

**FMCSA GUIDANCE**  
**Issued by Federal Motor Carrier Safety Administration**  
**April 2005**

*(For purpose of clarification, "FHWA" in this document has been replaced with "FMCSA". FMCSA agrees that FHWA was incorrectly used.)*

**382.103 APPLICABILITY**

*Question 1: Are intrastate drivers of CMVs, who are required to obtain CDLs, required to be alcohol and drug tested by their employer?*

*Guidance:* Yes. The definition of commerce in 382.107 is taken from 49 U.S.C. 31301 which encompasses interstate, intrastate and foreign commerce.

*Question 2: Are students who will be trained to be motor vehicle operators subject to alcohol and drug testing? Are they required to obtain a CDL in order to operate training vehicles provided by the school?*

*Guidance:* Yes. 382.107 includes the following definitions:

Employer means any person (including the United States, a State, District of Columbia or a political subdivision of a State) who owns or leases a CMV or assigns persons to operate such a vehicle. The term employer includes an employer's agents, officers and representatives.

Driver means any person who operates a CMV.

Truck and bus driver training schools meet the definition of an employer because they own or lease CMVs and assign students to operate them at appropriate points in their training. Similarly, students who actually operate CMVs to complete their course work qualify as drivers.

The CDL regulations provide that "no person shall operate" a CMV before passing the written and driving tests required for that vehicle (49 CFR 383.23(a)(1)). Virtually all of the vehicles used for training purposes meet the definition of a CMV, and student drivers must therefore obtain a CDL.

*Question 3: Are part 382 alcohol and drug testing requirements applicable to firefighters in a State which gives them the option of obtaining a CDL or a non-commercial class A or B license restricted to operating fire equipment only?*

*Guidance:* No. The applicability of part 382 is coextensive with part 383--the general CDL requirements. Only those persons required to obtain a CDL under Federal law and who actually perform safety-sensitive duties, are required to be tested for drugs and alcohol.

The FMCSA, exercising its waiver authority, granted the States the option of waiving firefighters from CDL requirements. A State which gives firefighters the choice of obtaining either a CDL or a non-commercial license has exercised the option not to require CDLs. Therefore, because a CDL is not required, by extension part 382 is not applicable.

A firefighter in the State would not be required under Federal law to be tested for drugs and alcohol regardless of the type of license which the employer required as a condition of employment or the driver actually obtained. It is the Federal requirement to obtain a CDL, nonexistent in the State, that entails drug and alcohol testing, not the fact of actually holding a CDL.

*Question 4: An employer or State government agency requires CDLs for drivers of motor vehicles: (1) with a GVWR of 26,000 pounds or less; (2) with a GCWR of 26,000 pounds or less inclusive of a towed unit with a GVWR of 10,000 pounds or less; (3) designed to transport 15 or less passengers, including the driver; or (4) which transport HM, but are not required to be placarded under 49 CFR part 172, subpart F. Are such drivers required by part 382 to be tested for the use of alcohol or controlled substances?*

*Guidance:* No. Part 382 requires or authorizes drug and alcohol testing only of those drivers required by part 383 to obtain a CDL. Since the vehicles described above do not meet the definition of a CMV in part 383, their drivers are not required by Federal regulations to have a CDL.

*Question 5: Are Alaskan drivers with a CDL who operate CMVs and have been waived from certain CDL requirements subject to controlled substances and alcohol testing?*

*Guidance:* Yes. Alaskan drivers with a CDL who operate CMVs are subject to controlled substances and alcohol testing because they have licenses marked either "commercial driver's license" or "CDL". The waived drivers are only exempted from the knowledge and skills tests, and the photograph on license requirements.

*Question 6: Do the FMCSA's alcohol and controlled substances testing regulations apply to employers and drivers in U.S. territories or possessions such as Puerto Rico and Guam?*

*Guidance:* No. The rule by definition applies only to employers and drivers domiciled in the 50 states and the District of Columbia.

*Question 7: Which drivers are to be included in a alcohol and controlled substances testing program under the FMCSA's rule?*

*Guidance:* Any person who operates a CMV, as defined in 382.107, in intrastate or interstate commerce and is subject to the CDL requirement of 49 CFR part 383.

