

exceed the Simplified Acquisition Threshold;

(c) *Software and ownership rights.* (1) All procurement and contract instruments must include a clause that provides that the comprehensive Tribal IV-D agency will have all ownership rights to Computerized Tribal IV-D System software or enhancements thereof and all associated documentation designed, developed or installed with FFP. Intergovernmental Service Agreements are not subject to this paragraph.

(2) OCSE reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use and to authorize others to use for Federal Government purposes, such software, modifications and documentation.

(3) FFP is not available for the costs of rental or purchase of proprietary application software developed specifically for a Computerized Tribal IV-D System. Commercial-off-the-shelf (COTS) software packages that are sold or leased to the general public at established catalog or market prices are not subject to the ownership and license provisions of this requirement.

(d) *Requirements for acquisitions under the threshold amount.* A comprehensive Tribal IV-D agency is not required to submit procurement documents, contracts, and contract amendments for acquisitions under the Simplified Acquisition Threshold unless specifically requested to do so in writing by OCSE.

**§ 310.30 Under what circumstances would FFP be suspended or disallowed in the costs of Computerized Tribal IV-D Systems?**

(a) *Suspension of APD approval.* OCSE will suspend approval of the APD for a Computerized Tribal IV-D System approved under this part as of the date that the system ceases to comply substantially with the criteria, requirements, and other provisions of the APD. OCSE will notify a Tribal IV-D agency in writing in a notice of suspension, with such suspension effective as of the date on which there is no longer substantial compliance.

(b) *Suspension of FFP.* If OCSE suspends approval of an APD in accordance with this part during the installation, operation, or enhancement of a Computerized Tribal IV-D System, FFP will not be available in any expenditure incurred under the APD after the date of the suspension until the date OCSE determines that the comprehensive Tribal IV-D agency has taken the actions specified in the notice of suspension described in paragraph (a)

of this section. OCSE will notify the comprehensive Tribal IV-D agency in writing upon making such a determination.

**§ 310.35 Under what circumstances would emergency FFP be available for Computerized Tribal IV-D Systems?**

(a) *Conditions that must be met for emergency FFP.* OCSE will consider waiving the approval requirements for acquisitions in emergency situations, such as natural or man-made disasters, upon receipt of a written request from the comprehensive Tribal IV-D agency. In order for OCSE to consider waiving the approval requirements in § 310.25 of this part, the following conditions must be met:

(1) The comprehensive Tribal IV-D agency must submit a written request to OCSE prior to the acquisition of any ADP equipment or services. The written request must be sent by registered mail and include:

(i) A brief description of the ADP equipment and/or services to be acquired and an estimate of their costs;

(ii) A brief description of the circumstances which resulted in the comprehensive Tribal IV-D agency's need to proceed prior to obtaining approval from OCSE; and

(iii) A description of the harm that will be caused if the comprehensive Tribal IV-D agency does not acquire immediately the ADP equipment and services.

(2) Upon receipt of the information, OCSE will, within 14 working days of receipt, take one of the following actions:

(i) Inform the comprehensive Tribal IV-D agency in writing that the request has been disapproved and the reason for disapproval; or

(ii) Inform the comprehensive Tribal IV-D agency in writing that OCSE recognizes that an emergency exists and that within 90 calendar days from the date of the initial written request under paragraph (a)(1) of this section the comprehensive Tribal IV-D agency must submit a formal request for approval which includes the information specified at § 310.25 of this title in order for the ADP equipment or services acquisition to be considered for OCSE's approval.

(b) *Effective date of emergency FFP.* If OCSE approves the request submitted under paragraph (a)(2) of this section, FFP will be available from the date the comprehensive Tribal IV-D agency acquires the ADP equipment and services.

**Subpart D—Accountability and Monitoring Procedures for Computerized Tribal IV-D Systems**

**§ 310.40 What requirements apply for accessing systems and records for monitoring Computerized Tribal IV-D Systems and Office Automation?**

In accordance with Part 95 of this title, a comprehensive Tribal IV-D agency must allow OCSE access to the system in all of its aspects, including installation, operation, and cost records of contractors and subcontractors, and of Service Agreements at such intervals as are deemed necessary by OCSE to determine whether the conditions for FFP approval are being met and to determine the efficiency, effectiveness, reasonableness of the system and its cost.

