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TO: AMERICAN ALLIANCE DRUG TESTING (AADT)

FROM: THE LAW OFFICES OF BROOKS ELLISON

SUBJECT: **CSAT AGREEMENT ANALYSIS**

DATE: 2/13/08

Compliance with drug and alcohol testing requirements under both California and federal law is often complex and contradictory, particularly with the passage of SB 871 in 2001. As General Counsel for American Alliance Drug Testing (AADT), formerly California Drug & Alcohol Testing Alliance (C-DATA), we have been tasked with understanding and, if possible, reconciling these laws. At the apex of the confusion are Controlled Substances and Alcohol Testing (CSAT) Agreements. This letter serves as our interpretation of the current state of the law, as well as our analysis of the most reasonable solution to the CSAT Agreement issue. All interpretations below are simply that – our 'interpretations'. As always, anyone (including administrative agencies and courts) may have an interpretation that differs from our own. The following information is not intended, nor should be construed, as legal advice for anyone other than AADT.

I. CURRENT CALIFORNIA DRUG AND ALCOHOL TESTING LAW

Under California law, motor carriers and drivers must comply with the federal Department of Transportation (DOT) drug and alcohol testing requirements (Cal. Veh. Code §34520, 49 CFR §40, §382). DOT regulations require all "employers" of commercial drivers to implement drug and alcohol testing (49 CFR §382). Employers are required to subject drivers to pre-employment testing (including investigating employment history), post-accident testing, random testing and reasonable suspicion testing (49 CFR §§382.301-307, CVC §34520). Independent contractor motor carriers operating under their own authority, direction and control (hereafter "owner-operators") can be both an employer and an employee simultaneously under federal drug and alcohol testing law. However, the DOT has expressed in several letters their belief that overlying motor carriers/truck brokers (hereafter "brokers") who contract with an owner-operator would not likely be considered their "employer" under federal law, as brokers do not exert sufficient control over owner-operators (Brennan letter, 1999; Falk letter, 2000).

Despite vigorous industry opposition lead by the California Dump Truck Owners Association (CDTOA), SB 871 was signed into law in 2001. SB 871 further altered drug and alcohol testing

compliance requirements for brokers and owner-operators by modifying several provisions of the California Vehicle Code and Civil Code. Of most importance to the transportation industry, the bill held a person or entity who contracts the services of independent owner-operators (as defined in CVC §34624) to substantially the same drug and alcohol testing obligations as an employer is under federal regulations (49 CFR §§382.301-307, CVC §34520, Cal. Civ. Code § 3333.7). However, specifically noted is the inability for these obligations to "change the definition of 'employer,' 'employee,' or 'independent contractor' for any purpose" (*Id.*). Under SB 871, drug and alcohol testing requirements begin the moment the contracted owner-operator works for the broker, not "60 of 90 days" (CVC §34520).

Additionally as a result of SB 871, a person or entity may be held liable for treble (triple) damages for any injury proximately caused by a commercial motor vehicle driver, including an owner-operator under contract, if it is shown that: (1) the driver was under the influence of alcohol or a controlled substance at the time of the accident; and (2) the person or entity willfully failed to comply with the DOT drug and alcohol testing requirements (Cal. Civ. Code § 3333.7). In order to have "willfully failed" in this context, it must be shown that any of the following occurred: (1) an intentional and uncorrected failure to have a controlled substances and alcohol testing program in place; (2) an intentional and uncorrected failure to enroll an employed driver into the controlled substances and alcohol testing program; (3) a knowing use of a medically disqualified driver, including the failure to remove the driver from safety-sensitive duties upon notification of the medical disqualification; or (4) an attempt to conceal legal deficiencies in the motor carrier's controlled substances and alcohol testing program (CVC §34623).

The following analysis discusses means of ensuring compliance with the above Code sections, particularly for brokers and owner-operators.

