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Commercial Driver's License Drug and Alcohol Clearinghouse
79 Federal Register 9703, February 20, 2014

Advocates for Highway and Auto Safety (Advocates) files these comments in response to the Federal Motor Carrier Safety Administration (FMCSA) notice and request for public comment on the proposal to revise the Code of Federal Regulations (CFR), 49 CFR Part 382, to establish the Commercial Driver's License Drug and Alcohol Clearinghouse (clearinghouse), 79 FR 9703 (Feb. 20, 2014). This database administered by FMCSA will contain results from the alcohol and controlled substances tests of holders of commercial driver's licenses (CDLs). Advocates recognizes that congressional action in section 32402 of the Moving Ahead for Progress in the 21st Century (MAP-21) Act,[1] requires the establishment of the drug and alcohol testing clearinghouse[2] and that the FMCSA proposed rule largely fulfills that statutory mandate.

As stated in the FMCSA's Notice of Proposed Rulemaking (NPRM), "CDL drivers who use drugs or alcohol while operating a CMV pose a significant risk to the public safety."[3] Yet, currently employers do not have the ability to identify CDL drivers who have previously violated the alcohol and drug testing provisions because they cannot independently verify the testing histories of applicant drivers. Thus, drivers with repeated violations are able to easily circumvent existing regulations and operate commercial motor vehicles (CMVs) with deadly consequences. In 1999, for example, a motorcoach crash in New Orleans, Louisiana, resulted in the deaths of 22 passengers and is a tragic example of the pressing need for this information clearinghouse. The subsequent crash investigation by the National Transportation Safety Board (NTSB) revealed that the driver of the motorcoach had used marijuana and taken a sedating antihistamine prior to reporting to duty.[4] The driver also had a history of failed drug tests that

[1] Safe Roads Act of 2012, Division C, Title II, Subtitle D, Pub. L. 112-141 (2012).
[2] Section 32402 of MAP-21 is codified at 49 U.S.C. § 31306a.
[3] 79 FR 9703, 9704 (Feb. 20, 2014).
[4] National Transportation Safety Board, *Highway Accident Report: Motorcoach Run-Off-The-Road, New Orleans, Louisiana, May 9, 1999"* Report No. HAR-01-01, Washington, DC, August 2001.

had resulted in his termination from multiple previous employers.[5] However, the driver's employer at the time of the crash was unaware of the prior test results at the time the driver applied for his position.[6] The employer had no avenue to obtain prior drug and alcohol test results unless voluntarily supplied by the driver, which the driver failed to disclose.[7]

Sadly, the crash in Louisiana is not an isolated event. The Government Accountability Office (GAO) has identified numerous instances of "job hopping" where an applicant failed to reveal a previous positive test for such substances as cocaine, marijuana and amphetamines to prospective employers.[8] The failure to disclose prior positive drug and alcohol test results is not an uncommon practice. Recognizing the severity and breadth of the problem, both the NTSB and GAO recommended the establishment of a database for driver drug tests as required in MAP-21 and proposed in this rule.[9]

FMCSA Should Not Limit the Requirement of Employers to Report Actual Knowledge Violations to Only Instances Where a Driver Receives a Traffic Citation

Under the proposed rule, FMCSA seeks to limit the reporting requirement of employers with actual knowledge of a driver's use of alcohol or drugs to only incidents where a driver receives a traffic citation for operating a CMV while impaired. The agency's rationale for excluding other events, i.e., direct observation of an employee committing a violation and an employee's admission of drug or alcohol use, from required reporting to the clearinghouse is the concern that these additional circumstances are too subjective in nature. However, the statutory language demonstrating the intent of Congress that all actual knowledge of violations should be reported to the clearinghouse is unambiguous. MAP-21 states that the "clearinghouse shall function as a repository for records relating to the positive test results and test refusals of commercial motor vehicle operators *and violations by such operators of prohibitions set forth in subpart B of part 382 of title 49, Code of Federal Regulations*…"[10] The FMCSA also notes in the rule that these incidents are serious enough for an employer to prohibit the driver from performing safety-sensitive functions until the return-to-duty process is completed.[11]

