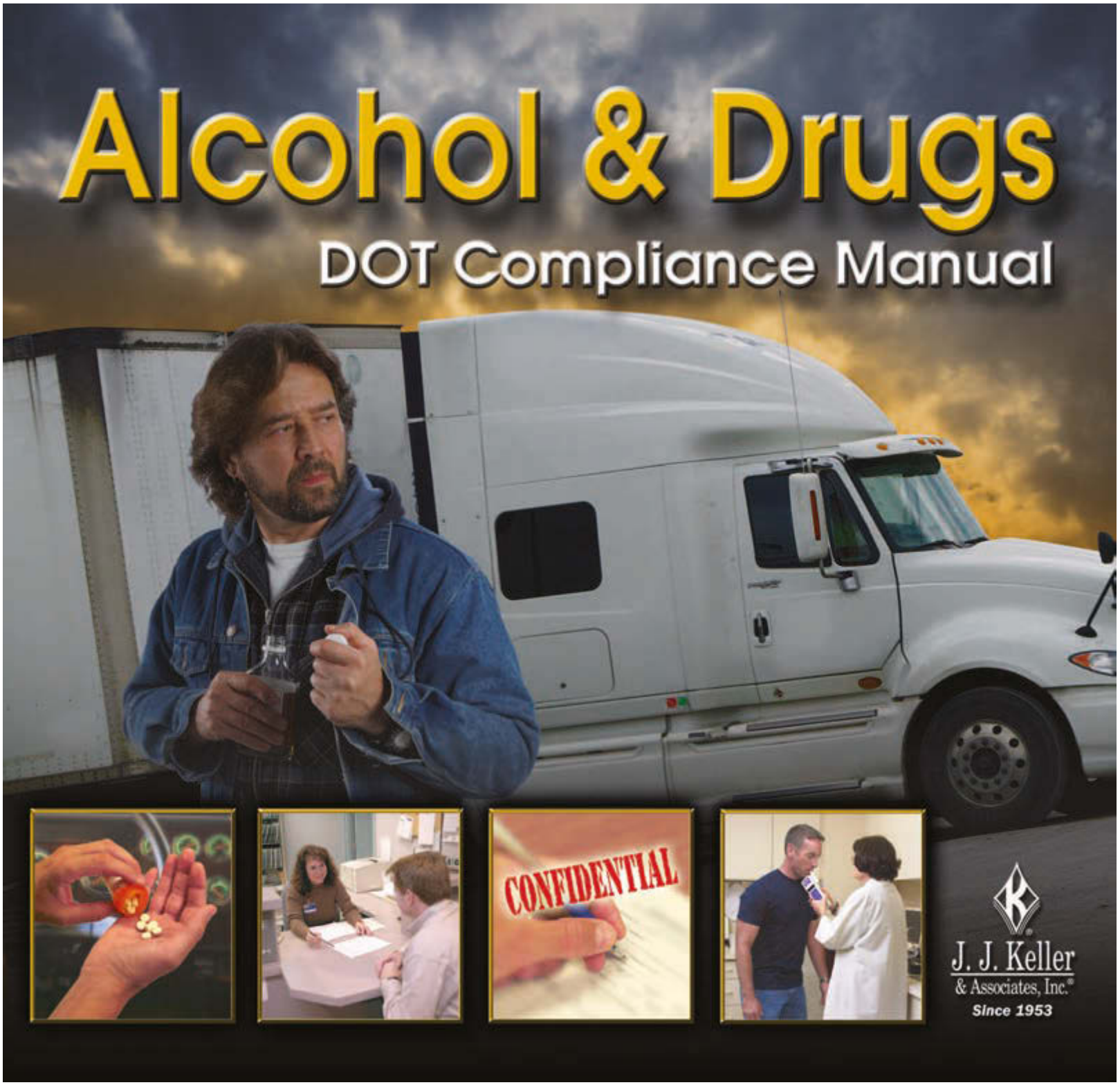
Alcohol & Drugs

DOT Compliance Manual



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Introduction

The issues surrounding alcohol and drug testing are multi-faceted and complex. There are the alcohol and drug testing requirements in the Federal Motor Carrier Safety Regulations. Some states have other regulations that limit or attach conditions on a testing program. Finally there are legal issues to consider when developing and implementing the program. Aside from these concerns, relationships must be established with outside organizations.