II. CSAT AGREEMENT BACKGROUND

The current CSAT Agreements are essentially standardized agreements between a broker and an owner-operator to share test results. These have been widely distributed and utilized in the trucking industry. The Agreements are intended to authorize the release of the owner-operator's confidential medical information such that the broker may remain informed of compliance by the driver owner-operator and satisfy their legal obligations under SB 871. The California Highway Patrol (CHP) has not formally endorsed any of the CSAT Agreements currently in use. We understand that some brokers in the past have been denied a satisfactory BIT inspection by the CHP for failure to have in force a CSAT Agreement for all their utilized owner-operators. However, the CHP has denied that this is their policy.

a. Legal Problems with Current CSAT Agreements

i. The current CSAT Agreements likely violate federal law.

Pursuant to federal law found in Title 49 of the Code of Federal Regulations, Part 40.321, service agents such as AADT are strictly "prohibited from releasing individual test results or medical

information about an employee [*in this case, the owner-operator*] to third parties without the employee's specific written consent." It is our understanding that the typical broker would be a "third party" for these purposes as defined in §40.321(a). Also, the current CSAT Agreements do not provide "specific written consent," and are likely a "blanket release," which is prohibited under 49 CFR 40.321(b), as set out below:

> *49 CFR 40.321(b): "**Specific written consent**" means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. "**Blanket releases**," in which an employee agrees to a release of a category of information (e.g., all test results) or to release information to a category of parties (e.g., other employers who are members of a C/TPA, companies to which employee may apply for employment), are prohibited under this part.*

ii. AADT may incur liability, based on State privacy law, if it honored the current CSAT Agreements.

By law, if the subject matter of a contract is illegal, the contract itself is rendered void (i.e. nobody can enforce it). As discussed above, the current CSAT Agreements likely violate federal law. As such, a court could find the Agreements void and unenforceable. Thus, if AADT were to release an owner-operator's confidential medical information in spite of such an unenforceable contract, they may be held civilly liable by the owner-operator for a violation of their State privacy rights. This concept is reinforced in Falk's 2000 DOT letter ("Owner/operator could try to hold the consortium liable for violating his or her privacy rights").

State privacy rights are found in the California Constitution, Article 1, Section 1, giving each citizen an "inalienable right" to pursue and obtain "privacy." The CA Supreme Court has held that the CA Constitution in and of itself "creates a legal and enforceable right of privacy for every Californian." *White v. Davis* (1975) 13 Cal. 3d 757, 775. To successfully assert a claim for invasion of one's constitutional right to privacy, a plaintiff must establish the following three elements: 1) a legally protected privacy interest; 2) a reasonable expectation of privacy in the circumstances; and 3) conduct by the defendant that constitutes a serious invasion of privacy. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 39-40. If these three elements are established by the plaintiff, the defendant may prove that the invasion of privacy is justified because it "furthers legitimate and important competing interests" – thus a court will use a balancing test of competing interests. *Hill*, 7 Cal. 4th at 38.

Additionally, California recognizes civil liability for invasion of privacy under common law principles. Specifically relevant to this situation are possible claims for 1) public disclosure of private facts about the plaintiff; and 2) publicity that places the plaintiff in a false light in the public eye.

As always, we would need the facts of each particular case to truly assess the strength of any State privacy claim, but as you can see, liability may exist if AADT were to utilize and respect the current CSAT Agreements.

III. POTENTIAL CSAT AGREEMENT SOLUTION

As AADT now has a backlog of over 300 brokers who have submitted a variety of CSAT Agreements, a reasonable and immediate solution is necessary. In an attempt to lessen the liability created by the current CSAT Agreements, we have crafted, in our opinion, a reasonable alternative – the "Notification of Owner-Operator Inactivity" practice.

State law requires a broker to be responsible for owner-operators in substantially the same way as employees concerning drug and alcohol testing. To the extent it prohibits a "blanket release," federal law makes this more difficult but not impossible. A "Notification of Owner-Operator Inactivity" from AADT or other consortium for any reason, plus a combination of specific waivers when needed and reasonable monitoring of owner-operators, likely accomplishes what is required of brokers. State law specifically excludes such monitoring activities from creating or implying an employer/employee relationship. We believe such monitoring could be sufficient to rebut claims that a broker "willfully failed at the time of the injury to comply with any of the requirements of the federal law described in subdivision (a) of Section 34520 of the Vehicle Code in regard to the involved driver" (Civ. Code §3333.7). Details of our recommended Notification of Owner-operator Inactivity documents are below.

