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Clearinghouse Training FMCSA Issues Final Regulations Creating National Drug and Alcohol Testing Clearinghouse for Commercial Truck and Bus Drivers

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Meet the Presenter

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Bar & Court Admissions

Alabama, 1980
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U.S. District Courts, AL & GA,
11th Circuit Court of Appeals
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Education

**Cumberland School of Law,
Samford University,
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J.D., *cum laude*

**Auburn University,
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Tommy Eden's law practice is principally in the areas of Management Labor and Employment Law; Drug Testing Law (DOT Regulated and Non-Regulated) throughout the United States; defense of employers in federal court in all aspects of employment litigation including claims under Title VII, ADA, FMLA, FLSA, ADEA, and retaliatory discharge actions; defense of employers in charges brought with the EEOC, Wage and Hour Division, National Labor Relations Board, and the Department of Labor; and litigation over employee benefits under ERISA and frequent speaker on Affordable Healthcare topics. He also counsels employers on Immigration compliance under the Alabama Immigration Act and conducting I-9 audits under the Federal Immigration Act.



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Legal Disclaimer

This presentation is for educational purposes only and is not intended as a substitute for the legal advice of an attorney knowledgeable in the field of work place drug and alcohol testing.

The presenter makes no assurances regarding the accuracy or completeness of the following information. Legislative, regulatory or case law.



"No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers."

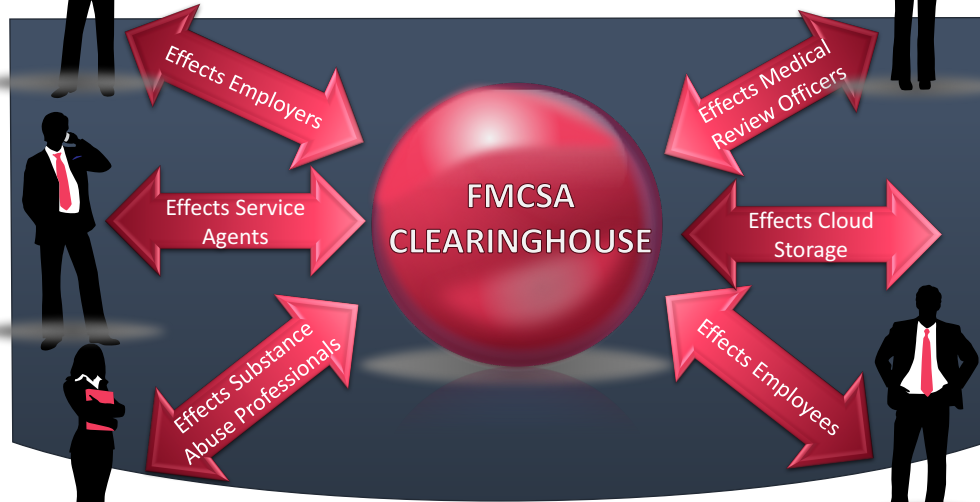


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FMCSA Clearinghouse

FMCSA Issues Final Regulations Creating National Drug and Alcohol Testing Clearinghouse for Commercial Truck and Bus Drivers Published 12.5.16



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FMCSA Clearinghouse

Historical Overview

FMCSA Issues Final Regulations Creating National Drug and Alcohol Testing Clearinghouse for Commercial Truck and Bus Drivers

- The Drug & Alcohol Clearinghouse will be a data containing CDL drivers' drug and alcohol program violations.
- It will also contain information about whether a driver has successfully completed the mandatory return-to-duty drug and/or alcohol rehabilitation process.
- Clearinghouse requirements fall into two major categories:
 - Reporting
 - Querying
- The Clearinghouse is being implemented as part of the Moving Ahead for Progress in the 21st Century Act signed by the President on July 6, 2012 (Pub.L. 112-141, 112th Congress).

