

INFORMATION BULLETIN



November 19, 2007

CONTROLLED SUBSTANCES AND ALCOHOL TESTING (CSAT) DETERMINATION OF "EMPLOYER"

The purpose of this Information Bulletin is to clarify the Department's perspective on who is an "employer" when conducting carrier inspections. It has come to the attention of Commercial Vehicle Section (CVS) that confusion continues to exist when making this determination, especially within the context of owner-operators operating as independent sub-contractor motor carriers for another motor carrier.

Section 34520 of the California Vehicle Code (VC) adopts, by reference, Title 49 of the Code of Federal Regulations (49 CFR) Part 382, and by reference in Part 382, Part 40 as well. These are the CSAT regulations which pertain to employers of commercial motor vehicle (CMV) drivers. The regulations generally hold employers responsible for compliance with the requirements of the regulations. As such, it is important for the Department to accurately identify who is the "employer."

Highway Patrol Manual (HPM) 84.1, Motor Carrier Safety, Chapter 14, Controlled Substances and Alcohol Testing, indicates how the Department is to interpret certain terms.

"The Department will apply the federal regulations in substantially the same manner as the FMCSA or the FTA applies them. This means that for purposes of inspecting motor carriers for compliance with the federal CSAT regulations, the Department will use the federal definitions of words contained in those regulations, utilize published federal interpretations, and will inspect motor carrier records at their PPBs located in California, rather than at each California terminal."

A definition of the term "employer" is found in 49 CFR Section 382.107:

"Employer means a person or entity employing one or more employees (including an individual who is self-employed) that is subject to DOT agency regulations requiring compliance with this part. The term, as used in this part, means the entity responsible for overall implementation of DOT drug and alcohol program requirements, including individuals employed by the entity who take personnel actions resulting from violations of this part and any applicable DOT agency regulations. Service agents are not employers for the purposes of this part."

Further clarification is provided in the preamble to the final rule, published in the Federal Register, on August 17, 2001, when the last major revision to 49 CFR, Part 382 was published. An excerpt of this is printed below:

"...A carrier that uses owner-operators is not responsible for ensuring the owner-operator's compliance with Part 382 unless it can be shown that the primary carrier has control of the owner-operator's operation of his or her CMV."

A motor carrier is not automatically responsible for an owner-operator's compliance with Part 382 simply because the parties have entered into an agreement or subcontract to provide transportation services. However, inasmuch as our owner-operator leasing regulations, at 49 CFR Sec. 376.12(c), require authorized carrier lessees to have exclusive

possession, control and use of the equipment during the term of the lease, we consider an owner-operator operating a CMV under such a lease to be under the lessee carrier's control and direction for purposes of Part 382 compliance. In the absence of a lease subject to Part 376, there are other activities which may indicate whether a motor carrier controls or directs self-employed individuals including, but not limited to (1) establishing work schedules, (2) providing the origin, destination and/or routes for trips, (3) establishing worksite procedures, or (4) determining what drivers shall do as work progresses or assignments change. However, we decline to establish a bright line rule defining what constitutes sufficient control and direction in every case, as that determination depends on consideration of the totality of circumstances, which may vary among carriers."

The Department continues to hold this to be a key text when making an "employer" determination. The employer is considered to be the party exercising control and direction of the CMV.

In California, the person directing the operation of a CMV is the motor carrier. That motor carrier is responsible for compliance with the Motor Carrier Safety regulations found in Title 13 of the California Code of Regulations (13 CCR). Motor carriers are responsible for insurance, CMV condition and maintenance, driver qualification and hours-of-service compliance, and normally, CSAT compliance. HPM 84.1 uses the term "motor carrier" and "employer" interchangeably in Chapter 14.

In the absence of any substantiation that another person is directing the operation of the CMV, the motor carrier indicated by name and carrier identification number on the vehicle is the "employer" for the purpose of carrier inspections conducted by the Department. When there is substantiation another person is directing the operation of the CMV to the degree that would cause that other person to be considered the "employer" for CSAT purposes, specific documentation of that substantiation should be noted on the CHP 343D, Carrier inspection report, helping to avoid any confusion.

Within the motor carrier industry it is common practice for motor carriers who subcontract with owner-operators to ensure they are in a CSAT program of their own. Many carriers use a document commonly called a "CSAT Agreement" to assure that participation. Accounts have been received from the industry that motor carriers are being rated unsatisfactory during their carrier inspections for nothing other than failure to provide a "CSAT Agreement" document.

As indicated in the in-service training provided to all Motor Carrier Specialist I (MCS) personnel in 2006, the presence or absence of a "CSAT Agreement" document is never a reason for the motor carrier to be rated unsatisfactory. Although the presence of such a document can assist the MCS I in determining CSAT compliance, use of this document is never mandatory. As always, the totality of the circumstances is to be evaluated to determine CSAT compliance. Questions regarding this Information Bulletin may be directed to Commercial Vehicle Section, at (916) 445-1865.

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