



U.S. Department  
of Transportation

Federal Motor Carrier  
Safety Administration

Office of the Administrator

1200 New Jersey Ave, SE  
Washington, DC 20590

Mr. Robert D. Moseley, Jr.  
Moseley Marcinak Law Group, LLC  
P.O. Box 26148  
Greenville, SC 29616

Dear Mr. Moseley:

Thank you for your application for exemption, submitted pursuant to 49 CFR 381.310, requesting that the Federal Motor Carrier Safety Administration (FMCSA) exempt your motor carrier clients from the following regulations: 49 CFR 382.105; 49 CFR 382.301; and 49 CFR 382.305. Your clients seek the exemptions so they can rely on hair testing, in lieu of urine testing, to comply with certain drug testing requirements applicable to their commercial driver employees and applicants.

As explained below, FMCSA is unable to process the application in accordance with the requirements of 49 CFR part 381, subpart C, because the Agency does not have the statutory authority to grant the requested exemptions.

*Regulatory Requirements*

FMCSA's drug and alcohol use and testing regulations, set forth in 49 CFR part 382, apply to commercial driver's license (CDL) or commercial learner's permit (CLP) holders and drivers subject to the commercial driver license requirements of Mexico or Canada, who operate a commercial motor vehicle (CMV) in commerce in the United States, and their employers. The three sections of part 382 from which the Carriers request exemption are summarized below.

Section 382.105 requires that each employer ensure all alcohol or drug testing conducted on CDL holders complies with the procedures under 49 CFR part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs. All parties who conduct drug and alcohol tests required by the U.S. Department of Transportation (DOT) must, for example, follow the part 40 requirements for specimen collection and processing. Currently, 49 CFR 40.210 requires that drug testing be conducted only on urine specimens.

Section 382.301 sets forth requirements related to pre-employment drug testing. With limited exceptions, an employer must conduct pre-employment drug testing, prior to the first time a driver performs "safety-sensitive functions," as defined in 49 CFR 382.107. Employers must not allow a driver the employer intends to hire or use to perform safety-sensitive functions, unless the employer has received a verified negative drug test result for that driver from the medical review officer or consortium/third-party administrator, as those terms are defined in 49 CFR 40.3.

Section 382.305 sets forth the random testing requirements applicable to commercial drivers and their employers, including minimum annual percentage rates for random alcohol testing and random drug testing. The FMCSA Administrator's decision to increase or decrease the minimum annual percentage rates for testing is based on the reported positive rates for the entire industry. Currently the minimum required annual percentage rate for random drug testing is 50 percent.

Requested Regulatory Relief

You submitted the application for exemption on behalf of the following interstate motor carriers: Cargo Transporters; Duprè Logistics; Frozen Foods Express; J.B. Hunt Transport; KLLM Transport Services; Knight Transportation; Maverick Transportation; Schneider; Swift Transportation; USXpress; and May Trucking Company (the Carriers).

Specifically, you request that the Carriers be permitted to use hair testing, in lieu of urine testing, for 25 percent of the random drug testing currently required, and to report positive random hair test results to the Drug and Alcohol Clearinghouse (Clearinghouse). Additionally, you request that the Carriers be permitted to report positive hair test results conducted for pre-employment purposes to the Clearinghouse as actual knowledge of prohibited drug use,<sup>1</sup> and that positive hair tests also be reported in response to safety performance inquiries required by 49 CFR 391.23.

Statutory Requirements

FMCSA drug and alcohol use and testing regulations are authorized by the Omnibus Transportation Employee Testing Act of 1991 (OTETA) (Pub. L. 102-143, Title V, 105 Stat. 917, at 952, codified at 49 U.S.C. 31306). Section 31306(c)(2) requires that DOT follow the Department of Health and Human Services' (HHS) Mandatory Guidelines for technical and scientific testing issues. Thus, while DOT has discretion concerning many aspects of the regulations governing testing in the transportation industries' regulated programs, we must follow the HHS Mandatory Guidelines for the laboratory standards and procedures used for regulated testing.

In section 5402(b) of the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114-94, 129 Stat. 1548, codified at 49 U.S.C. 31306 note) (Dec. 4, 2015)), Congress required that HHS "not later than one year after ... this Act, ... issue scientific and technical guidelines for hair testing as a method of detecting the use of a controlled substance for purposes of section 31306 of title 49, United States Code." The FAST Act also amended OTETA by adding a requirement that FMCSA's drug and alcohol testing regulations permit the use of hair testing as an acceptable alternative to urine testing for pre-employment drug testing, and for random drug testing when the driver was subject to pre-employment hair testing (49 U.S.C. 31306(b)(1)(B)). The Conference Report accompanying the FAST Act noted that "[t]he FMCSA has informed the conferees, and the conferees agree that *nothing in section 5402 authorizes the use of hair testing as an alternative to urine tests until the U.S. Department of Health and Human Services establishes federal standards for hair testing*" (emphasis added).<sup>2</sup>

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<sup>1</sup> 49 CFR 382.107 provides, in part, that an employer has "actual knowledge" of prohibited use of alcohol or drugs "based on the employer's direct observation of the employee, information provided by the driver's previous employer(s), a traffic citation for driving a CMV while under the influence of alcohol or controlled substances or an employee's admission of alcohol or controlled substance use, except as provided in §382.121."

<sup>2</sup> H.R. Rep. 114-357, at 506 (Dec. 1, 2015).

HHS issued proposed Mandatory Guidelines for Federal Workplace Drug Testing Using Hair (HMG) in September (85 FR 56108 (Sept. 10, 2020)). HHS has not yet issued a final version of the HMG.

Conclusion

Based on the foregoing, FMCSA currently lacks the statutory authority to act on the Carriers' application for exemption to permit the use of hair testing to meet certain drug testing requirements set forth in 49 CFR part 382. The Agency is therefore unable to process the application in accordance with the requirements of 49 CFR part 381, subpart C, including the notice and comment provisions of §381.315(a). Publishing the application in the Federal Register and requesting public comment on a matter in which FMCSA presently has no discretion would be misleading to the Agency's stakeholders and other interested parties.

A similar letter has been sent to Clay Porter.

Sincerely,

A handwritten signature in black ink, appearing to read "Meera Joshi". The signature is fluid and cursive, with a large initial "M" and a trailing flourish.

Meera Joshi  
Deputy Administrator



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1200 New Jersey Ave, SE  
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Mr. Clay Porter  
Porter Rennie Woodard Kendall, LLP  
3602 Eastern Avenue  
Cincinnati, OH 45226

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Meera Joshi  
Deputy Administrator