

QA  
20030

Before the  
**FEDERAL HIGHWAY ADMINISTRATION  
U.S. DEPARTMENT OF TRANSPORTATION**

JULY 11, 1996  
WASHINGTON, DC

FHWA-97-20030-32

FEDERAL HIGHWAY  
ADMINISTRATION

96 JUL 11 A10:12

LEGS./REGS. DIV.

*Supplemental Comments of*  
**AMERICAN TRUCKING ASSOCIATIONS, INC.**

*On*  
**SAFETY PERFORMANCE HISTORY OF NEW DRIVERS**

---

**FHWA Docket No. MC-96-6**  
Federal Register [61 Fed. Reg. 10548, March 14, 1996]



**Without Trucks  
America Stops**



**DOCKET** MC-96-6-31  
**PAGE** 1 **OF** 9

## INTRODUCTION

The American Trucking Associations, Inc. ("ATA"), appreciates this opportunity to supplement its comments filed May 12, 1996, regarding Docket No. MC-96-6, Safety Performance History of New Drivers (61 Fed. Reg. 10548, March 14, 1996) ("May 12 comments"). As we indicated in our May 12 comments, the proposed rules present an important issue that required resolution by our member motor carriers at our recent Executive Committee meetings, held June 19-21, 1996. Accordingly, and in order to bring to FHWA's attention a matter of extreme importance to the carriers affected by the proposed rules, we provide the following additional comments (Issue 1). We also wish to clarify our position on an issue previously addressed in our May 12 filing, and do so below (Issue 2).

**ISSUE 1: In order to protect motor carriers who comply with the proposed rules from frivolous and costly driver lawsuits, the proposed rules should include a provision that recognizes the driver's implied consent to the release of factual, safety-related information (exclusive of drug and alcohol information).**

## DISCUSSION

As we said in our May 12 comments, ATA and its members support the intent of the proposed rules to enhance the exchange of relevant, safety-related data about individuals who apply for jobs as drivers with interstate motor carriers. That exchange, however, is not without some risk -- especially since the proposed rules do not indicate there is any immunity for carriers who release the required information. Moreover, the risk of litigation by a driver-applicant denied a job on the basis of information disclosed by a previous employer is magnified by the provision in the proposed rules that gives the driver applicant an absolute right to review "any information obtained" during an FHWA-required background

DOCKET MC-96-6-31  
PAGE 2 OF 9

investigation. See §391.23(d), 61 Fed. Reg. at 10556 (emphasis added).<sup>1</sup>

In discussing this issue with our members, it has become clear that the trucking industry is very concerned about the potential for greater litigation from drivers denied employment as a result of information disclosed under the proposed rules. For truckload carriers in particular, where there are high turnover rates and a high percentage of applicants who are denied jobs, this risk is especially great. Indeed, under the proposed rules, the truckload segment of the industry will be exchanging literally millions of documents and other information that could form the basis for a frivolous lawsuit by a disgruntled job applicant. We doubt that this was Congress's or FHWA's intent in mandating the exchange of information relevant to a driver's safety performance.

On the other hand, our members do not wish to add any greater paperwork burdens under the proposed rules before the mandated information could be released by a previous employer -- especially given the tremendous volume of applicants in the truckload segment of the industry. Experience with the rules regarding the driver's written consent for the disclosure of drug and alcohol information teaches that a similar process for pre-employment, non-drug and alcohol information would be impractical, expensive, and create a chilling effect on the exchange of such information.<sup>2</sup> And, while there is certainly some risk inherent in

---

<sup>1</sup>In our May 12, comments, we urged FHWA to limit the driver's right to review solely to the information mandated by the proposed rules, and we reiterate that position here. To go beyond the mandated information would not only expose motor carriers to invasion of privacy claims, but would also have a chilling effect on the exchange of data beyond the minimum required under the rules.

<sup>2</sup>Indeed, the number of individuals who must complete a written authorization for the release of drug and alcohol information is a small fraction of the total universe of individuals who apply for jobs as interstate truck drivers. For example, according to J.B. Hunt, a large

releasing any employment record, that risk is greater for information relating to a person's use of alcohol and controlled substances. Moreover, we do not object to the extension of the written release requirement to the additional drug and alcohol information mandated by the proposed rules.

