



U.S. Department  
of Transportation  
**Federal Aviation  
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.  
Washington, D.C. 20591

**JAN 20 2016**

Nolan Q. Reidhead, Esq.  
The Law Office of Nolan Q. Reidhead, PC  
7530 North La Cholla Blvd.  
Tucson, AZ 85741

Re: Clarification of 14 C.F.R. § 120.109(d) as it relates to contractors who have their own drug testing programs

Dear Mr. Reidhead:

This is in response to your letter dated August 27, 2015, in which you requested a legal interpretation of 14 C.F.R. § 120.109(d). You specifically sought clarification on § 120.109(d) as it relates to Job Aire Group, Inc. (Job Aire) contracting employees to perform aircraft maintenance or preventive maintenance for part 121 and part 145 certificate holders.

In your letter, you explained that Job Aire provides safety-sensitive employees by contract to various companies in ten locations. You further explained that Job Aire has one "on-site coordinator" at each location for coordinating payroll, processing new hires, orienting new hires, and training new hires on drug abatement. You stated that Job Aire has trained its coordinators in the detection of suspected drug use; however, Job Aire's coordinators are not aircraft maintenance technicians, are not working in the aircraft maintenance management group, and are not authorized to be present in the safety-sensitive areas at the work site.

Section 120.109(d) states:

Each employer must test each employee who performs a safety-sensitive function and who is reasonably suspected of having used a prohibited drug. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific contemporaneous physical, behavioral, or performance indicators of probable drug use. At least two of the employee's supervisors, one of whom is trained in detection of the symptoms of possible drug use, must substantiate and concur in the decision to test an employee who is reasonably suspected of drug use; except that in the case of an employer, other than a part 121 certificate holder, who employs 50 or fewer employees who perform safety-sensitive functions, one supervisor who is trained in detection of symptoms of possible drug use must substantiate the decision to test an employee who is reasonably suspected of drug use.

You asked two questions regarding the applicability of § 120.109(d) to Job Aire. Our responses to your questions are set out below.

### **1. The term “supervisor” in § 120.109(d)**

First, you asked if any of Job Aire’s employees, including its on-site coordinators, are considered “supervisors” as referenced in § 120.109(d) and if they are responsible for determining whether an employee is “reasonably suspected of drug use” and for “concur[ing] in the decision to test an employee.”

Part 120, subpart E contains the drug testing program requirements. If a contractor implements its own drug testing program, § 120.117(c) requires that contractor to meet the requirements of part 120, subpart E as if the contractor were an employer. Job Aire is a contractor that has its own drug testing program registration.<sup>1</sup> Therefore, Job Aire must meet the drug testing program requirements of part 120, subpart E as if it were an employer. Accordingly, Job Aire is considered the “employer” under § 120.109(d) and must test each employee who performs a safety-sensitive function and who is reasonably suspected of having used a prohibited drug. Additionally, as the employer, Job Aire must implement an employee training program, which includes specific training for Job Aire’s supervisory personnel who will determine when an employee is subject to testing based on reasonable cause. 14 CFR § 120.115(c). The decision to test one of Job Aire’s employees under § 120.109(d) must be made by Job Aire because Job Aire’s employees are covered under Job Aire’s drug testing program. The term “supervisor” in § 120.109(d) refers to the supervisory personnel of Job Aire and may include Job Aire’s on-site coordinators. At least two of these “supervisors,” one of whom is trained in detection of the symptoms of possible drug use, must substantiate and concur in the decision to test an employee who is reasonably suspected of drug use if Job Aire employs more than 50 safety-sensitive employees. 14 CFR § 120.109(d).

We recognize that a contractor may have employees who perform safety-sensitive functions under the direct supervision of a client employer, such as a part 121, 135 or 145 certificate holder. However, it is the contractor’s responsibility to make a determination and conduct the testing when the employee is covered under the contractor’s drug testing program. The term “supervisor” in § 120.109(d) does not refer to the supervisory personnel of the part 121, 135 or 145 certificate holder, unless the contract employee is included in the certificate holder’s own testing program.

