

RiskTopics

Commercial driver drug and alcohol testing

An organization that operates commercial motor vehicles is often subject to substance abuse testing and programs requirements and may face penalties and liability issues if they fail to meet these responsibilities.

Introduction

Companies that employ drivers required to hold commercial driver's licenses (CDL) are regulated by the United States Federal Motor Carrier Safety Administration (FMCSA) controlled substance and alcohol use testing regulations (49 CFR Parts 40, 382, 391 and 399). These regulations address the misuse of alcohol and the use of controlled substances by drivers of commercial motor vehicles (CMV) requiring a CDL. While companies should consult the regulations for greater detail, the information below highlights some of the areas to be considered.

Discussion

Applicability

The FMCSA requires U.S. based carriers, as well as non-U.S. carriers and drivers that operate in the U.S., to comply with controlled substance and alcohol guidelines for commercial drivers operating within the U.S. The regulations apply to employers and drivers who operate CMV's in commerce in the U.S. subject to the U.S. Commercial Driver's License requirements, the Mexican Licencia Federal de Conductor requirements, or the Commercial Driver's License requirements of the Canadian National Safety Code.

An employer who employs only themselves as driver (e.g. owner-operator) must comply with requirements as both employee and employer. These individuals must be in a consortium of two or more employees in the random testing selection pool.

The areas covered by this Risktopic are:

- Policy development and communication
- Types of testing
- What items to test
- Positive test requirements

- Employee education and assistance programs

Guidance

Policy development and communication

The FMCSA regulations require a separate written DOT policy be developed on controlled substances use and alcohol misuse in the workplace, and that the policy is provided to every driver (FMCSA drug and alcohol guidelines). Please note, these drivers may also be subject to the company's overall substance abuse policy.

An effective drug and alcohol policy should include:

- Overview of the policy
- Categories of drivers subject to testing
- Participation as a privilege to drive a vehicle for the organization.
- The requirement that a driver submit to alcohol and controlled substances tests administered in accordance with FMCSA 382.601(b)7.
- Completion of tests within required timeframes
- Prohibited behavior, including a refusal to submit to a test
- Circumstances for testing
- Testing procedures
- Consequences of use of controlled substances and misuse of alcohol
- Identity of contact person for inquiries
- Effects of alcohol and controlled substances
- Education and training

Types of testing

Under the FMCSA regulations for commercial drivers operating in the U.S., frequency of testing and substances to be tested for are clearly stated. There are six categories of drug screening: pre-employment (controlled substances test only; not alcohol), post-accident, random, reasonable suspicion, return to duty, and follow-up to rehabilitation.

Having a federal drug testing program does not preclude companies from having a non-DOT drug and alcohol testing program under a non-dot testing for additional drugs and collection non-urine specimens are not prohibited.

For fleet operations not falling under FMCSA regulations, the above types of tests can be key practices. These tests are optional for non-commercial drivers, and each state may have specific regulations pertaining to drug free work place requirements for non-commercial drivers.

When a federally regulated test is performed, these tests must be conducted before any non DOT test is performed and lists and pools of individuals subject to FMCSA regulations must be kept separately from those of other employees in a non-DOT or company policy testing program.

Pre-employment

Driver-applicants should be tested and results received by the employer before being placed in a safety sensitive position. Unless a negative test result is obtained, the applicant should not be allowed to drive. Under Part 40.25(j), employers are required to ask driver applicants about pre-employment tests. This would include whether he or she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied for, but did not obtain, safety-sensitive transportation work covered by any DOT agency drug and alcohol testing rules during the past two years. This also includes refusals during the previous two years in which they did not obtain a job. If the applicant had any positive tests or refusals, they must have documented completion of the return-to-duty process. As a part of the driver qualification process, employers must contact the applicant's employers for drug test results for the prior three years.

Beginning January 6, 2020 employers will have access to FMCSA Commercial Driver's License Drug and Alcohol Clearinghouse. The Clearinghouse will contain information on all CDL driver drug and alcohol program violations and provides secure online database that will give employers, real-time access to important information about CDL driver drug and alcohol program violations.

Companies employing CDL drivers will be required to conduct both electronic queries and traditional manual inquiries with previous employers to meet the three-year timeframe for checking CDL driver violation histories. Drivers must provide consent to current or prospective employers to access details about any drug and alcohol program violations in The Clearinghouse.