This compliance manual will help you understand the federal regulations and explore the related issues.

The manual contains a regulations summary — a detailed explanation of each major alcohol and drug program requirement. The regulations are "taken apart" and explained in step-by-step fashion. Starting with a brief historical background and an overview of the rules, we get into the major components of the Part 382 requirements including applicability, implementation dates, definitions, prohibited actions and their consequences, and required tests. From there we discuss the major components of the actual drug and alcohol procedures in Part 40. The publication also assists with understanding recordkeeping requirements, information concerning policies and training, and potential legal implications.

Our intention is that this book will give you the basic "how-to-comply" information you need to get your program developed, implemented, and running smoothly.

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REGULATIONS SUMMARY

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PROHIBITIONS/CONSEQUENCES

Subpart B of Part 382 (starting at §382.201) deals with prohibitions. Since some of the prohibitions concerning alcohol use are different than those for drug use, they will be addressed separately in this summary.

A discussion of the consequences, including referral and treatment requirements, follows the listing of prohibitions.

Part 392 also contains prohibitions regarding the use of alcohol and drugs. For your reference, those provisions from Part 392 are reprinted at the end of this section.

Alcohol Prohibitions

The alcohol rule prohibits any alcohol misuse that could affect performance of a safety-sensitive function, including:

1. Use while performing safety-sensitive functions.
2. Use during the 4 hours before performing safety-sensitive functions.
3. Reporting for duty or remaining on duty to perform safety-sensitive functions with an alcohol concentration of 0.04 or greater.
4. Use during 8 hours following an accident, or until he/she undergoes a post-accident test.
5. Refusal to take a required test.

NOTE: A driver found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall not perform, nor be permitted to perform, safety-sensitive functions for at least 24 hours. The other consequences imposed by the regulations and discussed below do not apply. However, an employer is able to take action independent of the regulations and FMCSA authority that is otherwise consistent with the law.

Drug Prohibitions

The regulations prohibit any drug use that could affect performance of safety-sensitive functions, including:

1. Use of any drug, except by doctor's prescription, providing the doctor has advised the driver that the drug will not adversely affect the driver's ability to safely operate the CMV and the drug does not appear on Schedule I;
2. Testing positive for drugs; and
3. Refusing to take a required test.

An employer may require a driver to inform the employer of any therapeutic drug use.

Actual Knowledge

Employers having "actual knowledge" that a driver has an alcohol concentration above the limit, is using alcohol or a controlled substance, has used alcohol within the past four hours, or has tested positive or has adulterated or substituted a test specimen for controlled substances, must not allow the driver to perform safety-sensitive functions. "Actual knowledge" means actual knowledge by an employer that a driver has used alcohol or controlled substances based on:

- the employer's direct observation of alcohol or controlled substances use by the employee (not including observation of employee behavior or physical characteristics sufficient to warrant reasonable suspicion testing under Sec. 382.307);
- information provided by the driver's previous employer(s);
- a traffic citation for driving a CMV while under the influence of alcohol or controlled substances; or
- an employee's admission of alcohol or controlled substance use, except as provided in Sec. 382.121.

Refusal to Test

A refusal to test (drug or alcohol) is a prohibition requiring the DOT return-to-duty process. The term is defined in 49 CFR Part 40 for all DOT agencies. According to §40.191 and §40.261, a refusal to test involves:

- Failure to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a Consortium/Third Party-Administrator (CTPA).
- Failure to remain at the testing site until the testing process is complete. However, an employee who leaves the testing site before the testing process commences (see §40.63 (c)) for a pre-employment test is not deemed to have refused to test.
- Inadequate sample:
  - Failure to provide a urine specimen for any drug test.
  - Failure to provide an adequate amount of saliva or breath for any alcohol test.
  - No acceptable medical explanation for failure to provide a sufficient specimen, as determined by the physician through a required medical evaluation.
  - Failure to undergo a medical examination or evaluation, as directed by the employer as part of the insufficient breath procedures.

