DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

Federal Highway Administration

49 CFR Part 391

Federal Railroad Administration

49 CFR Parts 217 and 219

Research and Special Programs Administration

49 CFR Part 199

Coast Guard

46 CFR Part 16

RIN 2105–AB81; 2120–AC33; 2125–AC81; 2130–AA64; 2137–AB95; 2115–AD84

Management Information System (MIS) For Workplace Drug Testing Programs

AGENCIES: Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Research and Special Programs Administration (RSPA), and United States Coast Guard (USCG), DOT.

ACTION: Final rules; common preamble.

SUMMARY: This document is a common preamble to five final rules being published by several operating administrations of the Department of Transportation (FAA, FHWA, FRA, RSPA & USCG) elsewhere in today's issue of the **Federal Register**. The Department needs employer drug testing program data in order to address policy and program issues relative to the anti-drug rules' effectiveness. The FAA, FHWA, FRA, RSPA, and USCG final rules are published elsewhere in today's **Federal Register**. These final rules require employers conducting drug testing to maintain and/or submit drug testing program data to the DOT Agency which has regulatory authority over the employer. This data will enhance the Department's ability to assess program effectiveness and compliance.

EFFECTIVE DATE: Effective generally, January 1, 1994. See separate OA's rules for specific date.

FOR FURTHER INFORMATION CONTACT: Dr. Donna Smith, Acting Director, Office of Drug Enforcement And Program Compliance, Department of Transportation, 400 7th St. SW., room 9404, Washington, DC 20540, (202) 366–3784.

SUPPLEMENTARY INFORMATION:

Introduction

On December 15, 1992, the Department published a notice of proposed rulemaking (NPRM) to amend 49 CFR Part 40 to establish alcohol and drug testing procedures for implementing the requirements of the Omnibus Transportation Employee Testing Act of 1991. That NPRM also proposed a Management Information System (MIS) to obtain specific drug and alcohol testing program information from employers. Also on December 15, 1992, the Operating Administrations (OAs)—FAA, FHWA, FRA, RSPA, and USCG—issued NPRMs that proposed to establish the specific MIS drug testing reporting requirements for the employers they regulate. A similar MIS was proposed for transit employers in the Federal Transit Administration (FTA) drug use prevention program NPRM published that same day; that MIS requirement will be included in the FTA final rule when issued at a later date.

The Department is issuing the final rules on the drug testing MIS, with this common preamble, to implement the employer reporting requirements for calendar year 1994. The Department needs employer drug testing program data in order to address policy and program issues relative to the anti-drug rules' effectiveness. The FAA, FHWA, FRA, RSPA, and USCG final rules are published elsewhere in today's **Federal Register**.

Over 40 comments on the proposed MIS were submitted to the 49 CFR part 40 NPRM docket. The OAs received comments on their MIS NPRMs. This common preamble responds to the comments submitted to the 49 CFR part 40 NPRM docket and to several common issues raised by commenters to the OAs' NPRM dockets. In addition, on February 8, 1993, the Department published a notice in the **Federal Register** advising that it was conducting a pilot project to evaluate proposed MIS report forms and submission procedures. Forty employers volunteered to participate in the pilot project. The general findings from the pilot project are summarized in this common preamble.

The Department has decided not to amend 49 CFR part 40 by adding § 40.81, as originally proposed. The Department received some comments that indicated that there appeared to be unnecessary duplication, and, in some cases, employers would be confused about which forms to use and how to report MIS data. Instead, each OA final rule will specify the MIS reporting requirements for employers regulated by the OA. All employer MIS reports will be submitted to each OA using the MIS forms and procedures specified in the OA's rules.

Response to Comments

1. Employer report submission date

The NPRM proposed February 15 of the calendar year following the year to which the data pertain as the date for employer submission of MIS reports to the appropriate OAs.

Numerous commenters stated that due to the need to compile and consolidate data from several locations and/or company divisions during January and February, it would be difficult to meet the February 15 reporting date. They requested a range of later dates (February 28–1 April). The Department needs timely submission of this data, but would not be seriously inconvenienced by waiting another month. The OAs' final rules establish March 15 as the reporting date for employers' MIS data to accommodate employers' legitimate need for additional time.

2. Complexity of MIS

Since the Department is implementing the MIS prior to the issuance of final rules on alcohol prevention programs, alcohol testing program data elements have been removed from the MIS forms, except for the two OAs that currently have alcohol testing requirements (FRA and USCG). The Department is still considering adding alcohol testing data reporting requirements to the final alcohol testing rules required by the Omnibus Transportation Employee Testing Act of 1991. Eventually, the Department hopes to combine both drug and alcohol program data in a single MIS report form for each OA where practical.

