

information, as well as the corresponding stipulation under the proposed § 383.35(f) and § 391.21(d) that employers notify driver applicants of this right. Pinnacle believed that “(u)ntil the Department of Labor makes this suggestion generally applicable to all employers, you are unreasonably forcing companies to become clearinghouses for minutiae.”

Some commenters suggested drivers be allowed to review the furnished investigative information only if they made a written request.

Dart Transit Company and Fleetline, Inc. recommended that only drivers who have been denied employment or a contract, in whole or in part, based on the furnished safety performance background information, be allowed to review and comment. They also suggested these drivers be given up to 30 days after notification of disposition of the application to provide written comments to the investigating carrier. In addition, they suggested a corresponding requirement that the prospective motor carrier advise all driver-candidates of their rights to request an opportunity to review and comment on the background data that is received.

Six commenters recommended all drivers be allowed to review and comment on only the safety items originally proposed under § 391.23(c)(1). Contract Freighters, Inc. suggested that only accident information be open to a driver's review and comment.

Several commenters recommended specific time frames for the driver applicant review and comment period. These range from within 3 workdays to 10, 30 or 60 days after receipt of notification of disposition of the application, commencement of the application process, or receipt of the investigation reports from the responding employer.

The United Motorcoach Association (UMA) proposed requiring employers to complete an employment record within 48 hours of an employee leaving, unless hindered by extenuating circumstances or authorized by a mutually agreed upon extension of that period. That employment record would be the one transmitted to subsequent employers investigating a prospective driver. The UMA also proposed drivers be granted the right to add brief personal and enlightening comments to the previous employer's report and that the combined record be forwarded to investigating employers upon request.

The International Brotherhood of Teamsters proposed a similar requirement, but favored allowing the

employer 10 days in which to provide separated employees with his or her complete employment record. The employee would similarly be entitled to file supplemental comments.

*FMCSA Response:* On June 9, 1998, the President signed TEA-21. Section 4014 of the Act addresses this rulemaking by preempting State and local liability laws and regulations, thus limiting employer liability for investigating, furnishing and using previous employer driver safety performance records as part of the hiring decision (*i.e.*, the proposed driver safety performance history information enumerated under § 391.23(d) and (e) of this SNPRM), when carried out in accordance with FMCSA rules. A copy of section 4014 of TEA-21 is included in the docket as document 39. Section 4014 further directs the FMCSA to amend the Safety Performance History of New Drivers NPRM to specify details of protection for driver privacy, including establishing procedures whereby drivers may review, correct, or rebut investigative information received by a prospective motor carrier employer from a previous employer. FMCSA believes these procedures replace the phrase “reasonable opportunity” and fully address the concerns expressed above from AHAS.

Section 4014(a) amends 49 U.S.C. chapter 5, by adding section 508, preempting the right of anyone to bring action against employers rightfully fulfilling their requirement to investigate, provide and use specified previous employer driver safety performance history of driver-applicants as part of the hiring decision.

After implementation of these liability limitation provisions proposed in this SNPRM, no one would be allowed to bring actions or proceedings against a motor carrier requesting, providing and using this information in conformance with the procedures put forth in this SNPRM. This limitation would only apply if in accordance with FMCSA regulations the prospective employer has conducted the required investigations for driver safety performance information, the previous employers provided the required information to the investigating motor carrier, the previous employer is not found to have provided false information, and these processes were carried out in compliance with the proposed regulations. The proposed regulations would require observing the driver's right to review, correct or rebut the previous employer furnished records, and the requirement at 49 CFR 391.23(f) of this SNPRM to first obtain the driver's written authorization to

release his/her drug and alcohol information.

As a result of the limitation on liability being granted, FMCSA believes the concerns of those who wanted to restrict drivers' rights to review previous employer investigative data to only safety items are fully addressed. FMCSA believes the drivers' right to review, comment, or rebut applies to all investigative information provided to prospective employers and used as part of the hiring decision process.

In addition, the method proposed in this SNPRM to further provide protection for driver privacy for drug and alcohol information is modeled on that already operational in the DOT drug and alcohol regulations under 49 CFR part 40, which meet the intent of section 114 of the HazMat Act. Although results of DOT-mandated drug and alcohol tests were determined not to be medical records, DOT policy treats the release of such results similar to the release of medical records.

Thus, the applicant would continue to be required to sign a written authorization for the specific employer (or agent) to provide investigative information about the applicant's drug and alcohol history to the prospective employer specified on the authorization. Any use of the information by the prospective employer for other than hiring purposes, such as release to anyone not involved in the hiring process, would be permitted only in accordance with the terms of the driver's authorization.

Various third party consumer reporting agencies sell services to the truck and bus industry for obtaining and providing a variety of information, including inquiries for State driving records and investigations for employer history pertaining to CMV drivers. A similar function under the DOT alcohol and controlled substance regulations is referred to by the term “Service Agent.” Such agents are prohibited by 49 CFR 40.321 from releasing a driver's personal alcohol and controlled substance information without the driver's written consent for that specific release.

The DOT Office of the Secretary, Office of Drug and Alcohol Policy and Compliance interprets the restriction on releasing information to mean that such third party service agents are prohibited from disclosing even that a driver's alcohol and controlled substance information exists in the service agent's files without the driver's written consent. The proposals in this SNPRM for provision of alcohol and controlled substances information contain this same restriction on release of this information by previous employers or