FMCSA ANNOUNCES CONDITIONAL ENFORCEMENT DISCRETION FOR RANDOM DRUG AND ALCOHOL TESTING REQUIREMENTS

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BACKGROUND:
The Federal Motor Carrier Safety Administration (FMCSA) announced it will exercise conditional enforcement discretion for employers unable to comply with certain FMCSA random drug and alcohol testing requirements due to the COVID-19 emergency. The FMCSA’s Notice of Enforcement Discretion Determination may be downloaded here.

RANDOM TESTING ENFORCEMENT DISCRETION:
The FMCSA may choose not to enforce the following calendar year 2020 random drug and alcohol testing requirements for qualifying employers:

- The 50% minimum annual random testing rate for controlled substances (49 CFR 382.305(b)(2)),
- The 10% minimum annual random testing rate for alcohol (49 CFR 382.305(b)(1)),
- The requirement that each employer ensure the dates for administering random drug and alcohol tests are spread reasonably throughout the calendar year. (49 CFR 382.305(k)(2)).

EMPLOYERS QUALIFYING FOR ENFORCEMENT DISCRETION:
All employers must continue to select drivers for random testing at the required 50% rate of average number of driver positions for controlled substances and the 10% rate for alcohol during calendar year 2020. However, if a random test cannot be completed due to the COVID-19 public health emergency, the employer may qualify for enforcement discretion. Examples of inability to comply due to COVID-19 include:

- Closure or restricted use of drug and alcohol testing facilities,
• Unavailability of drug and alcohol testing personnel,
• Prolonged or intermittent driver furlough,
• Other applicable COVID-19 related reasons for noncompliance.

**WRITTEN DOCUMENTATION REQUIRED:**
Employers requiring enforcement discretion for the annual random drug and alcohol testing rates and/or the requirement for the even administration of random testing throughout the calendar year, must maintain written documentation explaining the specific reasons for noncompliance. The written documentation should include:

• Identification of closed or restricted testing facilities and dates of closure or restriction,
• Actions taken to identify alternative drug and alcohol testing facilities,
• Length and number of driver furloughs (if any),
• Other applicable COVID-19 related reasons for noncompliance.

The required written documentation must be detailed, written contemporaneously, and included with company drug and alcohol testing records.

**IMPORTANT!** The FMCSA enforcement discretion is **not a waiver or suspension** of the random drug and alcohol testing requirements. **Employers who are capable of complying with the random drug and alcohol testing requirements must continue to do so.** Employers unable to comply will qualify for enforcement discretion **provided** the underlying written documentation explaining the reasons for noncompliance are found satisfactory by the FMCSA.

**IMPORTANT!** Enforcement of annual random drug and alcohol testing does not take place until the calendar year **following** the calendar year the testing occurred. Therefore, the FMCSA enforcement discretion will take place in calendar year 2021 for random drug and alcohol testing completed in calendar year 2020. The FMCSA enforcement discretion **does not** apply to random drug and alcohol testing completed in calendar year 2019.

*Got Questions? Contact PMAA Regulatory Counsel Mark S. Morgan – mmorgan@pmaa.org.*