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FAA Revisits Repair Station Drug-Test Rule

On March 8, 2011, the FAA released a supplemental regulatory flexibility analysis for the 2006 drug-and-alcohol-testing rule. This was the next chapter in the FAA's 10-year effort to expand the scope of the drug-testing rules. This is an epic saga that continues to affect AEA members.

THE SAGA BEGINS

The saga began with a 2002 notice that proposed to amend the definition of "employee" in order to expand the scope of the drug-testing rules. The proposed expansion would have changed the word "employee" in the context of air carrier safety-sensitive employees who must get drug-and-alcohol tested, and it proposed to "clarify" the proposition that drug-testing rules would apply to maintenance subcontractors at any tier, not just those who are direct contractors. The proposed rule admitted that the drug-testing rules should apply to some Part 145 organizations, but it also failed to provide any initial analysis of the costs of applying the rules to repair stations on the grounds that the FAA did not have sufficient data to estimate the costs.

> **"The drug-testing rules directly impact many AEA members. ...The RFA that is being performed now will continue to serve as the foundation for analyzing future changes to the drug-testing rules.**

In 2004, the FAA published some changes to the drug-testing rules in which it reported that commenters had explained that the "clarification" that drug-testing rules would apply to maintenance subcontractors at any tier was more than a clarification — it was a change to the scope of the rule. The FAA explained in 2004 that it did not have any data on the effect of drug testing on maintenance contractors, so they would be gathering data in order to assess the economic impact of this expansion of scope. It is important to note, despite the FAA's claims of no data, in the original 1988 promulgation of the drug-testing rules, the FAA announced that it had obtained data estimating the cost of drug testing to a repair station to be $24,000 per year.

THE 2006 RULE

It took four years for the FAA to develop a final rule addressing sub-tier contractors in response to the 2002 NPRM. In 2006, the FAA published a "clarification" that the drug-testing requirements that apply to air carriers also apply to the employees of repair stations that perform contract maintenance work for air carriers. The 2006 publication "clarified"

that the drug-testing rules apply to maintenance subcontractors at any tier, not just direct contractors.

This impacted many AEA members because the definition of the term "air carrier" includes more than just commercial airlines – it also includes Part 135 operators. And, Part 135 operators also are subject to the same drug-and-alcohol-testing rules. The new interpretation also applied to sub-tier repair stations, which means that component shops need to be aware of where a part has come from and where it may be going in order to gauge whether they are subject to the drug-testing rules as indirect contractors to an "air carrier."

The 2006 rule disingenuously found that although repair stations that adopt drug-testing programs are directly subject to the drug-and-alcohol-testing rules, they were not sufficiently affected to warrant review under the Regulatory Flexibility Act. This was interesting, because the earliest promulgations of this rule in the 1980s found that the rule would have "a significant economic impact on a substantial number of small entities."

AN IN-COURT CHALLENGE ON RFA GROUNDS

After the new interpretation of the rule came out, the Aeronautical Repair Station Association filed a lawsuit challenging the fact that although the rule applied a burden to repair stations, it failed to provide a cost-benefit analysis, or regulatory flexibility analysis.

Under the Regulatory Flexibility Act of 1980, government agencies are required to conduct studies to determine whether a new regulation would have a significant impact on a substantial number of small

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entities. In the drug-testing rule, the FAA claimed an RFA was not necessary because "industry feedback" justified its conclusion that the rule would not significantly impact small businesses. At the time, it believed the rule would only impact 297 subcontractors, and that most repair stations were not directly regulated by the rule.

The Aeronautical Repair Station Association sued in D.C. federal court to challenge the rule, arguing it would actually impact between 12,000 and 22,000 entities, including both repair stations and organizations that use A&P mechanics to perform maintenance - like line maintenance stations – but that do not hold a repair station certificate. In 2007, the court upheld the rule, but ordered the FAA to conduct the required regulatory flexibility analysis.

Instead of completing the required regulatory flexibility analysis, though, the FAA merely reissued the drug-testing rules in a separate Part (Part 120) in May 2009. The FAA explained that this new Part 120 merely reorganized the existing drug-and-alcohol-testing regulations and was not a substantive change, which is why the reorganization happened without any prior notice, nor any opportunity to comment. Also, because it was a mere reorganization, there was no substantive effect that could cause a cost or a benefit, so the FAA announced that no regulatory flexibility analysis was necessary. There was no mention in the rule of the 2007 court order that found the FAA's prior promulgation had failed to meet the legal requirements imposed by the Regulatory Flexibility Act.

The 2009 reorganization also established language that more clearly imposed regulatory duties on repair stations performing contract maintenance work at any subtier for Part 135 and Part 121 air carriers.

ANOTHER LAWSUIT

Until March 8, 2011, the administration had ignored the 2007 order and has failed to publish a formal RFA that met the demands of the court.

