



Owner-Operator Independent Drivers Association

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November 9, 2020

Elinore F. McCance-Katz, M.D., Ph.D.
Assistant Secretary for Mental Health and Substance Use
Substance Abuse and Mental Health Services Administration
U.S. Department of Health and Human Services
5600 Fishers Lane
Rockville, MD 20857

Re: Docket # SAMHSA-2020-0001, "Mandatory Guidelines for Federal Workplace Drug Testing Programs"

Dear Dr. McCance-Katz:

The Owner-Operator Independent Drivers Association (OOIDA) is the largest trade association representing the views of small-business truckers and professional truck drivers. OOIDA has over 150,000 members located in all fifty states that collectively own and operate more than 240,000 individual heavy-duty trucks. OOIDA's mission is to promote and protect the interests of its members on any issues that might impact their economic well-being, working conditions, and the safe operation of commercial motor vehicles (CMVs) on our nation's highways.

Today's professional truckers contend with overwhelming volumes of regulations. Their schedules are set by the Department of Transportation (DOT), their equipment is controlled by the Environmental Protection Agency, their pay is dictated by the Department of Labor, and they adhere to strict drug testing measures established by the Department of Health and Human Services (HHS). The vast majority of these rules, often prescribed by politicians and Washington bureaucrats who have never spent a moment behind the wheel of a truck, have no expectation of actually improving highway safety. However, these types of regulations do come at a disproportionate cost to small-business truckers and independent owner-operators. Any efforts to mandate hair testing for the nation's CMV drivers would be another misguided regulatory approach that will not reverse the trend of rising crashes and fatalities involving heavy trucks.

As discussed throughout the proposed guidelines, there remain significant debates and unanswered questions concerning the use of hair testing. Some of the problems in using hair testing for controlled substances are contamination from the environment and the interference of cosmetic treatment on the analysis of hair. Variances in hair types have also posed difficulties in standardizing drug testing. Hair shape, size, color, texture, formation, etc., varies by race, sex, age, and position on the scalp. Differing portions of the scalp hair can even be dormant at any

given time and do not reflect drug use. There is no shortage of research illustrating these concerns.

Hair tests can lead to false positive results because certain drugs can be absorbed into hair.¹ Additionally, there is currently no way to fully cleanse hair of the drugs required for Department of Transportation testing. Some drugs, such as cocaine, have been shown to affix to African-American hair at greater rates than they do to fine, light-colored hair.² Damage to hair caused by treatments and certain cosmetic products can further facilitate drug absorption. As the HHS guidelines reference, these limitations of hair testing have led to discriminatory employment practices.

The HHS guidelines specifically mention the merits of two legal cases, Jones v. City of Boston, 845 F.3d 28 (1st Cir.2016) and Thompson v. Civil Service Com'n, 90 Mass.App.Ct. 462 (Oct. 7, 2016). Both cases indicate that an employment action taken on the basis of a positive hair test alone, without other corroborating evidence, may be vulnerable to legal challenge. Unfortunately, we fear that similar discriminatory policies are already in place among some trucking employers that use hair testing. Mandating hair testing policies for professional truckers would only expand the opportunities for employment discrimination for drivers that refuse to submit hair samples, whether it be for faith-based or other medical reasons.

Many OOIDA members have also expressed personal privacy objections regarding the possibility of required hair tests. In recent years, the privacy rights of truckers have been obstructed by electronic logging devices that track their whereabouts, the growth of automated license plate readers that unfairly target drivers for enforcement, and a lack of cybersecurity protection from DOT's National Registry of Certified Medical Examiners. A government mandate for hair testing will be viewed as another intrusion upon a driver's privacy which will inevitably cause at least some of the industry's safest drivers to leave the profession.

To be clear, OOIDA does not, has never – and will never – condone the use of illegal substances for any trucker while operating a CMV, or any vehicle for that matter. In 2018, there were 33,654 fatal motor vehicle crashes in the United States. The driver of a large truck, which is defined as a truck with a gross vehicle weight rating greater than 10,000 pounds, which includes drivers not subject to Federal Motor Carrier Safety Administration (FMCSA) regulations, was recorded for at least one positive drug test result in 305 of those crashes, or 0.90%, according to data reported by FMCSA.³ While any fatality is too many, it is unlikely that requiring hair testing will reduce that percentage.

In January 2020, FMCSA launched the Drug and Alcohol Clearinghouse (Clearinghouse). The Clearinghouse is a centralized online database that gives motor carriers, the FMCSA, State Driver Licensing Agencies (SDLAs), and law enforcement personnel real-time information about CMV drivers' drug and alcohol violations. The Clearinghouse enables employers to

¹ <https://www.ncjrs.gov/pdffiles1/nij/grants/225531.pdf>.

² Joseph, R. E., Jr, Su, T. P., & Cone, E. J. (1996). In vitro binding studies of drugs to hair: influence of melanin and lipids on cocaine binding to Caucasoid and Africoid hair. *Journal of analytical toxicology*, 20(6), 338–344. <https://doi.org/10.1093/jat/20.6.338>.

³ *Large Truck and Bus Crash Facts 2018*, FMCSA (2020), pg. 101.

identify drivers who commit a drug or alcohol violation while working for one employer, but who fail to subsequently inform another employer.

We believe it is imperative that the Clearinghouse employ proven testing protocols, equipment, and methodology that is scientifically controlled so that all testing follows specific procedures using labs that have been approved by SAMSHA. Moving forward, the Clearinghouse should not accept the results of any hair follicle testing considering the inconsistencies and inaccuracies involved. Even under current Clearinghouse regulations, drivers are not always assured of due process. Not surprisingly, drivers have shared legitimate concerns about their employment status following false positives and other contentious results.