The Department has attempted to minimize the MIS reporting burden on employers. In response to the comments and the findings from the pilot project, the Department has identified additional ways to reduce the complexity of the MIS report forms and instructions, and, therefore, the burden on employers. The critical data elements needed by the Department and its OAs have been retained, while the format, organization and some of the proposed data elements have been consolidated and simplified, resulting in shorter forms. To ease the reporting burden on employers that have no positive test results we have developed simplified "E-Z" forms.

In response to the Department's inquiry, a significant number of commenters indicated that they would

prefer (or were interested in) electronically submitting the required data to the OAs. Therefore, the Department is committed to developing and providing a system that will allow employers to submit their reports electronically. The OAs' final rules specify the electronic systems currently available for employers' reporting or plans for development of such. It's the Department's intention that all OAs will eventually provide a system for electronic reporting.

3. Methodology

Commenters generally supported the need for the Department and its OAs to acquire anti-drug program data. Some commenters suggested that there may be other, less burdensome ways to acquire the data, such as obtaining the data from OAs' audits of employers' programs. We considered this method, but the cost, both to the Federal government and the employers, and the reduced utility of such data make this infeasible. Data derived from ongoing inspections and audits would not cover common timeframes (such as a calendar year) unless collection of a previous year's data was used. For example audits conducted in 1995 would collect only 1994 data, leading to considerable time lag in evaluating program data. In addition, audit or inspection data would represent a significantly reduced sample of the industry since the audit force could not annually audit the approximately one million employers that are covered by the rules. Audit samples are often biased, because they focus on employers who have poor safety records or against whom complaints have been lodged.

The Department requested comment on the possibility of using a two-tiered system of reports. Under this methodology, some employers could have been required to report on the complete set of data elements and some on a reduced set. Only two comments specifically addressed this issue and both stated that a two-tier system would be too complex and unworkable. The Department's efforts to develop a workable two-tiered process did lead to development of the "E-Z" form described earlier, for use by employers whose drug testing programs have no positive test results.

Some commenters suggested requiring drug testing laboratories to report drug testing data to DOT and to survey some Medical Review Officers (MROs). The Department and its OAs already have access to aggregated laboratory data but it is not definitive (i.e., specific to each employer or regulated industry), and, therefore, does not meet the Department's oversight needs. Laboratory data would not be useful because it includes quality control specimen data and confirmed positive test results that have been verified negative by the MRO. In addition, the Department does not have the authority to impose or enforce a reporting requirement upon laboratories and/or MROs. Only the employer has access to the data needed to review program implementation, compliance and effectiveness.

Some commenters suggested that the "Government" should conduct the testing and compile the data. The current anti-drug rules impose the recordkeeping responsibility on the employer because the employer is required to conduct or arrange for drug testing. The employer, therefore, is the logical entity to collect and report the data. An employer-based drug testing program, in contrast to a government-operated one, reduces the intrusiveness of the Federal government in the day-to-day activities of transportation employers and employees.

Employer-based programs provide employers with the flexibility to conduct drug testing with minimal disruption to their operations. In response to the Omnibus Transportation Employee Testing Act of 1991, the FHWA is conducting a pilot project in four states in which State safety enforcement personnel conduct roadside random drug and alcohol testing of truck drivers. The testing is conducted as part of State safety inspections of the drivers and their vehicles. The FHWA will issue a report in April 1994 on the feasibility of such government-operated drug testing programs.

Several commenters recommended more frequent reporting and some recommended reporting only every 2 or 3 years. More frequent reporting would be more burdensome to employers and unnecessary for the Department's purposes. Biannual or Triannual reporting would not provide information in a timely manner and doesn't respond quickly to trends. We believe that annual reporting is workable for employers and is sufficient to show trends and program findings for the Department's program evaluation and policy development needs. Therefore, the final rules establish annual MIS reporting requirements.

4. Specific data requested

The MIS consists of a standard set of data elements the Department and its OAs need in order to review implementation, compliance and program results, with some modifications specified in the OAs' final rules to accommodate circumstances peculiar to their industries.

Some commenters recommended deleting periodic testing data since this type of testing is generally not required after the first year of testing program implementation. A large majority of employer reports would contain only zeros for periodic testing. Each OA has its own unique requirements for periodic testing. Therefore, each OA rule will specify periodic testing data requirements where necessary for monitoring compliance and enforcement of its program.

Several commenters stated that there is no need to report "Number of employees covered by more than one DOT OA." Although most employers do not employ employees who are subject to testing under two or more OA rules, many of the operational problems brought to the attention of the DOT concern "dual-covered" employees. Dual or multi-modal operational concerns are important and deserve resolution. To help accomplish this, the Department needs baseline data to identify problem areas and develop appropriate solutions; therefore, we are retaining the requirement. Generally, pre-employment, random and return-to-duty tests should be reported to the OA which regulates that function used as the basis for the safety-sensitive employee category. Post-accident tests should be reported to the OA to whom that accident is reportable. Reasonable suspicion and periodic tests should be reported to the OA based on employee function requiring the test. Most employers will simply report "zero" in items requesting data on dual-covered employees.