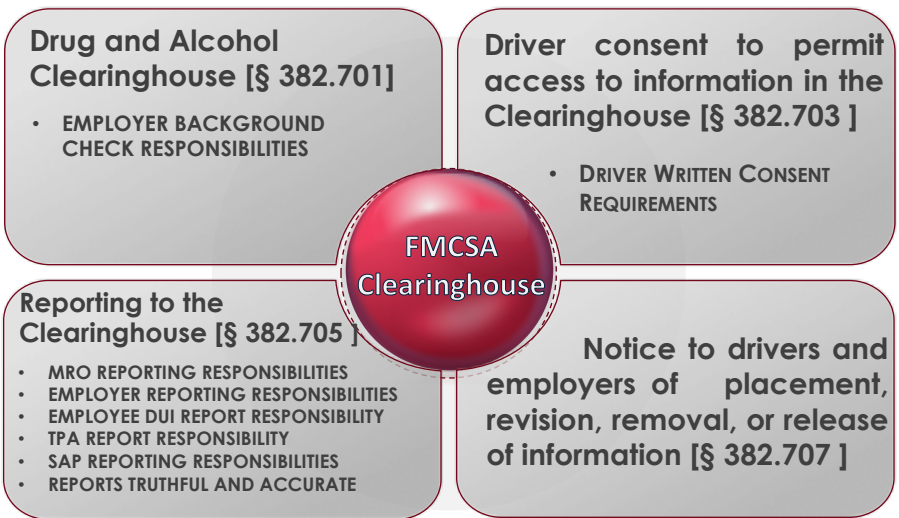


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Final Regulatory Changes

New Sections Overview



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Final Regulatory Changes New Sections Overview

Drivers' access to information
in the Clearinghouse.
[§ 382.709]

Clearinghouse registration
[§ 382.711]

FMCSA
Clearinghouse

Duration, cancellation, and
revocation of access.
[§ 382.713]

Authorization to enter
information into the
Clearinghouse [§ 382.715]



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Final Regulatory Changes New Sections Overview

Procedures for correcting
information in the database
[§ 382.717]

Availability and removal
of information [§ 382.719]

FMCSA
Clearinghouse

Fees [§ 382.721]

Unauthorized access or
use prohibited [§ 382.723]



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Final Regulatory Changes New Sections Overview

- Access by State licensing authorities [§ 382.725]
- Must query database prior to issue CMV license

FMCSA
Clearinghouse

Penalties [§ 382.727]



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Final Regulatory Changes Section by Section Analysis

§ 382.701 Drug and Alcohol Clearinghouse Querying—The Basics

- **Employers will be required to query the Clearinghouse for covered drivers for purposes:**
 1. Pre-employment screening
 2. Annual verification
- **Pre-employment**
 - **Purpose:** to ensure that the prospective employee is eligible to drive.
 - **Query-type:** full queries would be conducted which means that FMCSA must verify specific driver consent prior to releasing information



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Final Regulatory Changes

Section by Section Analysis

§ 382.701 Drug and Alcohol Clearinghouse

Querying—The Basics

- **Annual Queries**

- **Purpose:** to ensure that a driver did not violate the drug and alcohol program with another employer.
- **Query-type:** limited queries to determine whether any data exists for a driver would be allowed and will only require general driver consent, subject to FMCSA audit.
- A limited query only identifies whether information about the driver exists in the Clearinghouse and will not result in release of any driver information.



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Final Regulatory Changes

Section by Section Analysis

§ 382.701 Drug and Alcohol Clearinghouse

Querying—The Basics

- If the limited query shows a driver record in the query, triggering FMCSA verification of specific driver consent before releasing information.
- Drivers refusing consent will not be able to perform safety sensitive functions such as driving a commercial motor vehicle.
- Information regarding the driver will be accessible to employers for a minimum of 5 years. If the driver does not satisfy the mandatory return to duty requirements, the information will remain accessible to employers indefinitely.



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Final Regulatory Changes

Section by Section Analysis

§ 382.703 Driver Consent to Permit Access to Information in the Clearinghouse

Driver Written Consent Requirements:

- The employer must obtain written consent from the driver for it to access Driver information in the Clearinghouse. Consents apply to both pre-employment and annual queries.
- May be written or electronic consent
- Driver must submit electronic consent
- May have annual or multiyear consent for limited query



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Final Regulatory Changes

Section by Section Analysis

§ 382.705 Reporting To The Clearinghouse

MRO Reporting Responsibilities

- MROs must report to the Clearinghouse within 2 business days all verified positive, adulterated, or substituted drug test results and refusals to test that require a determination by the MRO as specified in 49 CFR 40.191.
- And 1 day to make changes to results



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Final Regulatory Changes

Section by Section Analysis

§ 382.705 Reporting to the Clearinghouse

Employer Alcohol Test Reporting Responsibilities

- Paragraph (b) requires employers to report to the Clearinghouse by close of 3rd business day: “Alcohol test results with an alcohol concentration of 0.04 or greater”; negative return-to-duty tests; drug and alcohol test refusals; reports that drivers have successfully completed all SAP follow-up tests.
- Documentation and Certificate of Service to drive.



