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Background

Summary of NPRM

Discussion of Comments to the NPRM

Summary of the SNPRM

Impacts of Other Related Rulemakings

Rulemaking Analyses and Notices

Regulatory Evaluation: Summary of Benefits and Costs

Background and Summary

Costs

Benefits

Background

Section 391.23 of Title 49 of the Code of Federal Regulations (CFR), Investigations and Inquiries, sets forth a motor carrier's responsibility to check the driving record and investigate the employment history of a new driver. The section directs the motor carrier to investigate information about the employment history from a driver's previous employers during the last three years. It does not specify what type of information must be investigated. The driver's driving records are to be obtained from each State in which the driver held a motor vehicle operator's license or permit during the preceding three years. These inquiries and investigations must be completed within 30 days of hiring the new employee. Currently, there is no specification of what information must be investigated, or a requirement for a current or previous employer to respond to such investigations. Consequently, many former employers refuse to respond to employment investigations, while others—for fear of litigation—merely verify that the driver worked for the carrier and provide the driver's dates of employment.

The Hazardous Materials Transportation Authorization Act of 1994 was signed into law on August 26, 1994 (Pub. L. 103–311, 108 Stat. 1677) (HazMat Act), partly codified at 49 U.S.C. 5101–5127. Section 114 of the HazMat Act directed the Secretary of Transportation to amend § 391.23 to specify minimum safety information to be investigated from previous employers when performing employment record investigations on driver candidates and newly hired drivers. A copy of section 114 of the HazMat Act is included in the docket as document 37. Section 114 specified that a motor carrier must investigate a driver's 3-year accident record, and drug and alcohol history, from employers the driver worked for

within the previous three years. Current or previous employers must be required to respond to the investigating employer within thirty days of receiving the investigation request.

The agency published the NPRM for implementing regulations in the **Federal Register** on March 14, 1996 (61 FR 10548). A copy of the NPRM is in docket FMCSA–1997–2277.

Summary of NPRM

The March 14, 1996, NPRM proposed changes to 49 CFR part 391 (Qualification of Drivers), with proposed conforming amendments to parts 382 (Controlled Substances and Alcohol Use and Testing), 383 (Commercial Driver's License Standards; Requirements and Penalties), and 390 (Federal Motor Carrier Safety Regulations; General). The agency proposed under § 391.23 that motor carriers investigate the following minimum safety information from the previous 3-year period from all employers who employed the driver during that time: (1) Hours-of-service violations that resulted in an out-of-service order, (2) accidents as defined under § 390.5, (3) failure to undertake or complete a rehabilitation program recommended by a substances abuse professional (SAP) under § 382.605, and (4) any “misuse” of alcohol or use of a controlled substance by the driver after he/she had completed a § 382.605 SAP referral. The existing § 391.23(b) requirement to obtain a driver's driving record(s) from the State(s) would be retained. To harmonize § 391.23(e) with then current drug and alcohol regulations under § 382.413, the agency also proposed the motor carrier obtain the driver's written authorization to investigate the required drug and alcohol information.

Current and former employers would be required to respond to an investigating employer within 30 days of receiving an investigation request. The investigating motor carrier would have to afford the driver a reasonable opportunity to review and comment on any information obtained during the employment investigation, and would have to inform the driver of this right at the time of application for employment. Conforming changes were also proposed to §§ 383.35(f) and 391.21(d) to reinforce the driver notification requirement.

Further, the agency proposed under § 390.15 to change the required retention period for the accident register maintained by motor carriers from one year to three years, and to begin requiring motor carriers to provide information from the accident register in response to all prospective employer

investigations pursuant to § 391.23. These provisions would facilitate the proposal requiring investigation of accident information by prospective employers by expanding a source of accident data that was already being collected and maintained by motor carriers for other purposes.

When the NPRM was published in 1996, the agency drug and alcohol regulations codified at 49 CFR part 382 required employers to investigate: (1) Alcohol tests with a result of 0.04 or greater alcohol concentration, (2) verified positive controlled substances test results, and (3) refusals to be tested. Section 382.413(a)(2) allowed a previous employer to pass along drug and alcohol test information received from other previous employers (as long as the information covered actions occurring within the previous two-year period). Under § 382.413(b), if an employer found that it was not feasible to obtain the drug and alcohol information prior to the first time a driver performed a safety-sensitive function for the employer, that employer could continue to use the driver in a safety sensitive function for up to 14 calendar days. After that time period, the employer could not use the driver in a safety-sensitive function unless the requisite information was obtained, or the employer had made a good faith effort to obtain it.

In its 1996 NPRM, the agency also proposed numerous conforming amendments to expand the type of drug and alcohol information that should be sought under § 382.413(a). Employers would be required to investigate whether, in the past 3 years, a driver had: (1) Violated the prohibitions in subpart B of part 382, or the alcohol or controlled substances rules of other DOT agencies; and (2) failed to undertake or complete a SAP's rehabilitation referral pursuant to § 382.605, or the alcohol or controlled substances rules of another DOT agency. Beyond incorporating the HazMat Act requirements into part 382, the violations enumerated in § 382.413 would also have been included in the alcohol and controlled substances regulations of “all DOT agencies.” At that time, FHWA believed that some drivers might apply for positions that require driving a CMV after having violated the alcohol or drug use prohibitions of another DOT agency. Therefore, the agency included a requirement for an employer to investigate information from all past employers for which a driver had worked in a position covered by the alcohol and/or drug prohibitions and testing requirements of another DOT