

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Grant of waiver.

SUMMARY: FMCSA grants a three-month waiver from certain pre-employment testing requirements applicable to employers of drivers subject to 49 CFR part 382. This action responds to the President's Executive Order No. 13924, Regulatory Relief to Support Economic Recovery, issued on May 19, 2020, related to the economic consequences of the Coronavirus Disease 2019 (COVID-19) public health emergency.

DATES: This waiver is effective June 5, 2020, and ends on September 30, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. David J. Yessen, Chief of the Compliance Division, Office of Enforcement and Compliance, 202-366-1812, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590-0001.

Legal Basis

The Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, 112 Stat. 107, June 9, 1998) provides the Secretary of Transportation (the Secretary) authority to grant waivers from any of the Federal Motor Carrier Safety Regulations issued under Chapter 313 of Title 49 of the United States Code or 49 U.S.C. § 31136, to a person(s) seeking regulatory relief (49 U.S.C. §§ 31136(e), 31135(a)). The Secretary must make a determination that the waiver is in the public interest and that it is likely to achieve a level of safety equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver. Individual waivers may be granted for a specific unique event for a period up to three months. TEA-21 authorizes the Secretary to grant waivers without requesting public comment, and without providing public notice.

The Administrator of FMCSA has been delegated authority under 49 CFR 1.87(e) and (f) to carry out the functions vested in the Secretary by 49 U.S.C. chapter 313, relating to commercial motor vehicle operators, and 49 U.S.C. chapter 311, subchapter I and III, relating to commercial motor vehicle programs and safety regulations.

Background

On May 19, 2020, the President issued Executive Order No. 13924 setting forth "the policy of the United States to combat the economic consequences of COVID-19 with the same vigor and resourcefulness with which the fight against COVID-19 itself has been waged." Among other things, the Executive Order directed executive branch agencies to "address this economic emergency by ... waiving [] or providing exemptions from regulations and other requirements that may inhibit economic

recovery consistent with applicable law and with protection of the public health and safety” This waiver responds to the unique circumstances of certain preemployment testing requirements arising from the economic emergency identified in the President’s Executive Order, as further described below.

Various measures employed to reduce the spread of COVID-19, including social distancing, and stay-at-home and business closure orders issued by State and local governments, have significantly decreased demand for motor carrier services, particularly from passenger carriers. In response to the COVID-19 public health emergency, many employers have imposed layoffs, furloughs, or otherwise temporarily removed employees from performing safety-sensitive functions, as defined in 49 CFR 382.107, resulting in their removal from the random pool for controlled substances and alcohol testing for a period greater than 30 days. As employers begin calling these drivers back to work, they will incur the cost of conducting pre-employment controlled substances testing before using these drivers to perform safety-sensitive functions, as required by 49 CFR 382.301. The administrative and cost burdens of pre-employment testing for furloughed drivers outside the random testing pool for more than 30 days falls on motor carrier employers at the very time they are attempting to return to expanded levels of operation. The Agency finds that temporary regulatory relief from this burden will aid in the economic recovery of motor carriers impacted by the COVID-19 public health emergency, without negatively impacting safety. FMCSA also concludes that this waiver will aid in the Nation’s overall economic recovery by enabling the efficient resumption of the transportation of people and cargo throughout the United States.

FMCSA’s Determination and Regulatory Provisions Waived

Consistent with the statutory requirements for waivers, FMCSA has determined that it is in the public interest to issue a waiver, until September 30, 2020, limited in scope and circumstances, that is likely to achieve a level of safety equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver.

Currently, pursuant to 49 CFR 382.301(a), prior to the first time a driver performs safety sensitive functions for an employer, the driver must undergo pre-employment testing for controlled substances and the employer must receive a verified negative controlled substances test result for that driver from a medical review officer or a consortium/third party administrator. This requirement also applies each time a driver returns to work after a furlough, lay-off, or other period of unemployment when the driver does not continue to be subject to random controlled substances testing in accordance with 49 CFR 382.305.

Section 382.301(b) provides an exception allowing an employer to forgo administration of a preemployment test if the driver has participated in a controlled substances testing program that meets the requirements of 49 CFR part 382 within the previous 30 days; and, if while participating in that program, the driver either: (i) was tested for controlled substances within the past 6 months or (ii) participated in

the random controlled substances testing program for the previous 12 months. In addition, under the exception, the employer would be required to ensure that no prior employer of the driver has records of a violation of 49 CFR part 382 or the controlled substances use rule of another DOT agency within the previous six months.

As employers begin to recall drivers who were furloughed, laid off, or otherwise not working for the company for more than 30 days, the cost and logistical barriers of testing a large influx of drivers in a short timeframe are significant, at a time when the commercial trucking and motorcoach industry is facing unprecedented economic challenges. This problem is further compounded by the reduced availability of controlled substances testing resources due to continued facility closures or other testing impediments caused by the COVID-19 public health emergency.

This waiver would extend, from 30 days to 90 days, the period under which drivers would qualify for the pre-employment testing exception under 49 CFR 382.301(b). This relief would allow employers to forego pre-employment testing for drivers who have participated in a controlled substances testing program that meets the requirements of 49 CFR part 382 within the previous 90 days of hire or rehire. Allowing employers to forego pre-employment testing for drivers who were in a testing program within the previous 90 days will provide relief from the administrative burdens and costs associated with administering tests and allow them to return drivers to the workforce in a more efficient manner, thus promoting job creation and economic growth.

Public Interest

FMCSA finds that the granting of this waiver is in the public interest because it will facilitate the efficient return of furloughed commercial motor vehicle drivers to the workforce, allowing them to resume critical transportation functions performed by passenger and property motor carriers. In addition, this waiver will reduce the regulatory burden on employers and furloughed drivers subject to the pre-employment testing requirement.

