

their agents operating under the limited liability provisions contained in this SNPRM.

The method proposed in this SNPRM to ensure the driver's right to review, correct, or rebut contains two major parts. First, as part of the application process prospective employers are required to notify driver applicants in writing of their review rights. Second, the furnishing previous employer is required to work with the driver to either revise the report, or allow the driver to have his/her rebuttal appended to the carrier report.

This process is generally modeled after provisions in the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*) as it applies to motor carriers obtaining investigative information as part of the hiring decision process. Prospective employers would be authorized to investigate, and previous employers would be required to provide, non-drug and alcohol safety performance history information without a signed authorization from a prospective employee. Prospective employers would be required to provide the driver a copy of the information received if the driver submits a written request to the carrier to review the information (electronic or Internet requests would be acceptable).

In the interest of allowing drivers prompt access to the information critical to their hiring, the FMCSA proposes two business days for the prospective employer to provide a copy of the investigative data received upon receipt of a written request from the driver to review the information. If the driver chooses to correct or add a rebuttal to a previous employer's information, it is proposed that the previous employer have up to thirty calendar days to respond to the driver's request for such changes or incorporation of the rebuttal.

Comments are requested on the appropriateness of the number of days proposed for employer responses in this SNPRM. For example, should the prospective employer have more business days, such as five, or 10, to provide the driver with copies of the investigative data received? Should the previous employer be required to respond earlier than 30 calendar days, such as 10 or 15 business days, since the driver may not be receiving compensation pending resolution of adverse information provided by the previous employer?

The liability limitation protections under 49 U.S.C 508(a) only apply to motor carrier employers carrying out these investigations and other parties functioning as the agent for a previous or prospective employer. Companies functioning as a consumer-reporting

agency providing reports from their repository of driver safety performance information, rather than as the agent for a specific motor carrier, are not granted the liability limitation proposed in this SNPRM. Instead they are subject to protections specified in the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* In addition, the protections under TEA-21 would not apply to motor carriers found to have knowingly provided false information. The previous or current employer's response should be based on fact and not opinion or hearsay.

Title 49 U.S.C. section 508 requires that the § 391.23(c) safety performance history information be accessible only to authorized persons involved in the hiring decision process and the motor carrier's insurance company. Under current regulations, motor carriers maintain information received in response to § 391.23(c) investigations in the Driver Qualification (DQ) file, along with various other types of information required by the FMCSRs. These include information related to the § 391.25 driving record annual review, and the § 391.41(a) bi-annual review of a driver's medical qualifications. The multiple functions of the DQ file increases the potential that motor carrier personnel other than those involved in hiring decisions would repeatedly have access to a driver's background employment records.

However, sections 114(b)(2) and (3) of the HazMat Act specify that drug and alcohol information are part of the minimum safety performance information to be sought under § 391.23(c). Therefore, that information is included in the information specified under section 4014 of TEA-21 as being restricted to limited accessibility, and only used for the hiring decision.

DOT regulated employers are already required by § 40.25(i) and § 382.401(a) to maintain drug and alcohol records confidentially in a secure location with controlled access. As a result, the industry has already developed procedures for complying with the recordkeeping requirements of parts 40 and 382. It is accepted practice to maintain drug and alcohol records separately from the DQ file in order for the employer to ensure that the data is adequately secured, and access to it is controlled in compliance with parts 40 and 382 recordkeeping requirements. Those persons with access to the drug and alcohol records are specifically designated and charged with keeping the data secure, and their access is controlled to ensure this is not compromised.

Therefore, the established recordkeeping practices for drug and

alcohol records fulfill the requirements of section 4014 of TEA-21 for all previous employer investigative information. Accordingly, this SNPRM proposes under § 391.53 to require that all investigative information received from previous employers pursuant to § 391.23(c) be kept in the controlled, access-secured file. FMCSA believes that this meets the accessibility requirements necessary for employers being granted the limited liability specified in section 4014 of TEA-21.

Therefore, this proposal would revise § 391.23(c) to require that investigative information received be maintained as specified at § 391.53. Current instructions in § 391.51(b)(2) for retaining information relating to the § 391.23(c) investigations in the driver qualification file would be removed. The restriction contained in 49 U.S.C. 508(b)(1)(C) that investigative information received from previous employers can only be used for the hiring decision means the accident data received cannot be considered in the annual reviews of the driver's driving record required by § 391.25.

Section 4014 of TEA-21, codified at 49 U.S.C. 508 requires the Secretary to develop regulations implementing liability limitations on motor carriers requesting and providing investigative driver safety performance history information, and that those include procedures for prospective drivers to review, comment or rebut the information provided to prospective motor carriers. This SNPRM has modeled driver rights to review, comment or rebut driver safety performance on those contained in the Fair Credit Reporting Act for investigative information.

This SNPRM provides notification at § 391.23(i) of the right of the driver to request access to information provided to the prospective motor carrier employer, and at § 391.23(j) for the driver and the previous motor carrier to resolve any differences. FMCSA requests comments on the sufficiency of these procedures, and specific, proposed methods to improve them.

Hours of Service Violations Resulting in an Out-of-Service Order

SBA recommends FMCSA eliminate its proposal that motor carriers investigate information about a driver's hours-of-service violations that resulted in an out-of-service order. SBA does not believe the agency has adequately explained how the information would contribute to safety. It points out that section 114 of the Hazmat Act does not require information about a driver's hours-of-service violations, and the