



[4910-EX-P]

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2020-0101]

Controlled Substances and Alcohol Use and Testing: Motion Picture Compliance Solutions Application for Exemption from the Drug and Alcohol Clearinghouse Pre-Employment Full-Query

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to grant Motion Picture Compliance Solutions (MPCS) an exemption from the requirement that an employer must not employ a driver who is subject to drug and alcohol testing to perform safety-sensitive functions prior to conducting a full query of the Drug and Alcohol Clearinghouse (Clearinghouse) on behalf of its members that employ commercial driver's license (CDL) holders. Under the exemption, MPCS may conduct a limited query of the Clearinghouse before one of its member employers hires a driver for a project, rather than conducting a full pre-employment query as required. If the limited query indicates that information about the driver exists in the Clearinghouse, the driver would not be permitted to perform safety-sensitive functions unless and until a full query subsequently shows that the driver is not prohibited from operating a commercial motor vehicle (CMV). Absent the exemption, a limited query would be available only to satisfy the employer's duty to make an annual query, not a pre-employment query. The Agency has determined that the terms and conditions of the exemption, coupled with MPCS's unique safety protocols, will achieve a level of safety that is equivalent to the level of safety that would be achieved through compliance with the applicable regulation.

DATES: This exemption is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] and expires May 28, 2025.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this notice as being available in the docket, go to www.regulations.gov and insert the docket number, “FMCSA-2019-0101 in the “Keyword” box and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Docket Operations.

FOR FURTHER INFORMATION CONTACT: Ms. Pearlie Robinson, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: (202) 366-4325; E-mail: MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTAL INFORMATION:

I. Legal Basis

FMCSA has authority under 49 U.S.C. 31315(b) to grant exemptions from certain parts of the Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305(a)). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

II. Background

Current Regulations

Currently, 49 CFR 382.701(a)(2) requires that employers must not employ a driver subject to the testing requirements of 49 CFR part 382 without first conducting a pre-employment full query of the Clearinghouse. A full query allows the employer to see any information that exists about a driver in the Clearinghouse. An employer must obtain the driver's specific consent, provided electronically through the Clearinghouse, prior to the release of detailed information in response to the full query.

By contrast, a limited query allows an employer to determine whether the Clearinghouse contains any information about the driver, but does not release any specific information about the driver. Limited queries require only a driver's general consent, which is obtained and retained outside the Clearinghouse and may be in written or electronic form. Under 49 CFR 382.701(b)(2), an employer may conduct a limited query in lieu of a full query when satisfying the annual query requirement for current driver-employees. However, if the response to a limited query indicates there is information about the driver in the Clearinghouse, the employer must

conduct a full query, after obtaining the driver's specific consent, within 24 hours, as required by 49 CFR 382.701(b)(3). If the full query is not conducted within the 24-hour period, or shows that the driver is prohibited from operating a CMV, the employer must not permit the driver to continue to perform safety-sensitive functions.

MPCS Exemption Application

MPCS requested the exemption from 49 CFR 701(a)(2) on behalf of its members that employ CDL holders subject to drug and alcohol testing under 49 CFR part 382. MPCS's members employ drivers providing transportation services to or from theatrical, commercial, television, or motion picture production sites. MPCS would conduct a limited query of the Clearinghouse before one of its member employers hires a driver for a project. If the limited query indicates that information about the driver exists in the Clearinghouse, the driver would not be permitted to perform safety-sensitive functions unless and until a full query subsequently shows that the driver is not prohibited from operating a CMV. MPCS, serving as a Consortium/Third-party Administrator (C/TPA) for its member employers, requests, obtains, and retains limited query general consent forms from drivers. A copy of the exemption application is included in the docket referenced at the beginning of this notice.

III. Public Comments

On March 6, 2020 (85 FR 13229), FMCSA published a Federal Register notice requesting public comment on MPCS's exemption application. The Agency received 12 comments: dot Production Compliance; Brian Gray; Brian Hildebrandt; Michael Millard, AWM; the Owner-Operator Independent Drivers Association (OOIDA); Scopelitis Transportation Consulting (STC); James Whalen; Mark Whelan, Teamsters Local 817; Pamela White; and three separate

anonymous comments. Four of the commenters supported the request while eight commenters expressed opposition to the request.

dot Compliance believes that granting the MPCS request to start with a limited query is needed for employing drivers in the studio production industry. The company stated, “[The exemption] allows for a more expedient onboarding process and we agree that this exemption would not have any adverse impacts on operational safety, because if the Limited Query produces negative information MPCS will then conduct a Full Query.”

dot Compliance believes compliance with 49 CFR 382.701(a)(2) would significantly slow down the industry’s ability to hire drivers within the short onboarding periods of less than 24 hours and prevent the studios from implementing “more efficient or effective operations that would maintain a level of safety equivalent to, or greater than, the level of safety achieved without the exemption.”

