

DEPARTMENT OF CALIFORNIA HIGHWAY PATROL

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March 19, 2008

File No.: 62.A09822.8-1-0148

Kirk Blackburn
Ellison Wilson Advocacy, LLC
1725 Capitol Avenue
Sacramento, CA 95814

Dear Mr. Blackburn:

This is in response to your electronic mail dated February 11, 2008, sent to Mr. Don Callaway, of my staff, addressing the California Highway Patrol's (CHP's) enforcement of motor carrier safety requirements. Specifically, your correspondence includes an attached analysis addressed to American Alliance Drug Testing (AADT) regarding state and federal regulations regarding controlled substances and alcohol testing (CSAT), and some documents proposed in the analysis to mitigate liability exposure for AADT. Your correspondence also references prior meetings on August 21, 2007, with Commercial Vehicle Section (CVS), and February 8, 2008, with Enforcement Services Division. The electronic mail includes a new invitation to meet and discuss matters.

With various electronic mails back and forth, and seeing a need to make clear the CHP's perspective on this matter, it seemed appropriate to respond in this formal manner. It seems much of your concern comes from a fundamental misunderstanding of the effect of Senate Bill (SB) 871 on enforcement of CSAT regulations. Indeed, while it is asserted that the California's CSAT regulations are "contradictory" with federal regulations, there *are no* California regulation regarding CSAT. California adopted the federal regulations by reference in statute (Section 34520 of the California Vehicle Code [VC]). As you are aware, it is the CHP's policy to enforce the federal regulations using the same terms and interpretations as the Federal Motor Carrier Safety Administration (FMCSA), the CSAT enforcement agency for the federal government.

Senate Bill 871 amended the language of Section 15242 VC, indicating motor carriers are responsible for driver license status and motor carrier safety compliance of owner-operators under their direction and control. However, SB 871 had *no effect* on the relationship between an owner-operator and a contracting motor carrier or broker for the purpose of CSAT. The applicability of Section 15242 VC is limited to "this chapter" (i.e. Division 6, Chapter 7, VC [commercial driver licensing]) and "for purposes of the regulations adopted by the department pursuant to Section 34501" (i.e. Title 13, California Code of Regulations, Division 2, Chapter 6.5, [motor carrier safety regulations]). Nowhere in these two passages are there regulations for CSAT.

On August 21, 2007, CVS met with representatives of AADT, California Dump Truck Owner's Association (CDTOA), and Ellison Wilson Advocacy, LLC, to discuss several concerns, including the CHP's enforcement of CSAT requirements. Following that meeting, CVS issued an Information Bulletin (see enclosed) clarifying that Unsatisfactory ratings should never be based solely on the absence of a "CSAT Agreement" document. For CSAT purposes, a driver is judged to be an employee of a motor carrier only ". . .when there is substantiation another person (a motor carrier) is directing the operation of the CMV to the degree that would cause that other person (motor carrier) to be considered the 'employer' . . ." Motor Carrier Safety personnel were also reminded to document the basis for the determination of who was the employer on the CHP 343D, Carrier Inspection Report, to avoid misunderstanding.

The CHP uses the definition of the term "employer" found in Title 49, Code of Federal Regulations, (49 CFR) Part 382. Further clarification of the relationship between motor carriers and independent owner-operators is also found 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. Excerpts from this preamble were included in the Information Bulletin. Although the term "controls or directs" is used in the preamble language, this is not associated with the term "direction and control" as used in Section 15242 VC.

CSAT Agreements have their root in a guidance and interpretation question from 49 CFR Section 382.305, question number five. This interpretation indicates, for the purpose of meeting the random testing requirements of 49 CFR Section 382.305, an employer *may* use the testing program of another, provided certain conditions are met. If the conditions are not met, the only acceptable method of compliance with 49 CFR Section 382.305 is to have the driver in the employer's random testing pool. One of the conditions identified is that the CSAT program agrees to treat the new employer as an additional employer for the purpose of reporting drug test results. It should be noted at this point that when the testing program agrees to consider the new employer an additional employer, the new employer is no longer a third party. The decision to utilize this interpretation or follow the rule is up to the discretion of the employer, subject to the concurrence of the testing program. Should a testing program (such as AADT) refuse to enter into such an agreement, it may do so, and the employer must have the drivers enrolled in the employer's own random selection pool to comply with 49 CFR Section 382.305.

While the existence of a written CSAT Agreement might be an indication a motor carrier is using the interpretation to comply with 49 CFR Section 382.305, the document itself is not proof of compliance. No such document is required or prohibited from being used. Motor Carrier Safety personnel are trained to contact those managing the testing program to determine if compliance with 49 CFR Section 382.305 is being accomplished through use of the interpretation in question five, or by following the rule itself. Once again, this is only germane when it has already been determined the driver is being controlled by the employer to the degree the employer meets the federal definition of employer.

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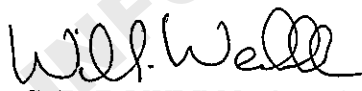
Following the August 21, 2007, meeting you requested Mr. Callaway review two of your proposed documents, the AADT Consent to Release Activity Status, and Confirmation of Receipt of Controlled Substances and Alcohol Testing (CSAT) Agreement and Statement of Consortium's Limitations. You requested Mr. Callaway indicate to you whether use of these documents would be in compliance with the regulations. Mr. Callaway indicated he would review them and pass them along to the Federal Motor Carrier Safety Administration (FMCSA), for their analysis as well.

On September 11, 2007, Mr. Callaway received confirmation from the FMCSA, and shortly thereafter passed along to you, confirmation that use of these forms is not prohibited by the regulations. Since the documents reference an interpretation of the federal regulation, and are not required by the regulation, use of these forms can not be required. In your recent electronic mail it was indicated the forms were slightly revised, and another form, Notification of Owner-Operator Inactivity, was attached. Mr. Callaway has reviewed these forms and agrees they have not been substantially changed, and indicates use of the new form likewise would not violate the CSAT regulations. Copies of the forms reviewed at this time are enclosed.

The CHP believes a motor carrier who is not an employer under the federal definition for CSAT is not responsible to provide notification of the status of an independent owner-operator's CSAT program. Conversely, a motor carrier or broker who is an employer under the federal definition for CSAT must comply with 49 CFR Section 382.305, for all their drivers. In summary, use of the referenced forms is not prohibited by the regulations, neither are they a valid substitute for compliance with 49 CFR Section 382.305 when such compliance is required.

As this response may have initiated some additional questions, Commercial Vehicle Section would welcome an opportunity to meet and discuss areas of concern. Please feel free to contact myself, or Mr. Callaway at (916) 445-1865.

Sincerely,

 LT.
S. B. DOWLING, Captain *for*
Commander
Commercial Vehicle Section

Enclosures