*Question 8: Is a foreign resident driver operating between the U.S. and a foreign country from a U.S. terminal for a U.S.-based employer subject to the FMCSA alcohol and controlled substances testing regulations?*

*Guidance:* Yes. A driver operating for a U.S.-based employer is subject to part 382.

*Question 9: What alcohol and drug testing provisions apply to foreign drivers employed by foreign motor carriers?*

*Guidance:* Foreign employers are subject to the alcohol and drug testing requirements in part 382 (see [382.103](#)). All provisions of the rules will be applicable while drivers are operating in the U.S. Foreign drivers may also be subject to State laws, such as probable cause testing by law enforcement officers.

### **382.105\_ TESTING PROCEDURES**

*Question 1:* What does a BAT do when a test involves an independent, self-employed owner-operator with a confirmed alcohol concentration of 0.02 or greater, to notify a company representative as required by [40.65\(i\)](#)?

*Guidance:* The independent, self-employed owner-operator will be notified by the BAT immediately and the owner-operator's certification in Step 4 notes that the self-employed owner-operator has been notified. No further notification is necessary. The BAT will provide copies 1 and 2 to the self-employed owner-operator directly.

*Question 2:* A driver does not have a photo identification card. Must an employer representative identify the driver in the presence of the BAT/urine specimen collector or may the employer representative identify the driver via a telephone conversation?

*Guidance:* Those subject to part 382 are subject first, generally, to part 383. Part 383 requires all States, with an exception in Alaska for a very small group of individuals, to provide a CDL document to the individual that includes, among other things: the full name, signature, and mailing address of the person to whom such license is issued; physical and other information to identify and describe the person including date of birth (month, day, and year), sex, and height; and, a color photograph of the person. Except in these rare Alaskan instances, the FMCSA fully expects most employer's to require the driver to present the CDL document to the BAT or urine collector.

A driver subject to alcohol and drug testing should be able to provide the CDL document. In those rare instances that the CDL or other form of photo identification is not produced for verification, an employer representative must be contacted and must provide identification. The FMCSA will allow employer representatives to identify drivers in any way that the employer believes will positively identify the driver.

*Question 3:* Will foreign drug testing laboratories need to be certified by the National Institute on Drug Abuse (NIDA)? Will they need to be certified by the Department of Health and Human Services (DHHS)?

*Guidance:* The NIDA, an agency of the DHHS, no longer administers the workplace drug testing laboratory certification program. This program is now administered by the DHHS' Substance Abuse and Mental Health Services Administration. All motor carriers are required to use DHHS-certified laboratories for analysis of alcohol and controlled substances tests as neither Mexico nor Canada has an equivalent laboratory certification program.

*Question 4:* Particularly in light of the coverage of Canadian and Mexican employees, how should MROs deal, in the verification process, with claims of the use of foreign prescriptions or over-the-counter medication?

*Guidance:* Possession or use of controlled substances are prohibited when operating a CMV under the FMCSA regulations regardless of the source of the substance. A limited exception exists for a substance's use in accordance with instructions provided by a licensed medical practitioner who knows that the individual is a CMV driver who operates CMVs in a safety-sensitive job and has provided instructions to the CMV driver that the use of the substance will not affect the CMV driver's ability to safely operate a CMV (see [382.213](#), [391.41\(b\)](#)(12), and [392.4\(c\)](#)). Individuals entering the United States must properly declare controlled substances with the U.S. Customs Service. 21 CFR 1311.27.

The FMCSA expects MROs to properly investigate the facts concerning a CMV driver's claim that a positive controlled substance test result was caused by a prescription written by a knowledgeable, licensed medical practitioner or the use of an over-the-counter substance that was obtained in a foreign country without a prescription. This investigation should be documented in the MRO's files.

If the CMV driver lawfully obtained a substance in a foreign country without a prescription which is a controlled substance in the United States, the MRO must also investigate whether a knowledgeable, licensed medical practitioner provided instructions to the CMV driver that the use of the "over-the-counter" substance would not affect the driver's ability to safely operate a CMV.

Potential violations of [392.4](#) must be investigated by the law enforcement officer at the time possession or use is discovered to determine whether the exception applies.

### **382.107\_ DEFINITIONS**

*Question 1:* What is an owner-operator?