While the certificate holder’s supervisory personnel may not make the reasonable cause determination to test a contractor’s employee who is covered under the contractor’s drug testing program, the regulations do not prohibit the certificate holder’s supervisory personnel from consulting with the contractor’s supervisory personnel when suspicion of illegal drug use occurs. In this case, the certificate holder’s supervisory personnel may communicate his or her concerns and observations to Job Aire’s supervisory personnel. It is then Job Aire’s responsibility to comply with § 120.109(d).

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<sup>1</sup> Job Aire has an active FAA-mandated drug and alcohol testing program under registration number CONN546A.



**2. The contractor's responsibility if an employee is suspected of drug use and if a decision has been made to test the employee**

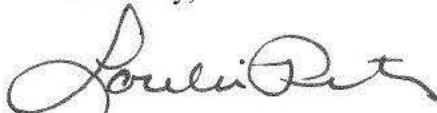
Your second question asked what Job Aire's responsibility is if an employee is in fact suspected of drug use and a decision has been made to test the employee. With your second question, you inquired about several scenarios which are not addressed by 14 CFR part 120. For example, you asked who is responsible for escorting the employee to the testing facility. You asked if Job Aire must tell the suspected drug user to drive himself or herself to the testing facility. You asked if Job Aire is responsible to obtain a police escort. You also asked what happens if the employee becomes belligerent or uncooperative.

Each employer must conduct the types of testing described in § 120.109 in accordance with the procedures set forth in part 120, subpart E and with the Department of Transportation (DOT) "Procedures for Transportation Workplace Drug Testing Programs" 49 CFR part 40. With respect to your specific questions, DOT guidance recommends that you develop testing policies that clearly state what activities are acceptable after notification of a drug test. For more information, see Office of Drug and Alcohol Policy and Compliance, U.S. Department of Transportation, What Employers Need to Know About DOT Drug and Alcohol Testing 17, 19 (2015), [https://www.transportation.gov/sites/dot.gov/files/docs/ODAPC\\_Employer\\_Guidelines\\_%20June\\_1\\_2015\\_A.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/ODAPC_Employer_Guidelines_%20June_1_2015_A.pdf).

If an employee becomes belligerent or uncooperative and does not appear for the test after Job Aire has directed the employee to do so, the FAA could find that he or she has refused to take a drug test. 49 CFR § 40.191(a)(1); 14 CFR § 120.7(o). An employee who refuses to take a drug test could be subject to the consequences specified under 14 CFR §§ 120.11, 120.13 or 120.15 for violating the FAA's regulations. 49 CFR § 40.191(c).

We appreciate your patience and trust that the above responds to your concerns. If you need further assistance, please contact my staff at (202) 267-3073. This response was prepared by Katie Patrick, Attorney, Regulations Division of the Office of the Chief Counsel, and coordinated with the Enforcement Division of the Office of the Chief Counsel and the Drug Abatement Division of the Office of Aerospace Medicine.

Sincerely,

A handwritten signature in black ink, appearing to read "Lorelei Peter", with a stylized flourish at the end.

Lorelei Peter  
Acting Assistant Chief Counsel  
for Regulations, AGC-200

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August 27, 2015

International Law, Regulation & Legislation Division, AGC-200  
800 Independence Avenue SW  
Washington, DC 20591

ATTN: Mr. Cole Millart, Chief Counsel  
RE: Job Aire Group, Inc. - 14CFR Part 120.109(d)

REC'D  
OFFICE OF THE  
CHIEF COUNSEL  
ENFORCEMENT DIV  
2015 SEP -9 AM 11:06

Dear Mr. Millart:

I represent Job Air Group, Inc. ("Job Aire") with respect to its business operations. There have been several emails between Ms. Vicky Dunne, Manager, Program Policy Branch, Drug Abatement Division, and William Tiley, CEO of Job Aire regarding 14CFR Part 120.109 (d) (the "CFR"). Specifically, Job Aire is concerned about the CFR and its application to Job Aire considering Job Aire's specific situation with the companies with which it does business. This letter is to ask for a legal interpretation as to the CFR's application to Job Aire considering the facts set forth below.

