

Memorandum

FROM: Ellen Kreifels
TO: NREA Member Managers
DATE: November 1, 2023
RE: FMSCA Drug Testing

All CDL holders are subject to FMSCA's drug and alcohol testing requirements. This is federal law and all cooperatives and PPDs are strictly subject to those laws. Federal law requires drug testing at the pre-employment stage, post-accident, randomly, and when there is a reasonable suspicion that a CDL holder is under the influence of drugs or alcohol. Drug testing tests for 5 different categories, but includes 14 different substances. A drug test will come back "positive" if the presence of the substance is detected—not necessarily if there is an impairment. (Recently, FMSCA approved the use of oral spit samples which are intended to be more accurate. However, no lab has been approved to conduct those tests. Once a lab has been approved, it is the employer's choice whether to permit oral spit sampling instead of urine sampling.)

What happens after a positive?

If a test comes back "positive" a Medical Review Officer (MRO) will investigate whether there is a medical reason for the detection. The MRO will not investigate the validity of the medical reason, only that a medical reason exists. This is intended to allow certain uses under a physician's care to be permissible. In that instance, the "positive" will not be verified as positive and there will be no reporting to the CDL Clearinghouse.

What about marijuana?

Marijuana is one of the categories with THC being one of the fourteen substances tested for. Under the 2018 Farm Bill, hemp derived products became legal, which contain THC. CBD is one of those derived products. Therefore, CBD is widely available for purchase around Nebraska. Be advised that CBD products may contain sufficient levels of THC, one of the tested for substances, to result in a "positive" drug test result. FMSCA issued a "CBD Notice" informing all CDL drivers that there is no legitimate explanation for a positive drug test for THC. Therefore, an MRO will have no choice but to verify a "positive" drug test for CBD use.

CBD products that can produce a "positive" result include Delta-8, Delta-9, and various CBD oils and lotions. Because CBD products are not regulated by the FDA there is no way to verify the content and strength of the product. Additionally, there is no labeling requirement that the content be accurately reported.

The CBD industry itself recognizes that Delta-9 is detectable in urine for 3-30 days after use or up to 72 hours in a saliva test.

Next Steps:

Once a “positive” result has been verified by the MRO, it will be reported to the employer and the CDL Clearinghouse. The employer has the choice whether to terminate the employee at that point in time or to permit the employee to undergo the “return to duty” process. The return to duty process takes at least one year. It requires meeting with a Substance Abuse Professional (SAP), receiving a plan from the SAP, following the terms of that plan until the SAP determines the employee is eligible for another drug test to return the employee to work. After the employee completes all these steps and is reinstated, the SAP may continue follow-up testing for up to five years. The cost of the SAP and any additional testing will be at the employee’s own cost.

Takeaway:

All employees whose job description requires a CDL should protect their CDL and not take risks with a positive drug test. A verified positive drug test will create significant disruption to, and could even end, a lineman’s career. The employer has the right to terminate the employee for a positive test result and has no obligation to permit the return to duty process. IF the employer permits return to duty, there is no obligation to find alternative work for the employee to perform while undergoing the return to duty process. The employee may be put on an unpaid leave pending the outcome of the return to duty process.