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Final Regulatory Changes

Section by Section Analysis

§ 382.705 Reporting to the Clearinghouse

Employee Actual Knowledge of DUI While Operating CMV Report Responsibility

- Employers would also be required to report by the close of the 3rd business day each instance in which they have obtained actual knowledge that an employee-driver received a traffic citation while driving a CMV under the influence of drugs or alcohol or other “actual knowledge”.
- Documents, evidence, video and Certificate of Service to driver of what is being reported.



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Final Regulatory Changes

Section by Section Analysis

§ 382.705 Reporting to the Clearinghouse C/TPA Report Responsibility

- If an employer uses a C/TPA to comply with his or her reporting duties, the employer remains responsible for ensuring that the C/TPA makes the required reports.

Exception: C/TPA must make reports for owner-operator drivers.



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Final Regulatory Changes

Section by Section Analysis

§ 382.705 Reporting to the Clearinghouse SAP Return to Duty Reporting Responsibilities

- Paragraph (d) of new §382.705 would require SAPs to report information to the Clearinghouse about drivers who completed the evaluation, referral, and treatment process and are eligible for return-to-duty testing, by the close of the business day following the determination driver completed the process.



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Final Regulatory Changes

Section by Section Analysis

§ 382.705 Reporting to the Clearinghouse

All Reports to Clearinghouse Must Be Truthful and Accurate

- Paragraph (e) requires persons reporting information to the Clearinghouse to do so truthfully and accurately. FMCSA prohibits anyone from reporting false or information that *should* be known as false or inaccurate. Anyone making an inadvertent error should make a correction immediately upon discovering the error. Anyone violating the provisions of this paragraph would be subject to the civil and criminal penalties set forth in 49 U.S.C. §521(b)(2)(E) and criminal penalties under 49 U.S.C. §521(b)(6)(B).



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Reporting Entities and Circumstances	
Reporting Entity	When Information Will Be Reported to Clearinghouse
Prospective/Current Employer of CDL Driver	<ul style="list-style-type: none"> — An alcohol confirmation test with a concentration of 0.04 or higher — Refusal to test (alcohol) as specified in 49 CFR 40.261 — Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191 — Actual knowledge, as defined in 49 CFR 382.107, that a driver has used alcohol on duty, used alcohol within four hours of coming on duty, used alcohol prior to post-accident testing, or has used a controlled substance. — Negative return-to-duty test results (drug and alcohol testing, as applicable) — Completion of follow-up testing
Service Agent acting on behalf of Current Employer of CDL Driver	<ul style="list-style-type: none"> — An alcohol confirmation test with a concentration of 0.04 or higher — Refusal to test (alcohol) as specified in 49 CFR 40.261 — Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191 — Actual knowledge, as defined in 49 CFR 382.107, that a driver has used alcohol on duty, used alcohol within four hours of coming on duty, used alcohol prior to post-accident testing, or has used a controlled substance. — Negative return-to-duty test results (drug and alcohol testing, as applicable) — Completion of follow-up testing
MRO	<ul style="list-style-type: none"> — Verified positive, adulterated, or substituted drug test result — Refusal to test (drug) requiring a determination by the MRO as specified in 49 CFR 40.191
SAP	<ul style="list-style-type: none"> — Identification of driver and date the initial assessment was initiated — Successful completion of treatment and/or education and the determination of eligibility for return-to-duty testing



§ 382.705 Reporting to the Clearinghouse, p. 171

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Final Regulatory Changes

Section by Section Analysis

§ 382.707 Notice to Drivers and Employers of Placement, Revision, Removal, or Release of Information

Reporting to the Clearinghouse

(a) FMCSA must notify a driver when information concerning that driver has been added to, revised, or removed from the Clearinghouse.

