2009 HOUSE TRANSPORTATION

HB 1242

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1242

House Transportation Committee

☐ Check here for Conference Committee

Hearing Date: 01/29/09

Recorder Job Number: 8129

Committee Clerk Signature Jeanette Cook

Minutes:

Chairman Ruby introduced HB 1242. This bill tracks the drug testing of CDL drivers.

Representative R. Kelsch: Will this track any drug test, for any reason, during a person's lifetime? I don't see any time limitations on here. For example, if a young person failed a drug test at age 20. Then they were clean for five years and applied for a job. How would you view that as an employer?

Chairman Ruby: That would be up to the discretion of the employer.

Representative R. Kelsch: Shouldn't there be a reasonable amount of time that one can check back, maybe a year but not an indefinite time? I think that this is too broad.

Terry Narum spoke in support of HB 1242. He wanted to alert the committee of a loophole in Federal legislation that is being addressed both from the standpoint of the Federal government as well as from a variety of different states. This bill addresses only someone that has a CDL license and only someone who is taking a federally mandated drug test. Mr. Narum provided a copy of a Release of Information Form (49 CFR Part 40 Drug and Alcohol Testing) . See attachment #1. He explained that a prospective employee for a CDL job would be required to give one of these to a new employer to request information from his **most current past employer.** So, that person is self identifying if he/she has any problems. If a person takes a

drug test and fails, and therefore doesn't get a job with that company, he is not obligated to disclose that test, since he was not employed by that company. Most of the current legislation is federal and self-identifying. Attachment #2 has to do with the Federal Register. It recognizes that employees are not providing the correct information to a respective or current employer. As a result, the federal regulations were changed to allow the individual states to begin to track these types of incidences. This is what is being referred to as the perceived loophole. The benefits to setting up a tracking procedure would be potential improvements to safety as a result of state procedures that could prevent violators of DOT rules from driving commercial vehicles for a time. It would also prevent "job hopping". (Jumping from job to job to stay ahead of your past conviction.) There are no statistics that show how often this is happening. Attachment #3 is a list of states that have begun tracking. The tracking is done by either setting up a complete new agency to do the tracking, or is done through an agency that is already in place such as the Department of Motor Vehicles. Mr. Narum recommended that DOT be the instrument for making these records available. The fiscal note attached to this assumes that everything would be automated. Some states are not automating; it can be done in other ways.

Representative R. Kelsch asked who Mr. Narum is representing.

Terry Narum stated that he was representing himself, but that he also is a co-owner of a company that does background checks and drug testing. The information that he has gathered has come from employers that he has worked with who have been frustrated at not being able to get information on prospective employees.

Tom Balzer, the managing director of the North Dakota Motor Carriers Association, spoke in opposition of HB 1242. He stated that his industry does not oppose the concept of HB 1242. He provided written testimony explaining their position. See attachment #4.

Linda Butts, Deputy Director of Driver and Vehicle Services at the DOT, spoke in a neutral position on HB 1242. She provided information to the committee that would make them aware of several possible issues with the bill in its current form. See attachment # 5.

The hearing on HB 1242 was closed.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1242

House Transportation Committee

☐ Check here for Conference Committee

Hearing Date: 02/05/09

Recorder Job Number: 8865 @ 4 minutes

Committee Clerk Signature Jeanette Cook

Minutes:

Chairman Ruby explained the amendments that were distributed to the committee members. He felt that these changes would address most of the concerns with the bill.

There was information from **Linda Butts, DOT**, relating to whether the DOT can rerelease information to a third party. The only way the DOT believes that they can release that information is with the signature authorization of the employee.

Representative Delmore moved the ammentments.

Representative Thorpe seconded the motion.

A voice vote was taken with all in favor. The amendment was adopted.

Representative Weiler expressed his concern at the additional FTE in the bill. He didn't understand the necessity of an extra person.

Chairman Ruby reviewed the purpose of the bill. It would provide a source to check if someone was trying to job hop and failing drug tests on the way with no record of the person's actions. But, the information that we received from DOT says that the person will still have to sign the authorization to release that information.

A short discussion ensued.

Representative Heller questioned whether our state's drivers would be put at a disadvantage.

Chairman Ruby felt that the state's employers would be more protected.

