

## IV. Alcohol and Controlled Substance Testing

Federal regulations establish strict guidelines for alcohol and controlled substance use by drivers and testing by carriers.<sup>1</sup> These guidelines apply to every person who operates a commercial motor vehicle in commerce in any state if he is subject to the commercial driver's license requirements in the United States, Mexico or Canada.<sup>2</sup> Federal law preempts state law in regards to drug and alcohol testing of drivers to the extent that compliance with both the state and federal requirements is not possible or compliance with the state law is an obstacle to the accomplishment and execution of the federal law.<sup>3</sup> Pursuant to this preemption provision, state and local governments may not attempt to regulate the time and manner of a motor carrier's drug testing program.<sup>4</sup>

### A. Use of Alcohol While On Duty

A driver cannot use alcohol within 4 hours of going on duty or being physically in control of or operating a commercial vehicle.<sup>5</sup> A driver may not possess wine, beer or distilled spirits while on duty or operating a commercial vehicle.<sup>6</sup> A motor carrier cannot permit a driver to operate a commercial vehicle if it appears by his conduct or appearance that he has consumed alcohol within 4 hours.<sup>7</sup> Any driver who appears to have consumed alcohol within 4 hours of going on duty or operating a commercial vehicle must be placed out-of-service for a 24-hour period.<sup>8</sup>

A driver also cannot use alcohol while performing a safety sensitive function<sup>9</sup> and cannot report for duty or remain on duty requiring the performance of a safety-sensitive function while having an alcohol concentration of 0.04 or greater.<sup>10</sup> A safety-sensitive function includes operating a commercial vehicle, being present in a commercial vehicle except time spent resting in a sleeper berth, waiting at a terminal, facility or other property for dispatch unless the driver has been relieved by his employer, inspecting, servicing or conditioning a commercial vehicle, loading or unloading a vehicle or assisting in the loading or unloading process, or repairing or attending to a disabled vehicle.<sup>11</sup> A trucking company is prohibited from allowing a driver who has used alcohol within 4 hours,<sup>12</sup> is using alcohol,<sup>13</sup> or has an alcohol concentration of 0.04 or greater<sup>14</sup> to perform or continue to perform a safety sensitive function. A driver who is found to have an alcohol concentration of greater than 0.02 but less than 0.04 cannot perform or continue to perform safety-sensitive functions until at least 24 hours after the alcohol test.<sup>15</sup> A jury issue exists as to whether an intoxicated driver acts outside the scope of his employment with the trucking company when the company's policies forbid alcohol use.<sup>16</sup>

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1 49 C.F.R. § 382 *et. seq.*

2 49 C.F.R. § 382.103(a).

3 49 C.F.R. § 382.109(a).

4 Visnovec v. Yellow Freight System, Inc., 754 F.Supp. 142 (D.Minn. 1990); Yellow Freight System, Inc. v. Amestoy, 736 F.Supp. 44 (D.Vermont 1990).

5 49 C.F.R. § 392.5(a)(1).

6 49 C.F.R. § 392.5(a).

7 49 C.F.R. § 392.5(b).

8 49 C.F.R. § 392.5(c).

9 49 C.F.R. § 382.205.

10 49 C.F.R. § 382.201.

11 49 C.F.R. § 382.107.

12 49 C.F.R. § 382.207.

13 49 C.F.R. § 382.205.

14 49 C.F.R. § 382.201.

15 49 C.F.R. § 382.505(a).

16 Minter v. Great American Insurance Co. of NY, 423 F.3d 460 (5<sup>th</sup> Cir. 2005).

**\*\*Practice Pointer:** Request copies of all alcohol tests performed on the driver and correspondence with prior employers about alcohol use.

