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

Office of the Chief Counsel

Office of the Chief Counsel
800 Independence Ave., SW.
Washington, DC 20591

APR 19 2013

Ms. Nancy Mayo
Drug and Alcohol Program Manager
Kalitta Air
818 Willow Run Airport
Ypsilanti, MI 48198

Dear Ms. Mayo:

This is in response to your two letters requesting interpretations of FAA drug and alcohol testing rules under 14 C.F.R. part 120, specifically the definition of performing in § 120.7(k) and its relation to drug testing, and the proper procedures for notifying an employee of his or her selection for random drug testing.

The definition of performing found in § 120.7(k) is specific to alcohol testing. You will notice that under subpart E of part 120, which deals with drug testing, the word performing is not mentioned. That is because the use of prohibited drugs, as defined in 49 C.F.R. part 40, is never permitted. If an employee is responsible for a safety-sensitive function, that employee is subject to drug testing regardless of whether the employee is performing a safety-sensitive function at the moment that he or she is subject to drug testing.

Your second inquiry concerned the issue of notifying employees that they have been randomly selected for drug testing. While FAA regulations do not specify what methods may be used to notify an employee of his or her selection, an employer may not use a method that provides the employee with advance notice (e.g., ACARS, voicemail) (69 FR 1848). All random drug tests must be unannounced. *See* 14 C.F.R. § 120.109(b)(7). Employers must also ensure that an employee who is notified of his or her selection for random drug testing proceeds to the testing facility immediately. 14 C.F.R. § 120.109(b)(8).

In your letter, you cite as an example a scenario involving an employer who notifies its employees by phone that they have been selected for random drug testing. You ask whether, in circumstances where the employer has not spoken with the employee directly, the employer should remove the employee from the performance of safety-sensitive functions until a drug test is completed. You also ask how an employer should proceed if an employee is "inadvertently notified on a day off."

An employee's obligation to appear for a random drug test is triggered when that individual receives notice from the employer that he or she has been selected and is directed to proceed to the testing facility. In the scenario you described, the employer has not spoken to the employee directly and, thus, the employee has not received notice of his or her selection for testing. Accordingly, it would not be appropriate for the employer to remove the employee

from the performance of safety-sensitive functions because there has been no event requiring such action (e.g., a refusal based on the employee's failure to appear for the test after being notified and directed to do so).

As discussed above, it is the employer's responsibility to ensure that an employee who has been notified of his or her selection for random drug testing proceeds to the testing facility immediately. Accordingly, employers should take care to notify an employee of his or her selection for random drug testing at a time when it can ensure that the employee proceeds to the testing facility immediately (i.e., when the employee is at work). Once the employee is notified to report for testing and the test does not occur, the opportunity for random testing is over. In a situation where an employee is not tested (e.g. a refusal to submit, collection site is closed, etc.), you must document the reason and annotate the random selection list.

We hope this response is helpful to you. If you have additional questions regarding this matter, please contact my staff at (202) 267-3973. This response was prepared by Neal O'Hara, an attorney in the International Law, Legislation and Regulations Division of the Office of the Chief Counsel, and was coordinated with the Enforcement Division of the Office of the Chief Counsel and the Drug Abatement Division in the Office of Aerospace Medicine.

Sincerely,

Mark Bury
Acting Assistant Chief Counsel for International Law,
Legislation and Regulations, AGC-200