We are also concerned that requiring the driver's written consent before the information required by the rules is released by a former employer would impose tremendous additional costs and paperwork burdens on the thousands of small trucking businesses that would be subject to the rules. Indeed, under the Regulatory Flexibility Act, 5 U.S.C. §601 et seq (1996), a government agency must determine whether a proposed rule has a "significant economic impact" on a significant number of small businesses.<sup>3</sup> Should FHWA require the driver's written consent before the release of the non-drug and alcohol information mandated by the proposed rules, we believe the agency's obligations under the Regulatory Flexibility Act would be triggered.

In seeking a resolution to this issue, our members looked again to the intent behind the rules and the implicit assumption behind them -- namely, that by seeking a position as an

---

truckload carrier, only 12% of applicants satisfy Hunt's stringent safety requirements. See Comments of J.B. Hunt Transport, Inc., FHWA Docket No. MC-96-6, April 29, 1996. That means the vast majority of applicants never receive a conditional offer of employment, which is a necessary prerequisite to all drug and alcohol inquiries required under the Americans With Disabilities Act. Requiring a written release for all applicants -- not just those who receive a conditional offer of employment -- would dramatically increase the cost of the pre-employment process with little added benefits to safety.

<sup>3</sup>The Regulatory Flexibility Act requires government agencies to conduct, and make public when it proposes a rule, an analysis of the number of small entities affected by the proposed rule, a description of the impact of the rule, and a description of alternatives which minimize "any significant impact" on small entities. 5 U.S.C. §603(c).

interstate driver, an applicant gives implied consent to the information released by previous employers during an FHWA-required background investigation. Indeed, under the Federal Motor Carrier Safety Regulations ("FMCSRs"), the company must investigate the driver's safety and employment history, and virtually all applicants for driving positions understand that requirement. If the driver refuses to give the consent required to release such information from previous employers, the hiring company cannot comply with its legal obligation to conduct a background check, and the entire process is stymied. Such conflicting obligations under the FMCSRs would put motor carriers between a rock and a hard place and would do little to promote the very public policy underlying the proposed rules -- to enhance the exchange of driver performance records to ensure the safety of the nation's highways.

Of course, the driver's right to review that information provides a mechanism to ensure fairness in the process. By making express in the rules that the driver is giving implied consent to the disclosure of truthful, safety-related information from previous employers, motor carriers will have some protection from invasion of privacy lawsuits, which exposes employers to liability for the mere act of disclosing confidential employment records.<sup>4</sup>

There is precedent under FHWA's rules for the notion of assuming a driver's implied consent for the disclosure of otherwise-confidential information. For example, FHWA rules

---

<sup>4</sup>In response to employers' concerns about the growing number of employee lawsuits, several states have passed laws providing a limited exemption for the release of relevant, factual information regarding the performance of past employees. Because interstate motor carriers do business in many, if not all, states, these laws will be of limited utility in the trucking industry since plaintiffs will be able to "forum-shop" to bypass employer-friendly jurisdictions.

that require drivers to submit to alcohol testing by law enforcement officials expressly recognizes the drivers' implied consent to such testing:

Any person who holds a CDL shall be deemed to have consented to such testing as is required of him/her by any State or jurisdiction in the enforcement of §383.51(b)(2)(i) [which prohibits driving a commercial motor vehicle under the influence of alcohol] and §392.5(a)(2) [which prohibits use of alcohol while on duty or while operating a commercial motor vehicle]. Consent is implied by driving a commercial motor vehicle.

49 CFR §383.72 (emphases added).

Similarly, the notion of implied consent is embodied in 49 CFR §382.405(g), which permits employers to disclose drug and alcohol test results (or other rules violations) without the driver's written consent when a lawsuit or other proceeding has been brought by the driver or another individual on his behalf. The rule also expressly recognizes that such information can be disclosed even in proceedings where a claimant may not be represented by an attorney, such as workers' compensation or unemployment hearings.

