

The Federal Motor Carrier Safety Regulations

Introduction

Early in 1995, we published a Legal Report concerning the new Federal Motor Carrier Safety Regulations (the "Regulations"). The Regulations, which went into effect on January 1, 1995, apply to church and school vehicles designed to carry 16 or more passengers, if these vehicles are used to transport passengers across State lines ("covered vehicles"). Of course, the Regulations also apply to those individuals who drive "covered vehicles."

Our earlier Report addressed those requirements that should have been satisfied during 1995, e.g., obtaining U.S. DOT numbers for "covered vehicles" in your ministry, and obtaining commercial driver's licenses ("CDL") for the drivers of these vehicles. You may recall that the earlier Report also mentioned the fact that churches and Christian schools would be required to comply with new drug **and alcohol testing requirements** by January 1, 1996, although the Report did not go into great detail about these new testing requirements.

It is now January of 1996 and we have started receiving calls about the new drug and alcohol testing requirements. **You should note at the outset that the new testing requirements apply to all of your drivers, even those who drive only within your particular State. The requirements apply to employees who are compensated and to individuals who drive on a volunteer basis.**

In this Legal Report, we will attempt to shed some light on the new testing requirements as well as answer those questions that you have been raising about the new rules.

Discussion

Drug and alcohol testing requirements have been in place for drivers in the mass transit industries for several years. In February of 1994, however, the United States Department of Transportation (the "DOT") expanded these testing requirements to apply to **private** motor carriers, including churches and Christian schools. As noted above, the expanded testing requirements apply to **all** of your drivers who are required to hold a commercial driver's license (a "CDL"), including volunteers, even if they do not drive across State lines.

The February 1994 rules directed employers with 50 or more drivers to comply with the new drug and alcohol testing requirements by January 1, 1995. They also directed employers with less than 50 drivers to comply with the new rules by January 1, 1996. Accordingly, all of our member schools who use bus drivers are required to be in compliance with the testing requirements this year.

A. ALCOHOL TESTING REQUIREMENTS

Under the new rules, the following types of alcohol tests are required:

Preemployment - conducted before a new driver is hired, or after an offer to hire is extended but before the new employee actually drives; also required when an existing employee takes on new responsibilities as a driver

Post-accident - conducted following an accident involving a fatality regardless of whether the driver was culpable or at fault; also conducted after other "serious" accidents if the driver has been cited in connection with the accident

Reasonable suspicion - conducted when a trained supervisor observes behavior or appearance that is characteristic of alcohol misuse

Random - conducted on a random basis just before, during, or after a driver performs his or her driving duties

Return-to-duty and follow-up - conducted when an individual who has violated prohibited alcohol conduct standards returns to his or her driving duties

1. Specific alcohol tests affecting your ministry

Although 5 types of tests are contemplated under the new rules, it is likely that your ministry will be concerned mainly with Preemployment, Post-accident, and Random testing. The reason for this is that any of your drivers who drink alcohol may be fired in accordance with the ministry's internal policies, thus making Return-to-duty testing unnecessary. In addition, while Reasonable suspicion testing could come into play, if your employees are non-drinkers, then such testing would be necessary only in the rarest of circumstances. Accordingly, the 3 main types of tests affecting your ministry are discussed below.

a. Preemployment testing

Any driver hired by your ministry after January 1, 1996 must complete a "preemployment" alcohol test before undertaking his or her driving responsibilities. In addition, if any of your "non-driver" employees take over new driving responsibilities after January 1, 1996, then these employees must complete an alcohol test before performing their new driving duties.

A new driver is exempt from the "preemployment" test only if he or she has passed a DOT-approved alcohol test within the previous six months. Usually, this will occur when a new hire was required to take an alcohol test in connection with his or her previous employment. "Passing" an alcohol test means that the driver has been tested with a result indicating an alcohol concentration of less than 0.04.

The good news is that those drivers who were employed by your ministry prior to January 1, 1996 are not required to go back and take a "preemployment" alcohol test. These drivers simply go into a random pool (discussed below), and they will not be required to undergo an alcohol test unless they are selected as part of the random testing.

b. Post-accident testing

A "post-accident" alcohol test must be performed on any driver involved in an accident involving a fatality, regardless of whether that driver was responsible for the accident. "Post-accident" alcohol tests also will be given to any driver involved in a "serious" accident who is given a citation in connection with the accident. "Serious" accidents are described as those where a tow truck or medical assistance is required.

c. Random testing

"Random" testing is what most people think of when the issue of alcohol testing is raised. Here are some guidelines to follow in connection with "random" alcohol testing:

Random testing must be conducted "**just before, during, or just after an employee's performance**" of his or her driving duties

The number of random tests that should be conducted by an employer each year must total at least **25%** of the employer's drivers

Employees must be randomly selected for this type of testing and are not to be told ahead of time that they will be subjects of the test

2. General facts that apply to all alcohol tests

In the preceding section, we reviewed the specific types of alcohol tests affecting your ministry. In this section, we will answer some general questions that apply to all of the tests mentioned above.

Who does the testing? As an employer, your ministry is responsible for implementing and conducting an alcohol testing program. PLEASE NOTE, HOWEVER, THAT YOU MAY USE YOUR OWN EMPLOYEES TO CONDUCT THE TESTS, YOU MAY HIRE A PRIVATE COMPANY OR A LOCAL PHYSICIAN TO PERFORM THE TESTS, OR YOU MAY JOIN A CONSORTIUM THAT PROVIDES SERVICES FOR SEVERAL DIFFERENT COMPANIES.