Representative Weisz stated that he felt that this type of legislation should be done nationally.

Representative Gruchalla doesn't see any unfairness in the bill.

Representative Delmore thinks that this bill possibly won't do what it is intended to do.

Representative R. Kelsch moved a **Do Not Pass as amended.**

Representative Delmore seconded the motion.

A roll call vote was taken. **Aye 10 Nay 4 Absent 0**

Representative Griffin will carry the bill.

FISCAL NOTE

Requested by Legislative Council
01/12/2009

Bill/Resolution No.: HB 1242

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures				$120,060		$100,800
Appropriations				$120,060		$100,800

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill adds the inclusion of positive drug test results to the driver record and to make them available for request in the same manner and for the same fee as a driving abstract.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

This would require substantial software modifications and one additional FTE to review, enter, update, and maintain the information.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

Revenue is not determinable due to the unknown number of actual operators. The federal motor carrier safety regulation covers all commercially licensed drivers along with anyone with a class D license operating a vehicle 10,001 lbs or greater for a commercial purpose.

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Computer software modification cost estimate is based on a new report collection and generation, mainframe input screens, print capability, Filenet Storage and a Web based on-line application.

Mainframe Programming 120 hrs @ $69 = $8,280
Web Application Development 120 @ 69 = 8,280
Server hosting $450 x 24 months = 10,800
DOT Staff Hours = 60 hrs @ $45 = 2,700
Total $30,060

One (1) new FTE cost estimate is based on receiving, reviewing, editing, updating driver record, and maintaining the information to make it available for request.

Annual salary & benefits = $45,000
Per biennium estimate = $90,000

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Computer Software Modifications:
2009-2011 biennium = $30,060
2011-2013 biennium = $10,800
Additional FTE's Required:
2009-2011 biennium = $90,000
2011-2013 biennium = $90,000

Name:	Glenn Jackson	**Agency:**	NDDOT
Phone Number:	328-4792	**Date Prepared:**	01/16/2009

90562.0101
Title.0200

Prepared by the Legislative Council staff for
Representative Ruby
February 4, 2009

VR
2/6/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1242

Page 1, line 6, replace "An employer of or a" with "A"

Page 1, line 7, after "positively" insert "for drugs and a blood alcohol technician for an employee who has tested positive for alcohol,"

Page 1, line 9, replace "social security" with "commercial driver's license"

Page 1, line 10, remove ", other"

Page 1, line 11, remove "than the social security number,"

Page 1, line 12, replace "A report is a permanent record" with "The director may not provide the information in a report to a requester after ten years from the date of the test"

Renumber accordingly

Date: 2-5-09

Roll Call Vote #: _____

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1242

House TRANSPORTATION Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do pass ☒ Don't Pass ☒ Amended

Motion Made By Kelsch Seconded By Delmore.

Representatives	Yes	No	Representatives	Yes	No
Representative Ruby - Chairman		✓	Representative Delmore	✓	
Rep.Weiler – Vice Chairman		✓	Representative Griffin	✓	
Representative Frantsvog	✓		Representative Gruchalla		✓
Representative Heller	✓		Representative Potter		✓
Representative R. Kelsch	✓		Representative Schmidt	✓	
Representative Sukut	✓		Representative Thorpe	✓	
Representative Vigesaa	✓				
Representative Weisz	✓				

Total Yes 10 No 4

Absent 0

Bill Carrier Griffin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1242: Transportation Committee (Rep. Ruby, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (10 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1242 was placed on the Sixth order on the calendar.

Page 1, line 6, replace "An employer of or a" with "A"

Page 1, line 7, after "positively" insert "for drugs and a blood alcohol technician for an employee who has tested positive for alcohol,"

Page 1, line 9, replace "social security" with "commercial driver's license"

Page 1, line 10, remove ", other"

Page 1, line 11, remove "than the social security number,"

Page 1, line 12, replace "A report is a permanent record" with "The director may not provide the information in a report to a requester after ten years from the date of the test"