## B. Use of Controlled Substances While On Duty

A driver cannot use a controlled substance when reporting for or remaining on duty requiring the performance of a safety-sensitive function unless the use of the controlled substance is pursuant to the instructions of a physician who has advised the driver that the substance will not adversely affect his ability to safely operate a commercial vehicle.<sup>17</sup> A motor carrier may require a driver to disclose any therapeutic drug use related to a medical condition.<sup>18</sup> A driver cannot report for duty, remain on duty or perform a safety sensitive function if he tests positive for controlled substances.<sup>19</sup> An employer is prohibited from allowing a driver who has used controlled substances<sup>20</sup> or tests positive for a controlled substance<sup>21</sup> to perform or continue to perform a safety sensitive function.

**\*\*Practice Pointer:** Request copies of all controlled substances tests performed on the driver and correspondence with prior employers about drug use.

## C. Pre-Employment Alcohol & Drug Screening

A trucking company must provide its drivers with educational material explaining its policies and procedures and federal guidelines concerning alcohol and controlled substance testing prior to conducting a pre-employment alcohol and controlled substances screen.<sup>22</sup> A motor carrier must complete a pre-employment screen of a driver for alcohol and controlled substances before the driver performs his first safety-sensitive function for the carrier.<sup>23</sup> A carrier may not allow a driver to perform a safety-sensitive function until the driver has undergone an alcohol test with a result indicating an alcohol concentration less than 0.04 and has undergone a controlled substances test with a negative result.<sup>24</sup> A carrier does not have to perform a pre-employment alcohol test if the driver has been tested in the last six months with a result of less than 0.04, and the carrier ensures that the driver's prior employer has no record of a violation of the alcohol use prohibition within the last six months.<sup>25</sup>

A pre-employment controlled substance test is not necessary if the driver was tested for controlled substances within the past six months or was involved in a random testing program for the past twelve months AND the carrier contacts the driver's prior employer to ensure that the driver did not violate any prohibitions within the past six months.<sup>26</sup> A carrier who does not conduct a pre-employment screen under the aforementioned exceptions must obtain a copy of the driver's alcohol and/or drug testing records from his prior testing program.<sup>27</sup> A carrier who does not employ a driver but uses him more than once a year must obtain the driver's alcohol and controlled substance testing

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17 49 C.F.R. § 382.213(a).

18 49 C.F.R. § 382.213(c).

19 49 C.F.R. § 382.215.

20 49 C.F.R. § 382.213(b).

21 49 C.F.R. § 382.215.

22 49 C.F.R. § 382.601(a).

23 49 C.F.R. § 382.301(a).

24 49 C.F.R. § 382.301(a).

25 49 C.F.R. § 382.301(b).

26 49 C.F.R. § 382.301(c).

27 49 C.F.R. § 382.301(d)(1).

records from his primary employer every six months or must conduct its own testing of the driver.<sup>28</sup>

A carrier must also request all alcohol test results greater than 0.04, all positive controlled substances results, and all refusals to be tested from a driver's prior employers for the two-year period preceding the application for employment.<sup>29</sup> This information must be reviewed by a carrier no later than 14 days after the first time a driver performs a safety-sensitive function.<sup>30</sup> If a carrier cannot obtain these records after making a good faith effort, the carrier must document in the driver's qualification file the efforts made to obtain the records.<sup>31</sup> A carrier who obtains information that a driver has violated the alcohol or controlled substances requirements may not employ the driver until the carrier has obtained information on subsequent compliance with the referral and rehabilitation requirements.<sup>32</sup>

**\*\*Practice Pointer:** Request all pre-employment drug and alcohol screens and any information provided to drivers about drug and alcohol testing.