STC expressed support for the MPCS exemption application. STC stated:

[MPCS’s] robust safety protocols, including a private database that tracks drivers’ drug testing history, provides MPCS with an uninterrupted look into drivers’ qualifications. This coupled with their adoption of the Drug & Alcohol Clearinghouse limited query protocol (which will be converted to a full query in the unlikely event information is returned) is an approach that exceeds minimum requirements and creates a level of safety greater than that required under current regulation. Under the exemption, MPCS will not be relieved of the requirement to use the Clearinghouse, they will simply be allowed to use a reasonable alternative method to access the information. They will continue to take the same action in response to information it contains and will be obligated to report testing information like all other motor carriers and third-party administrators.

OOIDA opposes the MPCS request because they believe granting the exemption would “. . . diminish the intended safety benefits of the program.” OOIDA acknowledges the employment arrangement described by MPCS and states:

This type of scenario was one of the reasons the Clearinghouse was enacted, so drivers with drug/alcohol violations cannot simply move around to different carriers. Waiving the pre-employment full query requirements may prevent carriers from accessing necessary

hiring information and allow drivers with drug/alcohol violations to return [to] the road before proper evaluation and treatment is completed. OOIDA urges FMCSA to deny the MPCS exemption request. The exemption would not maintain or improve the level of safety that is currently required by the Drug and Alcohol Clearinghouse.

Brian Gray also wrote in opposition to the MPCS requests for an exemption from 49 CFR 382.701(a)(2). Mr. Gray states:

All motor carriers are in need of drivers to start ASAP. Allowing this exemption will push CDL holding drug users into the motion picture industry, and because MPCS uses the pre-employment testing exemption in its hiring process, most of these drivers won't get pre-employment tested. MPCS's reasoning for the exemption is due to the length of time it says it takes to run a full query. Being a TPA owner myself, my staff has completed over 1,000 pre-employment queries. The most time consuming part of running the query is getting the driver registered with the Clearinghouse. Once the driver is registered, performing the query takes less than 5 minutes. That being said, registration has been open since October 2019. MPCS has had plenty of time to get its 12,000 drivers registered.

IV. FMCSA's Safety Analysis and Decision

The FMCSA acknowledges the concerns of commenters who expressed opposition to the MPCS exemption application. However, as explained below, FMCSA disagrees with commenters who stated that, were we to grant the requested exemption, an equivalent level of safety would not be maintained. In the Agency's judgment, MPCS's process for identifying qualified drivers for its member employers is uniquely designed to accommodate safety concerns related to drug and alcohol testing violations. FMCSA concludes that, based on MPCS's existing processes, coupled with the terms and conditions set forth below, it is appropriate to provide limited relief from the pre-employment full query requirement through the requested exemption.

As MPCS explained, the motion picture industry is freelance in nature and employs a pool of approximately 12,000 production drivers who are considered multiple-employer drivers. These drivers frequently work for more than one production-related motor carrier in a week and in some instances, two or more in the same day. To address the challenges in the motion picture industry, MPCS and its member motor carriers implemented a DOT Violation Database

(Database) comparable to the FMCSA's Clearinghouse. The Database consists of all information and documentation pertaining to a driver's violations, including the initial positive/violation report(s) and/or supporting documentation, substance abuse professional (SAP) documentation, and information about return-to-duty tests and any follow-up tests. This process has been in place for 10 years and drivers and employers have provided and disclosed information relating to their violations such that the Database houses the information needed to support a high level of safety oversight for the motion picture industry's CMV drivers. The Database complies with the applicable privacy rules including driver notification and consent.

With regard to queries of the Database, each time a production company hires a CDL holder, the company accesses the driver's record in the Database to determine if he or she is eligible to operate a CMV based on their drug and alcohol violation history. The Database instantly identifies drivers who are prohibited from performing safety-sensitive functions and ensures that such drivers receive the required SAP evaluation, treatment, return-to-duty testing and follow-up testing before returning to safety-sensitive duties. FMCSA notes that, under this process, drivers are part of a pool of drivers serving the motion picture industry over a period of time, whose pre-Clearinghouse DOT drug and alcohol testing history is known to the employer via the Database. Therefore, these drivers are not fundamentally "new hires," as that term is commonly understood.