The CFR states in pertinent part as follows: "each employer must test each employee who performs a safety-sensitive function and who is reasonably suspected of having used a prohibited drug. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific contemporaneous physical, behavioral or performance indicators of probable drug use. At least two of the employee's supervisors, one of whom is trained in detection of the symptoms of possible drug use, must substantiate and concur in the decision to test an employee who is reasonably suspected of drug use; except that in the case of an employer, other than a part 121 certificate holder, who employees 50 or fewer employees who perform safety-sensitive functions, one supervisor who is trained in detection of symptoms of possible drug use must substantiate the decision to test an employee who is reasonably suspected of drug use."

Job Aire specializes in placing its employees with aircraft maintenance companies ("Companies") on a temporary basis to supplement their employment needs, particularly FAR Part 121 and Part 145 Companies. Job Aire currently has contractual relations with various Companies where it places its employees in ten locations where the employees work in safety sensitive assignments. Job Aire has one "On-Site-Coordinator" ("Coordinators") at each location for coordinating payroll, processing new hires, orienting new hires and training new hires on drug abatement.

Job Aire has two questions with regard to its duties and responsibilities under the CFR. Are any of Job Aire employees, including its Coordinators, considered "supervisors" as referenced in the CFR



COLE MILLART, CHIEF COUNSEL  
AUGUST 27, 2015  
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and responsible to determine whether an employee is "reasonably suspected of drug use" and "concur in the decision to test an employee"? Pursuant to contractual relations between the Companies and Job Aire, the Companies are solely responsible for all management and supervision of Job Aire employees and personnel while on site. Further, the Coordinators are not aircraft maintenance technicians, not working in the aircraft maintenance management group and not even authorized to be present in the safety-sensitive areas at the site. At many locations, the Coordinators are not even in close proximity to the site, due to the safety-sensitive areas.

The final question is what, if any, responsibility does Job Aire have if an employee is in fact suspected of drug use and a decision has been made to test the employee. Who is responsible to escort the employee to the testing facility? Is Job Aire to tell the suspected drug user to drive herself or himself to the testing facility, acting on his or her own volition to be tested? If so, who authorizes the employee to drive to the testing facility? Job Aire is instructing its supervisors to tell the employees to contact a friend or a taxi to transport them to the testing facility. However, what if the employee is not transported to the facility unbeknownst to Job Aire. Is Job Aire responsible to obtain a police escort? Does Job Aire have a responsibility to transport the employee to the testing facility? What if the employee becomes belligerent or uncooperative? As you can appreciate, there are many scenarios not addressed or explored by the CFR, and Job Aire does not want itself or its supervisors to be in a situation of liability or physical harm.

Job Aire desires to comply with its responsibilities under the CFR. Job Aire has trained its Coordinators in the detection of suspected drug use. However, due to the above-mentioned facts, it is Job Aire's belief that the Coordinators would not be able to properly function as a "supervisor", as referenced in the CFR. Further, the CFR does not address what are Job Aire's responsibilities if an employee is suspected of drug use and it is decided that the employee must be tested.

Please provide your legal interpretation to the above queries at your earliest convenience. Thank you for your assistance and do not hesitate to contact me with any questions, concerns or comments.

Sincerely,

THE LAW OFFICE OF NOLAN Q. REIDHEAD, PC

*Nolan Q. Reidhead*

Nolan Q. Reidhead, Esq.

NQR/nqr

cc: Job Aire Group, Inc.