendations for employers considering criminal record information when making hiring decisions.

#### General

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

#### Developing a Policy

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
  - Identify essential job requirements and the actual circumstances under which the jobs are performed.
  - Determine the specific offenses that may demonstrate unfitness for performing such jobs.
    - Identify the criminal offenses based on all available evidence.
  - Determine the duration of exclusions for criminal conduct based on all available evidence.
    - Include an individualized assessment.
  - Record the justification for the policy and procedures.
  - Note and keep a record of consultations and research considered in crafting the policy and procedures.
- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.

#### Questions about Criminal Records

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

#### Confidentiality

- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

## Moving Forward

This EEOC Policy Guidance has been the topic of much discussion and some controversy. Some have criticized the EEOC, saying it does not have rule-making authority in this area and that it has no statistical evidence that the use of criminal background checks disadvantages ex-offenders who would otherwise perform as well on the job as non-offenders. Others contend that felons are not a protected class, and that the EEOC itself has sued employers for not performing criminal background checks (e.g., *EEOC v. ABM Industries*, in which male employees were accused of sexually harassing their female coworkers).

Moreover, the EEOC maintains that complying with a state law regarding employment of convicted felons is *not* a defense to an EEOC charge under the Guidance. The EEOC will only honor a state-law exemption if it determines the state's law complies with the EEOC's Guidance. So, businesses are faced with a dilemma—follow their state's law or follow the EEOC?

Despite these issues, the ruling stands, and employers who don't comply risk enforcement action from the EEOC. So, how do transportation companies stay legal in their hiring practices and, at the same time, avoid risky drivers? One effective practice is to use a comprehensive employee selection process based on a compensatory model.

### The Compensatory Selection Model: A Multifaceted Approach to Hiring

To avoid potential EEOC violations, employers are advised to eliminate policies and practices that exclude people from employment based solely on their having a criminal record and to follow best practices in hiring. Among these practices are evaluating candidates against not only typical tangible data for hiring drivers, such as age, CDL, MVR, drug-free status, education, experience, work history, and other factors (including felony record), but also against the qualities found in the ideal driver. Ideal drivers are generally safe, stable, capable, reliable, flexible, friendly, efficient, responsible, and conscientious.

One way to evaluate these ideal qualities is to look at both "Can Do" and "Will Do" factors. The Can Do aspect looks at an applicant's KSAs—knowledge, skills, and abilities—while the Will Do portion looks at values, motivations, and personality. Note that shortcomings in the Can Do factors can be addressed through education and training; however, Will Do factors are generally established before adulthood and are not easily changed, making it advisable to hire candidates who already possess these qualities. Having a standardized, comprehensive selection process in place can help you evaluate both what candidates Can Do and what they Will Do.

An effective selection process uses multiple steps to gather a wide array of Can Do and Will Do data so that hiring decisions can be based on the broadest view of an applicant. This is known as a "compensatory model" and typically includes the following best practices.

1. **Effective recruitment process.** Before you can select the right candidates for the job, you need to attract many viable candidates. An effective recruitment process is one that defines your brand, describes best-fit candidates, creates a unique message that brings those best-fit candidates to your door, and broadcasts that message far and wide.
2. **Realistic job preview.** Candidates should be given an accurate portrayal of the job—the good, bad, and ugly—to help them understand what the job entails and to decide for themselves if they are a good fit. Providing a realistic job preview reduces the likelihood of someone accepting a job only to learn it isn't what they thought it would be. Unfulfilled expectations are a leading cause of driver turnover.
3. **Pre-employment personality assessment.** A personality assessment that is job-related and validated specifically for the type of role you're hiring for can help you determine whether candidates have the ideal traits for the job (safe, stable, reliable, etc.). A multitude of personality tests are widely available, and some are validated specifically for professional drivers.
4. **Structured interview.** Rather than asking candidates hypothetical questions ("What would you do if...?" or "How would you handle a situation where...?"), structured, behavior-based interviews ask candidates to describe how they actually behaved in the past in job-related situations. Asking specific questions ("Tell me about a time when you were asked to break a rule or the law. How did you deal with it and what was the outcome?") gives insight into candidates' values and character. Structured interviews ask predetermined questions, and interviewers write down the answers and score them after the interview. These scores then become one of the many different data sets used to make the hiring decision.

Other best practices in a compensatory selection model include familiar elements such as minimum qualification (knockout) questions, an MRV review, employment verification, a road test, a physical and drug test, and a felony record review. As noted, any disqualification based on a prior criminal record must be job-related and consistent with business necessity.

### A Selection Process Using a Compensatory Model

- Minimum qualification questions
- Realistic job preview
- Application review
- MVR review
- Employment verification
- Pre-employment assessment
- Structured interview
- Road test

Conditional offer based on all of the above, then:

- A physical and drug test
- Felony record review

### Conclusion: Be Consistent and Comprehensive to Stay Legal and Avoid Risky Drivers

The EEOC ban against blanket disqualifications for ex-offenders gives transportation companies a pressing reason to reevaluate their hiring practices. However, implementing a compensatory selection process that incorporates best practices in recruiting, screening, and hiring candidates is an effort that stands on its own merit.