  - Failure to undergo a medical examination or evaluation, as directed by the Medical Review Officer (MRO), as part of the verification process.
- In the case of a directly observed or monitored collection in a drug test:
  - Failure to permit the observation or monitoring of the provision of a specimen.
  - Failure to follow the observer's instructions to raise his or her clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if the employee has any type of prosthetic or other device that could be used to interfere with the collection process.
- Failure or decline to take an additional drug test the employer or collector has directed the employee to take, for instance, §40.197(b).
- Failure to cooperate with any part of the testing process:
  - For drug testing, examples include refusing to empty pockets when directed by the collector, behaving in a confrontational way that disrupts the collection process, failing to wash hands after being directed to do so by the collector.
  - For alcohol testing, an example might include failure to sign the certification at Step 2 of the Alcohol Testing Form.
- Other examples of refusing to test for drug testing include:
  - Possessing or wearing a prosthetic or other device that could be used to interfere with the collection process; and
  - Admitting to the collector or MRO that he or she adulterated or substituted the specimen.

Interpretation

Recording Refusals to Test

Documentation is key in any safety compliance program. In cases of refusals to test for DOT drug and/or alcohol programs, employers may need to generate an objective statement detailing the event when an employee leaves the facility before a test is complete.

The DOT published official guidance to §§40.73, 40.191, 40.193, 40.333, and 40.355(j) explaining the necessity of having solid reasoning when deeming an event as a refusal to test. It reads:

> "If an employee leaves the collection facility prior to the testing process being completed, the collector must inform the employer as required under §40.191(d). The employer, as required under §40.355(i), must then

determine whether the employee's actions constitute a refusal to test. To make this determination, the employer should consider the information documented on the Chain of Custody Form (CCF) and the advice and information received from the collector and service agents, as well as any supporting information provided by the employee (i.e., in the event of a medical emergency, copies of hospital admission records/EMS records/ police records, etc). The employer must document its decision, and the solid reasoning for the decision, in all collection site refusal determinations. Copies of these decisions, and the information relied on in making those decisions, must be maintained in accordance with §40. 333 and the applicable modal recordkeeping requirements. If during the course of an inspection, the DOT determines that you have not properly documented these determinations, the employer may be subject to penalty in accordance with these regulations."

Consequences

The consequences for engaging in conduct prohibited under Subpart B of Part 382 are outlined in Subpart E of Part 382. In addition, Subpart O of Part 40 specifies the referral, evaluation, and treatment requirements for those who have failed a drug or alcohol test, or have refused to take a DOT-required drug or alcohol test.

If a driver violates any of the prohibitions in Subpart B, as described above, the FMCSA requires the employer to take certain steps to make sure the driver is removed from duty and does not drive again until he/she receives treatment and passes additional tests.

The following steps **must** be taken after a violation:

1. The employer must notify the driver of the results of the test if the driver failed a random, reasonable-suspicion, or post-accident drug test. The employer must also inform the driver which drug was verified as positive. The results do **not** have to be reported to the FMCSA.
2. The driver must stop performing safety-sensitive functions immediately, and must not be allowed to perform such functions. This includes driving a commercial motor vehicle, but also the various other tasks included in the definition of "safety-sensitive function," including:
   - Waiting to be dispatched while at an employer or shipper plant, terminal, facility, or other property, or on any public property, unless relieved from duty.
   - Inspecting, servicing, or conditioning a CMV.

- Spending time in or upon any CMV, unless resting in a sleeper berth.
- Loading or unloading a vehicle, supervising or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded.
- Repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

A rule violation by a CDL-carrying driver operating a 26,001-pound or greater vehicle in interstate or intrastate commerce also is prohibited from driving a 10,001-pound or greater vehicle in interstate commerce. In other words, the driver is prohibited from operating any "commercial motor vehicle" as define in §382.107 *and* §390.5.

Remember that §382.119 prohibits companies from removing its drivers from duty based solely on an unconfirme drug test result. The results must be confirme before a company takes action.

