



U.S. Department
of Transportation
**Research and
Special Programs
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

JUN 19 2003

Mr. Richard Moskowitz
Assistant General Counsel and
Regulatory Affairs Counsel
American Trucking Associations
2200 Mill Road
Alexandria, Virginia 22314

Ref. No. 03-0135

Dear Mr. Moskowitz:

This responds to your letter to Nancy Machado, Assistant Chief Counsel for Hazardous Materials Safety, Research and Special Programs Administration, requesting clarification of the security plan requirements in the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) adopted under Docket HM-232. Your questions are paraphrased and answered below.

Q1. Section 172.802(a)(2) of the HMR requires employers subject to the security plan regulation to confirm information provided by job applicants hired for positions that involve access to and handling of hazardous materials covered by the security plan. The preamble to the HM-232 final rule suggested that employers should make an effort to check information related to an applicant's recent employment history, references, and citizenship status. If circumstances make it impossible to verify an applicant's prior employment history, may an employer still hire the individual? What is the definition of "recent" as that term is used in the HM-232 preamble? Does an employer have an obligation to document in writing the results of its efforts to confirm information provided by a prospective employee?

A1. Section 172.802(a)(2) requires an employer who is subject to the security plan regulation to implement measures to confirm information provided by applicants who are hired for positions that involve access to and handling of hazardous materials covered by the security plan. The requirement is flexible. An employer may use its discretion to determine the information that will be checked as part of the application process and whether and to what extent its inability to confirm certain information will affect hiring decisions. Thus, if an employer is unable to confirm information about an applicant's recent employment history, but is satisfied based on other information that an applicant does not pose a security risk, then the employer is not precluded from hiring the applicant. In this context, the employer may define "recent employment history" as it implements the personnel security measures required under § 172.802(a)(2). An employer must include the measures it has implemented to confirm information provided by applicants in its written security plan, but an employer need not document the results of its efforts to confirm information for specific applicants.



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Q2. Regulations developed by the Transportation Security Administration and the Federal Motor Carrier Safety Administration to implement the USA PATRIOT Act will ensure that all drivers possessing a current hazardous materials endorsement to their commercial driver's license have successfully completed a Federal background check. If an employer's security plan includes a procedure to verify a prospective driver's hazardous materials endorsement, does that satisfy the employer's obligation to confirm information provided by job applicants under § 172.802(a)(2)?

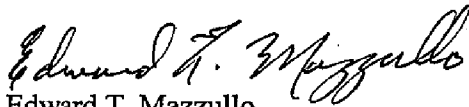
A2. Yes.

Q3. Many trucking companies utilize leased workers provided by a third-party agent to assist with operations during peak freight periods. The individuals may perform work for the motor carrier on only a few days each year and are not hired as employees of the motor carrier. Must a motor carrier confirm background information for these leased workers?

A3. If the leased workers utilized by the motor carrier will have access to or handle hazardous materials covered by a motor carrier's security plan, then the leased workers must be covered by the security plan. It is the responsibility of the motor carrier to ensure that the requirements of its security plan concerning personnel security and security training are met. For leased workers, the motor carrier and the third-party agent who provides the leased workers must decide the question of who will confirm background information provided by job applicants.

I hope this information is helpful. If you have further questions, please do not hesitate to contact this office.

Sincerely,



Edward T. Mazzullo
Director, Office of Hazardous
Materials Standards



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Law Department

May 23, 2003

Ms. Nancy Machado
U.S. Department of Transportation
Research and Special Programs Administration
Office of Chief Counsel
400 Seventh Street, S.W.
Washington, DC 20500

Via Facsimile: (202) 366-7041

RE: Interpretation of HM-232 – HazMat Security Plans

I am writing on behalf of the motor carrier members of the American Trucking Associations (ATA) to request an informal opinion concerning the implementation of the Research and Special Programs Administration's (RSPA) new requirement to develop hazardous materials security plans under 49 C.F.R. § 172.802.¹

ATA is the trade association representing the American trucking industry.² As the national representative of the trucking industry, ATA is interested in matters affecting the nation's trucking fleet, including the implementation of the new security requirements affecting the transportation of hazardous materials.

Our members have raised the following issues with respect to the new security requirements:

One aspect of HM-232 requires motor carriers transporting placarded amounts of hazardous materials to develop a security plan that *inter alia* addresses personnel security. The regulation specifically requires these motor carriers to implement

“measures to *confirm* information provided by job applicants hired for positions that involve access to and

¹ 68 *Federal Register* 14510 (March 25, 2003) (hereinafter “Final Rule” or “HM-232”).

² ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation.

handling of hazardous materials covered by the security plan."³

We read the preamble to the Final Rule as providing motor carriers with discretion to determine the information to be confirmed:

We do not expect companies to confirm all of the information that a job applicant may provide as part of the application process. However, employers should make an effort to check information related to an applicant's *recent* employment history, references, and citizenship status.⁴

Previous employers may not return phone calls, making it impossible to verify prior employment history. Question 1: In these cases, may the motor carrier still hire the individual if the motor carrier is unable to verify an applicant's recent employment history? Question 2: In that regard, what constitutes recent (last job, last 2 jobs, last 3 years)? Question 3: Does the motor carrier have an obligation to document in writing the results of any background investigation (*i.e.*, confirmation) conducted on a prospective employee?

The recent implementation of the USA PATRIOT Act now ensures that all drivers possessing a current hazardous materials endorsement to their CDL have been through a federal background check. Question 4: Does RSPA believe that a security plan that includes a procedure to verify a prospective driver's hazardous materials endorsement is sufficient to satisfy the motor carrier's obligation to confirm information under the personnel security component of the security plan as described in 49 CFR § 172.802(a)(1)?

The new rule requires companies to

confirm information provided by job applicants *hired* for positions that involve access to and handling of hazardous materials covered by the security plan.⁵

Many trucking companies use leased workers provided by a third party agent to assist with operations during peak freight periods (*e.g.*, pre-holiday). The individuals may perform work for the motor carrier on only a few days each year and are not hired as employees of the motor carrier. Question 5: Please confirm our understanding that the

³ 49 C.F.R. § 172.802(a)(1) (emphasis added).

⁴ 68 *Federal Register* at 14516/2.

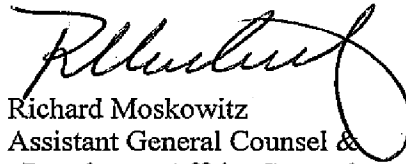
⁵ 49 C.F.R. § 172.802(a)(1).

Final Rule does not create a new obligation for motor carrier's to confirm background information for these leased workers.

* * * * *

As you know, the requirement to implement a hazardous materials security plan under HM-232 must be met by September 2003. Because of the need to comply with this regulatory deadline, we would appreciate your opinion on the questions raised herein as soon as possible. If you require additional information on these issues, please call me at 703-838-1910.

Respectfully submitted,



Richard Moskowitz
Assistant General Counsel &
Regulatory Affairs Counsel