



Policy Advisor

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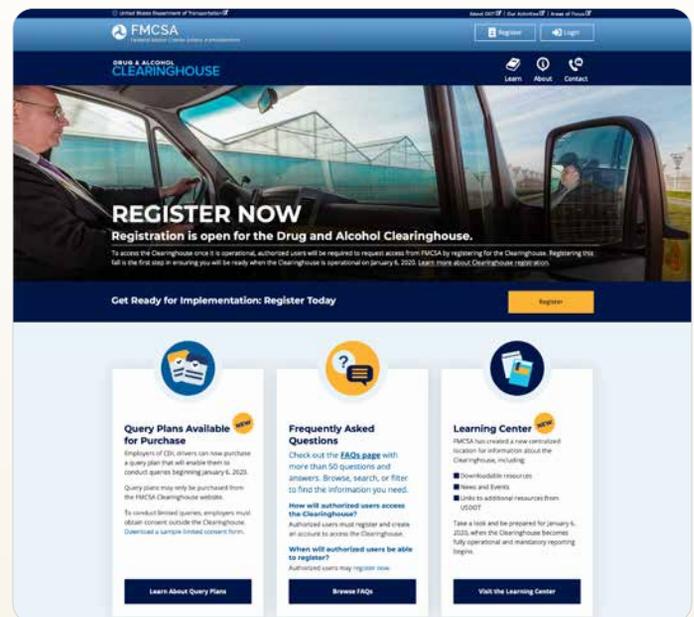
TOPICS: I. BUS DRIVER/CDL HOLDER DRUG TESTING PROGRAM UPDATE – CLEARINGHOUSE II. POLICY IMPLEMENTATION – CASE LAW

I. BUS DRIVER/CDL HOLDER DRUG TESTING PROGRAM UPDATE – CLEARINGHOUSE

The United States Department of Transportation (USDOT) through the Federal Motor Carrier Safety Administration agency (FMCSA) has amended the rules for commercial driver's license drug testing program to establish requirements for the Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse). The Clearinghouse was required to be established by a federal law passed a few years ago with the intent to improve road safety. The purpose of the Clearinghouse is to maintain records of every violation of the drug and alcohol testing program in a central repository so that employers of CDL holders may have one electronic resource to go to in order to determine if potential drivers and current employees have violated the USDOT drug and alcohol testing regulations. The amended rules address various aspects of the use of the Clearinghouse and require employers to amend their drug and alcohol testing policies concerning the use of the Clearinghouse. This article will provide general information about the Clearinghouse as it pertains to school board members and school administrators and address the policy changes needed to be made.

The Clearinghouse must be used beginning January 6, 2020. Every employer who employs CDL drivers must register as employers in the Clearinghouse. (The website for the

Clearinghouse is <https://clearinghouse.fmcsa.dot.gov/>.) The registration is good for 2 years if the employer does not use it in that time period. If an employer uses the Clearinghouse during a 2-year period, the employer will not have to re-register.



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The employer is required as part of the registration to name its employees who will have the authority to make an inquiry. For a school corporation this would be the superintendent and/or the transportation director. These designated persons will be allowed to make the inquiries required by the regulations.

The regulations require an employer to make an inquiry to the Clearinghouse for applicants for a CDL driver position (i.e., bus driver) and to make an inquiry on an annual basis for current CDL drivers. This initial inquiry will provide information as to whether or not the Clearinghouse contains information as to whether the driver has violated the drug and alcohol regulations which include testing positive on one of the required drug tests or has been found to violate one of the prohibited activities in the regulations, which include consuming alcohol while performing a safety-sensitive function on the job or consuming alcohol within 4 hours prior to performing a safety-sensitive function. If the Clearinghouse shows there is a violation, the employer is required to do a full inquiry within 24 hours. The full inquiry will provide the details of the violation to the employer. The employer must get the written consent of the driver prior to doing any initial or full inquiry. If the driver does not consent, the employer is not to hire the applicant and is prohibited from allowing the current employee safety-sensitive functions until consent is given by the applicant and the employee and the full inquiry is completed. The purpose of doing an annual inquiry of current employees is to determine if these employees have committed any violations while working for other covered current employers. Information an employer receives from the Clearinghouse is confidential and cannot be disclosed to another entity or to other employees who do not have the authority to hire or to discipline the driver/employee.

The employers of CDL drivers are also required to input information on their current employees when such employees have violated the regulations. The violations required to be reported by the employer in the Clearinghouse include positive drug and alcohol tests required by the regulations and actual knowledge of violations of the drug and alcohol regulations such as the use of drugs and/or alcohol prior to performing safety-sensitive functions or while on duty or refusal by the driver to be tested. The employer must report this information in the Clearinghouse within three (3) business days of the day the violation took place. In addition,



the regulations require the employer, medical review officers, and substance abuse professionals to provide information to the Clearinghouse on return-to-work plans and test results and whether the employee has completed the requirements of the plan. The regulations also require drivers to register with the Clearinghouse and enter information on violations of the drug and

alcohol testing requirements and non-testing violations of the regulations as well. Drivers are also required to give electronic consent to the Clearinghouse to disclose information on the driver where a current or prospective employer makes an initial inquiry about the driver through the Clearinghouse. The regulations require all information entered in the Clearinghouse by any person or entity to be truthful and accurate, including keeping the information in the Clearinghouse up to date on a driver.