#### By...

- Implementing a standardized hiring process
- Eliminating a blanket ban on felony convictions
- Adding a realistic job preview
- Including a pre-employment personality assessment
- Using a structured, behavior-based interview
- Following a compensatory selection model

#### You are more likely to...

- Hire drivers who have the ideal qualities for the job.
- Avoid disruptive “bad hires” that lead to high turnover and expose you to potential risks and costs from injuries, accidents, cargo losses, vehicle damage, and loss of customer confidence.
- Protect yourself from legal issues based on unfair hiring practices.

## Q&A from Webinar Participants

### Asking for past felonies is now illegal. So when can a background check be run?

You can run a background check *with the permission of the applicant*, and you can ask about prior convictions. The important part is that you not have a policy that prohibits people with a felony conviction from being hired. Depending on the particular job, a specific type of conviction could very well disqualify that person, while another type of conviction might not.

### How can offenses such as drug charges and motor vehicle charges not be relevant to the trucking industry? We even have government contracts that mandate background checks and felony-free history.

The EEOC recognizes in its Guidance that there are some transportation jobs that require a felony-free history. However, it is requiring companies to make a more individualized assessment. For example, suppose you have a 48-year-old applicant who had a pot offense when he was 17 years old. Even if it were a felony conviction, it is probably not an advisable reason to exclude that applicant. On the other hand, in an example given in the EEOC Guidance, an applicant convicted of a felony for transportation of dangerous explosives, even though he was only 19 when it happened, may be justifiably excluded from consideration. The point is that you must dig a little deeper to evaluate what the conviction was for and how recent it was. Above all, you should not have an absolute policy against hiring convicted felons.

### If we were to hire a convicted felon, is there a rule of thumb about how much time should have elapsed since the person was charged? Five years? Ten years?

The severity of the offense is pertinent here. Perhaps it was a felony murder and the applicant was the driver in a store holdup in which another person murdered a sales clerk. That may be a situation where hiring someone as few as 5 years removed from that conviction would be appropriate. Perhaps the person was completely innocent, or perhaps argues that he didn't know what the other person was doing in the store. On the other hand, if the applicant is the trigger person in that example, 5 years is probably not enough lapsed time. Twenty or 30 years later? Perhaps. It's more of an individualized assessment. If you can point to another federal rule or law that prohibits hiring someone with a particular type of felony conviction, then you are on safer ground.

### What about a non-trucking example, such as a charter bus driver with a battery felony record?

Hiring passenger-facing, passenger-meeting drivers comes with the added challenge of looking for someone with characteristics such as interpersonal skill and appropriate

behavior. While a felony conviction is useful as one type of proxy measure—this person broke the rules in the past and may break them again—it is only one of many different types of data you can collect and consider about this person in making your hiring decision. Using a compensatory model helps you decide based on a wide variety of information you've captured about a person and is legally defensible.

**We haul hazmat liquids. What if our insurance company prohibits drivers from having a criminal history, including felony, drugs, domestic violence, and public violence, even misdemeanors, because the job has high security risk and involves customer service?**

You should inquire with your insurance company as to how it expects you to comply with the EEOC Guidance if it truly has an outright ban. You might ask them if that includes someone who had such a conviction that is now 25 or 30 years old. If it does, you should ask how that is in compliance with the EEOC Guidance. It is unlikely that an insurance company would support an outright ban under all circumstances.

**How does the EEOC ruling apply to independent contractors—drivers contracted, rather than hired as employees?**

As a general matter, the EEOC Guidance applies to the employment situation. One can only bring a Title 7 claim, and file a claim with the EEOC, to the extent that one is an employee. If you are truly in an independent contractor situation, then, that is a separate consideration than this EEOC Guidance. In that case a plaintiff would have to make a claim under Section 1981 of the Civil Rights Act and claim that you were discriminating based upon the making or enforcement of a contract. That's a much tougher claim to make.

**Could there be an issue of negligent entrustment by hiring a convicted felon should things go bad?**

Yes, which is why it is so important to make an individualized assessment of what the conviction was about. If it was a recent conviction, then you may certainly use the issue of potential negligent entrustment to not hire the applicant.

**Where does a company's moral compass come into play? Can we make a negative hire decision against, say, a child molester, for example? Can the compensatory model protect our position in a case like this?**

Yes, a compensatory model, used correctly, makes it very, very difficult to make a claim of disparate impact. A compensatory model considers many factors—history, background, age, credentials, MVR, drug test, road test—before deciding someone is not a good fit for the particular job. That's a very defensible way to hire. If your business has a moral compass and you, by reason of ethics or morals, decide there are certain kinds of people that you want and don't want, you may do that provided you are neither discriminating against nor impacting people of protected classes.

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