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**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**49 CFR Part 40**

[Docket OST-2008-0184]

RIN 2105-AD67

**Procedures for Transportation Workplace Drug and Alcohol Testing Programs**

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

**ACTION:** Final rule; response to comments on Interim Final rule.

**SUMMARY:** This final rule adopts as final, without change, a June 13, 2008, interim final rule (IFR) authorizing employers in the Department's drug and alcohol testing program 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. The rule also responds to comments on the IFR.

**DATES:** This rule is effective February 25, 2010.

**FOR FURTHER INFORMATION CONTACT:** Patrice M. Kelly, Deputy Director, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; 202-366-3784 (voice), 202-366-3897 (fax), or [patrice.kelly@dot.gov](mailto:patrice.kelly@dot.gov) (e-mail).

**SUPPLEMENTARY INFORMATION:**

**Background and Purpose**

The Department's drug and alcohol testing procedures regulation, 49 CFR Part 40, provides confidentiality of

employee test results as a fundamental part of the balance between employee privacy and the public safety need to test for illegal drugs. As we discussed in the preamble to this IFR (73 FR 33735, June 13, 2008), the Department's regulation dates back to 1988 and has always limited the release of an employee's test results in the interest of privacy.

Generally, § 40.321 prohibits release of individual drug or alcohol test results to third parties without the employee's specific written consent. Section 40.331 creates certain exceptions to this general requirement. Of particular importance is § 40.331(e), which provides that parties "must provide drug or alcohol test records concerning the employee" to a "state or local safety agency with regulatory authority over you or the employee."

We recognized that several States have undertaken legislative action to require employers and certain service agents to provide individual test results to State agencies (e.g., the State CDL issuing and licensing authority) whenever CDL holders have tested positive for drugs, had a breath alcohol concentration (BAC) of 0.04 or greater, or refused a required drug or alcohol test result. Absent regulatory action by the Department to modify its employee privacy procedures, employers and third party administrators (TPAs) for owner-operator CMV drivers with CDLs would have been in violation of 49 CFR 40.321, if they released this information to State agencies under such State statutes. This is because doing so for all CDL drivers would not have fallen within the exception to the general privacy requirement created by § 40.331(e).

On June 13, 2008 [73 FR 33735], the Department issued an IFR to mitigate this conflict between the DOT rules and what we view as beneficial State laws by allowing employers and the TPAs for owner-operator CMV drivers with CDLs to comply with State laws of this type. The IFR permitted these parties to provide the information called for by State laws without violating Part 40. As a result of this IFR, employers and the TPAs for owner-operators will not be held in violation of 49 CFR 40.321 for complying with State law requirements to report violations that enable State CDL issuing and licensing authorities to act upon the DOT result. The IFR has now been in place since June 2008 without causing any reported problems. At the time we issued the IFR, we noted that it did not create any new reporting requirements or obligations. It merely allowed employers and the TPAs for owner-operator CMV drivers with CDLs

to comply with some specific reporting requirements under State laws without violating part 40 by such reporting. The IFR created no new Federal reporting requirements. It merely eliminated a conflict that would have precluded parties from complying with certain State laws.

#### Discussion of Comments to the Docket

There were eleven comments to the docket. Six of the comments supported the IFR, four of the comments opposed the IFR, and one comment was neutral.

The neutral comment stated that the commenter did not know where, or to whom, within the State to report the results. This IFR is not intended to identify where reports are to be filed. That is a matter that program participants should take up with the State agencies in question. The IFR was only intended to make it clear that an employer or TPA for an owner-operator is not violating Part 40 when complying with its duty to report DOT drug and alcohol testing violations to State CDL issuing and licensing authorities.