3. The employer must refer the driver to a substance abuse professional (SAP) for evaluation and treatment, even if the driver is an applicant or new employee. The employer must provide a list of SAPs readily available to the employee and acceptable to the employer, with names, addresses, and telephone numbers. The employer may not charge for the list.

   The employer is not responsible for making sure the driver reports to an SAP, nor for paying for the SAP's services.

4. The employer must keep all records related to the driver's drug and/or alcohol test(s), and must provide that information to other employers upon request. The information may not be released without the driver's written permission.

The following additional steps **may** be taken after a drug or alcohol rule violation, according to company policy. These steps are neither required nor prohibited under DOT regulations:

1. The employer may discipline the driver. The Federal Motor Carrier Safety Regulations leave questions of employee discipline up to the company. A driver who tests positive (or who violates company drug/alcohol policies) may be fired suspended (with or without pay), assigned to a non-driving task, etc. The company's disciplinary policies should be in written form, and all drivers should be made aware of them when hired. Refer to the EMPLOYER PROGRAM IMPLEMENTATION section for more information.

   Disciplinary policies must be enforced consistently. For example, a company should not fir one employee who tested positive and keep a second employee who also tested positive. Companies may be required to justify any discrepancies in the way they discipline employees. Refer to the LEGAL ISSUES section for more details.

2. The driver may be assigned to non-safety-sensitive duties. A driver who has violated the DOT's drug and/or alcohol regulations may continue to work but may only perform duties that are not considered "safety-sensitive functions." This may include handling of materials exclusively in a warehouse, regardless of whether the materials are considered hazardous, as long as safety-sensitive functions are not performed until the individual has completed treatment and has passed a return-to-duty test.
3. The employer may pay for treatment. The FMCSA leaves questions of payment up to employer policies and labor-management agreements. In any case, whether the employer pays or the employee pays, if the employee returns to performance of safety-sensitive functions, the employer must ensure that follow-up testing occurs as required. If the employer offers to return the employee to safety-sensitive duties, the company should make sure the counseling or rehabilitation programs are acceptable.
4. The employer may allow the driver to return to the performance of safety-sensitive duties after treatment is complete. Even if the driver completes the treatment process, the company is not *required* to return him/her to safety-sensitive duties. Before the driver can again perform such duties, he/she must complete the return-to-duty process described below.

The following steps **must** be taken before a driver who has violated the DOT's drug or alcohol rules can return to the performance of safety-sensitive functions:

1. The SAP must determine that the driver has successfully complied with the SAP's prescribed education and/or treatment plan. The employer should work closely with the SAP to verify that treatment has been completed successfully, and should obtain a written certificatio from the SAP.
2. The employer must ensure that the driver passes a **return-to-duty test** conducted under direct observation. The driver must have a negative drug test result and/or an alcohol test result of less than 0.02 before resuming performance of safety-sensitive duties.
3. After the driver returns to safety-sensitive duties, the employer must ensure that the driver takes and passes all **follow-up tests** as required in the SAP's treatment plan and conducted under direct observation. The SAP will determine the number and frequency of follow-up tests, with at least 6 tests performed within the firs 12 months after returning to duty. The tests must be unannounced and must be performed in addition to any other DOT-required tests (e.g., random, post-accident, etc.). These testing requirements would follow the driver if he/she left one employer and went to another, and could be required for up to 60 months.

Follow-up and return-to-duty tests need not be confine to the substance involved in the violation. If the SAP determines that a driver needs assistance with a poly-substance abuse problem, the SAP may require, for example, alcohol tests to be performed along with the required drug tests after the driver has violated the drug testing prohibition.

Pre-Employment Drug Test Result

Question: "When a driver tests positive on a DOT pre-employment drug screen, how much time must elapse before the driver is given a retest?"

Answer: The regulations **do not** allow for a retest to nullify any previous DOT test results. The Medical Review Officer (MRO) — during the verification process — gave the driver the opportunity to test the split specimen. This is the other half of the original urine collection (sealed in a separate container) which is sent to a different lab in the event the driver wants to challenge the results. This request had to have been made within 72 hours of this conversation between the driver and MRO.