Thus, FHWA rules already recognize that driving a commercial motor vehicle is a privilege and that, in some instances, the concern for highway safety supersedes a driver's right to privacy. To promote the exchange of relevant, safety-related information and to protect motor carriers from burdensome employee lawsuits, FHWA should also incorporate the notion of implied consent for the release of non-drug and alcohol information under the proposed rules.

In order to protect the driver from information that may be false or defamatory, our proposal also includes an exception for information "known to be false" by a previous employer. We believe this exception strikes the appropriate balance between the motor

carrier's concerns about liability for mere disclosure, and the driver's interest in ensuring that only truthful information is exchanged.

**ATA RECOMMENDATION:**

To further promote the exchange of safety-related driver performance information, and to protect motor carriers who comply with the proposed rules from litigation, we recommend that the following provision be added as proposed rule 49 CFR §391.23(f):

Except as otherwise required by paragraphs (c)(1)(iii) and (iv) of this section or by §382.413(a)(1)(i) and (ii), a driver applicant shall be deemed to have consented to the release by a previous employer or its agent of the information required to be obtained under this Part [49 CFR Part 391], except that a driver shall not be deemed to have authorized the release by a previous employer or its agent of information which the previous employer or agent knows is false.

**ISSUE 2:** The proposed rules should delete the so-called "daisy chain" requirement under §382.413(a)(2), which requires a prospective employer to obtain (and the previous employer to disclose) drug and alcohol information the previous employer obtained from other previous employers.

**DISCUSSION**

In our May 12 comments, we strongly urged FHWA to delete this provision, and reiterate those arguments here.<sup>5</sup> We also proposed an alternative requirement that would require each prior employer to provide the names of all known earlier prior employers. See May 12 comments at p. 8. After further discussion with our members at our Executive Committee meetings, we no longer support this alternative and urge FHWA simply to delete this provision in its entirety.

---

<sup>5</sup>The discussion of this issue in our May 12 comments appears under Issue #1C, at pp. 7-8.

At our recent Executive Committee meetings, our members expressed their concern that both the proposed rule and our proposed alternative would add tremendous new costs and paperwork burdens without a corresponding benefit in promoting highway safety.<sup>6</sup> The requirement would also appear to be redundant, since under the proposed rule, a prospective employer must contact all previous employers directly in order to obtain the identical information. Moreover, existing FHWA rules make it clear that it is the applicant's responsibility to identify previous employers [see 49 CFR §391.21(b)(10) and (11)], and to certify that this information is true [49 CFR §391.21(b)(12)]. To impose a similar requirement on former employers would, in most cases, provide little or no additional information relevant to the hiring decision.

We are also concerned that this provision would be unfair to drivers. There is every possibility that one or more of the driver's previous employers may be deceased, out of business, or otherwise unavailable to verify information contained in another employer's records. This situation would also render meaningless the fairness provision under the proposed rule giving drivers a right to review information obtained from previous employers. To ensure that qualified applicants are not denied jobs based on erroneous information, FHWA should delete this provision from the proposed rules.

Finally, because of the significant economic impact of this requirement on the

---

<sup>6</sup>Those costs could include the cost of defending defamation lawsuits brought by former drivers because of information passed on to a prospective employer. See Comments of DAC Services, FHWA Docket No. MC-96-6, May 13, 1996, pp. 28-29. In addition, a current employer's risk of exposure to a negligent hiring or negligent retention suit is increased if the driver's past employment records indicate any safety deficiencies -- even if the driver's tenure with the current employer reveals no safety problems.

thousands of small trucking companies that would be subjected to it, we believe FHWA would be required to comply with the Regulatory Flexibility Act, 5 U.S.C. §601 et seq. (See discussion supra at p. 3), before the rules could go into effect. Given the minimal (if any) added safety benefit to this provision, we question whether FHWA should expend any resources assessing its economic impact or risk holding up the effective date of the remaining proposed rules until that analysis is complete.

**ATA RECOMMENDATION**

Proposed §382.413(a)(2) should be deleted in its entirety.

\*\*\*\*\*

**Questions concerning ATA's supplemental comments should be directed to Laurie T. Baulig, Vice President, Labor & Human Resources Policy, (703) 838-1904 or Neill Darmstadter, Senior Safety Engineer, (703) 838-1850.**