Renumber accordingly

2009 TESTIMONY

HB 1242

Attachment #1
HB 1242

1/29/09

Release of Information Form
49 CFR Part 40 Drug and Alcohol Testing

Section I. To be completed by the new employer, signed by the employee, and transmitted to the previous employer:
Employee Name (printed):_____ Emp. SSN or ID #_____
I hereby authorize release of information from my Department of Transportation regulated drug and alcohol testing records by my previous employer, listed in *Section I-B*, to the employer listed in *Section I-A*. This release is in accordance with DOT Regulation 49 CFR Part 40, Section 40.25. I understand that information to be released in *Section II-A* by my previous employer, is limited to the following DOT-regulated testing items:

1. Alcohol tests with a result of 0.04 or higher;
2. Verified positive drug tests;
3. Refusals to be tested;
4. Other violations of DOT agency drug and alcohol testing regulations;
5. Information obtained from previous employers of a drug and alcohol rule violation;
6. Documentation, if any, of completion of the return-to-duty process following a rule violation.

Employee Signature: _____ Date: _____

I-A. New Employer
Name: _____

Address: _____

Phone #:_____ Fax #:_____

Designated Employer Representative: _____ _____

I-B. Previous Employer Name_____

Address: _____ _____City: _____ _____ State:_____ Zip: _____

Phone #: _____ Fax #: (_____) _____-_____

Designated Employer Representative (if known): _____

Section II. To be completed by the previous employer and transmitted by mail or fax to the new employer:

II-A. In the 2 years prior to the date of the employee's signature (in Section I) for DOT-regulated testing ~
49CFR, Part 382.301 An employer is not required to administer a drug test if:

1. The driver has participated in a drug testing program (DOT approved) within the previous 30 days -AND-
2. While in that program **either;**
   a. Was tested for controlled substances within the past 6 months -OR-
   b. Participated in the random testing program for the previous 12 months –AND-
   c. The employer ensures no prior employer of the driver (known) has records of a violation of <u>any other</u> DOT Agency within the previous 6 months.

1. Did the employee meet the above requirement(s) while working with your company? **YES ____ NO ____**
2. Did the employee have alcohol tests with a result of 0.04 or higher? **YES ____ NO ____**
3. Did the employee have verified positive drug tests? **YES ____ NO ____**
4. Did the employee refuse to be tested? **YES ____ NO ____**
5. Did the employee have other violations of DOT agency drug and alcohol testing regulations? **YES ____ NO ____**
6. Did a previous employer report a drug and alcohol rule violation to you? **YES ____ NO ____**
7. If you answered "yes" to any items above, did employee complete the return-to-duty process? **N/A ____ YES ____ NO ____**
8. Date of last random drug test: _____/_____/_____

NOTE: If you answered "yes" to item 6, you must provide the previous employer's report. If you answered "yes" to item 7, you must also transmit the appropriate return-to-duty documentation (e.g., SAP report(s), follow-up testing record).

II-B.
Name of person providing information in *Section II-A(* Please Print): _____

§40.25 Must an employer check on the drug and alcohol testing record of employees it is intending to use to perform safety-sensitive duties?

(a) Yes, as an employer, you must, after obtaining an employee's written consent, request the information about the employee listed in paragraph (b) of this section. This requirement applies only to employees seeking to begin performing safety-sensitive duties for you for the first time (*i.e.*, a new hire, an employee transfers into a safety-sensitive position). If the employee refuses to provide this written consent, you must not permit the employee to perform safety-sensitive functions.

(b) You must request the information listed in this paragraph (b) from DOT-regulated employers who have employed the employee during any period during the two years before the date of the employee's application or transfer:

(1) Alcohol tests with a result of 0.04 or higher alcohol concentration;

(2) Verified positive drug tests;

(3) Refusals to be tested (including verified adulterated or substituted drug test results);

(4) Other violations of DOT agency drug and alcohol testing regulations; and

(5) With respect to any employee who violated a DOT drug and alcohol regulation, documentation of the employee's successful completion of DOT return-to-duty requirements (including follow-up tests). If the previous employer does not have information about the return-do-duty process (*e.g.*, an employer who did not hire an employee who tested positive on a pre-employment test), you must seek to obtain this information from the employee.

(c) The information obtained from a previous employer includes any drug or alcohol test information obtained from previous employers under this section or other applicable DOT agency regulations.