a. 'Confirmation of Receipt of Controlled Substance & Alcohol Testing (CSAT) Agreement and Statement of Consortium's Limitation' form

The above document would serve as an overview letter to be delivered to all brokers who submit a version of the current CSAT Agreement. In essence, it states that AADT has received their CSAT Agreement, but for legal reasons it is unable to comply with the Agreement. However, the letter goes on to offer an alternative that will achieve the same goal of CSAT compliance. The alternative is AADT's "Notification of Owner-Operator Inactivity" practice. This practice is described as follows:

> "The only information that AADT is permitted to send a broker without specific written consent is whether the Owner-Operator is active or inactive in their program. Should the Owner-Operator become inactive for any reason, AADT will send you this information in the form of a Notification of Owner-Operator Inactivity, in which the following explanation will be provided:
>
> *Please be advised that the Independent Contractor Owner-Operator operating under their own authority (Owner-Operator) listed below is no longer active in our controlled substance and alcohol testing program. Also note that there are many reasons as to why the Owner-Operator may have become inactive with AADT. Reasons include, but are not limited to, non-payment for services rendered, incorrect company/driver information, a positive controlled substance or breath alcohol test result, or failure to comply with the U.S. Department of Transportation (DOT) requirements of a return to duty process including an Employee Assistance Program. Additionally, the Owner-Operator may have also requested to be inactivated for reasons including, but not limited to, illness*

or disability, temporarily out of service, permanently ceased operations, or elected the services of another consortium."

Ideally, as this Notification of Owner-Operator Inactivity practice becomes standardized, this letter could eventually be eliminated.

b. 'Consent to Release Activity Status' form

The above document would serve as the actual consent form from the owner-operator that he or she expressly: 1) consents to share with the broker a notification of activity/inactivity in AADT's program; and 2) directs AADT to notify the broker of his or her activity status. This form would need to be signed by both the owner-operator and the broker, along with other pertinent information, prior to being returned to AADT.

c. 'Notification of Owner-Operator Inactivity' form

The above document would be the actual notification provided to the broker should the owner-operator ever become inactive in AADT's program for any reason, as listed in the above Confirmation section. Upon receipt of this information, the broker may decide how to proceed accordingly.

d. Termination forms

Should the owner-operator or the broker ever decide to terminate the activity status practice with the other, either would be able to do so. As indicated in the "Consent" and "Notification of Owner-Operator Inactivity" forms, the owner-operator would need to provide a written revocation of their consent agreement to terminate the practice with a given broker. We have created a "Revocation of Owner-Operator's AADT Consent to Release Activity Status" form to easily facilitate this revocation. It would not be the only method for written revocation, but it would be the preferred method. The owner-operator would return the document to AADT, who would be authorized pursuant to the document to deliver a copy to each applicable broker.

As also indicated in the "Consent" and "Notification of Owner-Operator Inactivity" form, the broker would terminate the practice through a written declaration declining to further receive any notifications of a given owner-operator's activity status. We have created a "Broker's Termination of Owner-Operator Activity Status" form to be the preferred method to do so. After delivering this declaration to AADT, AADT would notify each applicable owner-operator.

IV. WHY THIS SOLUTION LIMITS AADT'S LIABILITY

As discussed above, we believe utilizing the current CSAT Agreement requiring a "blanket release" – that is likely illegal under federal law – carries with it a significant risk of liability to AADT. We believe our proposed alternative likely complies with the spirit and letter of both State and federal law without requiring an illegal blanket waiver of medical privacy. Thus, given the complex and contradictory nature of the laws, it is the most reasonable solution to accomplish the safety-based

intent of the law. As always, we cannot guarantee that others will not differ in their analysis, however, with our research we believe this may be the best course of action to comply with the law and, at the same time, may lessen AADT's liability in this area. Our reasons for this belief are explored in more detail below.

a. A "Notification of Inactivity" is not likely prohibited under federal law.