(b) FMCSA must notify a driver when information concerning that driver has been released from the Clearinghouse to an employer and specify the reason for the release.

(c) Drivers will be notified by letter sent by U.S. Mail to the address on record with the State Driver Licensing Agency that issued the driver's commercial driver's license. Exception: A driver may provide the Clearinghouse with an alternative means or address for notification, including electronic mail.



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Final Regulatory Changes

Section by Section Analysis

§ 382.709 Drivers' Access to Information in the Clearinghouse

A driver may review information in the Clearinghouse about himself or herself, except as otherwise restricted by law.



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Final Regulatory Changes

Section by Section Analysis

§ 382.711 Clearinghouse Registration

Each employer and designated service agent to an employer supporting its controlled substances and/or alcohol testing program must register with FMCSA before accessing or reporting information in the Clearinghouse.



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Final Regulatory Changes

Section by Section Analysis

§ 382.713 Duration, Cancellation, and Revocation Of Access

(a) Term. Clearinghouse registration is valid for 5 years, unless cancelled or revoked.

(b) Cancellation. FMCSA will cancel Clearinghouse registrations that are inactive for 2 years.

(c) Revocation. FMCSA has the right to revoke the Clearinghouse registration of anyone who fails to comply with any of the prescribed rights and restrictions on access to the Clearinghouse, including but not limited to, submission of inaccurate information and misuse or misappropriation of access rights or protected information from the Clearinghouse and failure to maintain the requisite qualifications, certifications and/or training requirements in part 40 of this title.



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Final Regulatory Changes

Section by Section Analysis

§ 382.717 Procedures for Correcting Information in the Database

As a statutory requirement, FMSCA will provide a dispute resolution procedure to remedy administrative errors in an individual's Clearinghouse record. Drivers would submit a petition detailing the reasons they believe the information is inaccurate and evidence supporting their challenge. Drivers would not be able to challenge the accuracy or validity of the alcohol or controlled substance test results.



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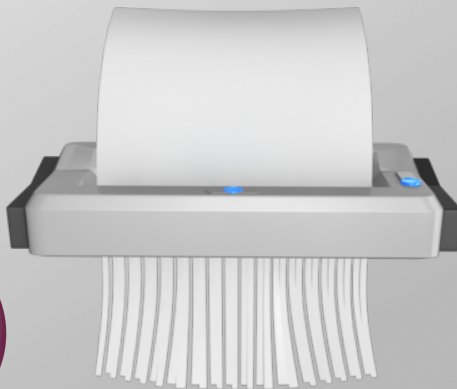


Final Regulatory Changes

Section by Section Analysis

§ 382.719 Availability and Removal of Information

Information about a driver's drug or alcohol violation will not be available to an employer conducting a query of the Clearinghouse after return-to-duty conditions are successfully satisfied.



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Final Regulatory Changes

Section by Section Analysis

§ 382.721 Fees

- As statutorily authorized, FMCSA may collect reasonable fees from entities that are required to query the Clearinghouse. The Agency would be prohibited from collecting fees from drivers accessing his/her own records.
- A full query and a limited query would have a cost to be determined.
- Full queries are required by all pre-employment screenings. If an annual limited query indicates that information exists on a particular driver in the Clearinghouse, then a limited query would lead to a full query.



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Final Regulatory Changes

Section by Section Analysis

§ 382.723 Unauthorized Access or Use Prohibited

The Clearinghouse may only be accessed as authorized by this Final rule. Reporting inaccurate or misleading information to the Clearinghouse would also be prohibited. No one may disclose or disseminate any information obtained from the Clearinghouse, except as otherwise authorized by law. Employers would be specifically prohibited from using information from the Clearinghouse for any purpose other than to assess or evaluate whether a driver is prohibited from operating a CMV.



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Final Regulatory Changes

Section by Section Analysis

§ 382.725 Access by State Licensing Authorities

Each State chief commercial driver's license official has the right to access information in the Clearinghouse about an applicant for a CDL. The applicant is not required to grant prior consent to the State licensing authorities because by law an applicant is deemed to have granted consent by virtue of applying for a CDL.



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Final Regulatory Changes

Section by Section Analysis

§ 382.727 Penalties

An employer, employee, medical review officer, or service agent who violates any provision of this subpart shall be subject to the civil and/or criminal penalty provisions of 49 U.S.C. 521(b)(2)(C).