This inaction prompted ARSA to petition for a writ of mandamus earlier this year. A writ of mandamus, when issued by a court, forces the government to perform an action that it is legally bound to perform. In this case, the petition sought to require the FAA to perform the analysis that was required and ignored as part of the 2007 court order.

On March 1, 2011, the U.S. Court of Appeals for the D.C. Circuit recognized the FAA's failure to comply with the previous order. It ordered the administration to "show cause" as to why the drug-testing rule should not be suspended until the FAA follows proper rulemaking procedures. The FAA responded by explaining that it was a simple mistake. In a recent speech addressing the subject, FAA Associate Administrator Peggy Gilligan summarized the FAA's position. "We goofed," she said. "That's right, we goofed. We didn't respond to the court's order, but now we have."

Gilligan's admission of error was a rare one in a government that perennially avoids responsibility for its acts, and it says a lot more about her integrity than about anything else.

The recent court order made clear that the court will not allow the FAA to ignore its rulemaking obligations. Importantly, it also acknowledged that, even though the FAA had moved the rule to a different section of the FAA regulations since the 2007 ruling, the RFA requirement applies equally to the new location of the rule and was not rendered moot on a technicality.

SUPPLEMENTAL RFA

Finally, in advance of the March 10, 2011, show-cause date, the FAA surrendered and began the process of establishing a genuine RFA for the extension of the drug-testing rules to the repair station community. On March 7, 2011, it published a supplemental notice concerning the RFA.

The preamble to the new RFA relies in large part on data supplied by ARSA in its initial challenge to the rule. Specifically, it discusses the result of an ARSA survey describing the size and revenue of repair stations and relevant to their classification as small businesses in accordance with Small Business Administration standards. Accepting that a majority of companies affected are small businesses, the analysis goes on to assess the economic impacts of the rule, which it claims are "minimal."

To assess the economic impact, the FAA estimated the average cost of testing, training, documentation and programming development to arrive at a figure of $12,981 to cover both alcohol-and-drug training. Because a plurality (32.1 percent) of companies cited

revenues of $750,000 or less, it then compared the estimated cost to $750,000 in revenues, resulting in a maximum cost of less than 2 percent of total revenues. A regulation costing 2 percent of revenue can reflect a substantial burden for a small business with a narrow profit margin.

The FAA used its analysis to make a preliminary certification that the rule would not significantly impact a large number of small businesses.

The administration is currently accepting comments from the industry concerning the draft RFA. Comments are due May 9, 2011. Although it seems unlikely that the FAA would make any changes to the rule, this could be the industry's last chance to get honest numbers in the system and to have an honest economic review of the impact of drug testing. Therefore, it is a good idea for AEA members to consider all of the costs of drug testing and file comments with the FAA.

POSSIBLE FUTURE CHALLENGES

The Show-Cause Order from the Court of Appeals had anticipated requiring the FAA to complete an RFA within 90 days. Although the administration has seemingly complied with the underlying intent of the court order by issuing a supplemental regulatory flexibility analysis, questions remain as to whether the supplemental analysis is sufficient. It is possible that further court orders might require more specific compliance.

There is some history of court challenges to RFAs where the agency has failed to provide a reasonable assessment in the RFA. In one case involving the regulations of fishing, a federal court explained that although agencies are empowered to regulate, they are not empowered to regulate in any manner they choose without regard to the cost. This is because the Administrative Procedures Act restricts agencies from engaging in arbitrary or capricious action.

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Possible challenges to the substance of the analysis might focus on the accuracy of the statistical data, as well as the accuracy of the FAA claim that an effect on 2 percent of a small business' revenue is deemed "minimal," the FAA's failure to consider less burdensome alternatives, and its failure to mention any benefits brought about by these changes.

RFAs have been struck down as inadequate by courts in the past, so a final rule emerging after the comment period could be rendered invalid if it fails to produce more reliable support.

If the rule is ultimately struck down, repair stations might no longer be covered under the federal pre-emption associated with current drug-testing laws. This would mean that repair stations would be governed by various state laws previously inapplicable due to federal preemption. State drug-and-alcohol-testing standards vary greatly due to different standards of protection for individual privacy. Repair stations also would need to withdraw from Department of Transportation testing pools, since participation in such programs by non-federally regulated entities can amount to a regulatory violation.

However, it is unlikely that the Court of Appeals would revoke the drug-and-alcohol-testing standards that apply to repair stations. The court has taken great pains to permit the FAA to retain its program, and the FAA has initiated a valid RFA.

The drug-testing rules directly impact many AEA members. The RFA could have an effect on the current rule, although such an effect is unlikely. But, more importantly, the RFA that is being performed now will continue to serve as the foundation for analyzing future changes to the drug-testing rules. It is, therefore, very important for repair stations subject to the rules to communicate their actual direct and indirect expenses associated with drug-testing programs. ❑