Pursuant to Part 40.321, a service agent is "prohibited from releasing individual test results or medical information about an employee." A mere statement of activity/inactivity is not confidential medical information. As such, specific written consent is not required and a blanket release is not present. In addition, by signing the 'Consent to Release Activity Status' form, the program participant has likely effectively consented to the limited release of information. This may negate any potential state law claim of violation of an individual's "reasonable expectation of privacy in the circumstances."

Finally, the "Statement of Consortium's Limitation" properly notifies brokers of AADT's inability to act under the current CSAT Agreement, and puts the broker on notice of the owner-operator's current possible non-compliance. This shifts the burden of determining compliance from AADT to the broker and thus may lessen breach of contract/misrepresentation liability for not informing brokers of an owner-operator's failed test results.

b. Meetings with the CHP

AADT staff and counsel met with CHP's Gary Ritz, Gregg Bragg, Don Callaway at the CHP offices on August 21, 2007 to discuss our concerns with the current CSAT Agreement and to introduce our Notification of Inactivity documents. The CHP expressed strong displeasure with any of their officers who find carriers' Carrier Inspections "unsatisfactory" for CSAT violations simply because they do not have a CSAT Agreement. It was stated that the CHP's strict policy is that there is "no mandatory agreement" to prove CSAT compliance, as even an oral agreement may suffice (federal rules permit verbal agreements). This policy is believed to be stated in their enforcement manual, Chapter 14: Enforcement Policy on CSAT. The CHP agreed to send out an I.B. to officers clarifying this policy (that a CSAT agreement "can be part of the process, but is not the determining factor of CSAT compliance").

After reviewing our proposed Notification of Inactivity documents, the CHP personnel expressed no reservations about utilizing the practice. We left them with copies of such documents, as well as emailed electronic versions later, should they need to review them further. On February 8, 2008 AADT staff and counsel met again with Gregg Bragg and requested confirmation that the AADT approach was acceptable. We agreed to forward the relevant documents (including this memo) and to set a follow-up meeting to discuss the issue further as needed.

c. Our concerns with 'Notification of Inactivity' practice

Our chief concern, which was illustrated by a recent situation, is that the Notification of Inactivity practice encompasses a certain degree of potential liability exposure to AADT based on the theory that the ambiguous and non-specific "Notification of Inactivity" creates a false impression of drug or

alcohol violation. The argument is that notwithstanding the Notice's explanation that it can mean a variety of things including simple non-payment of fees, a broker receiving such a Notification will inevitably react as if the notice is one of drug or alcohol violation. A potential plaintiff/employee can be expected to argue that such a Notification will effectively put them out of work even if they have done nothing wrong. We believe we have minimized this liability risk by including caveat language in both the Confirmation and Consent documents listing a variety of reasons why an employee may become inactive. AADT cannot control a broker's failure to consult with the owner-operator and determine the exact reason for the Notification and resolve the issue. In addition, by continuing to emphasize the varied possible reasons in all future communications and documents, the risk of claims is reduced. However, please note that we may well see similar disputes in the future.

Another area that the Notification of Inactivity practice does not necessarily resolve (but does not exacerbate beyond the current CSAT Agreement practice) is the legal requirements of brokers under CA law. California drug and alcohol testing law requires, at a minimum, four specific types of testing by employers, which as described above, includes brokers contracting the services of owner-operators. The four types are: 1) pre-employment testing (including investigating employment history); 2) post-accident testing; 3) random testing; and 4) reasonable suspicion testing.

While the Notification of Activity/Inactivity practice would aid an employer in meeting pre-employment and random testing requirements, potentially under State law an employer could still be responsible for investigating employment history, requiring a driver to get tested post-accident, reporting to a consortium any knowledge or information of "reasonable suspicion" and demanding a new test before placing or continuing to use the driver. However, these requirements upon a broker are no more stringent than they are now under the current CSAT Agreements. All brokers should seek independent legal counsel to ensure compliance.

V. CONCLUSION

Based on our careful research and discussion, we believe the "Notification of Owner-Operator Inactivity" practice is the most reasonable course of action for AADT and complies with State and federal law. However, given the complex and contradictory nature of complying with drug and alcohol testing laws in California, we cannot offer complete assurances that some liability for AADT will not arise. Let us know how we can be of help during the implementation process.