LEAGUE OF MINNESOTA CITIES

Get Your City Ready for the Drug & Alcohol Clearinghouse
Polling Question
The New FMCSA Clearinghouse

- FMCSA issued final regulations creating the National Drug and Alcohol Testing Clearinghouse for CDL Drivers on 12.5.2016

- The final regulations go into effect 1.6.2020
Polling Question
https://clearinghouse.fmcsa.dot.gov/

REGISTER NOW

Registration is open for the Drug and Alcohol Clearinghouse.

To access the Clearinghouse once it is operational, authorized users will be required to request access from FMCSA by registering for the Clearinghouse. Registering this fall is the first step in ensuring you will be ready when the Clearinghouse is operational on January 6, 2020. Learn more about Clearinghouse registration.

Get Ready for Implementation: Register Today
What types of drivers and employers will the Clearinghouse affect?

- All CDL drivers who operate Commercial Motor Vehicles (CMVs) on public roads, and their employers and service agents.
- This includes municipal drivers of CMVs
  - CMVs are motor vehicles used to transport passengers or property with a gross vehicle weight rating of 26,001 pounds or more, or a gross combination weight of 26,001 pounds or more (including a towed unit with a gross vehicle weight rating of more than 10,000 pounds).
(Limited) City Employee Exemptions

- Two categories of City drivers are exempted from CDL (and, therefore, DOT and FMCSA) requirements:
  - Drivers of authorized emergency vehicle (e.g., fire service personnel, even if a city requires them to possess a CDL)
  - Backup snowplow drivers operating a CMV to remove snow or ice from a roadway by plowing, salting or sanding... but only if:
    - The driver is the employee of a City with a population of 3,000 or less
    - The driver is operating within the boundaries of the City
    - And the driver holds a valid Class D driver’s license

- These exempted drivers are still subject to drug and alcohol testing under the Minnesota Drug and Alcohol Testing in the Workplace Act (‘‘DATWA’’).
The Current Process

- CDL and commercial learner’s permit (CLP) holders with drug and alcohol program violations may not operate a CMV until they complete required drug or alcohol program education or treatment
- Drivers must inform a new employer of violations they committed while with a previous employer
- Employers must monitor drivers’ compliance with drug and alcohol regulations
The Current Process

- The pre-Clearinghouse process requires:
  - Drivers to self-report positive test results
  - Employers to conduct and respond to background checks, as well as ongoing driver compliance
    - This includes manually collecting DOT violation information for the preceding three years from applicants’ prior employers
    - This also includes manually providing DOT violation information for the preceding three years to current and former employees’ prospective employers
Polling Question
The Clearinghouse

- A centralized database of CDL drivers’ drug and alcohol program violations
- Also includes information about whether drivers with violations have completed mandatory return-to-duty drug and alcohol rehabilitation
- Two primary sets of requirements on employers:
  - Reporting requirements
  - Querying requirements
The Clearinghouse Regulations

- Employer Background Check Responsibilities
- Driver Written Consent Requirements
- Reporting Responsibilities
- Driver Notification Requirements
- Access to the Information in the Clearinghouse
- Clearinghouse Registration
The Clearinghouse Regulations

- Authorization to Enter Information
- Procedures for Correcting Information
- Availability and Removal of Information
- Fees
- Unauthorized Access/Prohibited Uses
- Access by State Licensing Agencies
- Penalties
Registering in the Clearinghouse

- Employer must enter the following to register:
  - Employer name
  - USDOT Number (if available)
    - If the employer doesn’t know it, it is typically on the side of its DOT covered equipment (e.g., plows)
  - Street address, city, county, state, zip code
  - PIN (if employer does not know its PIN, it will need to call Clearinghouse to request a reset)
Querying the Clearinghouse

Employers are required to query the Clearinghouse for two purposes:

- Pre-employment screening to ensure that the prospective employee is eligible to drive
- Annual queries to ensure that a driver has not violated the drug and alcohol program with another employer
Query Types

- Pre-employment screening requires “full queries,” meaning that FMCSA must verify drivers’ “specific consent” prior to releasing information.

- Annual screening requires “limited query” to determine whether any information exists for a driver, and requires only “general consent.”
  - Other than confirming that information about the driver exists, the limited query will not result in the release of any driver information.
Consents

• Specific consent, required for each “full query,” is provided electronically in the Clearinghouse

• General consent, required for “limited queries,” is collected outside the Clearinghouse (but consent records must be retained, and are subject to audit)
  ○ This can be a one-time general consent; or
  ○ It can be an “evergreen” consent, good for the duration of employment
Limited Query Results

- If the limited query reveals that no information exists, no additional action is required.
- If the limited query reveals that information exists, then a full query is required.
  - As with pre-hire full queries, a specific consent is required for these full queries, and is provided electronically in the Clearinghouse.
FMCSA does not require that motor carrier employers subject to the Agency’s drug and alcohol use and testing regulations in 49 CFR Part 382 use this sample format to obtain an employee's consent to conduct a limited query of the Drug and Alcohol Clearinghouse. Employers may, however, use or adapt the content as they see fit.