#### D. Reasonable Suspicion Testing

If a motor carrier has a reasonable suspicion that a driver has violated the alcohol use prohibitions, the carrier must require the driver to submit to testing.<sup>33</sup> This reasonable suspicion must be based on the appearance, behavior, speech or body odor of the driver.<sup>34</sup> A supervisor or company official who has received specific training regarding the use of alcohol shall make the determination that a reasonable suspicion to conduct testing exists.<sup>35</sup> Carriers are required to provide these supervisors with at least one hour of alcohol misuse training and one hour of controlled substances training in order to identify violators.<sup>36</sup> The supervisor must witness the alleged violation during, just preceding or just after the period of the workday.<sup>37</sup> The supervisor making the determination is prohibited from conducting the alcohol test on the driver.<sup>38</sup> If the alcohol test is not performed within two hours of the determination of a reasonable suspicion, the carrier must prepare and maintain a record stating the reasons the test was not completed in a timely fashion.<sup>39</sup> If the carrier fails to conduct a test within eight hours, the carrier shall cease any attempts to complete the test.<sup>40</sup> After a determination that a reasonable suspicion exists for a violation, a carrier may not allow a driver to report for duty or remain on duty requiring the performance of safety-sensitive functions until an alcohol test is completed with a result of less than 0.02 blood alcohol concentration, or twenty-four hours has elapsed since the alleged violation.<sup>41</sup>

A carrier must also conduct a controlled substance test if the carrier has a reasonable suspicion that a driver has used a controlled substance.<sup>42</sup> The carrier's reasonable suspicion must be based on the behavior, speech and body odor of the driver especially any indications of chronic or withdrawal effects

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28 49 C.F.R. § 382.301(d)(2).

29 49 C.F.R. § 382.413(a)(1).

30 49 C.F.R. § 382.413(b).

31 49 C.F.R. § 382.413(c).

32 49 C.F.R. § 382.413(g).

33 49 C.F.R. § 382.307(a).

34 49 C.F.R. § 382.307.

35 49 C.F.R. § 382.307(c).

36 49 C.F.R. § 382.603.

37 49 C.F.R. § 382.307(d).

38 49 C.F.R. § 382.307(c).

39 49 C.F.R. § 382.307(e)(1).

40 49 C.F.R. § 382.307(e)(1).

41 49 C.F.R. § 382.307(e)(4).

42 49 C.F.R. § 382.307(b).

of controlled substance use.<sup>43</sup> A supervisor or company official who has received specific training regarding the use of controlled substances shall make the determination that a reasonable suspicion to conduct testing exists.<sup>44</sup> The supervisor must make a written record of the observations leading to the controlled substance testing within twenty-four hours of the occurrence or before the results of the test are released, whichever is earlier.<sup>45</sup>

**\*\*Practice Pointer:** If drug or alcohol use by a driver is an issue, make sure that a supervisor had training in reasonable suspicion testing to detect the driver's use before it became a problem.

#### E. Random Drug & Alcohol Testing

A carrier must also conduct random alcohol and drug testing on a certain percentage of its drivers per year regardless of their conduct.<sup>46</sup> The testing must be unannounced and the dates for administering the tests must be spread reasonably throughout the calendar year.<sup>47</sup>

#### F. Post-Accident Testing

A trucking company must perform a drug and alcohol test on a driver whenever he is involved in an automobile accident resulting in a fatality.<sup>48</sup> Testing is also required when the investigating officer issues a citation to the driver involved in the accident and the accident causes bodily injury requiring immediate treatment away from the accident scene or the accident causes disabling damage to any motor vehicle which must be towed from the scene.<sup>49</sup> Disabling damage does not include damage which can be remedied at the scene without special tools or parts, tire damage without any other damage, headlight or taillight damage, or damage to turn signals, horn or windshield wipers.<sup>50</sup> The post-accident testing should occur as soon as practicable after the accident.<sup>51</sup> A motor carrier's cancellation of a scheduled post-accident test is admissible as evidence tending to show that the carrier was trying to conceal the driver's potential use of alcohol or controlled substances.<sup>52</sup>

If the alcohol test cannot be administered within two hours of the accident, the carrier must maintain on file a record indicating the reason the test was not promptly administered.<sup>53</sup> If the alcohol test cannot be completed within eight hours, the carrier shall cease attempts to conduct the test.<sup>54</sup> The controlled substance test must be performed within 32 hours following an accident, and if not completed within this time frame, the carrier shall cease attempts to conduct the test and shall maintain a record stating the reasons the test was not promptly administered.<sup>55</sup> A carrier does not have to conduct an alcohol or controlled substance test if Federal, State or local officials have already conducted a breath or blood test for alcohol and a urine test for controlled substances.<sup>56</sup> A carrier must provide a driver with the necessary information to complete the post-accident testing, and a driver must take all

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43 49 C.F.R. § 382.307(b).