The regulations require a prospective employer to get drug and alcohol testing information from prior employers who employed the driver within the last three (3) years. Employers will continue to be required to do so until January 6, 2023, when the Clearinghouse is three years old. After that date, an employer making an inquiry to the Clearinghouse on the driver/applicant will fulfill this requirement. If the Clearinghouse provides information that is incomplete, such as information on the completion of return-to-work plans, the employer must ask the prior employer about the completion of the plan. In addition, the Clearinghouse only applies to the motor carriers industry and not to other USDOT covered transportation such as railroads; an employer if applicable would still need to ask prior employers about drug and alcohol testing violations for those applicants who worked in such other transportation industries.

The regulations require the employer to state in its policy on the CDL drug and alcohol testing program information on the requirement of the employer to report violations of the program to the Clearinghouse and to include such information in the training and notice materials given to the drivers as required by the regulations. The ISBA sample policy on the CDL drug and alcohol testing has been amended to address the Clearinghouse requirements. Other amendments have been made to the ISBA sample policy as well to update the policy to current regulations which have been amended in minor areas over the past few years.

The regulations provide more details about the use and

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function of the Clearinghouse including how information and inquires will be shared with the employers and drivers. The regulations may be found at 49 CFR Section 382.701 et seq. Other related regulations were amended to be consistent with the Clearinghouse regulations. Additional information concerning the Clearinghouse may be found at the following website: <https://clearinghouse.fmcsa.dot.gov/FAQ/FAQLearnMoreAll>.

II. POLICY IMPLEMENTATION – CASE LAW

Recently a federal district court case addressed the issue of a board policy on graduation prayer found to be constitutional but the implementation of it by the school administrators was alleged to be unconstitutional. A brief summary of the facts of the case will provide a context for the ruling. For many decades, a school district held its graduation ceremonies in a chapel, prayer was a part of the ceremony and was said by students, prayer or invocation was listed as an item in the program, attendees were asked to stand for the student prayer/speech, and a religious song was sung by the choir at the ceremonies. About five years ago the school district was sued by parents of a student who attended the school claiming the practice violated the Establishment Clause. The parents prevailed on this claim and as a result the school district changed its practice of having graduations in the chapel and changed its policy to allow only student-led or student-initiated prayer at graduation and made other changes to comply with the court order. The court reviewed the revised policy and found it constitutional.

After the revised prayer was adopted, for two years the graduation ceremonies continued to have religious music sung by the choir, required the audience to stand for the student speech, and indicated there would be a prayer or invocation during the ceremony in the program. The school district was sued again to address the constitutionality of the implementation of the new policy. The court allowed the parties to have discovery to determine how the revised policy was being implemented. As a result of the information discovered, the court found the school administrators had not been following the revised policy. It was not clear whether the school board provided the revised policy to the school administrators or if they acted on their own.

The court ruled that while the policy on its face was constitutional, the actual implementation of it was not. As a result, the court revised its previous order and ordered the school board to add nine (9) additional provisions to the revised policy. These

provisions provided very specific actions to be carried out at all school district graduation ceremonies where prayers had previously been allowed. The last one provided the board shall “provide school officials with a written policy that includes these guidelines for graduation ceremonies, and the district and/or school officials shall provide a copy of that written policy to any student who is selected to give remarks at a graduation ceremony.” [The case is *American Humanist Assn. v. Greenville County School District*, No. 13-2471 (D.S.C. July 18, 2019)]

This case provides an excellent illustration of the importance of implementing policy in a legal manner. It is not enough the policy is legal on its face; the implementation of the policy is important as well. A policy found to meet the requirements of law must be followed and implemented as written in order to reduce the risk of litigation for improper or potentially illegal implementation of the policy. In this case, it was clear there was no oversight of the implementation of the policy either because the school administrators and staff were not made aware of the revised policy or they were made aware of it, ignored it, and their supervisors



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did not oversee the actions of the employees to be sure the policy was being implemented as written, as the court found it necessary to specifically order the school district to provide the written policy and the additional court-ordered provisions to the school administrators and staff members, and to the students so that they would be aware of the revised policy.

School boards not only have the authority and responsibility to adopt policies that meet the legal requirements of the law but also school boards must provide a process wherein appropriate school employees and other people know what the policy states and requires. School boards must also provide for the implementation of the policy through a process to be sure the policy is being implemented properly and appropriately.



While the school board may delegate to the superintendent the task of overseeing the distribution and implementation of board policies to and by school administrators and other employees, it is ultimately the school board who is responsible for the implementation of policy by its employees.

The process and procedures for distribution of its policies and to ensure the implementation of its policies should be addressed in the board's policy addressing board policy development as this is part of the policy development cycle for boards to ensure the policy has its intended result. Proper implementation is an important factor in this analysis. 🗡️

If you have any questions or would like a copy of any document referred to in this article, please contact Julie M. Slavens by phone: 317/639-0330 ext. 111 or by e-mail: jslavens@isba-ind.org.



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