Sample Format: General Consent for Limited Queries of the Federal Motor Carrier Safety Administration (FMCSA) Drug and Alcohol Clearinghouse

I, (Driver Name), hereby provide consent to (Company Name) to conduct a limited query of the FMCSA Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse) to determine whether drug or alcohol violation information about me exists in the Clearinghouse. [Employers and employees may also wish to include the terms of the consent. For example, is the driver consenting to a single limited query or multiple limited queries? If the driver consents to multiple limited queries, will those queries be conducted over a fixed period of time or for the duration of employment? Is the number of limited queries specific or unlimited? The scope of this consent would be determined by the employer and the employee.]

I understand that if the limited query conducted by (Company Name) indicates that drug or alcohol violation information about me exists in the Clearinghouse, FMCSA will not disclose that information to (Company Name) without first obtaining additional specific consent from me.

I further understand that if I refuse to provide consent for (Company Name) to conduct a limited query of the Clearinghouse, (Company Name) must prohibit me from performing safety-sensitive functions, including driving a commercial motor vehicle, as required by FMCSA's drug and alcohol program regulations.

__________________________
Employee Signature

__________________________
Date
Polling Question
Queries and Consent Recap

- Drivers must register in Clearinghouse to provide consent for pre-employment queries
  - Current drivers are not required to register (although FMCSA encourages it)
- Drivers must consent in writing to employer annual queries ("evergreen" consents are OK)
- Employers must obtain a driver’s consent before querying the driver’s violation information
- Drivers who decline consent cannot perform safety-sensitive functions (including operating a CMV) for the employer
MRO Reporting Responsibilities

- MROs must report to the Clearinghouse, within 2 business days, all:
  - Verified positive, adulterated, or substituted drug test results
  - Refusals to test (that require a determination by the MRO)
Polling Question
Employer Reporting Responsibilities

- By the close of the 3rd business day, report to the Clearinghouse:
  - Alcohol test results with an alcohol concentration of 0.04 or above
  - Drug and alcohol test refusals (that do not require verification by the MRO)
  - Negative return to duty test results
    - Negative drug test result
    - Alcohol test with an alcohol concentration of less than 0.02
  - Reports that drivers have successfully completed all SAP follow-up tests
Employer Reporting Responsibilities

- “Actual knowledge” that a driver received a traffic citation while operating a CMV under the influence of drugs or alcohol
  - Off-duty DUI is not considered “actual knowledge of alcohol abuse” under the FMCSA regulations
- Other actual knowledge of use before or while performing safety sensitive functions
Truthful and Accurate Reports

- Submitting information to the Clearinghouse that is known to be false or inaccurate, or that should be known to be false or inaccurate, can subject the reporter to civil fines (up to $1,100 a day/$11,000 per violation), as well as criminal penalties.

- There is a safe harbor for inadvertent errors, so long as they are corrected immediately upon discovering the inaccuracy.
Truthful and Accurate Reports

- Consider having the reporter prepare a signed declaration or affidavit to reduce the risk of claims of false or inaccurate reporting.
- Consider presenting the driver with a copy of the Clearinghouse report before reporting.
  - The driver’s failure to respond can be viewed as an admission to accuracy.
  - Document the meeting, any statements by the driver, and that the report was provided to the driver.
What NOT to Report

- Off-duty DUI
- Drug and alcohol testing that is outside the scope of the DOT testing (i.e., testing in accordance with the DATWA).
  - Positive test results or refusals for non-DOT testing may NOT be reported to the Clearinghouse.
Employer Reporting Recap

- Alcohol confirmation test with concentration of 0.04 or higher
- Refusal to test (alcohol)
- Refusal to test (drug) not requiring a determination by the MRO
- Actual knowledge that driver has used alcohol on duty, used alcohol within four hours of coming on duty, used alcohol prior to post-accident testing, or used a controlled substance
- Negative return-to-duty test results
- Completion of follow-up testing
The reporting page provides the following drop down menu:

- Violation information
  - Drug
  - Alcohol
- Types of refusal (seven options)
- Actual knowledge of violation (drop-down menu and text box for comments)
- When did you obtain knowledge of the violation?
- State of the violation, if known
- Detailed description of the violation
- Documents and evidence (upload link)
Once Violation is Reported

• Employer may not allow, require, permit, or authorize driver to operate a CMV during any period the employer determines the driver is not in compliance with return-to-duty requirements after:
  ○ The driver receives a positive, adulterated, or substituted drug test result
  ○ The driver receives an alcohol confirmation test result of 0.04 or higher alcohol concentration
    (Note: this is a new definition of a positive alcohol test)
Once Violation is Reported (cont.)

