



TRUCKING LAW UPDATE

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CORONAVIRUS (COVID -19): STATE OF EMERGENCY

- FMCSA EXPANDED EMERGENCY DECLARATION - HOS Waiver For Motor Carriers And Drivers Hauling Relief Supplies (3/18/20)
 - FMCSA webpage:

www.fmcsa.dot.gov/emergency/expanded-emergency-declaration-under-49-cfr-ss-39023-no-2020-002-relating-covid-19
 - HOS suspension only applies to carriers and drivers providing “direct assistance” in support of relief efforts by hauling the following:
 - Medical supplies & equipment for testing, diagnosis, and treatment
 - Supplies and equipment necessary for prevention of community transmission (masks, gloves, hand sanitizer, soap, disinfectants)
 - Items needed for emergency restocking of distribution centers or stores (food, paper products, and other groceries)
 - Raw materials needed for the above-listed categories (such as paper, plastic, and alcohol)
 - Fuel
 - Equipment and supplies necessary for temporary housing

- “Direct assistance” does not include mixed loads of routine deliveries and the identified emergency supplies
- Upon completion of the emergency delivery, driver must take 10 hours off-duty if transporting property and 8 hours off-duty if transporting passengers
- Declaration will remain in effect until termination of emergency or until 11:59 pm (ET) on April 12, 2020, *whichever occurs sooner*
- ***WARNING:*** HOS suspension does ***not*** alter a motor carrier’s duties to monitor its drivers and maintain RODS, and to ensure drivers are not ill, fatigued, impaired, or otherwise unable to operate a CMV safely!
 - The emergency-based HOS suspension does ***not*** “immunize” the motor carrier or driver from negligence lawsuits by others as a result of an accident caused by the driver operating in the course of transporting emergency-related supplies
- FMCSA 3/24/20 “NOTICE OF ENFORCEMENT POLICY:” Extension Of CDL And Medical Certification Renewal Deadline During COVID-19 National Emergency
 - This enforcement action provides relief to holders of expiring CDL’s and CLP’s by waiving obligation to renew until June 30, 2020:
 - Extends until June 30, 2020, the maximum period of CDL and CLP validity for those licenses due for renewal *on or after March 1, 2020*
 - Waiver does ***not*** apply to a CDL or CLP holder if his/her license expired ***before*** March 1, 2020
 - Waiver does ***not*** apply to a CDL or CLP holder if that driver’s privileges have been suspended or withdrawn for traffic offenses
 - This enforcement action also waives the requirement CDL and CLP holders have a medical examination and certification, provided that they have proof of a valid medical certification that was issued for a period of 90 days or longer and that expired *on or after March 1, 2020*
 - This enforcement action also waives the requirement that CDL and CLP holders, in order to maintain the medical certification status of “certified,” provide the State Driver Licensing Agency with an original or copy of a subsequently issued medical examiner’s certificate, provided they have proof of a valid medical certification that expired *on or after March 1, 2020*
 - Waiver does ***not*** apply to drivers who cannot provide evidence of a prior medical certification that expired *on or after March 1, 2020*
 - Waiver does ***not*** apply to a driver with a medical examiner’s

certificate originally issued for less than 90 days

- Waiver does **not** apply to new drivers who have never obtained a medical certification
- Notification To FMCSA Of Accident: Motor carriers must notify FMCSA *within 5 business days* of the occurrence of an accident involving a CDL or CLP holder operating under the terms of this FMCSA waiver
 - Notification must be made via email to: mcpsd@dot.gov

DOT GUIDANCE (3/23/20) RE: DRUG & ALCOHOL TESTING COMPLIANCE

- This USDOT compliance notice (dated 3/23/20) clarifies compliance guidelines for motor carriers (“DOT-regulated employers”) and employee/drivers during current emergency regarding underlying modal regulations applicable to drug and alcohol testing of drivers and driver/applicants:
 - Recognizes that during current emergency, **some testing program resources may not be available** – including collection sites, MRO’s, SAP’s, and BAT’s (Breath Alcohol Technicians)
 - Employer/motor carrier must nonetheless make reasonable efforts to locate necessary resources, and mobile collection services may suffice for alcohol (but not drug) testing
 - If the employer/motor carrier is **unable to conduct** DOT drug or alcohol training or testing, including due to unavailable resources or driver refusal (due to fear of contracting COVID-19 at a testing facility), the motor carrier **must** nonetheless **document** why the test could not be completed
 - DOT recognizes that given the immediate “novel public health risk,” a driver’s refusal to test due to fear of contracting COVID-19 at a collection or testing site/clinic is not unreasonable
 - Accordingly, the employer/motor carrier is obligated to verify with the site/clinic that “it has taken the necessary precautions to minimize the risk of exposure to COVID-19”
 - Further in that event, the employer/motor carrier has some discretion to determine if “flexibilities [relating to otherwise underlying modal regulations] allow for collection and testing **at a later date**”
 - Notably, the guidance specifically states that if testing cannot be conducted due to unavailable resources, the “underlying modal regulations [for testing] continue to apply; By way of example, the guidance further advises that “without a ‘negative’ pre-employment drug test result, an employer may not