*Guidance:* The FMCSA neither defines the term "owner-operator" nor uses it in regulation. The FMCSA regulates "employers" and "drivers." An owner-operator may act as both an employer and a driver at certain times, or as a driver for another employer at other times depending on contractual arrangements and operational structure.

### **382.109\_ PREEMPTION OF STATE AND LOCAL LAWS**

*Question 1:* An employer is required by State or local law, regulation, or order to bargain with unionized employees over discretionary elements of the DOT alcohol and drug testing regulations (e.g., selection of DHHS-approved laboratories or MROs). May the employer defer the 1995 or 1996 implementation dates for testing employees until the collective bargaining process has produced agreement on these discretionary elements, or must the employer implement testing as required by part 382?

*Guidance:* The FMCSA provided large employers 45 weeks and small employers 97 weeks collectively to bargain the discretionary elements of the part 382 testing program. An employer must implement alcohol and controlled substances testing in accordance with the

schedule in [382.115](#). If observance of the collective bargaining process would make it impossible for the employer to comply with these deadlines, [382.109\(a\)\(1\)](#) preempts the State or local bargaining requirement to the extent needed to meet the implementation date.

### **382.113 REQUIREMENT FOR NOTICE**

*Question 1:* Must a notice be given before each test or will a general notice given to drivers suffice?

*Guidance:* A driver must be notified before submitting to each test that it is required by part 382. This notification can be provided to the driver either verbally or in writing. In addition, the FMCSA (Federal Motor Carrier Safety Administration) believes that the use of the DOT (U.S. Department of Transportation) Breath Alcohol Testing Form, OMB No. 2105-0529, and the Drug Testing Custody and Control Form, 49 CFR part 40, appendix A, will support the verbal or written notice that the test is being conducted in accordance with Part 382.

### **382.115 STARTING DATE FOR TESTING PROGRAMS**

*Question 1:* In a governmental entity structured into various subunits such as departments, divisions, and offices, how is the number of an employer's drivers determined for purposes of the implementation date of controlled substances and alcohol testing?

*Guidance:* Part 382 testing applies to governmental entities, including those of the Federal government, the States, and political subdivisions of the States. An employer is defined as any person that owns or leases CMVs, or assigns drivers to operate them. Therefore, any governmental entity, or a subunit of it that controls CMVs and the day - to-day operations of its drivers, may be considered the employer for purposes of part 382. For example, a city government divided into various departments, such as parks and public works, could consider the departments as separate employers if the CMV operations are separately controlled. The city also has the option of deeming the city as the employer of all of the drivers of the various departments.

### **382.205 ON-DUTY USE**

*Question 1:* What is meant by the terms "use alcohol" or "alcohol use?" Is observation of use sufficient or is an alcohol test result required?

*Guidance:* The term "alcohol use" is defined in [382.107](#). The employer is prohibited in [382.205](#) from permitting a driver to drive when the employer has actual knowledge of the driver's use of alcohol, regardless of the level of alcohol in the driver's body. The form of knowledge is not specified. It may be obtained through observation or other method.

### **382.213 CONTROLLED SUBSTANCES USE**

*Question 1:* Must a physician specifically advise that substances in a prescription will not adversely affect the driver's ability to safely operate a CMV or may a pharmacist's advice or precautions printed on a container suffice for the advice?

*Guidance:* A physician must specifically advise the driver that the substances in a prescription will not adversely affect the driver's ability to safely operate a CMV.

### **382.301 PRE-EMPLOYMENT TESTING**

*Question 1:* What is meant by the phrase, "an employer who uses, but does not employ, a driver \* \* \* ?" Describe a situation to which the phrase would apply.

*Guidance:* This exception was contained in the original drug testing rules and was generally applied to "trip-lease" drivers involved in interstate commerce. A trip-lease driver is generally a driver employed by one motor carrier, but who is temporarily leased to another motor carrier for one or more trips generally for a time period less than 30 days. The phrase would also apply to volunteer organizations that use loaned drivers.

*Question 2:* Must school bus drivers be pre-employment tested after they return to work after summer vacation in each year in which they do not drive for 30 consecutive days?

*Guidance:* A school bus driver whom the employer expects to return to duty the next school year does not have to be pre-employment tested so long as the driver has remained in the random selection pool over the summer. There is deemed to be no break in employment if the driver is expected to return in the fall.

