

announcing the completion of band reconfiguration in that region.

(ii) Five years after the release of a public notice announcing the completion of band reconfiguration in a given 800 MHz NPSPAC region, the channels listed in paragraph (c)(12) of this section will revert back to their original pool categories.

\* \* \* \* \*

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 40

[Docket OST-2008-0184]

RIN OST 2105-AD67

#### Procedures for Transportation Workplace Drug and Alcohol Testing Programs: State Laws Requiring Drug and Alcohol Rule Violation Information

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Interim final rule.

**SUMMARY:** The Office of the Secretary (OST) is amending its drug and alcohol testing procedures to authorize employers to disclose to State commercial driver licensing (CDL) authorities the drug and alcohol violations of employees who hold CDLs and operate commercial motor vehicles (CMVs), when a State law requires such reporting. This rule also permits third-party administrators (TPAs) to provide the same information to State CDL licensing authorities where State law requires the TPAs to do so for owner-operator CMV drivers with CDLs.

**DATES:** The rule is effective June 13, 2008. Comments to this interim final rule should be submitted by August 12, 2008. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** You may file comments identified by the docket number DOT-OST-2008-0184 by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.

- *Fax:* (202) 493-2251.

**Instructions:** You must include the agency name and docket number DOT-OST-2008-0184 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** For program issues, Bohdan Baczara or Patrice M. Kelly, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366-3784 (voice), (202) 366-3897 (fax), [bohdan.baczara@dot.gov](mailto:bohdan.baczara@dot.gov) or [patrice.kelly@dot.gov](mailto:patrice.kelly@dot.gov) (e-mail). For legal issues, Robert C. Ashby, Deputy Assistant General Counsel for Regulations and Enforcement, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366-9310 (voice), (202) 366-9313 (fax) or [bob.ashby@dot.gov](mailto:bob.ashby@dot.gov) (e-mail).

**SUPPLEMENTARY INFORMATION:**

Confidentiality of an employee's test results is a cornerstone of the balance between public safety and employee privacy that is crucial to the Department of Transportation's testing program. Early in the Department of Transportation's drug testing program, we recognized the need for confidentiality of employee testing information and reflected this in our December 1, 1989 **Federal Register** notice (54 FR 49854). This rule required the Medical Review Officer (MRO) to disclose positive drug test result information only to employers. The rule also required laboratories to maintain employee test records in confidence, but permitted laboratories to disclose a positive drug test result to the employee, employer, or the decision maker in a lawsuit, grievance or other proceeding initiated by or on behalf of the employee as a result of the employee's positive drug test.

Congress passed the Omnibus Transportation Employee Testing Act of 1991, which directed the Department to implement significant changes to its substance abuse testing program, and specifically referenced providing for the confidentiality of employee test results. The Department amended its drug and alcohol testing regulations to implement these statutory requirements. (59 FR 7340; February 15, 1994). As provided in the original 1989 DOT rules and the 1994 amendments, Part 40 includes strict and specific provisions for maintaining the confidentiality of employee testing records. Specifically, employers are permitted to release

employee drug and alcohol testing records to other employers only upon written consent from the employee, and only when the consent authorized the release to a specifically identified individual.

In 2000, the Department revised its drug and alcohol testing regulations (65 FR 79462). In this revision, the Department prohibited MROs from disclosing employee drug testing information to other employers and prohibited service agents and employers from using blanket releases. We intended in 2000 for State safety agencies with regulatory authority over employers to be provided with certain testing information about an individual employee with no signed releases necessary. In recent years, several States have passed legislation requiring the release of certain test result and refusal information for all CDL holders without the employees' consent. Specifically, the States have required employers and/or their service agents to report to their respective State CDL issuing and licensing authorities the drug and alcohol violations of employees who are CMV drivers with CDLs. We do not want our regulations to have the effect of prohibiting employers and TPAs of owner-operators from providing the drug and alcohol test results of CMV drivers with CDLs. Consequently, the Department must take rapid action to avoid any such conflict.

The Department believes that State action to suspend or revoke the CDLs of CMV drivers who violate DOT rules until they demonstrate that they have successfully completed the SAP process can have important safety benefits. We support State legislation that can reliably provide State CDL licensing authorities with the information they need to take such action. In particular, the Department is concerned that, in the absence of such action, CMV drivers with CDLs who do not seek required Substance Abuse Professional (SAP) evaluations, yet continue to perform safety-sensitive duties after they violate the Department's drug and alcohol regulations (so-called "job hoppers"), pose an unacceptable safety risk to the public. We believe measures taken by States to suspend or revoke the CDL licenses of CMV drivers who violate DOT drug and alcohol rules will enhance the Department's efforts to ensure that such drivers are evaluated by SAPs and receive treatment or education before they resume safety-sensitive duties.

To be consistent with our policy in enforcing the existing regulations and because we want to ensure that 49 CFR Part 40 is supportive of such State

legislation, we are acting at this time to amend section 40.331. This amendment specifies that employers are authorized to respond—without conflict with Part 40 confidentiality requirements—to State law requirements by providing drug and alcohol violation information to State CDL licensing authorities on all CMV drivers with CDLs who are covered by DOT testing rules. This same authorization applies to TPAs for owner-operators, since they are the party in the best position to provide this data if owner-operators choose not to report their own violations. We note that this amendment does not authorize the release of individually identifiable testing information outside the scope of the State laws requiring its provision to a State agency for safety purposes. For example, if a State statute requires employers to provide information on positive tests and refusals to the DMV for purposes of taking action against the driver's CDL, it would be improper for the DMV to release the test information to other third parties without the written consent of the driver.