(d) If feasible, you must obtain and review this information before the employee first performs safety-sensitive functions. If this is not feasible, you must obtain and review the information as soon as possible. However, you must not permit the employee to perform safety-sensitive functions after 30 days from the date on which the employee first performed safety-sensitive functions, unless you have obtained or made and documented a good faith effort to obtain this information.

(e) If you obtain information that the employee has violated a DOT agency drug and alcohol regulation, you must not use the employee to perform safety-sensitive functions unless you also obtain information that the employee has subsequently complied with the return-to-duty requirements of Subpart O of this part and DOT agency drug and alcohol regulations.

(f) You must provide to each of the employers from whom you request information under paragraph (b) of this section written consent for the release of the information cited in paragraph (a) of this section.

(g) The release of information under this section must be in any written form (*e.g.*, fax, e-mail, letter) that ensures confidentiality. As the previous employer, you must maintain a written record of the information released, including the date, the party to whom it was released, and a summary of the information provided.

(h) If you are an employer from whom information is requested under paragraph (b) of this section, you must, after reviewing the employee's specific, written consent, immediately release the requested information to the employer making the inquiry.

(i) As the employer requesting the information required under this section, you must maintain a written, confidential record of the information you obtain or of the good faith efforts you made to obtain the information. You must retain this information for three years from the date of the employee's first performance of safety-sensitive duties for you.

(j) As the employer, you must also ask the employee whether he or she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied for, but did not obtain, safety-sensitive transportation work covered by DOT agency drug and alcohol testing rules during the past two years. If the employee admits that he or she had a positive test or a refusal to test, you must not use the employee to perform safety-sensitive functions for you, until and unless the employee documents successful completion of the return-to-duty process (see paragraphs (b)(5) and (e) of this section).

DOT Interpretations — §40.25

Question: When an employer is inquiring about an applicant's previous DOT drug and alcohol test results is the employer required to send the inquiry via certified mail?

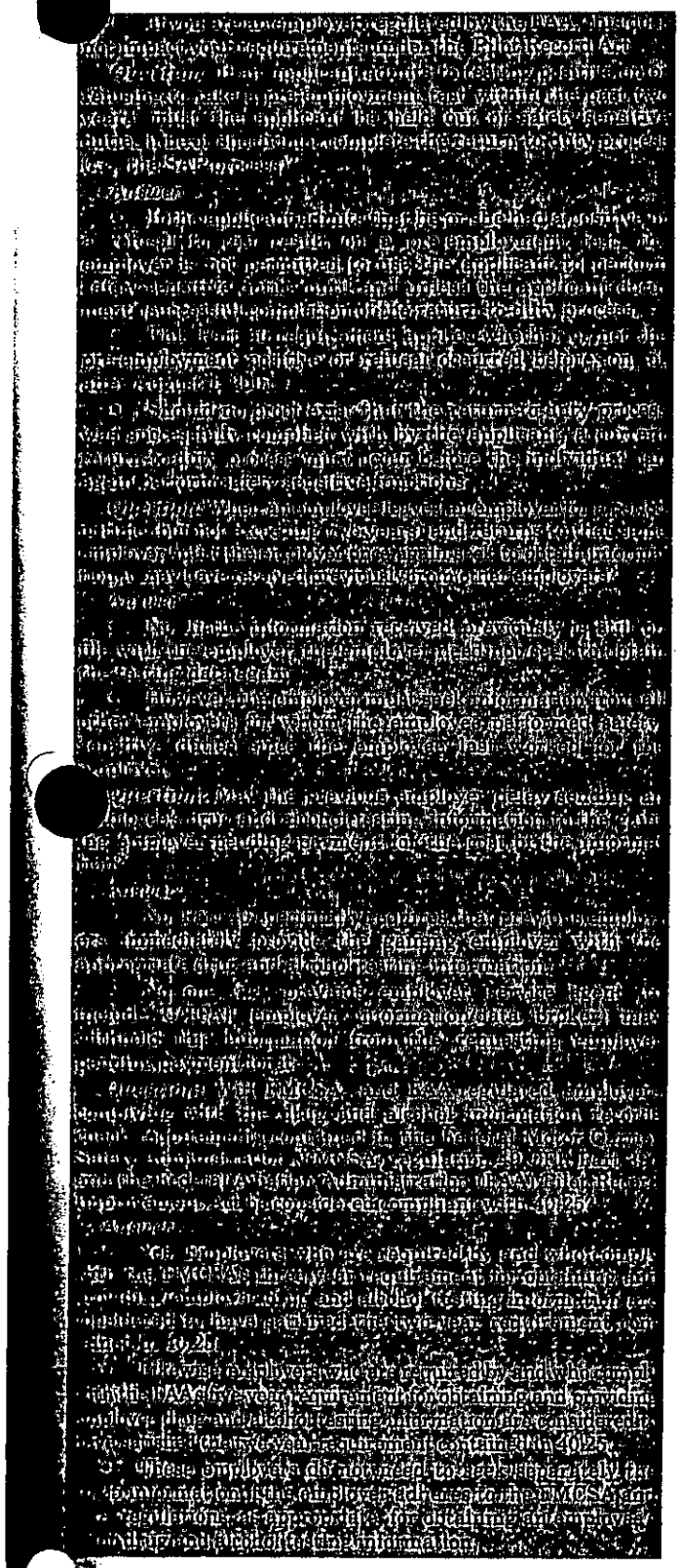
Answer:

- No. Certified mail is not required.
- The employer can make this inquiry through a variety of means, including mail (certified or not), fax, telephone or email.
- However, the employer must provide the former employer the signed release or a faxed or scanned copy of the employee's signed release.
- The former employer must respond via a written response (*e.g.*, fax, letter, email) that ensures confidentiality.
- The employer should document an attempt or attempts to contact and contacts with previous employers, no matter how they were made, so that it can show a good faith effort to obtain the required information.

Question: When a previous employer receives an inquiry from a new employer for drug and alcohol testing information does the previous employer provide information it may have received from other employers in the past?

Answer:

- As an employer, when you receive an inquiry about a former employee, you must provide all the information in your possession concerning the employee's DOT drug and alcohol tests that occurred in the two years preceding the inquiry.
- This includes information you received about an employee from a former employer (*e.g.*, in response to the Federal Motor Carrier Safety Administration's pre-employment inquiry requirement).
- It is not a violation of Part 40 or DOT agency rules if you provide, in addition, information about the employee's DOT drug and alcohol tests obtained from former employers that dates back more than two years ago.



Attachment #2
HB 1242

1/29/09

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.

* * * * *

[FR Doc. E8–13352 Filed 6–12–08; 8:45 am]
BILLING CODE 6712–01–P

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* or *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* (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 those 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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[FR Doc. E8–13377 Filed 6–12–08; 8:45 am]

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Attachment #3
HB1242

1/29/09

State Reporting of DOT/FMCSA Test Violations

State	Statute	What is Reported	Who Reports it?	To Whom?	How?	Use of the Data
Arkansas	Ark. Code Ann. §27-23-205	positive or refusal FMCSA-authorized alcohol tests; positive, refusal, substituted, or adulterated FMCSA-authorized drug tests	employers reports alcohol tests; MROs reports drug tests	Office of Driver Services, Arkansas Dept of Finance & Administration; Little Rock, AR	online, www.ark.org/drugtest, within three days of test	Employers must check the online database before putting drivers on the road.
California	California V.C. 34520	positive FMCSA-authorized drug test "summaries" – notification (e.g., test date, reason for test, drug detected) without identifying the driver or motor carrier	consortium	California Highway Patrol, Commercial Vehicle Section; Sacramento, CA	mail or fax	California originally planned to maintain a database of positive drug test results. However, no such database was developed. For compliance with the law, consortia must report positive drug tests, but without names.
	California V.C. 13376(b)(3)	positive or refusal FMCSA-authorized drug tests conducted on drivers of school buses and vehicles to transport developmentally disabled people	employers	Driver Safety Actions Unit, Sacramento, CA, with a copy to local California Highway Patrol Area Office	mail, using Form DS 334, Positive Controlled Substance Test Result Report, within 5 days of receiving the test result	California revokes the driver's certificate for three years unless the driver complies with the DOT return to duty process.
New Mexico	N. M. Stat. Ann §65-3-14	positive drug test results	consortium or MRO	Motor Vehicle Division; Santa Fe, NM	<to be determined>	New Mexico's law was supposed to take effect June 15, 2007, but implementation has been delayed.
North Carolina	N.C. Gen. Stat. §20-37.19(c)	positive and refusal FMCSA-authorized drug	employer	Department of Motor Vehicles;	Form CDL-8 and copy of test result, by	North Carolina revokes the driver's CDL until the