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FMCSA Clearinghouse Surprises

FMCSA issues final regulations creating national drug and alcohol testing clearinghouse for commercial truck and bus drivers

- **Publication Date:** 12.5.16
- **Effective Date:** 1.5.17
- **Compliance Date:** 1.6.20



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FMCSA Clearinghouse Surprises

§ 382.103 Applicability

- All Service Agents—newly defined by Part 40
- Every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State
- Are subject to “Commercial Driver’s License Drug and Alcohol Clearinghouse”



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FMCSA Clearinghouse Surprises

§ 382.107 Definitions

- **Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse)** means the FMCSA database that subpart G of this part requires employers and service agents to report information to and to query regarding drivers who are subject to the DOT controlled substance and alcohol testing regulations.
- **Negative return-to-duty test result** means a return-to-duty test with a negative drug result and/or "an alcohol test with an alcohol concentration of less than 0.02"



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FMCSA Clearinghouse Surprises

§ 382.123 Driver Identification

- Alcohol Testing Form (ATF) & Drug Testing (CCF) - The driver's **commercial driver's license number and State of issuance** (currently, a driver's social security number is the only acceptable identification)



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FMCSA Clearinghouse Surprises

§ 382.217 Employer responsibilities

- No employer may allow, require, permit or authorize a driver to operate a commercial motor vehicle during any period in which an employer determines that a driver is not in compliance with the return-to-duty requirements in 49 CFR part 40, subpart O, after the occurrence of any of the following events:
 - a) The driver receives a positive, adulterated, or substituted drug test result conducted;
 - b) The driver receives an **alcohol confirmation test result of "0.04 or higher alcohol concentration"** (new definition of positive alcohol test);



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FMCSA Clearinghouse Surprises

§ 382.217 Employer responsibilities (cont'd)

- c) The driver **refused to submit to a test for drugs or alcohol**;
- d) The driver used alcohol prior to a post-accident alcohol test in violation of § 382.209;
- e) **An employer has actual knowledge**, as defined at § 382.107, that a driver has:
 - 1) Used alcohol while performing safety-sensitive functions;
 - 2) Used alcohol within four hours of performing safety-sensitive functions; or
 - 3) **Used a controlled substance.**



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FMCSA Clearinghouse Surprises

§ 382.401 Retention of records

- Records related to the administration of the alcohol and controlled substances testing program, including records of all driver violations



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FMCSA Clearinghouse Surprises

§ 382.405 Access to facilities and records

- Each employer, and each service agent who maintains records for an employer, must make available copies of all results for DOT alcohol and/or controlled substances testing conducted by the employer under this part and any other information pertaining to the employer's alcohol misuse and/or controlled substances use prevention program when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.



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FMCSA Clearinghouse Surprises

§ 382.405 Access to facilities and records (cont'd)

- When requested by the **National Transportation Safety Board as a part of a crash investigation:**
 - 1) Employers must disclose information related to the employer's administration of a post-accident alcohol and/or a controlled substances test administered following the crash under investigation; and
 - 2) FMCSA will provide access to information in the Clearinghouse concerning drivers who are involved with the crash under investigation.



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FMCSA Clearinghouse Surprises

§ 382.409 Medical review officer or consortium/third party administrator record retention for controlled substances

- No person may obtain the individual controlled substances test results retained by a medical review officer or a consortium/third party administrator, and no MRO or C/TPA may release the individual controlled substances test results of any driver to any person, **without first obtaining a specific, written authorization from the tested driver.**



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FMCSA Clearinghouse Surprises

§ 382.409 Medical review officer or consortium/third party administrator record retention for controlled substances (cont'd)

- Nothing shall prohibit a MRO or a C/TPA from releasing to the employer, the Clearinghouse, or to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances and alcohol testing program.



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FMCSA Clearinghouse Surprises

§ 382.413 Inquiries for alcohol and controlled substances information from previous employers

- Employers must request alcohol and controlled substances information from previous employers in accordance with the requirements of § 40.25 of this title, except that the employer must request information from all DOT-regulated employers that employed the driver within the previous 3 years and the scope of the information requested must date back 3 years.