5. Data on Cost of the Drug Testing Program

The Department asked for comments on whether the OAs' rules should require data on the cost of implementing anti-drug programs. Most commenters did not address this issue, but of the ones that did, most supported reporting cost data. A few stated that cost data would be useless or inappropriate. Some commenters stated that it would be difficult to compile cost data and to standardize how it would be reported. Others stated that it would have utility, but that it should come from industry, consortia groups or associations, not individual employers.

While the Department believes cost data on the mandated elements of drug testing programs (specimen collection, laboratory testing, employee training, and MRO services) would be useful in assessing program effectiveness and

cost-efficiency, difficulties in standardizing how such information would be computed and interpreted, reduce its utility and increase the burden for employers. OA rules' preambles further discuss this issue. The final rules do not require cost data reporting.

6. Data on Employee Drug Abuse Prevention Training

Employee training and education are very important in substance abuse prevention programs. The Department has included MIS data elements to report employee training conducted to meet an OA's requirement or to enhance workplace anti-drug programs. Each OA anti-drug rule requires employers to provide drug awareness training or education for covered employees and specific training for supervisors who make reasonable suspicion test determinations. In general, commenters to the NPRM on this issue stated that final rules should require MIS data only for the training mandated in the OAs' rules. Each OA rule addresses the specific training data requirements applicable to its regulated employers.

Some commenters recommended deleting the data element on "actions taken in response to refusal-to-test". The reason given is that the OA rules require employers to remove from safety sensitive duties a person who refuses to take a drug test. Therefore, other employer actions (i.e., termination, suspension, transfer) would be beyond the scope of the rule. Some of the participants in the pilot test of the MIS also supported deleting this data element, citing that information on the number of refusals-to-test was sufficient. Three of the OAs have decided to drop this reporting element and monitor this area through other means. Two of the OAs (RSPA and FAA) have decided to retain the requirement to report personnel actions imposed in verified positive and refusal-to-test circumstances; the preambles to the FAA and RSPA final rules discuss this issue in detail.

7. Analysis Of Changes In The Final Rules

The following general changes from the proposed rules have been made in the OAs' final rules:

(a) In response to concerns raised by commenters, the MIS report submission date is changed from February 15 to March 15;

(b) The requirement for reporting data element (3), which proposed, in part, to require periodic testing data, may be deleted if the particular OA no longer requires periodic testing or does not require reporting of that data element.

(c) In response to comments and findings from the pilot project, the data element on actions taken in response to a refusal to submit to a drug test, has been withdrawn from some OAs' final rules. Where it has been retained, the OA preamble to its final rule discusses the issue, including justification for retaining the requirement.

(d) The OAs' rules contain the MIS forms to be used by employers subject to their rules. The forms include modifications to the instructions and the forms based on the comments and pilot project findings from employers and other respondents. OA rules will discuss requirements for employers to report data on employees that are covered by two or more OA regulations.

(e) Each OA rule except the USCG's provides a standard, simplified "E-Z" MIS report form for use by employers whose drug testing programs have no verified positive tests. The USCG's MIS form has been simplified to the point that they have determined a separate "E-Z" form is not necessary.

Taking into account these changes, as well as changes to current programs contained in the rules as proposed, the DOT operating administrations estimate a net increase of approximately 12,500 burden hours of increased recordkeeping and reporting burden as compared with comparable DOT OA information collection requirements for drug testing programs currently in place. On balance, this represents less than a 1% increase over current levels. While there is a considerable reduction in some individual OAs have made substantial efforts to minimize information collection burdens through the means discussed in this preamble and the preambles to the final rules of the individual OAs.

Regulatory Process Matters

Each of the OA MIS rule preambles separately addresses a number of administrative matters concerning compliance with administrative requirements in statutes, executive orders and Departmental policies and procedures. Readers should refer to the individual OA rules for statements specific to each rule.

Paperwork Reduction Act

The proposed information collection requirements contained in the notices of proposed rulemaking were reviewed by the Office of Management and Budget (OMB) under section 3504(H) of the Paperwork Reduction Act (44 U. S. C. 3501 *et. seq.*). Revisions of the information collection requirements contained in the final rules have been submitted to OMB for final approval. A **Federal Register** notice will be published when that approval has been obtained.

Common Preamble for the Management Information System (MIS) Final Rules.

Issued on December 13, 1993 in Washington, D.C.

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