		and alcohol tests		Raleigh, NC	mail or fax (but originals must still be mailed), within five days of receiving the result	driver successfully completes the DOT return to duty process.
Oregon	Or. Rev. Stat. §825.410	positive FMCSA-authorized drug test, including identification of the drug that was detected	MRO	Driver and Motor Vehicle Services Division;Salem, OR	CCF 2 and Form 735-7200, by mail or fax	Oregon plans on maintaining a database of positive drug tests that employers can access. That database has not yet been developed.
Texas	Tex. Transp. Code Ann. §643.064	positive FMCSA-authorized drug tests	Form MCS-20 started by MRO; submitted by employer or, if owner-operator, by MRO	Department of Public Safety, Motor Carrier Bureau; Austin, TX	Form MCS-20 and test report, within ten days of receiving test result	With the driver's authorization, an employer can ask the Motor Carrier Bureau about past positive results.
Washington	Wash. Rev. Code §46.25.123	positive and refusal DOT drug or alcohol tests	MROs and BATs	Department of Licensing; Olympia, WA	Form DR-500-013 by fax or mail, within three days of the test	Washington State revokes the driver's CDL for at least a year, and may require completion of the DOT return to duty process

Attachment # 4

TESTIMONY
HOUSE BILL 1242
TRANSPORTATION COMMITTEE
JANUARY 29, 2009

Mr. Chairman and members of the House Transportation Committee my name is Tom Balzer, managing director of the North Dakota Motor Carriers Association. I am here this morning to testify in opposition of House Bill 1242.

Although we do support the concept of a drug registry, our organization along with the American Trucking Associations supports it on a national level and not state by state.

We oppose House Bill 1242 for a number of reasons:

1) We do not like the reporting to be done by the employer, this is just one more regulation on business that is unnecessary and puts the employer at odds with the employee.
2) It asks for a social security number to be reported, with concerns over identity theft use of a social security number should be avoided.
3) This would put North Dakota drivers at a disadvantage because the reporting would only include North Dakota drivers and North Dakota employers. If a driver from South Dakota with a long drug history applies for a job the employer would not have a record of the drug tests, but would for North Dakotans.
4) There is already a mechanism in place required by the Federal Motor Carrier Safety Administration in the form of the previous employer request form that goes to the driver's last three employers in the last seven years.
5) This is an unnecessary administrative burden on the Department of Transportation

We would ask for a DO NOT PASS recommendation for House Bill 1242. Mr. Chairman this concludes my testimony, I would be happy to answer any questions.

Attachment #5

HOUSE TRANSPORTATION COMMITTEE
January 29, 2009 at 9:15 a.m.

North Dakota Department of Transportation
Linda Butts, Deputy Director of Driver and Vehicle Services

HB 1242

Good morning, Mr. Chairman and members of the committee. I'm Linda Butts, Deputy Director of Driver and Vehicle Services at the North Dakota Department of Transportation. Thank you for giving me the opportunity to present information to you today.

Comments:

The North Dakota Department of Transportation is neutral on this bill but would like to make the committee aware of several possible issues with the bill in its current format.

Confidentiality of one's personal information is something that NDDOT works to preserve and in some instances is mandated to comply with confidentiality laws. Medical information is one of those components of a person's driving record that is deemed confidential.

The Code of Federal Regulations, Title 49, Part 40 addresses confidentiality and release of alcohol and drug testing results. In order for NDDOT to release this information to a third party, there must be written consent signed by the employee and then only to a particular, explicitly identified, person or organization. "Blanket releases" are prohibited under this part. For this reason, the word "requestor" in SECTION 1, line 11 raises concerns regarding compliance with federal regulations as it may be deemed too broad. An authorized requestor must be the person or organization explicitly identified by the employee in the employee's specific written consent.

Thank you Mr. Chairman, I will be happy to answer any questions.