On January 6, 2023, after three years of violation data is stored in the Clearinghouse, employers will no longer be required to also request information from the driver's previous FMCSA-regulated employers. The employer's query to the Clearinghouse will satisfy that requirement. For additional information on the Clearinghouse, please use the following links:

<https://clearinghouse.fmcsa.dot.gov/>

https://clearinghouse.fmcsa.dot.gov/Documents/Clearinghouse_Factsheet.pdf

Random

Per the FMCSA regulations, every commercial driver shall submit to random alcohol and controlled substance testing. All drivers must have an equal chance of being selected by a scientifically valid method with a unique identifying number.

The DOT annually publishes, for all covered agencies, current random testing rates. As of January 4, 2019, the FMCSA random drug testing rate is 25% and the random alcohol testing rate is 10%.

<https://www.transportation.gov/odapc/random-testing-rates>

Organizations may still choose to be a part of a random pool consortium with other employers to generate a larger number of drivers in the random pool. This is more often a choice of small organizations, but a company with a large number of drivers may do so as well.

Post-accident

Per FMSCA regulations, a commercial driver shall submit to both a drug and alcohol test following a DOT recordable crash. If the crash involves a fatality, then the driver needs to be tested, even if he/she did not receive a citation. For DOT recordable crashes not resulting in a fatality, but involving a towed vehicle or someone treated for injuries away from the scene, the driver only has to be tested IF they receive a citation. The alcohol test must be conducted within eight hours and the controlled substances test must be conducted within 32 hours of the crash. A test conducted by legal authority will satisfy the regulation, but the organization or driver choosing not to do so does not relinquish the driver of the responsibility.

If an alcohol test is not administered within 2 hours following the accident, the employer should prepare and maintain a record stating the reasons the test was not promptly administered. If an alcohol test is not administered within eight hours or a controlled substances test is not administered within 32 hours following the accident, the employer should cease attempts to administer the test and should prepare and maintain the same record.

These are the FMCSA minimum requirements. Some organizations take it upon themselves to test their drivers even if the crash doesn't meet the DOT recordable crash criteria and the driver did not receive a citation.

Remember to only use a Federal Chain of Custody form for DOT mandated tests. Do not use these forms for company policy/non-DOT testing. On a DOT audit, using the wrong form is a violation of the regulations. While it is not a critical or acute violation, it is still a violation that is scored during an audit. It is suggested that a system be implemented to ensure that the clinic or drug collection location is aware of the type of test being conducted (i.e., company policy vs. DOT required).

Reasonable suspicion

According to the FMCSA regulations, a driver must submit to an alcohol and/or controlled substances test if there is reasonable suspicion that the prohibitions concerning alcohol and/or controlled substances are violated. This can include poor job performance, erratic behavior, endangering public safety or the safety of a co-worker, evidence of use of alcohol while on duty, and visual signs of impairment. Suspicion should be based on a supervisor's specific and contemporaneous observations concerning the driver's behavior, speech and/or body/breath odor at the time they make the decision, and not on hearsay.

Supervisors are required to participate in 2 hours of reasonable suspicion training (one hour for controlled substances and one hour for alcohol). This will assist them in determining if a driver may be impaired and in recognizing violations of the regulations.

A driver who is under reasonable suspicion for the presence of drugs or alcohol should be immediately removed from duty, and not allowed to return until the results are obtained. Management should exercise due care to ensure that the driver in question gets to the testing facility safely, and preferably should drive them there.

Return to duty

Before returning to duty after engaging in prohibited conduct, an employer should ensure that the driver:

- is evaluated and released by a Substance Abuse Professional (SAP)

- participates in any treatment program prescribed
- pass a controlled substances and/or alcohol return-to duty test

Follow-up to rehabilitation

If the organization chooses to retain the driver following a positive test, they can partner with a Substance Abuse Professional (SAP) to evaluate the driver, set up a follow-up testing plan, and coordinate the reinstatement process. A minimum of six tests should be conducted in the first 12 months. A driver may be subject to testing for a maximum of 60 months.

If a driver enters a rehabilitation program, the driver is required to complete the return to duty and follow up process, regardless of whether the employer retains that driver as an employee. This is especially important to the driver selection process. This is also important to the next employer, or if a company hires a driver that failed a test at a previous employer. It further demonstrates the need to fully comply with requirements regarding inquiry into previous employment.

Substances required to be tested

There are many substances which may affect a driver's ability to perform their driving task in a safe manner. However, as of this writing, the FMCSA only requires employers to test for the following items which are typically referred to by laboratories as a "five-panel" test:

- Marijuana
- Cocaine
- Opioids (codeine, morphine, 6-AM*) Opioids certain semi-synthetic opioids (i.e., hydrocodone, hydromorphone, oxycodone, and oxycodone)
- Amphetamines (amphetamines, methamphetamines, MDMA, MDA, MDEA**)
- Phencyclidine (PCP)

* 6-AM (acetyl morphine) is a marker for heroin.