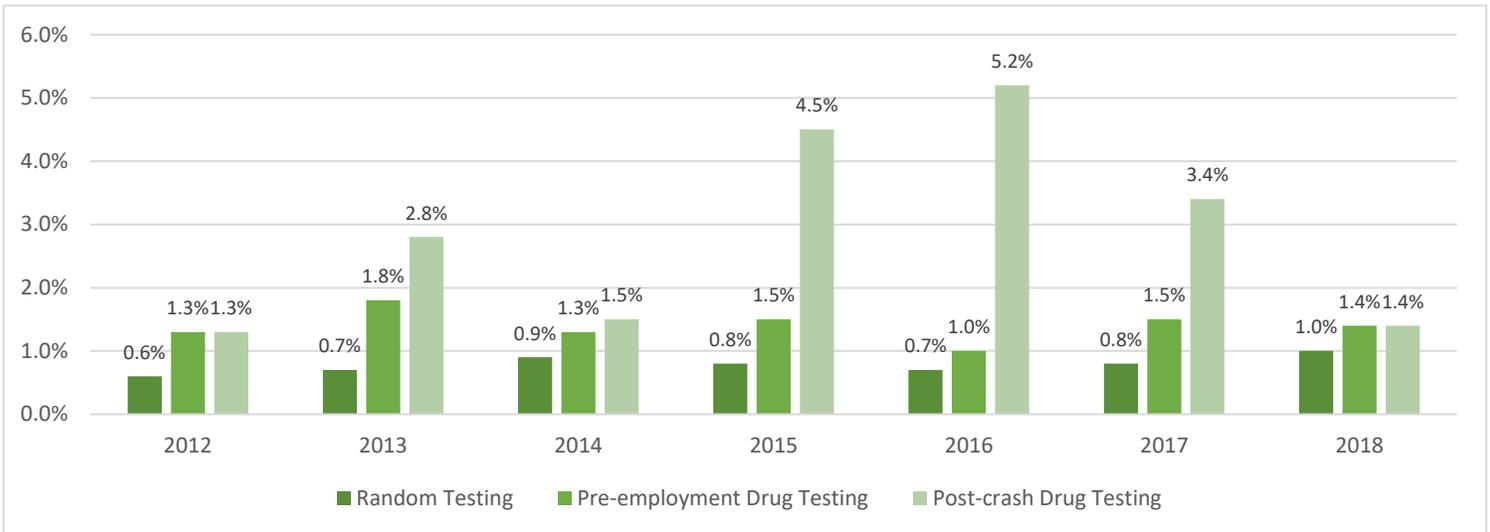
While we acknowledge the intent of the Clearinghouse, questions remain about its administration. For instance, in some ways the Clearinghouse is not setup to incentivize or reward carriers or drivers who have years of proven compliance with drug and alcohol requirements. This can lead to situations where drivers with virtually no trucking experience can get behind the wheel of a truck, as long as they don't test positive for drugs and/or alcohol one time. Conversely, a driver with 30 years of safe driving experience who records a false positive might never be able to get behind the wheel of a truck ever again. This is wrong on so many levels.

The ultimate measure of any change to the current methods for drug testing should be a reduction in crashes. We encourage SAMHSA to evaluate the safety performance of trucking companies which have voluntarily adopted hair testing procedures and have supported a hair testing mandate for the entire industry. In 2016, a group of predominately large trucking companies petitioned FMCSA to allow hair testing in lieu of urine testing for pre-employment controlled substances testing of commercial driver's license (CDL) holders. Although the petition applicants claim that hair testing is a safety issue, their petition failed to demonstrate that they have experienced a reduction in crash rates or an improved safety performance since their voluntary adoption of hair testing. Instead, these large carriers focused on the inconveniences of not being able to share hair testing results with other carriers.

Just because a small percentage of trucking companies opt to screen their drivers using hair testing does not mean the process should be mandated for the entire industry. Companies that must resort to extreme measures to compensate for excessive turnover rates may find hair testing appropriate; however, that does not mean their methods, which are not standardized, should be mandated.

The higher costs of hair testing are also another reason to forgo any potential mandate. SAMHSA acknowledges that "costs associated with hair testing are greater than for urine or oral fluid testing based on information from commercial laboratories currently testing hair specimens." Based on our findings, individual hair tests cost about \$90 for drivers which is twice the amount for standard urinalysis and other tests. While expenses are understandable when improving safety, there is not sufficient safety evidence to justify a mandate in this case. Additionally, relying on hair testing alone is unlikely to identify different positive rates or detect more habitual drug users than current protocols. The relatively low positive rates exhibited by truckers shows that there is no need to double their costs:

Random and Non-Random Drug Testing⁴



Given the many uncertainties and lack of safety improvements that we have discussed, there is no sound reasoning for federal agencies to double drug testing costs for drivers by imposing a hair testing mandate.

OOIDA represents the hardworking men and women delivering goods and supplies to stores and homes all over the nation. OOIDA members spend their days behind the wheel and no one better understands the critical role that drug and alcohol testing fulfills in keeping America's highways safe. We agree with HHS' assertion that "there is no requirement for federal agencies to use hair as part of their drug testing program." We encourage HHS and other Departments, including DOT, to refrain from adopting any sort of hair testing mandate in further regulatory processes concerning these guidelines and other hair testing protocols.

Thank you for your consideration of our comments.

Sincerely,

Todd Spencer
President & CEO
Owner-Operator Independent Drivers Association, Inc.

⁴ <https://rosap.ntl.bts.gov/view/dot/43603>