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## CDL Drivers and Drug Testing: The FMCSA Clearinghouse

*by Haley A. Drusen*

In recent years, the expression "going digital" has been a catchphrase for various technology initiatives. While "going digital" often results in better processes in the end, finalizing those digital methods can involve a challenging transitional period and learning curve.

In 2016, the Federal Motor Carrier Safety Administration (FMCSA) made the decision to begin the process of "going digital" for conducting background checks and reporting violations for Commercial Driver's License (CDL) holders. Though this process began four years ago, recently the "implementation" phase commenced, which requires school districts (and others who employ CDL drivers) to modify how they perform DOT background checks and reports.<sup>1</sup> These

changes require school districts, their Medical Review Officers (MROs), Substance Abuse Professionals (SAPs), and others involved in drug and alcohol testing to report violations to an online database known as the FMCSA Clearinghouse. In addition to implementing electronic reporting requirements, the Clearinghouse affects how school district employers conduct pre-employment and annual screenings of CDL drivers.

Reporting testing violations to the Clearinghouse makes that information available for review by potential employers and may be used to monitor driver compliance with DOT requirements. Though these reporting requirements are delegated to different individuals and/or entities

based on their drug-testing-related duties, the overall goal is for all violations to be cataloged in the Clearinghouse. Specifically, the new regulations require that a CDL employer (or an agent on its behalf) report the following violations to the Clearinghouse by the close of the third business day following the knowledge of the violation:

- An alcohol confirmation test with a concentration of 0.04 or higher or a refusal to test for alcohol.
- Refusal to test for drugs when a determination by an MRO is not required.
- Actual knowledge (defined by 49 C.F.R. 382.107) that a driver has used alcohol on duty, used alcohol within four (4) hours of coming on duty, used alcohol prior to a post-accident test, or has used a controlled substance.
- Negative return-to-duty test results (drug and alcohol testing); and
- Completion of a follow-up test.

In addition to the requirements for employer reporting, an SAP or MRO is required to report violations; including the following:

- Verified positive, adulterated, or

substituted controlled substance tests results (MRO);

- Refusal-to-test determination by the MRO (MRO);
- A negative return-to-duty test (SAP); and
- An employer's report of completion of follow-up testing (SAP).

Under the new system, starting in January 2023, employers will be required to perform the records search through the online Clearinghouse by performing a "full query."

While reporting these violations to the Clearinghouse may be difficult to navigate at first, ultimately it should assist employers in appropriately screening applicants and ensuring compliance with DOT required return-to-duty testing.

These regulations also change the process for conducting inquiries into an applicant's employment/DOT testing history as part of the pre-employment process. Under prior regulations, employers had to request DOT records from an applicant's previous employers going back two years. With the implementation of the Clearinghouse regulations, this timeline has been modified to three years.<sup>2</sup> In addition, the implementation of the Clearinghouse has changed the method for conducting these inquiries.

Under prior regulations, employers were required to contact a driver's former employers directly. This was potentially

problematic in cases where records had not been properly maintained or when a prior employer was unreachable. Under the new system, starting in January 2023, employers will be required to perform the records search through the online Clearinghouse by performing a "full query."<sup>3</sup> Until January 2023, employers are required to use a hybrid system, where they must both conduct a full inquiry in the Clearinghouse and request the information directly from the applicant's previous employers for the past three years. Even after January 2023, there may be exceptional circumstances where employers must contact prior employers directly (for example, if the applicant drove a CMV for a non-FMCSA regulated employer).

In addition to checking the Clearinghouse for violations upon initial hiring, CDL employers will also be required to check all employed drivers on the Clearinghouse annually. The new regulations indicate that employers must perform a query (either limited or full) once per year. If the employer chooses to run a limited query, and that query indicates that there are files on the Clearinghouse related to the individual, a full query must be requested for that driver.

eventually, this "one-stop shop" should make it much easier for employers to ensure that they are getting the best information about their driving applicants.

Under either pre-employment or annual queries, if the query indicates an unresolved violation,<sup>4</sup> the employee (or applicant) should not be permitted to perform safety-sensitive functions. In such cases, we would recommend that districts consult with their legal counsel regarding any obligations that they have regarding the individual's employment and/or DOT compliance.

Prior to implementing the new Clearinghouse system, employers must register with the system (this duty generally cannot be delegated to a service agent like an MRO). Additionally, before running queries, consent must be received from drivers. While a signed written consent for running a limited query of the Clearinghouse is permitted, prior to running a full inquiry, the driver must register with the Clearinghouse and provide electronic consent to search.

Though there are sure to be growing pains as CDL employers acclimate to the Clearinghouse, eventually, this "one-stop shop" should make it much easier for employers to ensure that they are getting the best information about their driving applicants. Consolidating these reports in one databank should make the pains of

“going digital” worth it in the end.

*RFR stands ready to help Districts with questions concerning DOT drug testing and the FMCSA Drug and Alcohol Clearinghouse. Districts with questions should contact their RFR school attorney to walk them through any drug testing related concerns.*

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<sup>1</sup>These new requirements apply to school bus drivers and other CDL holders responsible for driving commercial motor vehicles (CMVs) as a part of their job duties.

<sup>2</sup>The new system also requires that employers keep their DOT records for three years.

<sup>3</sup>A “full query” displays all information on a driver within the Clearinghouse system. A “limited query” is a search that only indicates whether the Clearinghouse has any information on the driver, but does not display the information.

<sup>4</sup>An unresolved violation occurs if the employee or applicant has not successfully completed the appropriate return-to-duty process.

## Q&A to clarify requirements under 2020 Title IX regulations released by OCR

by Cheryl A. Dixon

On Sept. 4, 2020, the U.S. Education Department’s Office for Civil Rights released *Questions and Answers Regarding the Department of Education’s Final Title IX Rule* in order to clarify certain requirements under the 2020 Title IX regulations, which were issued by the Education Department on May 6 and took

effect Aug. 14. The Q&A can be found at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf>.

In the Q&A, OCR reiterates that the 2020 Title IX rule adopts the definition of “sexual harassment” established by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). Under that standard, a school district must respond appropriately to sexual harassment that is severe, pervasive, and objectively offensive.

The Q&A specifies that a student is entitled to assistance from a school district under Title IX as long as the student presents “signs of enduring unequal educational access,” such as skipping class to avoid a harasser, a declining GPA, or difficulty concentrating at school. Although OCR acknowledged that sexual harassment must effectively deny a student access to educational programming to be actionable under Title IX, the Q&A emphasizes that neither the *Davis* decision nor the new Title IX rule require the student to show “certain manifestations of trauma or a ‘constructive expulsion.’” Rather, a school district must respond to a report of sexual harassment in a manner that is not clearly unreasonable or deliberately indifferent regardless of whether the alleged victim is presently a student or not.

The Q&A states that a “complainant who has left school because of sexual harassment but expresses a desire to

reenroll ... is attempting to participate in the [district's] education program." Additionally, a complainant who has graduated may be attempting to participate in the school district's program if the former student intends to remain involved in the school district's alumni activities or apply to a different program

altogether. According to the Q&A, the student would be entitled to Title IX protections in both examples.

*If you have any questions on this issue please contact your school district's attorney.*

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstien, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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