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[5] *Id.* at Page 9.
[6] *Id.*
[7] *Id.*
[8] U.S. General Accounting Office, *Examples of Job Hopping by Commercial Drivers after Failing Drug Tests*, Washington, DC, June 2008.
[9] National Transportation Safety Board, *Highway Accident Report: Motorcoach Run-Off-The-Road, New Orleans, Louisiana, May 9, 1999*, Report No. HAR-01-01. Washington, DC, August 2001; U.S. General Accounting Office, *Improvements to Drug Testing Programs Could Better Identify Illegal Drug Users and Keep Them Off the Road*, Washington, DC, May 2008.
[10] Section 32402(a)(3)(emphasis added). Part 382, subpart B, prohibits employers from permitting drivers with a blood alcohol concentration exceeding 0.04 percent from report for or remaining on duty, and from performing safety sensitive functions while on-duty and during pre-duty and post-accident situations.
[11] 79 FR 9710. Indeed, under the current testing regulations, such observations would provide an employer with reasonable suspicion of the use of alcohol or controlled substances sufficient to require testing of the driver. 49 C.F.R. § 382.307 (2013). Positive test results, or a refusal to take the test, would then be submitted to the clearinghouse.

Concerns regarding subjective or malicious reporting of such events can easily be remedied without excluding numerous significant violations from the clearinghouse that could prevent a dangerous repeat offender from operating a CMV on America's roads. In those instances where an employer deems a test as unfeasible or ineffective an employer should be required to submit a sworn affidavit subject to the penalties of perjury as outlined under Federal law.[12] Such an affidavit should assuage concerns regarding harassment or accusations based on bad faith where tests results are not available, and would encourage the reporting of only the most grievous violations to fall under these categories such as the admission to a supervisor of recent drug use or the observation of the consumption of alcohol or the use of drugs at the workplace.[13] In addition, these violations do not raise the concerns of hearsay and may be disputed by the driver in a prompt fashion as outlined in Section 382.717 of the proposed rule.[14]

FMCSA further proposes that there is no need to require the information obtained from previous employers be reported to the clearinghouse because current rules require such employers to report this information to a driver's prospective employer during the pre-employment background check. However, this reasoning assumes that the hiring process occurs without any errors or omissions whether intentional or unintentional. As noted above, there have been numerous documented cases where a driver fails to voluntarily provide a complete work history to his prospective employer because of past violations. In such instances, the driver's prior positive testing history would not be obtained by the prospective employer from the driver's previous employers. Furthermore, previous violations may never have been reported to the clearinghouse by the previous employer or been received by the prospective employer for a myriad of reasons including a simple oversight. Mandating that employers report all violations to the clearinghouse involving actual knowledge of the use of alcohol or drugs will provide an important safeguard to ensure prospective employers have an accurate and complete history of an applicant and dangerous drivers are kept off the roads until rehabilitated.

Advocates Urges FMCSA to Require That Information Regarding Violations Be Available for Review by Employers for Five Years

In order to meet the statutory requirements of MAP-21, FMCSA must retain the records of violations where the driver has successfully completed a return-to-duty process for a period of five years. FMCSA seeks comment on the issue based on an interpretation of the statutory language that requires the clearinghouse to retain the records for either three or five years. The statute clearly requires the clearinghouse to retain the test record for a period of five years. The language cited pertaining to these time periods is proscribing two separate requirements. The first requirement mandates that "an employer shall utilize the clearinghouse to determine whether an employment prohibition exists and shall not hire an individual to operate a

[12] 18 U.S.C. § 1621 (2012).
[13] Where an employer suspects a drug or alcohol violation has occurred when a driver reports for duty, and an on-duty and post-crash situations, conducting an immediate drug/alcohol test is preferred. However, where such a test is not possible, a direct observation report, including an explanation as to why a test could not be conducted, should be submitted to the clearinghouse.
[14] 79 FR 9712.