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FMCSA Clearinghouse Surprises

§ 382.413 Inquiries for alcohol and controlled substances information from previous employers (cont'd)

- As of January 6, 2023, employers must use the Drug and Alcohol Clearinghouse in accordance with § 382.701 (a) to comply with the requirements of §40.25 of this title with respect to FMCSA-regulated employers. Exception: When an employee who is subject to follow-up testing has not successfully completed all follow-up tests, employers must request the employee's follow-up testing plan directly from the previous employer in accordance with § 40.25(b)(5) of this title.



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FMCSA Clearinghouse Surprises

§ 382.413 Inquiries for alcohol and controlled substances information from previous employers (cont'd)

- If an applicant was subject to an alcohol and controlled substance testing program under the requirements of a DOT Agency other than FMCSA, the employer must request the alcohol and controlled substances information required under this section and § 40.25 of this title directly from those employers regulated by a DOT Agency other than FMCSA.



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FMCSA Clearinghouse Surprises

§ 382.415 Notification to employers of a controlled substances or alcohol testing program violation

- Each person **holding a commercial driver's license** and subject to the DOT controlled substances and alcohol testing requirements in this part **who has violated the alcohol and controlled substances prohibitions** must **notify in writing all current employers of such violation(s)**.
- The driver is not required to provide notification to the employer that administered the test or documented the circumstances that gave rise to the violation. The notification **must be made before the end of the business day following the day the employee** received notice of the violation, or prior to performing any safety-sensitive function, whichever comes first.



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FMCSA Clearinghouse Surprises

§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances

- The requirement that the following personal information collected and maintained under this part shall be reported to the Clearinghouse:
 - i. A **verified positive, adulterated, or substituted drug test result**;
 - ii. An **alcohol confirmation test with a concentration of 0.04 or higher**;
 - iii. A **refusal to submit to any test required**;



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FMCSA Clearinghouse Surprises

- iv. An employer's report of actual knowledge, as defined at § 382.107:
 - a) On duty alcohol use pursuant to § 382.205;
 - b) Pre-duty alcohol use pursuant to § 382.207;
 - c) Alcohol use following an accident pursuant to § 382.209; and
 - d) Controlled substance use pursuant to § 382.213;
- v. A substance abuse professional (SAP) report of the successful completion of the return-to-duty process;
- vi. A negative return-to-duty test; and
- vii. An employer's report of completion of follow-up testing.

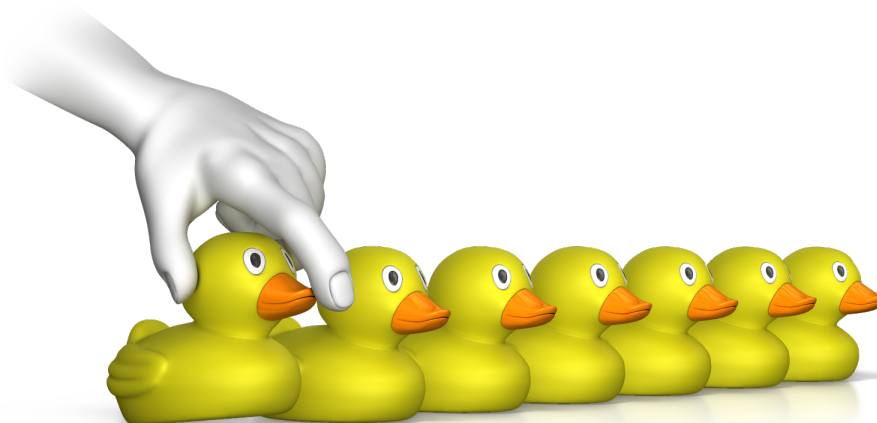


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Getting Your Ducks in a Row



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Employer Checklist

How to Prepare

- Update FMCSA Policy and Forms Toolkit
- Adopt Internal Reporting Protocol
- Modify Service Agent Agreement
- Train covered employees and supervisors



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MRO/SAP/TPA/Collector Checklist

How to Prepare

- Notify clients of need to update FMCSA Policy & Forms Toolkit
- Adopt internal protocol on timely reporting
- Look at current pricing structure based on enhanced duties
- Consider contractual modifications



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Questions? Comments?



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Contact the Presenter

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