On the other hand, if the driver is taken out of all DOT random pools for more than 30 days, the exception to pre-employment drug testing in [382.301](#) would be unavailable and a drug test would have to be administered after the summer vacation.

*Question 3:* Is a pre-employment controlled substances test required if a driver returns to a previous employer after his/her employment had been terminated?

*Guidance:* Yes. A controlled substances test must be administered any time employment has been terminated for more than 30 days and the exceptions under [382.301\(c\)](#) were not met.

*Question 4:* Must all drivers who do not work for an extended period of time (such as layoffs over the winter or summer months) be pre-employment drug tested each season when they return to work?

*Guidance:* If the driver is considered to be an employee of the company during the extended (layoff) period, a pre-employment test would not be required so long as the driver has been included in the company's random testing program during the layoff period.

However, if the driver was not considered to be an employee of the company at any point during the layoff period, or was not covered by a program, or was not covered for more than 30 days, then a pre-employment test would be required.

*Question 5:* What must an employer do to avail itself of the exceptions to pre-employment testing listed under 382.301(c) ?

*Guidance:* An employer must meet all requirements in 382.301(c) and (d), including maintaining all required documents. An employer must produce the required documents at the time of the Compliance Review for the exception to apply.

*Question 6:* May a CDL driving skills test examiner conduct a driving skills test administered in accordance with 49 CFR part 383 before a person subject to part 382 is tested for alcohol and controlled substances?

*Guidance:* Yes. A CDL driving skills test examiner, including a third party CDL driving skills test examiner, may administer a driving skills test to a person subject to part 382 without first testing him/ her for alcohol and controlled substances. The intent of the CDL driving skills test is to assess a person's ability to operate a commercial motor vehicle during an official government test of their driving skills. However, this guidance does not allow an employer (including a truck or bus driver training school) to use a person as a current company, lease, or student driver prior to obtaining a verified negative test result. An employer must obtain a verified negative controlled substance test result prior to dispatching a driver on his/ her first trip.

### **382.303 POST-ACCIDENT TESTING**

*Question 1:* Why does the FMCSA allow post-accident tests done by Federal, State or local law enforcement agencies to substitute for a 382.303 test even though the FMCSA does not allow a Federal, State or local law enforcement agency test to substitute for a pre-employment, random, reasonable suspicion, return-to-duty, or follow-up test? Will such substitutions be allowed in the future?

*Guidance:* A highway accident is generally investigated by a Federal, State, or local law enforcement agency that may determine that probable cause exists to conduct alcohol or controlled substances testing of a surviving driver. The FMCSA believes that testing done by such agencies will be done to document an investigation for a charge of driving under the influence of a substance and should be allowed to substitute for a FMCSA-required test. The FMCSA expects this provision to be used rarely.

The FMCSA is required by statute to provide certain protection for drivers who are tested for alcohol and controlled substances. The FMCSA believes that law enforcement agencies investigating accidents will provide similar protection based on the local court's prior action in such types of testing.

The FMCSA will not allow a similar approach for law enforcement agencies to conduct testing for the other types of testing. A law enforcement agency, however, may act as a consortium to provide any testing in accordance with parts 40 and 382.

*Question 2:* May an employer allow a driver, subject to post- accident controlled substances testing, to continue to drive pending receipt of the results of the controlled substances test?

*Guidance:* Yes. A driver may continue to drive, so long as no other restrictions are imposed by 382.307 or by law enforcement officials.

*Question 3:* A commercial motor vehicle operator is involved in an accident in which an individual is injured but does not die from the injuries until a later date. The commercial motor vehicle driver does not receive a citation under State or local law for a moving traffic violation arising from the accident. How long after the accident is the employer required to attempt to have the driver subjected to post-accident testing?

*Guidance:* Each employer is required to test each surviving driver for alcohol and controlled substances as soon as practicable following an accident as required by 382.303. However, if an alcohol test is not administered within 8 hours following the accident, or if a controlled substance test is not administered within 32 hours following the accident, the employer must cease attempts to administer that test. In both cases the employer must prepare and maintain a record stating the reason(s) the test(s) were not promptly administered.