commercial motor vehicle unless the employer determines that the individual, during the preceding 3-year period…" had not committed any violations.[15] The second requirement contained in the statutory language instructs FMCSA, as the administrator of the clearinghouse, to "retain a record submitted to the clearinghouse for a 5-year period beginning on the date the record is submitted."[16] The statutory requirement that applies to FMCSA is clear that the records should remain in the clearinghouse for five years regardless of the responsibilities placed on the employer.

There are additional public safety considerations that merit these records remaining in the clearinghouse for a period of five years. While companies may only be required to obtain information from the immediate three years prior to hiring a driver, many employers will find it helpful to have a complete and accurate employment history of the candidate beyond that brief timeframe. In addition, by removing violations after only three years, it allows dangerous drivers with a poor history of violations to simply wait for those violations to expire from the system to permit them to appear to be a more responsible driver and attractive candidate. FMCSA, by maintaining records of violations for five years in the database, even those that are followed by a successful return to duty, will provide another valuable safeguard to prevent dangerous drivers from operating on America's roads.

Advocates Supports New Affirmative Requirement that Drivers Must Report Any Testing Violation to All Employers

Under current regulations, drivers who work for multiple employers are not required to notify all of their current employers of a violation. Advocates strongly supports the new affirmative requirement contained in the proposed rule that would close this dangerous loophole and require notification by a driver to each employer of a violation. As an additional safeguard, Advocates recommends that each of the driver's employers known to FMCSA receive an electronic notification of the violation. Without such a notification employers that perform only an annual search of current employees (as required by this rule) could be unaware of a violation committed by one of their drivers while working for another company for period as long as eleven months. These further requirements and measures will ensure that the driver completes a successful return-to-duty process that can be accepted by each company and that every employer has accurate information regarding drug and alcohol use by all of its drivers.

Advocates Supports "Blanket Consent" for Annual Searches Performed by Employers

Annual inquiries of driver's test records by employers should be required and allowing "blanket consent" will encourage such searches. Under the proposed rule, employers would gain written consent from an employee to perform an annual search of the clearinghouse to determine whether any information regarding the driver exists in the clearinghouse. This consent would permit the employer(s) to perform the annual search for the entire duration of the driver's

[15] Safe Roads Act of 2012, 126 STAT. 795, 798, Pub. L. 112-141 (2012).
[16] Safe Roads Act of 2012, 126 STAT. 795, 799, Pub. L. 112-141 (2012).

employment without the burdensome task of obtaining written consent each year. Should the annual search indicate the existence of information about the driver in the clearinghouse, further written consent would then be required to perform a more detailed search to access the specific test records of the driver. Thus, the blanket consent encourages annual searches by lessoning the burden on the employer without infringing upon the privacy rights of the driver.

In conclusion, FMCSA should not limit the requirement of employers to report actual knowledge violations to only instances where a driver receives a traffic citation as such a rule would allow for numerous significant, documented violations to be omitted from the clearinghouse permitting dangerous drivers to remain on the road. Furthermore, in order to meet the statutory requirements of MAP-21, FMCSA must retain the records of violations where the driver has successfully completed a return-to-duty process for a period of five years. Along with meeting the statutory requirements, such a policy will ensure employers have full and complete information about prospective candidates. All of the procedures noted in these comments and required in the rule will help ensure that dangerous drivers are not permitted to operate CMVs on America's roads and FMCSA must "**establish, operate, and maintain** a national clearing house" by October 1, 2014 as required by the statutory language of MAP-21.[17]

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[17] Safe Roads Act of 2012, 126 STAT. 795, Pub. L. 112-141 (2012)(emphasis added). Note the effective date for the section of the statute establishing the clearinghouse is October 1, 2012. See 126 STAT. 413 (2012).