44 49 C.F.R. § 382.307(c).

45 49 C.F.R. § 382.307(f).

46 49 C.F.R. § 382.305.

47 49 C.F.R. § 382.305(k).

48 49 C.F.R. § 382.303(a)(1).

49 49 C.F.R. § 382.303(a)(2).

50 49 C.F.R. § 382.107.

51 49 C.F.R. § 382.303(a).

52 Wanke v. Lynn's Transportation Co., 836 F.Supp. 587 (N.D. Ind. 1993).

53 49 C.F.R. § 382.303(b).

54 49 C.F.R. § 382.303(b).

55 49 C.F.R. § 382.303(b)(4).

56 49 C.F.R. § 382.303(e).

reasonable steps to comply with the testing procedures.<sup>57</sup> The requirement for post-accident testing does not apply to an occurrence involving boarding or exiting a stationary vehicle, the unloading or loading of cargo, or the operation of a passenger vehicle not for hire.<sup>58</sup> A driver may not use alcohol for eight hours after an accident if he is required to take a post-accident alcohol test.<sup>59</sup>

### Post-Accident Drug Test Paperwork

#### INSERT PICTURE OF POST ACCIDENT DRUG TEST

In this case, the driver tested positive for cocaine after the accident. This document shows the chain of custody of the specimen and the results.

**\*\*Practice Pointer:** Request all post-accident drug and alcohol test results and notations about the failure to perform post-accident testing. A court order is necessary to obtain the results.

#### G. Refusal to Submit to Testing

Any person who holds a commercial driver's license or drives a commercial vehicle is deemed to have consented to alcohol and controlled substances testing as required by federal regulations.<sup>60</sup> A trucking company is prohibited from allowing a driver who refuses to submit to testing to perform or continue to perform a safety sensitive function.<sup>61</sup> Refusal to submit means that the driver (1) fails to provide adequate breath upon request for an alcohol test without a valid medical explanation, (2) fails to provide an adequate urine sample upon request for controlled substance testing or (3) engages in conduct that clearly obstructs the testing process.<sup>62</sup>

#### H. Alcohol & Controlled Substance Testing Policies and Procedures

Alcohol and controlled substance testing must comply with federal regulations dictating the proper methods of taking and preserving samples and performing the tests.<sup>63</sup> A driver may be terminated for failure to pass a drug or alcohol test<sup>64</sup> as long as the motor carrier's drug testing program meets federal specifications.<sup>65</sup> A carrier may retain an independent agency to perform the actual testing on the drivers. If the agency fails to conduct the testing in an appropriate manner, the carrier cannot be held liable for the agency's actions.<sup>66</sup> A motor carrier may also enforce alcohol and controlled substances policies and procedures that are more stringent than the guidelines contained in the federal regulations.<sup>67</sup>

#### I. Rehabilitation

A trucking company must inform a driver who violates the alcohol or controlled substances

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<sup>57</sup> 49 C.F.R. § 382.303(c)-(d).

<sup>58</sup> 49 C.F.R. § 382.303(f).

<sup>59</sup> 49 C.F.R. § 382.209.

<sup>60</sup> 49 C.F.R. § 383.72.

<sup>61</sup> 49 C.F.R. § 382.211.

<sup>62</sup> 49 C.F.R. § 382.107.

<sup>63</sup> 49 C.F.R. § 382.105.

