



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

Controlled Substances and Alcohol Testing Responsibilities of Commercial Driver Staffing Agencies and Motor Carriers that Use Them

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of Enforcement Guidance.

SUMMARY: This notice addresses commercial driver staffing agencies that employ commercial drivers who are supplied to motor carriers to operate commercial motor vehicles (CMV). If these CMVs require a commercial driver's license (CDL), the drivers are subject to the U.S. Department of Transportation (DOT) controlled substances (drug) and alcohol testing regulations.. Under the Federal Motor Carrier Safety Regulations (FMCSR), a driver staffing agency may qualify as an employer.

DATES: This enforcement guidance is effective immediately.

FOR FURTHER INFORMATION CONTACT: Mr. Juan Moya, Office of Enforcement and Compliance, Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001. Telephone Number: (202) 366-4844; E-mail Address: fmcsadrugandalcohol@dot.gov. Office hours are from 8:00 a.m. to 5:00 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

The term "employer," as defined in 49 CFR 382.107, encompasses driver staffing agencies that employ persons who operate CMVs and are subject to CDL requirements. The term "Employer," as defined in 49 CFR 382.107, encompasses a person or entity

employing one or more employees who are subject to DOT agency regulations requiring compliance with the . DOT drug and alcohol program requirements in parts 40 and 382, Service agents,¹ however, are not employers for the purposes of these regulations

Commercial driver staffing agencies supply the motor carrier industry with intermittent, casual, or occasional drivers to help meet industry business demands. The staffing agency directly employs the driver, and pays the driver's wages and employment taxes. Therefore, FMCSA has jurisdiction over these companies as employers of persons under Part 382 of the Federal Motor Carrier Safety Regulations (FMCSRs). As employers, driver staffing agencies are required to make records available for inspection upon request by a special agent or authorized representative of the FMCSA.

Section 382.103(a) further clarifies that the drug and alcohol regulations apply to persons and to employers of such persons who operate a CMV in commerce and are subject to the CDL requirements under 49 CFR part 383. Accordingly, staffing agencies, if they choose, may be responsible for ensuring compliance with all of the DOT drug and alcohol testing program requirements for their commercial drivers subject to parts 382 and 383 of the FMCSRs and 49 CFR part 40. These requirements include, but are not limited to, drug and alcohol testing, driver education, record retention, providing agency access to records, and requesting drug and alcohol information from a driver's previous employers. If a driver staffing agency chooses not to establish its own DOT drug and alcohol testing program when it provides a CDL driver to a motor carrier, the motor carrier is solely responsible for complying with part 382 prior to allowing the driver to

¹ Service agent. Any person or entity, other than an employee of the employer, who provides services specified under this part to employers and/or employees in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, substance abuse professionals, and C/TPAs. To act as service agents, persons and organizations must meet the qualifications set forth in applicable sections of this part. Service agents are not employers for purposes of this part.

perform a safety-sensitive function.

This guidance addresses the use of “casual, intermittent, and occasional” drivers, who may be leased from a driver staffing agency. FMCSA recognizes that motor carriers needing a CDL driver on short notice may not have the time or ability to conduct pre-employment testing or to place the short-term driver into the motor carrier’s random testing pool. Accordingly, FMCSA guidance provides for adoption of the DOT drug and alcohol testing program of another part 382 employer for purposes of regulatory compliance of the “borrowed” or leased driver. Section 382.301(c)(2), which addresses “Pre-employment Testing,” recognizes the situations where a motor carrier use, but does not employ, a driver more than once a year to operate a CMV. The regulation provides that employers, who use such drivers who must verify the driver’s participation in a DOT drug and alcohol testing program every six months and maintain records of such verification pursuant to the record retention requirements in section 382.401 Regulatory guidance to section 382.301 explains that this provision was intended to apply to drivers who are “temporarily leased” or loaned to a motor carrier “for one or more trips generally for a time period less than 30 days.” See 49 CFR 382.301(c)(2) and (62 FR 16385) “Guidance Question 1”).

Accordingly, FMCSA interprets a casual, intermittent, or occasional driver as one who works for another employer for any period of less than 30 consecutive days. If a leased driver operates or is expected to operate for a motor carrier employer for more than 30 consecutive days, the driver should be included in that motor carrier employer’s random testing pool and that motor carrier employer should assume full responsibility for the driver under its own DOT drug and alcohol testing program. A driver staffing agency

may remove the driver from its random testing pool or allow the driver to remain in its testing pool based on its reasonable expectation on whether the driver will or will not return to its employment as a temporary leased driver.

A motor carrier that leases one or more CDL drivers from a driver staffing agency is responsible for ensuring that each leased driver is participating in a compliant DOT drug and alcohol testing program. The motor carrier remains responsible at all times for ensuring compliance with all of the rules, including random testing, for all drivers which they use, regardless of any utilization of third parties to administer parts of the program. Therefore, to use another's program, an employer must make the other program, by contract, consortium agreement, or other arrangement, the employer's own program. This would entail, among other things, being held responsible for the other program's compliance, having records forwarded to the employer's principal place of business on 2 day-notice, and being notified of and acting upon positive test results. For purposes of the leased driver, the motor carrier must adopt the staffing agency's drug and alcohol testing program as its own program. Accordingly, the motor carrier remains responsible for any non-compliance by the driver staffing agency. This arrangement is consistent with FMCSA guidance on employer use of another employer's DOT drug and alcohol testing program for casual, intermittent, or occasional drivers. See (62 FR 16387 dated April 4, 1997. It is intended for short-term leased drivers.

If the staffing agency has not conducted the required testing, the motor carrier must treat the leased driver as a new employee and conduct all required part 382 drug and alcohol testing and program requirements before utilizing the driver to conduct a safety-sensitive function. These requirements include conducting the required background

inquiries, providing a copy of the drug and alcohol policy and educational materials, conducting a pre-employment drug test, placing the driver in a random testing pool, and all other recordkeeping, testing, and programmatic requirements in parts 382 and 390.

By adopting the driver staffing agency's drug and alcohol testing program as its own, the motor carrier assumes responsibility for the driver staffing agency's regulatory compliance with respect to the leased driver. Accordingly, motor carriers should ensure that the driver staffing agency has a fully compliant program under DOT regulations and is able to provide within 48 hours the required driver qualification records.

Pursuant to 49 CFR 382.507, employers that violate the requirements of 49 CFR part 382 or part 40 may be subject to the civil and/or criminal penalty provisions of 49 USC 521(b).

Issued on: December 15, 2016

T.F. Scott Darling, III,
Administrator

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