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DOT Creates CDL Drug and Alcohol Clearinghouse, Imposing Employer Reporting and Query Obligations

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On December 2, 2016, the U.S. Department of Transportation announced a final rule establishing a new “Commercial Driver’s License Drug and Alcohol Clearinghouse.” The Clearinghouse will provide a central database identifying violations of DOT’s drug and alcohol testing program by drivers who operate vehicles that require a commercial driver’s license (CDL), and information about whether such a driver has successfully completed the DOT-mandated return-to-duty rehabilitation processes. Creation of the Clearinghouse was mandated by the Moving Ahead for Progress in the 21st Century Act, a 2012 Congressional transportation funding initiative. Beginning in 2020, the rule will require covered employers to register with DOT and to comply with obligations in two areas: “Reporting” and driver “Queries.”

Registration and Reporting Obligations

Under the new rule, on or after January 6, 2020,¹ covered employers must register with the Clearinghouse. After registering, such employers will be obligated to report the following matters to the Clearinghouse by the close of the third business day following the date the employer obtained the information:

- Verified positive, adulterated, or substituted DOT drug test results.
- DOT alcohol confirmation tests with a concentration of 0.04 or higher.
- Refusal to submit to any DOT-mandated test.
- An employer’s actual knowledge of DOT-prohibited alcohol and drug use.

¹ Covered employers will need to register no later than the first time on or after January 6, 2016 there is either a Reporting or driver Query obligation, i.e., the first time Clearinghouse access is necessary to comply with the new rule.

Employers will have no obligation to report drug and alcohol use that is not prohibited by DOT rules or to report the results of testing that is not mandated by DOT.

Query Obligations and Requirements

The new rule will require covered employers to make queries to the Clearinghouse about *both applicants and employees*. To facilitate such queries, employers will pay a fee that DOT has not yet determined, with options for subscription and batch requests.

Applicant Queries

With respect to applicants, a covered employer will not be permitted to employ a driver subject to DOT drug and alcohol testing rules without first conducting a pre-employment query of the Clearinghouse to obtain information about whether the driver has had verified positive, adulterated, or substituted DOT drug or alcohol test results, has refused to submit to a DOT test, or an employer has reported actual knowledge of DOT-prohibited alcohol and drug use. (“Employ” in the DOT regulations means to use the driver regardless of the actual employment relationship. Therefore, the query obligation will apply to independent contractor drivers as well as regular employees.)²

Until the Clearinghouse has been operational for three years, employers will also be required to request drug and alcohol-testing histories from previous employers in addition to querying the Clearinghouse. Thereafter, the Clearinghouse query will satisfy the DOT drug and alcohol background check requirement, except where an employee was subject to testing under DOT modalities³ other than the Federal Motor Carrier and Safety Administration regulations.

Annual Driver Inquiries

Covered employers will also be obliged to make queries at least annually about current drivers subject to DOT drug and alcohol testing rules. Employers that learn of reportable information from a Clearinghouse inquiry may not return a driver to safety-sensitive work until the driver completes the DOT return-to-duty process. In lieu of a full query, an employer may be able to conduct a limited query that will simply tell the employer whether there is information about the individual driver in the Clearinghouse, without releasing that information to the employer. If a limited query shows that information exists in the Clearinghouse, the employer would then be obliged to make a full query.

Required Consent for Inquiries

No employer will be permitted to query the Clearinghouse without first obtaining the applicant’s or driver’s written or electronic consent, which must be retained by the employer for three years from the date of the last query. Drivers must also submit electronic consent to the Clearinghouse before an employer may access records about that driver. If a driver refuses to provide consent to the employer and to the Clearinghouse, the driver may not be permitted to perform DOT safety-sensitive work.

² In some circumstances, employers not in the transportation business that subcontract with third parties with required DOT-operating authority would likely not need to verify a subcontractor’s compliance with the Clearinghouse rules.

³ In addition to the Federal Motor Carrier and Safety Administration, DOT modalities include the Federal Aviation Administration, the Federal Railroad Administration, the Federal Transit Administration and the Pipeline & Hazardous Materials Safety Administration.

Sunset Provision

The Clearinghouse rule provides that when a driver has satisfied all DOT return-to-duty procedures and prescribed follow-up testing, and five years have passed since the violation determination, information about the violation will no longer be available to employers.

Ample Time to Prepare With 2020 Implementation Date

While the final DOT rule will take effect on January 4, 2017, employers will not be obliged to comply with its mandates until over three years later, on January 6, 2020.⁴ The Clearinghouse infrastructure does not currently exist and will not be created for some time. As a practical matter, therefore, employers will not be able to register, report violations or conduct queries until it is established. Guidance in DOT's Commercial Driver's License Drug and Alcohol Clearinghouse Frequently Asked Questions expressly advises that employer obligations will not attach until the 2020 Compliance Date:

...

2. *Will violations that occur before the Clearinghouse rule is implemented be included in the Clearinghouse?*

No. The Clearinghouse will contain only violations that occurred on or after the rule's implementation date of January 4,⁵ 2020.

Thus, employers will have ample time to prepare for compliance with the new rule. In doing so, employers should develop appropriate consent forms, decide whether full annual inquiries or only limited inquiries (with any needed follow-up) will be conducted, and draft and implement policies to ensure compliance with Clearinghouse rule requirements.

⁴ Since the rule is subject to review by Congress under the Congressional Review Act, it would not survive if Congress passes a resolution invalidating it and the resolution is approved by the President. Since the rule was promulgated in response to a Congressional mandate, however, we do not expect such an outcome.

⁵ The DOT FAQ contains a typo, identifying the implementation date as January 4, 2020, whereas the compliance date established and identified by DOT in the Federal Register is January 6, 2020.