<sup>64</sup> Exxon Corporation v. Esso Workers' Union, Inc., 118 F.3d 841 (1997).

<sup>65</sup> Reames v. Department of Public Works, 707 A.2d 1377 (N.J. Super. 1998).

<sup>66</sup> Carroll v. Federal Express Corporation, 113 F.3d 163 (9<sup>th</sup> Cir. 1997).

<sup>67</sup> 49 C.F.R. § 382.111.

prohibitions of the resources available to assist him in evaluating and resolving problems associated with alcohol and controlled substances abuse.<sup>68</sup> The driver must then be evaluated by a substance abuse professional to determine the kind of assistance needed for his rehabilitation.<sup>69</sup> A carrier must ensure that a driver who is in need of assistance in resolving problems associated with alcohol misuse and/or use of controlled substances is subject to unannounced follow up testing as directed by a substance abuse professional.<sup>70</sup> The driver shall also be routinely evaluated by a substance abuse professional to make sure the driver complies with his treatment plan.<sup>71</sup> Before a driver who has violated the alcohol prohibitions can return to duty requiring the performance of a safety-sensitive function, the driver must be given an alcohol test with a result less than 0.02 blood alcohol concentration.<sup>72</sup> A driver must take a controlled substances test indicating a verified negative result for controlled substances use before he can return to work after a violation of the controlled substance guidelines.<sup>73</sup> The carrier does not have to provide referral, evaluation, and rehabilitation services to a driver if the violation is discovered as a result of pre-employment testing.<sup>74</sup>

## J. Retention & Disclosure of Records

A motor carrier must retain for five years: (1) driver alcohol test results indicating an alcohol concentration of 0.02 or greater; (2) any verified positive controlled substance test results; (3) documentation of refusals to submit to alcohol or controlled substance testing; and (4) evaluations and referrals to rehabilitation specialists.<sup>75</sup> The carrier must retain for one year any records of negative and canceled controlled substances test results and alcohol test results with a result of less than 0.02.<sup>76</sup> All records regarding the training of drivers and supervisors must be maintained during the time of their employment and for an additional two years.<sup>77</sup> Carriers are also required generally to maintain any documents (1) related to random drug testing, (2) generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests, (3) generated in connection with post-accident tests, (4) related to a refusal to submit to testing, (5) generated in connection with verifications of a driver's testing from prior employers, (6) related to a driver's evaluation and consultation with a substance abuse professional and (7) related to educational or training materials provided to drivers including the carrier's testing policies and procedures.<sup>78</sup> A trucking company must prepare and maintain a summary of its alcohol and controlled substances testing results for the previous calendar year when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the company or its drivers.<sup>79</sup>

Documents regarding testing of a driver may only be released by consent of the driver, by request of the National Transportation Safety Board, by request of a subsequent employer with the consent of the driver, by request of Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the carrier or its drivers or in conjunction with an action for

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68 49 C.F.R. § 382.605(a).

69 49 C.F.R. § 382.605(b).

70 49 C.F.R. § 382.311(a).

71 49 C.F.R. § 382.605(c)(2).

72 49 C.F.R. § 382.309(a).

73 49 C.F.R. § 382.309(b).

74 49 C.F.R. § 382.605(f).

75 49 C.F.R. § 382.401(b)(1).

76 49 C.F.R. § 382.401(b)(3).

77 49 C.F.R. § 382.401(b)(4).

78 49 C.F.R. § 382.401(c).

79 49 C.F.R. § 382.403.

benefits sought by a driver.<sup>80</sup> In a civil action, the results of a drug or alcohol test can only be released if the driver consents to production or if a court of competent jurisdiction determines the information sought is relevant and issues an order directing the company to produce the results.<sup>81</sup> The results may only be released with a binding stipulation that the documentation will only be made available to the parties to the litigation.<sup>82</sup>

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80 49 C.F.R. § 382.405.

81 49 C.F.R. § 40.323(a).

82 49 C.F.R. § 40.323(b).