** MDMA, MDA and MDEA are often referred to as "club drugs" and sometimes go by the name of "Ecstasy."

Some states have enacted specific laws authorizing the use of "medical" or "recreational" marijuana. The Department of Transportation does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result. Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use "medical marijuana". Please note that marijuana remains a drug listed in Schedule I of the Controlled Substances Act (FMCSA, DOT Office of Drug and Alcohol Policy and Compliance Notice, 2010).

In addition to the five controlled substances, under the regulations, employers are also required to test for alcohol under all of the above mentioned types of testing except pre-employment. An Employer may conduct pre-employment alcohol testing under DOT authority, but only if two conditions are met: (1) The pre-employment alcohol testing must be accomplished for all applicants [and transfers], not just some; and (2) The

testing must be conducted as a post-offer requirement – meaning you must inform the applicant that he or she has the job if he or she passes a DOT alcohol test.

All testing should be performed by a laboratory certified by the Health and Human Services (HHS) guidelines. The Department of Transportation is required by the Omnibus Transportation Employee Testing Act of 1991 to adhere with the HHS on laboratory testing matters. Some employers may be tempted to save money or get quicker test results by using over-the-counter "instant" drug test kits. These are not allowed per the FMCSA regulations. In addition, some employers may want to use an Instrumental Initial Test Facility (IITF). IITF's are not authorized for use in the DOT's program. IITF's only screen for drugs and do not offer confirmation testing. A full scale lab that screens and confirms test results is required per the FMCSA regulations.

Positive test requirements

A driver who has tested positive for any of the substances will be notified and may discuss the positive test results with a qualified Medical Review Officer (MRO) before a result is reported to the employer. The driver will have an opportunity to explain any special circumstances to the MRO. The MRO has the authority and responsibility for reporting the results to the carrier's alcohol and drug program management for action.

The FMCSA rules require an employer to immediately remove an employee from safety-sensitive functions (until return to duty process is completed) after receipt of:

- Positive drug test results
- Verified tainted or substituted drug test results
- Alcohol Breath Alcohol Concentration (BAC) test greater than 0.04

A driver should be temporarily removed from safety-sensitive duty after receiving:

- Alcohol test between 0.02 and 0.39 BAC (no driving for at least 24 hours after the test given)
- A diluted specimen
- Invalid drug test requiring 2nd collection under direct observation

As with all medical records, companies should maintain appropriate confidentiality for all drug and alcohol testing results.

If a driver refuses to take a required drug or alcohol test, that refusal is treated as if the test result was "positive." While the individual is entitled to refuse to test, such refusal is construed as the equivalent of a positive test, and all return to duty and follow-up requirements apply.

A driver may self-admit that they have recently taken a controlled substance or used alcohol in violation of the rules, as long as it is prior to reporting to duty, and prior to being required to test under any of the rules. For example, the driver couldn't bring this up after being selected to go for a random. In self-admission situations, the driver could be removed from duty, seek rehabilitation, follow return to duty guidelines, and not be subjected to a violation of the FMCSA regulations.

While not a part of the FMCSA guidelines for controlled substance testing, employers should educate their drivers on the hazards of certain prescription and over-the-counter medications, and their effect on driving. For example, a painkiller prescribed for an injury may cause drowsiness, which may affect safe driving. Some

drivers taking over-the-counter medications, such as the decongestant Ephedrine, which is similar in structure to the (semi-synthetic) derivatives amphetamine and methamphetamine, may be worried about false positive drug tests. However, part of the process steps that are integral to the drug and alcohol program allow the Medical Review Officer to investigate any legitimate medical explanations and report the results to the employer as a negative test.

Periodically, the Department of Health and Human Services will review the laboratory cutoff levels for certain drugs. For example, as of October 1, 2010, the positive test level for cocaine and amphetamines was lowered, which allowed the DOT to identify more drug users. This will further assure the traveling public that the transportation system is the safest it can be. This also permits the DOT to continue to further deter drug use in the transportation industries and get those identified as using drugs referred for evaluation and treatment.

It is important to note that employers can expand upon the DOT's regulatory requirements, as long as they do not represent the test as being required by DOT. Under their non-DOT testing programs, DOT-regulated employers may test for other drugs of their choosing. Therefore, companies are not prohibited by DOT from testing for additional drugs that may be of concern within their communities and companies (U.S. Department of Transportation, Office of the Secretary, 2010).