Several commenters stated that they supported the objective of the IFR—"to ensure drug and/or alcohol abusing drivers are kept from behind the wheel of a large truck until they are successfully rehabilitated." Other commenters urged that DOT expand the IFR to cover some or all other service agents, including Medical Review Officers (MROs), Substance Abuse Professionals (SAPs), Breath Alcohol Technicians (BATs), etc. Some of these commenters wanted MROs to be responsible for reporting both drug and alcohol results to States.

The Department believes that, leaving aside TPAs serving owner-operators, it is not advisable, as a matter of policy, to task service agents with reporting drug and alcohol testing violations to State agencies. MROs often perform services for employers in multiple States and without having any ties or regular business dealings in those States. Consequently, it is questionable whether the State reporting laws could effectually apply to the out-of-state MROs. MROs would not have access to alcohol test results and many refusals, thus they would not be able to report such results, even if the States required them to do so.

Other commenters thought that service agents would be more responsible about reporting violations because the employers were likely to terminate the employee who violated Part 40 and would not want to pursue filing the violation with the State. We do not think it is reasonable to expand the IFR to include service agents who

have no meaningful business contacts with a State and may have no knowledge of the test results or violations of a particular driver. Instead, we believe that it was prudent for us to narrowly tailor the IFR to encourage the existing and future crafting of State legislation that is directed at employers communicating with the State in which they do business and which is most likely to be the State that issued the driver's CDL. Employers have access to all the information needed by States; employers are directly regulated by the State agencies in question; it is reasonable to task employers with this reporting responsibility.

Some commenters who supported the IFR wanted us to change the language in the IFR from "you are authorized to comply with State laws" to instead read as "you are authorized to comply with State laws and State regulations." The commenters felt that the reference to "laws" would not cover "regulations." We disagree with that distinction. However, to address the commenters concerns on this point, we are stating in this preamble that when we refer to "State law" in this provision, we are including State regulations that have the force and effect of State law.

One commenter supported the IFR, but felt that it should have gone further by requiring that States be notified that these drivers are no longer qualified to drive and that their licenses must be suspended until they can show proof of a SAP evaluation and a negative return-to-duty test. This commenter would also like to see more rigorous enforcement by the DOT agencies against violators. While we appreciate the safety intent underlying this commenter's suggestions, and we support vigorous enforcement of the rules, the purpose of the IFR was more limited: it intended only to remove a legal conflict that could have interfered with the implementation of beneficial State laws.

Several of the commenters who supported the IFR pointed out that the objective of the IFR is aimed in the right direction, but that true consistency in tracking, reporting, and acting upon CDL driver Part 40 drug and alcohol violations can only come through a national clearing house database. These commenters referred to a "piecemeal, non-uniform, voluntary State licensing agency-based approach" that will continue to take place until there is a Federal database to track driver non-negative results.

The Department of Transportation continues to strongly support the establishment of a national database. Currently, the Federal Motor Carrier Safety Administration (FMCSA) is

working toward being able to create such a database. However, it has not yet been established. Meanwhile, we believe it is useful to remove an obstacle to the implementation of State laws that do exist now. We simply recognize that the States are also stepping up to play a role in suspending CDLs based on Part 40 results and we do not want to discourage such actions where appropriate. We do not want Part 40 to pose an impediment to employers in their efforts to comply with their own respective State's legal requirements.

Some of the commenters who favored the IFR, as well as some of those who opposed it, suggested that we require the States to tailor their laws to include certain provisions, protections and limitations. Some of the commenters wanted us to order the States to have certain service agents report the results. Others wanted us to require that the individual driver's record be cleared of the violation after 2 years (which is not consistent with FMCSA requirements of 3 years tracking and would not provide a window into follow-up testing). Others asked that we order the States to notify drivers when the information is reported to the State and to provide the drivers with privacy rights, due process, and the right to correct their records in the State databases. Some commenters wanted assurance that the States would purge records regarding violations once the CDL holder completed the return-to-duty process under Part 40. Many of the commenters felt that, if DOT set standards for the States to meet within the scope of the respective legislation, this would address the concerns about inconsistent State laws.