An employer, or a TPA for an owner-operator, is in the best position to provide this information reliably to State authorities because it is the only entity with knowledge and information about all drug and alcohol violations for an employee. For example, an MRO will not necessarily know that an employee refused to go to the collection site. Since MROs are not involved in the alcohol testing process, MROs will not have any information concerning an alcohol test. Likewise, a breath alcohol technician will not have any information about an employee's drug test result. A SAP will have no records on an employee who has not sought evaluation and treatment after a rule violation. Many service agents are located out of State and may not know of a State law requirement, and in any case they may not be readily subject to State law jurisdiction. Most have no way of knowing whether the employee is a CMV driver with a CDL or which DOT agency regulates the employee. Employers, on the other hand, have all this information, and are in-State employers subject to the State's jurisdiction.

This amendment is not a mandate to employers or TPAs for owner-operators to send information to State authorities. It simply authorizes them to comply with the specifics of State information collection requirements. For example, if State A requires only positive drug tests to be transmitted to its Department of Motor Vehicles, an employer or TPA could provide only records of the employee's positive drug test without written employee consent. The

employer or TPA could not provide "blanket" information about refusals or alcohol tests to State A without written employee consent, since this was not required by State law. We note that enforcement of State laws that apply to a given employer or TPA would remain a State responsibility.

### Regulatory Analyses and Notices

#### Authority

The statutory authority for this rule derives from the Omnibus Transportation Employee Testing Act of 1991 (49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 *et seq.*) and the Department of Transportation Act (49 U.S.C. 322).

#### Administrative Procedure Act

The Department has determined that this rule may be issued without a prior opportunity for notice and comment because providing prior notice and comment would be unnecessary, impracticable, or contrary to the public interest. Because several States already have laws requiring the reporting of test result information and other States may be contemplating enacting such laws, it is important to clarify the status of employers and TPAs for owner-operators seeking to comply with these laws. As States work with drug testing program participants to implement their laws, it is essential that the Department work, without delay, to avoid any potential conflicts with Federal regulations that could impede such employers and TPAs from providing needed information to State agencies. It is important to resolve, as soon as possible, questions that States and other participants have already raised about the relationship of State law and DOT regulations in this area. Issuing the interim final rule should help to avoid confusion that could, to some extent, diminish the safety benefits that the combination of Federal and State requirements concerning persons who violate drug testing rules would otherwise have.

This rule clarifies that, in the interest of safety, employers and TPAs for owner-operators may comply with State reporting requirements to disclose to their State CDL authorities the DOT drug and alcohol violations of CMV drivers with CDLs. It would be inadvisable for the Department to delay issuing this rule and consequently to delay the safety benefits from continued compliance by employers with State laws. For the same reasons, the Department finds that there is good cause to make the rule effective immediately.

#### Executive Order 12866 and Regulatory Flexibility Act

The Department has determined that this action is not considered a significant regulatory action for purposes of Executive Order 12866 or the Department's regulatory policies and procedures. The interim final rule makes minor modifications to our rules to clarify that employers and TPAs for owner-operators are authorized to release employee-specific drug and alcohol testing information where required by State law.

This rule is being adopted solely to clarify that DOT rules do not conflict with State laws requiring employers to submit drug and alcohol test results to State safety agencies. As such, it imposes no compliance costs on any business or governmental entity. Any costs resulting from compliance of employers with State laws are attributable to those State laws, not to this rule. Given the absence of compliance costs to anyone, I certify that the interim final rule does not have a significant economic impact on a substantial number of small entities.

The benefits of this rule, which are not quantifiable, involve potential improvements to safety as the result of State procedures that could prevent violators of DOT rules from driving commercial vehicles for a time and in helping to prevent "job hopping" by drivers who test positive for one company and then seek a job at another company. It is important for the Department and States to begin realizing these benefits at this time.

#### Executive Order 13132

The Department has analyzed this proposed action in accordance with the principles and criteria contained in Executive Order 13132, and has determined that, by explicitly facilitating the operation of State laws, the amendments is consistent with the Executive Order and that no consultation is necessary. It avoids the preemption of State laws with respect to the reporting of testing information by employers and third-party administrators providing services to owner-operators.

#### List of Subjects in 49 CFR Part 40

Administrative practice and procedures, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

Issued at Washington, DC, this 22nd day of May, 2008.

Mary E. Peters,

Secretary of Transportation.

■ For reasons discussed in the preamble, the Department of Transportation amends Title 49 of the Code of Federal Regulations, Part 40, as follows:

**PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS**

■ 1. The authority citation for 49 CFR part 40 continues to read as follows:

**Authority:** 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 *et seq.*; 49 U.S.C. 322.

■ 2. Amend 40.331 by adding a new paragraph (g) to read as follows:

**§ 40.331 To what additional parties must employers and service agents release information?**

\* \* \* \* \*

(g) Notwithstanding any other provision of this Part, as an employer of Commercial Motor Vehicle (CMV) drivers holding commercial driving licenses (CDLs) or as a third party administrator for owner-operator CMV

drivers with CDLs, you are authorized to comply with State laws requiring you to provide to State CDL licensing authorities information about all violations of DOT drug and alcohol testing rules (including positive tests and refusals) by any CMV driver holding a CDL.

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