For all testing and management of the controlled substances and alcohol program, confidentiality of records is imperative.

[Employee education and assistance programs](#)

All drug screening programs require a comprehensive employee education component to complement the testing aspect. An effective drug education and awareness program is essential to support the company policy. The use of information newsletters and relaxed group discussions covering drug-related issues at driver safety meetings are both effective avenues of communication. These allow the employer to educate the workforce regarding such areas as the physical effects of drug and alcohol use, how drugs affect families, how drug use affects the company production levels and the effect of drugs upon society as a whole. Work with employees and encourage disclosure of personal problems with controlled substances and alcohol within a safe environment by having an open-door policy with management or using an Employee Assistance Program (EAP). An EAP enables drivers to alert management of concerns about other personnel and to seek help for their own substance abuse and/or alcohol problems. Employee assistance operates at three levels: consultation, education and assistance by referral to treatment and rehabilitation facilities. The employer, through the SAP employee assistance resource, is required to monitor the progress of the employee through reports and periodic testing during treatment and rehabilitation.

Conflicts or discrepancies with other DOT testing requirements should not be an issue. If a driver is required to be tested under other DOT regulations, he will be deemed to satisfy them as long as he or she participates in the most rigorous of the regulations under which he or she falls

Conclusion

The Federal Motor Carrier Safety Administration (FMCSA) recognizes that controlled substance use and alcohol misuse affect everyone in the United States in one way or another. The ultimate goal for the FMCSA and the commercial motor vehicle industry is to achieve a controlled substance and alcohol-free work force in the interest of the health and safety of employers, employees, and the public.

Organizations who must follow the DOT's regulations must realize that not complying with the drug and alcohol requirements can have negative consequences. The impact of testing positive, or refusing to test, for a driver and his/her family can be devastating. In addition to damaging the driver's reputation, it often results in extended periods of unemployment, due to the return-to-duty process and the tendency of employers not to hire drivers with drug or alcohol histories (U.S. Department of Transportation, Federal Drug & Alcohol Testing Regulations brochure, December 2010).

The guidelines presented in this Risktopic, along with the references provided, highlight the FMCSA requirements, and provide a starting point for implementing a drug and alcohol program. Please contact your Zurich Risk Engineering Consultant with additional questions regarding establishing or complying with such a program

References

1. *Implementation Guidelines for Alcohol and Drug Regulations - Chapter 3, Section 2*. Federal Motor Carrier Safety Administration. 13 March 2014. Web. 13 June 2016. <<https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/implementation-guidelines-alcohol-and-drug-regulations-chapter-3>>
2. *Annual Random Controlled Substances Testing Percentage Rate for Calendar Year 2016*. Federal Motor Carrier Safety Administration. Web. 13 June 2016. <<https://www.fmcsa.dot.gov/regulations/enforcement/annual-random-controlled-substances-testing-percentage-rate-calendar-year>>
3. *DOT 'Medical' Marijuana Notice from the DOT Office of Drug and Alcohol Policy and Compliance*. Federal Motor Carrier Safety Administration. 22 October 2009. Web. 13 June 2016. <<https://www.transportation.gov/odapc/medical-marijuana-notice>>
4. *49 CFR Part 382.601(b)(11) - Controlled Substances and Alcohol Use and Testing*. Federal Motor Carrier Safety Administration. 14 September 2013. Web. 13 June 2016. <<https://www.fmcsa.dot.gov/regulations/title49/section/382.601>>
5. *Drug and Alcohol Testing Brochure for Drivers*. Federal Motor Carrier Safety Administration. July 2010. Web. 13, June 2016. <<https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/drug-and-alcohol-testing-brochure-drivers>>

Resources

- *49 CFR Part 382 - Controlled Substances and Alcohol Use and Testing*. Federal Motor Carrier Safety Administration. <<https://www.fmcsa.dot.gov/regulations/title49/b/5/3>>
- *Overview of Drug and Alcohol Rules for Employers*. Federal Motor Carrier Safety Administration. <<https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/overview-drug-and-alcohol-rules-employers>>
- *Drug and Alcohol FAQs*. Federal Motor Carrier Safety Administration. <<https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/drug-and-alcohol-faqs>>
- *49 CFR Part 40 - Procedures for Transportation Workplace Drug and Alcohol Testing Programs*. U.S. Department of Transportation. <<https://www.transportation.gov/odapc/part40>>

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