The purpose of the IFR was simply to avoid a conflict between State and Federal law with respect to State laws that direct employers and TPAs for owner-operators to report violation information to State agencies. Going beyond this limited purpose and imposing additional requirements on States, even where such additional requirements would arguably be good policy, would exceed the scope of the IFR and require an additional notice of proposed rulemaking and comment period. We do not believe that taking such additional rulemaking steps is justified at this time.

Some of those who opposed the IFR appeared to suggest that, if we did not finalize this IFR, they would not need to comply with their State reporting laws. On a related, but slightly different note, some commenters assumed that this IFR was requiring compliance with State laws—and that the DOT Agencies would find employers and service agents out-of-compliance with Part 40

and the Federal Agency regulations, if these parties failed to properly comply with the State law requirements. These are not correct assumptions.

This IFR is intended to permit but not require employers and TPAs for owner-operator CMV drivers with CDLs to comply with State laws without running afoul of Part 40. We have not created compliance responsibilities under State law. That is within the jurisdiction of the States. It is up to the States to ensure compliance with their laws. Since we are not creating responsibilities, we also disagree with the commenter who believed that this IFR would impose significant costs resulting from new compliance requirements to conform to State laws. This IFR does not impose duties. It merely relieves a potential enforcement problem for certain employers and TPAs for owner-operator CMV drivers with CDLs.

Finally, there were some comments outside the scope of this rulemaking. One commenter suggested that the DOT rely on an industry association to point out who may be violating Part 40. Others referenced new Federal requirements that should be imposed upon the States, including a recommendation that Part 40 require notification to States that individual CDL holders have been identified as no longer qualified to drive after a Part 40 violation. Some commenters suggested higher fines levied by FMCSA for violations of § 40.25 and other provisions of Part 40. Others wanted this IFR to bring forward the FMCSA centralized database. All of these comments, and any others outside the scope of this rulemaking, have not resulted in changes to the IFR.

There were no comments which provided substantive information to warrant changing the procedures in the IFR, the Department will adopt the IFR as final with no changes to the procedures.

#### Regulatory Analyses and Notices

The statutory authority for this rule derives from the Omnibus Transportation Employee Testing Act of 1991 (49 U.S.C. 102, 301, 5331, 20140, 31306, and 54101 *et seq.*) and the Department of Transportation Act (49 U.S.C. 322).

This final rule is not significant for purposes of Executive Order 12866 or the DOT's regulatory policies and procedures. It represents a minor modification to our regulation to ensure that employers and TPAs for owner-operators are not held out-of-compliance with our regulation for providing information required by the State. The rule does not increase costs

on regulated parties. In fact, it will reduce the chance of civil penalty action and increase safety for employers and TPAs for owner-operators.

Consequently, the Department certifies under the Regulatory Flexibility Act that this final rule does not have a significant economic impact on a substantial number of small entities. To the extent that there is any such impact, it is expected to be negligible.

Issued at Washington DC, this 10th day of February 2010.

**Ray LaHood,**

*Secretary of Transportation.*

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

Accordingly, the Interim Final Rule amending 49 CFR Part 40 which was published at 73 FR 33735 on June 13, 2008 is adopted as a final rule without change.

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#### DEPARTMENT OF TRANSPORTATION

##### Office of the Secretary

##### 49 CFR Part 40

[Docket OST-2007-26828]

RIN 2105-AD64

##### Procedures for Transportation Workplace Drug and Alcohol Testing Programs

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

**ACTION:** Final rule.

**SUMMARY:** This final rule responds to the comments received regarding the interim final rule (IFR) procedures for the use of a new alcohol screening device (ASD) which is qualified for use in DOT Agency regulated alcohol testing. The Department did not receive any comments which were germane to the rulemaking. As such, the Department will adopt the rule as final without change.

**DATES:** This rule is effective February 25, 2010.

**FOR FURTHER INFORMATION CONTACT:** Bohdan Baczara, U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; 202-366-3784 (voice), 202-366-3897 (fax), or [bohdan.baczara@dot.gov](mailto:bohdan.baczara@dot.gov) (e-mail).

**SUPPLEMENTARY INFORMATION:**