- The driver may not operate a CMV after:
  - The driver refused to submit to a test for drugs or alcohol
  - The driver used alcohol prior to a post-accident test
  - The employer has “actual knowledge” that a driver has:
    - Used alcohol while performing a safety-sensitive function
    - Used alcohol within four hours of performing a safety-sensitive function
    - Used a controlled substance
SAP Reporting Responsibilities

- SAPs must report information to the Clearinghouse about drivers who complete the evaluation, referral, and treatment process and who are, therefore, eligible for return-to-duty testing by the close of the business day following the determination that the driver completed the program.
Drivers’ Duty of Notification

- Drivers who violate DOT drug and alcohol prohibitions must notify all current employers of the violation(s)
  - Driver is not required to notify the employer who administered the test or otherwise documented the circumstance that gave rise to the violation
- Notification must be provided to all employer(s) before the end of the business day following the day the driver received notice of the violation, or before the driver performs safety-sensitive functions, whichever comes first
Notice to Drivers

- FMCSA will notify drivers when information concerning the driver has been added to, revised, or removed from the Clearinghouse.
- FMCSA will notify drivers when information concerning the driver has been released to an employer, as well as the reason for the release.
- Driver may access and review information about him or herself in the Clearinghouse.
Driver Disputes

- Drivers may petition FMCSA to remedy errors in their Clearinghouse records
  - They cannot, however, challenge the accuracy or validity of the alcohol or drug test results in the Clearinghouse
Records Retention

- Records related to the employer’s alcohol and controlled substance testing/use prevention program, including driver consents and all records of driver violations, must be retained for a minimum of five years.
- Employers must make these records available to the DOT and state agencies.
- Employers must also make records relating to post-accident testing following a crash available to the NTSB as part of its crash investigation.
Third Party Administrators

If the employer uses a TPA to comply with its reporting requirements, the employer still retains ultimate responsibility for ensuring that the required reports are made, that they are truthful and accurate, and that records are retained.

Employers can reduce the risk associated with using a TPA through contract language that makes clear responsibilities and protections (such as indemnification if the TPA makes a late report).
Promulgate a Policy

- Employers must update their DOT Drug and Alcohol Testing Policy to address the Clearinghouse requirements.
- Failure to update an FMCSA policy and provide it to affected employees could result in a finding of a recordkeeping violation (and associated fines).
Polling Question
Promulgate a Policy

• The LMC’s DOT Drug and Alcohol Testing Model Policy has been updated to incorporate the new Clearinghouse requirements:

www.lmc.org/media/document/1/DOTDrugandAlcoholTesting.docx
## Clearinghouse Fees

<table>
<thead>
<tr>
<th>UNLIMITED QUERY PLAN</th>
<th>INDIVIDUAL QUERY PLAN</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>$24,500</strong></td>
<td><strong>$1.25</strong></td>
</tr>
<tr>
<td>One annual payment</td>
<td>Flat per query rate (limited or full)</td>
</tr>
</tbody>
</table>

- Expires 12 months after date of purchase*

*Note: Unlimited query plans purchased prior to January 6, 2020 will go into effect on January 6, and will expire on January 5, 2021.*

- Flat per query rate ($1.25), for limited and full queries
- Bundles customized to meet your business needs
- Queries never expire
- Purchase additional query plans, as needed
Clearinghouse Fines and Penalties

- Violations of Clearinghouse reporting and recordkeeping requirements can result:
  - Penalties of up to $1,100 per day
  - Penalties of up to $11,000 per violation
  - Potential wrongful discharge lawsuit for reporting a violation based on information that is known, or should have been known, to be false or inaccurate
Timeline

- Since October 2019 – Registration open to create user account ahead of implementation
- January 6, 2020 – Mandatory reporting begins, both electronic and manual queries required
- January 6, 2023 – Clearinghouse has three years of data, only electronic queries required
QUESTIONS
Contact Us

Additional questions? We have answers!

Get in touch with us at:

League of Minnesota Cities HR & Benefits Team:
hrbenefits@lmc.org
(651) 281-1200 / Toll-free: (800) 925-1122

If your city wishes to contract directly with Mark’s firm, Nilan Johnson Lewis PA. you may contact:

Mark J. Girouard mgirouard@nilanjohnson.com or 612.305.7579

Clearinghouse information: https://clearinghouse.fmcsa.dot.gov/  
View the recording of this webinar here: www.lmc.org/clearinghouse2019