If the split specimen test was not requested or it validates the original result, the result remains positive. It stands despite any objections by the driver or his or her motor carrier. The fact it was a pre-employment test type has no bearing. Another test does not wash away the results of the earlier test.

The consequences are the same as any other DOT test type. The driver is required to go through the DOT return-to-duty process, and cannot operate a commercial motor vehicle (CMV) for anyone until the necessary steps are completed in accordance with Part 40. If the driver is operating a CMV — despite this positive pre-employment test — the driver and any carrier using him or her are in violation of the safety regulations and subject to civil and criminal penalties per Section 390.37.

Federal Reporting Requirements

At this time, there are no federal rules requiring the reporting of positive drug or alcohol tests to the government. As of January 6, 2020, the Federal Motor Carrier Safety Administration (FMCSA) will establish a repository to collect information on drivers' DOT drug and alcohol violations occurring under a motor carrier's testing program. The DOT Drug and Alcohol Clearinghouse will capture data — provided by employers and services providers — on CDL drivers that tested positive or refused a DOT-required test.

State Reporting Requirements

Some states have adopted rules requiring that they be notified of positive drug and alcohol test results, as summarized below:

ARKANSAS — An Arkansas employer must report to the Office of Driver Services (within three business days) all valid positive and refusal to provide specimen results for post-accident (Sec. 382.303) and random (Sec. 382.305) alcohol testing for all Arkansas-issued commercial driver's license (CDL) holders it employs in safety-sensitive transportation jobs for which drug and alcohol testing is required according to the Federal Motor Carrier Safety Regulations (FMCSRs).

An Arkansas employer must report to the Office of Driver Services (within three business days) all valid positive drug test results for marijuana metabolites, cocaine metabolites, amphetamines, opiate metabolites' or phencyclidine, all refusals to provide a specimen for drug testing, or the submission of an adulterated, diluted positive, or substituted specimen for all Arkansas-issued CDL holders employed in safety-sensitive transportation jobs for which drug and alcohol testing is required according to the FMCSRs.

An Arkansas employer must submit a request for information (with an authorization signed by the employee) for each employee subject to drug and alcohol testing. The employer must retain this information for at least three years.

An employee may also submit a signed request his/her own information.

A consortium/third party administrator must meet these reporting requirements for an Arkansas employer or employee who holds an Arkansas-issued CDL. The definition of an employer includes an individual who holds an Arkansas-issued CDL and is self-employed in a safety-sensitive transportation job for which drug and alcohol testing is required according to the FMCSRs.

CALIFORNIA — Drug and alcohol testing consortiums (as defined in §382.107) must mail a copy of all drug and alcohol positive test result summaries to the California Highway Patrol within three days of the test. This requirement applies only to positive tests of drivers employed by motor carriers who operate terminals within California.

NEW MEXICO — Effective July 1, 2009, a person or entity who is subject to Sec. 382.103 must report positive test results or a refusal to submit to a test to the Motor Vehicle Division of the Taxation and Revenue Department. The Motor Vehicle Division must enter the report of a positive test result or refusal to submit to a test on the reported person's motor vehicle record.

The Motor Vehicle Division must keep the report of a positive test result or a refusal to submit to a test in the motor vehicle record of the driver for five years from the time the report was received by the Motor Vehicle Division.

NORTH CAROLINA — An employer must report all employee or applicant positive drug or alcohol test results and all employee refusals to participate in a drug or alcohol test under 49 CFR Part 382 or Part 655 to the Division of Motor Vehicles (DMV). The notification must be in writing and submitted within five business days of the employer's receipt of confirmation of a positive test or refusal to participate in the test. When DMV receives a report of a positive drug or alcohol test or refusal to participate in a drug or alcohol test, the driver will be disqualified from driving a commercial motor vehicle until he/she presents proof of successful completion of assessment and treatment by a substance abuse professional in accordance with Sec. 382.503. The driver will be notified of this disqualification by DMV and will have 20 days from the date of notice to request a hearing. The notice of disqualification will be placed on the driver's driving record and will remain on the driving record for two years following the end of the

driver's disqualification. A "Positive Drug Test Report for Current Employee" (CDL-8) for may be obtained via the DMV's website: www.ncdot.org/dmv/forms.