With the implementation of FMCSA's Clearinghouse, MPCS members, and MPCS as the C/TPA, will use the exemption to allow them to conduct a limited query of FMCSA's Clearinghouse as part of the "hiring" process. This alternative would not jeopardize safety because the employer and/or their C/TPA must conduct a full query if the limited query shows that information about the driver exists in the Clearinghouse. A driver's specific consent for the

full query would be provided electronically in the Clearinghouse as required under the existing regulations. At the same time, the Database that was established prior to the Clearinghouse will continue in operation, thereby providing further means of identifying qualified drivers prior to the FMCSA-mandated queries of the Clearinghouse.

To address the requirements for documentation of drivers' consent for limited queries, MPCS would serve as a C/TPA and request, obtain, and retain limited query consent forms from drivers on behalf of its motor carrier members. At any point that a full query becomes necessary, a driver's specific consent would be provided electronically, as noted above.

From a safety equivalency perspective, all CDL holders employed by MPCS' member companies would remain subject to FMCSA controlled substances and alcohol testing requirements, and their employers would ultimately be responsible for complying with the applicable requirements of part 382, other than the pre-employment full query. Drivers for whom a limited query indicates information is contained in the Clearinghouse would not be used in any safety-sensitive capacity until a full query is conducted and the results indicate the driver is not prohibited from operating a CMV. In addition, MPCS would continue to report violation information on behalf of its member employers to FMCSA's Clearinghouse, as required by 49 CFR 382.705 (b).

Finally, the Agency notes that 49 CFR 382.701(c), which provides that an employer conducting a pre-employment full query will be notified if any new information about that driver is reported to the Clearinghouse within 30 days of the full query, would not be applicable to pre-employment limited queries. However, due to the unique hiring practices of MPCS's member employers, under the exemption, MPCS would be conducting limited queries multiple times during any given 30-day period for the same driver, each time the driver is "hired" to perform

services for a different MPCS employer member. This practice, coupled with drug and alcohol violation information available to MPCS and its member employers through the existing Database, described above, ensures an equivalent or greater level of safety provided by the 30-day notification set forth in 49 CFR 382.701(c).

Based on the information presented in the exemption application, and in consideration of the public comments, FMCSA grants MPCS an exemption from 49 CFR 382.701(a)(2) on behalf of its members, subject to the terms and conditions set forth below. The Agency has determined, as required by 49 U.S.C. 31315(a) and the implementing regulations under 49 CFR 381, that the exemption is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the exemption.

V. Terms and Conditions for the Exemption

This exemption is limited strictly to 49 CFR 382.701(a)(2) of the Federal Motor Carrier Safety Regulations and during the period of the exemption:

1. MPCS, on behalf of its member employers, must obtain the results of a limited query of FMCSA's Clearinghouse for each driver hired to operate a CMV for a member employer, if a full query is not practicable;
2. MPCS, on behalf of its member employers, must conduct a full query of FMCSA's Clearinghouse for each driver whose limited query results indicate information about the driver exists in the Clearinghouse, and, in accordance with current regulations, must not permit the driver to perform safety sensitive functions if the results of the full query indicate the driver is prohibited from doing so;
3. MPCS, acting as a C/TPA, must request, obtain, and retain limited query consent forms from drivers on behalf of its member employers, in accordance with the regulations;

4. MPCCS, acting as a C/TPA, must report drivers' controlled substances and alcohol violations to FMCSA's Clearinghouse, in accordance with the regulations; and
5. MPCCS and its member employers must maintain operation of the DOT Violation Database, described above.

VI. PREEMPTION

In accordance with 49 U.S.C. 31315(d), during the period this exemption is in effect, no State shall enforce any law or regulation applicable to interstate commerce that conflicts with or is inconsistent with this exemption with respect to a firm or person operating under the exemption.

VII. TERMINATION

FMCSA does not believe the drivers covered by this exemption will experience any deterioration of their safety record. Interested parties or organizations possessing information that would otherwise show that MPCCS is not achieving the requisite statutory level of safety should immediately notify FMCSA. The Agency will evaluate any information submitted and, if safety is being compromised or if the continuation of this exemption is inconsistent with 49 U.S.C. 31315, FMCSA will immediately take steps to revoke the exemption of the company and drivers in question.

James A. Mullen,
Deputy Administrator.

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