If you hire a private company or local physician to perform these services, you should receive confirmation that the company or physician is following the specific rules set down by the DOT concerning alcohol testing.

If you join a consortium, then your drivers will be put into a "pool" of drivers, and only 25% of the "pool" will be tested on a random basis. You can contact your local DOT office or a local alcohol testing service to learn more about joining a consortium.

How will alcohol testing be done? Most alcohol tests will be done using evidential breath testing devices (EBTs) that have been approved by the National Highway Traffic Safety Administration. Check with those who are performing alcohol tests for your ministry to ensure that they are using approved EBTs.

What happens if a driver fails an alcohol test? The rules state that a driver who fails an alcohol test must be removed immediately from his or her driving responsibilities. The driver may not return to these responsibilities until he or she has been evaluated by a substance abuse professional and has complied with any recommended rehabilitation. Of course, your ministry may impose additional consequences for alcohol use, and the rules do not require that an employer reinstate a driver who has failed an alcohol test.

Are employee alcohol testing records confidential? Yes. Test results and other confidential information may be released only to the employer and to the substance abuse professional. Any other release of this information must be done only with the employee's consent.

How will the DOT know if your ministry is following the rules? Employers are required to keep records of their alcohol prevention programs and the tests that have been performed. DOT agencies may conduct inspections or audits of certain employers to ensure that the alcohol testing rules are being followed.

What other obligations does our ministry have as an employer? Under the rules, (i) employers must have an alcohol misuse prevention policy in place and must offer information to employees about the alcohol testing requirements; and (ii) your driver supervisor must attend at least 1 hour of training on alcohol misuse. Your local DOT office or local alcohol testing service can provide more information about prevention policies and training sessions.

B. Drug Testing Requirements

Under the rules, the **types** of drug tests that are required are the same as those required for alcohol testing: **Preemployment, Post-accident, Reasonable suspicion, Random, and Return-to-duty and follow-up.**

1. Specific drug tests affecting your ministry

Similar to the situation with alcohol testing, it is likely that your ministry will be concerned mainly with Preemployment, Post-accident, and Random drug testing. The guidelines for Preemployment and Post-accident alcohol testing are similar to those for Preemployment and Post-accident drug testing, and those guidelines will not be repeated here.

You should note, however, that there are 2 main differences between random drug testing and random alcohol testing:

1. Unlike random alcohol testing, random drug testing does not need to be conducted in immediate time proximity to performing driving functions; and

2. Unlike random alcohol testing, the number of random drug tests that must be conducted by an employer each year must total at least **50%** of the employer's drivers - (you will recall the number was 25% of drivers for alcohol testing);

2. General facts that apply to all drug tests

Although the procedures for alcohol testing and drug testing are similar, there are some differences. In this section, we will answer some general questions that apply to **all** of the different types of drug tests.

Who does the testing? Similar to alcohol testing, the employer is responsible for implementing a drug testing program. Nevertheless, because tests must be analyzed at a certified laboratory (discussed below), your ministry will need to work with a physician, private service, or certified laboratory in completing the drug testing requirements.

How will drug testing be done? Drug testing is conducted by analyzing an employee's urine specimen. The analysis should be performed at a laboratory that has been certified by the Department of Health and Human Services. All drug test results are reviewed and interpreted by a physician (also known as a medical review officer) before they are reported to the employer. Again, your local DOT office, local drug testing service, or a local physician can assist you in making sure that your ministry's drug tests are being evaluated by a certified laboratory.

What drugs are covered by the tests? Urine specimens are analyzed for (i) marijuana, (ii) cocaine, (iii) amphetamines, (iv) opiates (including heroin), and (v) phencyclidine (PCP). Testing is done in a two-stage process to ensure that over-the-counter medications or preparations are not reported as positive results.

What happens if a driver fails a drug test? The rules state that a driver who tests positive for drugs must be removed immediately from his or her driving responsibilities. This removal may not take place, however, until the medical review officer has interviewed the employee and determined that the positive drug test resulted from the unauthorized use of a controlled substance. Once dismissed, a driver may not return to his or her responsibilities until being evaluated by a substance abuse professional and complying with any recommended rehabilitation. Of course, your ministry may impose additional consequences for drug use, and the rules do not require that an employer reinstate a driver who has tested positive for drugs.

Are employee drug testing records confidential? Yes. Test results and other confidential information may be released only to the employer, the drug testing laboratory, and the medical review officer. Any other release of this information must be done only with the employee's consent.

What other obligations does our ministry have as an employer? Under the rules, (i) employers must provide information to employees on drug abuse; and (ii) your driver supervisor must attend at least 1 hour of training on the signs and symptoms of drug abuse.

Conclusion

This Legal Report has been designed to alert you to the new drug and alcohol testing requirements that apply to churches and Christian schools. To ensure that your ministry is complying with the new requirements, you may want to retain a drug and alcohol testing service or a local physician to assist you with the actual testing procedures.

Of course, all of the specifics of the new testing requirements cannot be addressed here. Nevertheless, we have attempted to highlight the important provisions of the new rules. Any additional questions you may have can be answered by the individual or company who is performing the testing services for your ministry. Alternatively, you may obtain more information on the testing requirements by contacting the Alcohol and Drug Testing Procedures Office at (202) 366-3784, the Federal Highway Administration Office at 1-800-832-5660, or the Federal Highway Administration Field Office in your State.