U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave., S.W.
Washington, D.C. 20591

MAY 31 2005

Deborah McElroy
President
Regional Airline Association
Suite 800
2025 M Street, NW
Washington, DC 20036

Dear Ms. McElroy:

As you know, on January 12, 2004, we had issued a final rule changing the pre-employment testing requirement to a "prior to hire" requirement in14 CFR part 121, appendix I, section V.A. Prior to the February 11, 2004, effective date of the regulatory change, you had asked for guidance to assist in implementing the prior to hire requirement. On February 3, 2004, Patrice M. Kelly, of my staff, sent you an email discussing the changes to the pre-employment testing requirements.

There has been confusion among some employers regarding the guidance in the February 3, 2004 email, and their actions have resulted in noncompliance with the pre-employment testing requirement. As you know, it has been more than a year since the regulation, 14 CFR part 121, appendix I, changed the pre-employment testing requirement to a "prior to hire" requirement. We believe that the wording of the regulation is very clear and employers must follow the language of the regulation. Therefore, this letter rescinds the email sent to you on February 3, 2004.

As you know, 14 CFR part 121, appendix I, section V.A. clearly states pre-employment testing must be conducted and a negative drug test result received before an individual is hired for a safety-sensitive function or transferred from a non-safety-sensitive function to a safety-sensitive function. As we stated in the preamble to the final rule changing the pre-employment testing requirement back to "prior to hire": "Pre-employment testing is directly tied to aviation safety, in that it is a gateway to safety-sensitive positions. Failure of a pre-employment test is a direct barrier to an individual's entry into safety-sensitive positions." 69 Federal Register 1840, 1845 (Jan. 12, 2004)

We consider pre-employment testing to be particularly critical because it has been the source of the largest number of positive drug test results in the aviation industry. Between the inception of drug testing in 1990 and calendar year 2003, the aviation industry has reported 21,583 positive pre-employment drug test results. The reports received to date for 2004 show 848 more positive pre-employment drug test results.

In the 2004 final rule, we explained we were restoring the pre-1994 regulatory language of testing "prior to hire" because pre-employment testing violations had become our most frequent employer violation after the 1994 regulatory change. By going back to the "prior to hire" language, we were re-establishing a clear event for the pre-employment testing. Thus, we believe more than ever "it is vital that the language requiring pre-employment testing be as clear as possible in order to maximize the efficiency of its use." 69 Federal Register at 1845

Since the February 11, 2004 effective date of the final rule, employers have been required to conduct pre-employment testing before an individual is hired for a safety-sensitive function. It is an employer's responsibility to determine when an individual is hired for a safety-sensitive function. The employer is in the best position to know whether the individual has been hired for a safety-sensitive function (e.g., pilot, flight attendant, etc.), or has been hired for a non-safety-sensitive function (e.g., reservationists, ticket agent, etc.). We expect each employer to pre-employment test and receive the negative test result prior to an employee being hired for safety-sensitive functions, even if the individual has not yet begun training.

In some cases, employers have now created a new "trainee" position to circumvent the rule by blurring the understanding of "hire." Some employers have designed multiple variations of this newly created "trainee" position, even though the "trainees" are being trained exclusively for safety-sensitive positions (e.g., pilot, flight attendant, mechanic). In most of the cases we have seen where employers have created a "trainee" position, we have not seen a clear and documented distinction between an individual's "trainee" status and the individual's status as a safety-sensitive employee. As a result, these employers are in violation of the rule by not performing a pre-employment test and receiving a negative drug test result prior to the initiation of training these individuals who have been hired for safety-sensitive positions. These air carriers must change their practices in order to be in compliance with the regulations.

We hope this clarifies the FAA position regarding the regulatory requirements, 14 CFR part 121, appendix I, Section V.A. If you have any further questions about pre-employment testing prior to hiring an individual for a safety-sensitive position, please contact Patrice M. Kelly at (202) 267-8442.

Sincerely,

Rebecca B. MacPherson
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