OREGON — As of March 1, 2000, carriers must certify they meet drug and alcohol testing program requirements at the time they initially register to operate in Oregon, and again each time they renew registration. Carriers who participate in a testing program maintained by a consortium must provide the names of the persons operating the consortium. An Oregon commercial driver's positive drug test must be entered on his/her employment driving record. The entry procedures are as follows:

- Medical review officers (MRO) must report any Oregon commercial driver's positive drug test result to Oregon's Driver and Motor Vehicle Services Division (DMV) so it can be entered on the driver's employment driving record.
- When a MRO reports a positive drug test, DMV will notify the driver and advise him/her of the right to a hearing. If the hearing is requested, no entry will be made on the driver's commercial driving record pending the outcome of the hearing. DMV will release drug test information contained on a commercial driving record only with the written permission of the driver.

SOUTH CAROLINA — Effective January 1, 2009, all employers must report to the South Carolina Department of Motor Vehicles (SCDMV) verified positive drug tests or positive alcohol confirmation tests, refusals to provide a specimen for a drug or alcohol test under 49 CFR Part 40, or submission of an adulterated, diluted positive, or substituted specimen for all employee or applicant commercial driver's license (CDL) holders. Employers must submit form CDL-18 to SCDMV within three business days and must maintain a copy of this notification for three years.

Commercial drivers who are reported as having a verified positive drug test or positive confirmed alcohol test, refusing to provide a specimen for a drug or alcohol test under 49 CFR Part 40, or submitting an adulterated, diluted positive, or substituted specimen will be disqualified by SCDMV from operating a commercial motor vehicle within 20 days.

The disqualificatio stays in effect until the employee or applicant undergoes a drug and alcohol assessment by a substance abuse professional (SAP) meeting the requirements of 49 CFR Part 40, successfully completes a drug or alcohol treatment or education program as recommended by the SAP, and pays a $100 reinstatement fee to SCDMV. If a CDL driver is disqualifie due to a drug or alcohol test violation more than three times in a fiv year period, he/she is permanently disqualifie from operating a commercial motor vehicle. Form CDL-18 may be obtained via SCDMV's website: www.scdmvonline.com.

TEXAS — An employer required to conduct Part 382 drug and alcohol testing must report to the Texas Department of Public Safety (DPS) a valid positive alcohol or drug test result for an employee who holds a commercial driver's license (CDL) issued by the state of Texas.

The report must be submitted on a form prescribed by DPS within 10 days of receiving notice of a valid positive drug or alcohol test. The form is available via the DPS website: www.txdps.state.tx.us/forms. Unless the report is a refusal to submit a sample, the employer must attach to the report a legible copy of either the Federal Drug Testing, Custody and Control Form (with at least steps one through six completed), U. S. Department of Transportation Alcohol Testing Form (with at least steps one through three completed), or the medical review officer's (MRO) or breath alcohol technician's (BAT) report of a positive, diluted, adulterated, or substituted test.

A BAT, MRO, laboratory, consortium, or other individual may submit the report, but reports submitted by a laboratory or other individual must be verifie by the MRO or BAT. Information regarding this report is confidentia and may only be released per the provisions of Texas Transportation Code, 521.053. A request for this information must be submitted on a DPS prescribed form. The form is available via the DPS website: www.txdps.state.tx.us/forms.

WASHINGTON — As of June 13, 2002, all breath alcohol technicians (BATs) and medical review officers (MROs) (regardless of the state where the BAT or MRO is located) must report all individuals who hold a Washington state commercial driver's license (CDL) who have a confirme positive drug or alcohol test to the Washington Department of Licensing. This report must be made within three business days of the confirme test, using a form from the Department of Licensing. Motor carriers, employers, or consortiums must make this requirement a written condition of their contract or agreement with a BAT or MRO. When the Washington Department of Licensing receives a report from a BAT or MRO that the holder of a CDL has a confirme positive drug or alcohol test, the driver will be disqualifie from driving a commercial motor vehicle. The Washington Department of Licensing will notify the driver of this disqualificatio by mail. The driver has 20 days from the day the notice is given to request a hearing.

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