permit a prospective or current employee to perform any DOT safety sensitive functions, ..., [and in the case of a driver/applicant] you cannot hire the individual.”

CVSA POSTPONES 2020 “INTERNATIONAL ROADCHECK” CAMPAIGN

- Per a 3/25/20 announcement, the annual CVSA (Commercial Vehicle Safety Alliance) “International Roadcheck” (which was set for May 5-7, 2020) has been postponed
- CVSA’s annual “International Roadcheck” is typically a high-volume, high-visibility multiple-day enforcement initiative in which roadside inspections are conducted across the United States, Canada and Mexico; According to CVSA, during last year’s campaign, approximately 17 trucks and buses were inspected on average every minute over a 72-hour period
- The focus this year is “driver requirements category of a roadside inspection”
- CVSA says the 2020 International Roadcheck will be rescheduled, but no date(s) have yet been given as of this writing

NEW HOS FINAL RULE COULD BE PUBLISHED LATER THIS YEAR

- FMCSA’s proposed changes to HOS rules, first announced in August 2019, are at the final stage before publication in the Federal Register – and are currently under review by the (federal) Office of Management And Budget (OMB)
- FMCSA made 5 proposed HOS changes:
 - To allow drivers to extend the 14-hour limit with one off-duty break of at least 30 minutes, but not more than 3 hours
 - To allow drivers to spend their mandatory 30-minute rest breaks *on duty* rather than off duty, and to allow up to 8 hours of driving time (rather than consecutive time) before a break is required
 - To extend the 12-hour limit on the 100-air mile exception to 14 hours, and to extend the allowed radius to 150 air miles
 - To extend the on-duty limit of the “adverse driving conditions” exception by 2 hours
 - To modify the sleeper-berth exception to allow drivers to split their required 10-hour breaks into two periods of at least 7 consecutive hours in the sleeper berth and another break of at least 2 consecutive hours

ROADSIDE INSPECTIONS – DOT INSPECTOR’S ACCESS TO CLEARINGHOUSE

- With regard to conducting roadside inspections, DOT personnel have recently been given access to a driver’s drug and alcohol testing information stored in the FMCSA’s Drug And Alcohol Clearinghouse (“Clearinghouse”) database
- During a roadside inspection, the DOT officer will query the CDL or CLP using existing software, either Query Central or CDLIS – which systems are linked to the Clearinghouse, in order to determine whether the driver has an unresolved FMCSA drug and alcohol testing violation
 - Prior to April 1, 2020, a driver will only be cited for an unresolved testing violation and the inspection report will be forwarded by the DOT agent to the local FMCSA office for follow-up action
 - Beginning April 1, 2020, an unresolved testing violation will result in the driver being placed OOS (out of service)
- A driver who receives a Roadside Inspection Report is required to deliver it to his/her motor carrier employer within 24 hours

CLEARINGHOUSE CLARIFICATIONS

- Employers (motor carriers) were required to register by January 6, 2020, with the FMCSA Drug & Alcohol Clearinghouse (“Clearinghouse”)
- All employers, drivers, Medical Review Officers (MRO’s), Substance Abuse Professionals (SAP’s), and consortia/third party administrators (C/TPA’s), must register in order to access the Clearinghouse database
- The Clearinghouse was created as a repository for records of CDL drivers’ violations of the FMCSA’s drug and alcohol regulations as forth in 49 CFR Part 382, Subpart B – including (1) positive drug and alcohol test results, (2) test refusals, and (3) SAP assessments and drivers’ Return-To-Duty (RTD) process information after a positive drug test or alcohol violation
- The Clearinghouse Rule has overhauled how motor carriers report and verify drivers’ drug testing history, adding new protocols to the hiring process and additional administrative work for motor carriers or all sizes
- According to the FMCSA, as of February 21, 2020, more than 8,000 positive substance abuse tests had been reported to the Clearinghouse database, and over 650,000 of the nation’s drivers had registered with the Clearinghouse
- The rate of positive tests reported is expected to rise due to the 50% random drug testing rate (which was increased from 25%), effective January 1, 2020
- According to a recent article in a transportation-related publication, three common

misunderstandings have evolved pertaining to motor carrier compliance with the Clearinghouse Rule since the Rule's January 6, 2020, implementation:

- What a query is and when one must be conducted;
 - What information must a motor carrier report to the Clearinghouse; and
 - What information must be documented and retained by a motor carrier
- Two types of queries = limited and full
 - Limited Query:
 - All motor carriers, or their C/TPA's, must conduct a limited query on all existing drivers on an annual basis
 - All drivers employed by a motor carrier must have been queried by January 5, 2021
 - A motor carrier must obtain its driver's consent form to authorize a limited query – in which the driver's signature can either be electronic or "wet"
 - If the driver has failed to register in the Clearinghouse, or refuses consent to the motor carrier's need to conduct the annual limited query, the driver must be **removed** from safety-sensitive functions (including, of course, driving)
 - A motor carrier may craft and utilize a consent form so that it is valid for more than just one annual query
 - A limited query is used to check for the presence of information in the driver's Clearinghouse record:
 - If that query returns a record (of a violation), the motor carrier *must* then conduct a full query to learn the details of that record
 - The motor carrier has **24 hours** to conduct the full query – which will provide details of the violation and the driver's RTD status
 - Full query:
 - Required (1) as part of the pre-employment process, and (2) any time a limited query returns a record of a violation
 - Drivers and driver/applicants must provide consent for a full query
 - Even if a driver/applicant is registered in the Clearinghouse, but refuses to provide consent to a full query, the driver/applicant **cannot** be hired

■ Reporting Requirements:

- All Employers (motor carriers), MRO's, and SAP's must report information to the Clearinghouse
- Employers (motor carriers), or their designated C/TPA's, must report positive test results of, or any refusals to test by, any current CDL or CLP driver or driver applicant
 - A motor carrier must report a driver's violation, including a positive test, within two business days
 - A motor carrier must also report receipt of other information indicating a driver's violation of DOT alcohol and drug testing rules by the end of the third business day (of receipt of the information)
- MRO's must report any driver admission to an adulterated or substituted specimen
- SAP's must report information about drivers undergoing a RTD drug and alcohol rehabilitation process
 - Specifically, SAP's must notify the Clearinghouse within one business day of (1) initial assessment of a driver's drug or alcohol violation, and (2) a determination that a driver has completed the RTD process

■ Documentation Requirements:

- The Clearinghouse will maintain for 5 years the records of a driver's positive test, or until the RTD process is completed, *whichever is later*
- Motor carriers must retain records of queries conducted (including consent forms) for three years
- In addition to the electronic queries of the Clearinghouse database, motor carriers must also continue to conduct the traditional manual inquiries of previous employers in order to satisfy the 3-year investigation time frame required under 49 CFR §391.23
 - However, this requirement that motor carriers continue to conduct the traditional manual inquiries of previous employers will expire on January 6, 2023

DRIVERS' USE OF CBD PRODUCTS STRONGLY DISCOURAGED

- On February 19, 2020, the USDOT *Office of Drug & Alcohol Policy & Compliance* (ODAPC) issued a "Compliance Notice" which strongly discourages CMV drivers' use of CBD products
- "Cannabidiol" ("CBD") products, including oils, lotions, etc., are marketed as over-the-counter remedies for pain, anxiety and other health issues
- Most CBD products currently on the market are not regulated by the US Food & Drug Administration (FDA), and thus it is difficult to know what is in these products
- According to the USDOT ODAPC, while CBD products are advertised as containing a concentration of *less than* 0.3% THC (tetrahydrocannabinol), which is the primary psychoactive component of marijuana, several CBD products which have been tested contain higher THC levels than advertised
- Current FMCSR's do *not* prohibit a driver's use of CBD products
- However, according to the USDOT ODAPC's 2/19/20 Compliance Notice, some CBD products may contain a concentration of *more than* 0.3% THC – which could cause a driver using the product to test positive for marijuana
- Accordingly, motor carriers would be wise to consider implementing an internal policy prohibiting their drivers from using CBD products while on the job

**For more information and counseling on these matters,
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