Safety Equivalency

Due to the limited scope of this waiver and the ample precautions that remain in place, FMCSA has determined that the waiver is likely to achieve a level of safety that is equivalent to the level of safety that would be obtained absent the waiver. The waiver of a particular regulation should not be looked at in isolation but rather as part of the whole of all regulations governing the safety of drivers. Waiver determinations are made holistically, taking all relevant factors into account. See *International Bhd of Teamsters v. DOT*, 724 F.3d 206 (D.C. Cir. 2013). For example, in these circumstances, it is important to note that this waiver does not alter any of the remaining controlled substances and alcohol use and testing requirements for a driver performing safety-sensitive functions, and that motor carrier employers subject

to the waiver have access, in real time, to driver-specific drug and alcohol violation information through the Drug and Alcohol Clearinghouse (Clearinghouse).

Section 382.301(b) sets forth the following conditions a driver must meet to be exempted from pre-employment testing:

- (1) The driver has participated in a controlled substances testing program that meets the requirements of this part within the previous 30 days; and
- (2) While participating in that program, either:
 - (i) Was tested for controlled substances within the past 6 months (from the date of application with the employer), or
 - (ii) Participated in the random controlled substances testing program for the previous 12 months (from the date of application with the employer); and
- (3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of [part 382] or the controlled substances use rule of another DOT agency within the previous six months.

FMCSA finds that extending the period for which drivers would qualify for the pre-employment testing exception under 49 CFR 382.301(b)(1), from 30 to 90 days, will not negatively impact safety. The existing requirement that an employer relying on the § 382.301(b) exception must verify that the driver participated in the controlled substances testing specified in § 382.301(b)(2)(i) and (ii) and had no recorded violations of another DOT agency's controlled substances use regulations within the previous 6 months remains in effect. Moreover, employers must conduct a pre-employment query of the Clearinghouse for returning drivers, as required by § 382.701(a). The Clearinghouse, which became operational on January 6, 2020, enables employers to identify drivers, including furloughed drivers, who have committed an FMCSA controlled substances and alcohol testing program violation that renders them ineligible to perform safety-sensitive functions. Such drivers are prohibited from performing safety-sensitive functions until completing the return-to-duty process, as set forth in 49 CFR part 40, subpart O. The Clearinghouse provides employers with a useful new tool for identifying drivers' drug and alcohol program violations that did not exist at the time the Agency enacted the 30-day limit for the exception in § 382.301(b). Further, employers must continue to complete a background investigation on returning or prospective drivers' controlled substances and alcohol testing history with all DOT-regulated employers that employed the driver within the previous 3 years, in accordance with 49 CFR §§ 40.25, 382.413, and 391.23.

FMCSA believes that the current regulatory framework, as well as the additional measures listed below under Terms, Conditions, and Restrictions of the Waiver, taken collectively, provide the assurance needed to meet the legal standard that granting the waiver is likely to achieve an "equivalent level of safety." Therefore, FMCSA has determined that extending from 30 to 90 days the period for which drivers would qualify for the pre-employment testing exception under 49 CFR

382.301(b) during the period of the waiver is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver.

Unique Circumstances

The COVID-19 public health emergency has led to unprecedented impacts to the Nation's economy. Various measures employed to reduce the spread of COVID-19, including social distancing, and stay-at-home and business closure orders issued by State and local governments, have significantly decreased demand for motor carrier services, particularly from passenger carriers. In response to the COVID-19 public health emergency, many employers have imposed layoffs, furloughs, or otherwise temporarily removed employees from performing safety-sensitive functions. FMCSA finds that the circumstances surrounding this waiver are unique due to the urgent need to remove regulatory barriers to allow the efficient resumption of motor carrier operations. For the reasons noted, FMCSA grants a three-month waiver as provided above, subject to the terms, conditions, and restrictions below.

Terms, Conditions, and Restrictions of the Waiver

This waiver covers employers of drivers subject to the requirements of 49 CFR part 382 for the period beginning at 12:01 a.m. (ET) on June 5, 2020, and continuing through 11:59 p.m. on September 30, 2020.

- (1) Employers must verify that the driver participated in the controlled substances testing specified in § 382.301(b)(2)(i) and (ii) and had no recorded violations of another DOT agency's controlled substances use regulations within the previous 6 months;
- (2) Employers must comply with the Clearinghouse pre-employment query requirement set forth in 49 CFR 382.701(a);
- (3) Employers must not allow a driver to perform any safety-sensitive function if the results of a Clearinghouse pre-employment query demonstrate that the driver is prohibited from doing so, in accordance with 49 CFR 382.701(d);
- (4) Employers must complete the investigations and inquiries required by 49 CFR §§ 40.25, 382.413, and 391.23;
- (5) Accident Notification. Each employer must notify FMCSA within 5 business days of an accident (as defined in 49 CFR 390.5), involving any driver operating under the terms of this waiver. See 49 CFR 390.15(b) (requiring maintenance of accident registry). Notification shall be by email to MCPSD@DOT.GOV. The notification must specify that the driver was operating under the terms of this waiver and must include the following information:

- i. Date of the accident;
- ii. City or town, and State in which the accident occurred, or closest to the accident scene;
- iii. Driver's name and license number;
- iv. Vehicle number and State license number;
- v. Number of individuals suffering physical injury;
- vi. Number of fatalities;
- vii. The police-reported cause of the accident (if available at time of the report); and
- viii. Whether the driver was cited for violation of any traffic laws, or motor carrier safety regulations; and

(6) FMCSA reserves the right to revoke this waiver due to drivers' involvement in accidents or employers' failure to comply with the terms of this waiver.