

FMCSRs do not require former employers to record or retain such information. Similarly, other commenters, including J.B. Hunt and Mobile Corporation, saw little or no relationship to safety performance.

FMCSA Response: The regulatory evaluation for this proposed rule reveals a strong and positive relationship between: (1) Hours-of-service violations that result in out-of-service orders, and (2) future safety performance. However, FMCSA has decided to eliminate the proposal for the following reasons: (1) Section 114 of the HazMat Act does not specifically require this information, (2) information about hours-of-service violations that resulted in out-of-service orders would be difficult for prospective employers to obtain from previous employers, because this information is only systematically reported to FMCSA as part of the Motor Carrier Safety Assistance Program (MCSAP) enforcement activities of the States, (3) requiring this information collection and establishing a motor carrier recording requirement would be particularly burdensome to small entities, and (4) comments to the docket opposed the proposal.

Drug and Alcohol Reporting

SBA believes the NPRM would result in an increased number of inquiries for drug and alcohol information under § 382.413, and that the 30-day response time would place new burdens upon small entities. SBA believes opinion and hearsay should be discouraged to minimize liability and circulation of false information.

To decrease the potential reporting burden and ensure that only fact-based information would be provided, SBA recommends the agency specify what information must be sought under § 382.413. The SBA further believes it would be difficult for employers to report the drug and alcohol violations and rehabilitation referrals of other DOT agencies, as proposed under § 382.413(a)(1). The SBA suggested FMCSA: (1) List the specific DOT modal regulations; (2) explain how to find records of violations for these rules, and (3) state the effect of such violations upon a driver's qualifications.

The SBA disagreed with the NPRM provision at § 382.413(a)(2) to require former employers to pass along driver information that a previous employer received from prior employers. The SBA recommended the FMCSA eliminate this requirement.

FMCSA Response: For reasons set forth under the following section entitled "Impacts of Other Rulemakings," the agency has

withdrawn conforming amendments to part 382, and believes the SBA concerns were largely addressed in previous rulemakings issued during 2000 and 2001 and affecting 49 CFR parts 40 and 382.

There is another issue on which FMCSA requests comments. Section 4014 of TEA-21, codified at 49 U.S.C. 508 (a)(3), relating to limitation on liability, states the limitation applies to "the agents or insurers of a person described in paragraph (1) or (2)." Section 508 (b)(1) restricts applicability of the limitation on liability within the requesting process for use by motor carriers. Sub item (B) specifically applies to agents and insurers by requiring that "the motor carrier and any agents and insurers of the motor carrier have taken all precautions reasonably necessary to protect the records from disclosure to any person, except for such an insurer, not directly involved in deciding whether to hire that individual." Section 508 (b)(2) restricts applicability of the limitation on liability to the previous motor carrier providing the information. Sub item (B) applies to insurers by requiring that "the complying person and any agents and insurers of the complying person have taken all precautions reasonably necessary to protect the records from disclosure to any person, except for such insurer, not directly involved in forwarding the records."

FMCSA points out that insurers are currently not allowed access to the drug and alcohol information by part 40. FMCSA interprets the requirements in section 114 of the HazMat Act as creating the authority to grant a limitation on liability if the drug and alcohol data is made available to the insurance providers, but does not mandate that they be given access to this information. Thus, for consistency with the existing drug and alcohol policy of the DOT established by part 40, FMCSA proposes that insurers be allowed access to the investigative information, but exclude any alcohol and controlled substances information provided by previous employers under written authorization of the driver applicant.

Comments are desired on whether alternative legal interpretations regarding insurer access to alcohol and controlled substances information are intended by the HazMat Act. If so, how should such access be managed? FMCSA does not have regulatory and enforcement authority to ensure the insurance providers remain in compliance with the requirement that the data only be used for the hiring decision.

Accidents

The SBA pointed out that immediate implementation of the proposal to extend the retention period for accident information from one to three years would be impossible, *i.e.*, it can only become three years after passage of time to allow motor carriers to retain accident data for up to that period. For this reason, the SBA suggested amending § 390.15 by stating that accidents occurring one year preceding the rulemaking or after its effective date must be kept for at least three years. Alternatively, the agency could provide compliance guidance that reminds field personnel that motor carriers may be unable to immediately provide information about accidents occurring more than a year prior to the effective date of the rule because it was not previously required. The SBA believes the agency should encourage field personnel to waive penalty or enforcement against carriers until sufficient time has elapsed to fully comply with the new accident recordkeeping requirement under § 390.15.

FMCSA Response: The FMCSA agrees with the recommendation to phase in this requirement and has amended § 390.15 to reflect the suggested phase in process.

Employment History Form

SBA and other commenters suggested the agency should include more details specifying the minimum data that must be investigated, and provided by previous employers. SBA additionally recommended that FMCSA develop, as part of its guidance materials, a non-mandatory form for use by inquiring and responding employers.

FMCSA response: In this SNPRM, FMCSA has clarified in the proposed § 391.23(d) and (e) the information that must be investigated and provided, and also eliminated redundant amendments to § 382.413. The description of the required alcohol and controlled substances records in proposed § 391.23(e) is revised to convey that only those existing records filed pursuant to § 382.401 are required. If the previous employer cannot provide the information regarding completion of a rehabilitation referral, the investigating employer must obtain it from the driver.

Summary of the SNPRM

The importance of obtaining access to previous employer driver safety performance history information is long established as a best hiring practice. The purpose of this proposed regulation is to enhance the ability of prospective