If the fatality occurs following the accident and within the time limits for the required tests, the employer shall attempt to conduct the tests until the respective time limits are reached. The employer is not required to conduct any tests for cases in which the fatality occurs outside of the 8 and 32 hour time limits.

*Question 4:* What post-accident alcohol and drug testing requirements are there for U.S. employer's drivers involved in an accident occurring outside the U.S.?

*Guidance:* U.S. employers are responsible for ensuring that drivers who have an accident (as defined in 390.5) in a foreign country are post-accident alcohol and drug tested in conformance with the requirements of 49 CFR parts 40 and 382. If the test(s) cannot be administered within the required 8 or 32 hours, the employer shall prepare and maintain a record stating the reasons the test(s) was not administered (see 382.303(b)(1) and (b)(4)).

*Question 5:* What post-accident alcohol and drug testing requirements are there for foreign drivers involved in accidents occurring outside the United States?

*Guidance:* Post-accident alcohol and drug testing is required for CMV accidents occurring within the U.S. and on segments of interstate movements into Canada between the U.S.-Canadian border and the first physical delivery location of a Canadian consignee. The FMCSA further believes its regulations require testing for segments of interstate movements out of Canada between the last physical pick-up location of a Canadian consignor and the U.S.-Canadian border. The same would be true for movements between the U.S.-Mexican border and a point in Mexico.

For example, a motor carrier has two shipments on a CMV from a shipper in Chicago, Illinois. The first shipment will be delivered to Winnipeg, Manitoba and the second to Lloydminster, Saskatchewan. A driver is required to be post-accident tested for any CMV accident that meets the requirements to conduct 49 CFR 382.303 Post-accident testing, that occurs between Chicago, Illinois and Winnipeg, Manitoba (the first delivery point). The FMCSA would not require a foreign motor carrier to conduct testing of foreign drivers for any accidents between Winnipeg and Lloydminster.

The FMCSA does not believe it has authority over Canadian and Mexican motor carriers that operate within their own countries where the movement does not involve movements into or out of the United States. For example, the FMCSA does not believe it has authority to require testing for transportation of freight from Prince George, British Columbia to Red Deer, Alberta that does not traverse the United States.

If the driver is not tested for alcohol and drugs as required by [382.303](#) and the motor carrier operates in the U.S. during a four-month period of time after the event that triggered the requirement for such a test, the motor carrier will be in violation of part 382 and may be subject to penalties under [382.507](#).

### **382.305 RANDOM TESTING**

*Question 1:* Is a driver who is on-duty, but has not been assigned a driving task, considered to be ready to perform a safety-sensitive function as defined in [382.107](#) subjecting the driver to random alcohol testing?

*Guidance:* A driver must be about to perform, or immediately available to perform, a safety-sensitive function to be considered subject to random alcohol testing. A supervisor, mechanic, or clerk, etc., who is on call to perform safety-sensitive functions may be tested at any time they are on call, ready to be dispatched while on-duty.

*Question 2:* What are the employer's obligations, in terms of random testing, with regard to an employee who does not drive as part of the employee's usual job functions, but who holds a CDL and may be called upon at any time, on an occasional or emergency basis, to drive?

*Guidance:* Such an employee must be in a random testing pool at all times, like a full-time driver. A drug test must be administered each time the employee's name is selected from the pool.

Alcohol testing, however, may only be conducted just before, during, or just after the performance of safety-sensitive functions. A safety-sensitive function as defined in [382.107](#) means any of those on-duty functions set forth in [395.2 On-Duty time](#), paragraphs (1) through (7), (generally, driving and related activities). If the employee's name is selected, the employer must wait until the next time the employee is performing safety-sensitive functions, just before the employee is to perform a safety-sensitive function, or just after the employee has ceased performing such functions to administer the alcohol test. If a random selection period expires before the employee performs a safety-sensitive function, no alcohol test should be given, the employee's name should be returned to the pool, and the number of employees subsequently selected should be adjusted accordingly to achieve the required rate.

*Question 3:* How should a random testing program be structured to account for the schedules of school bus or other drivers employed on a seasonal basis?

*Guidance:* If no school bus drivers from an employer's random testing pool are used to perform safety sensitive functions during the summer, the employer could choose to make random selections only during the school year. If the employer nevertheless chooses to make selections in the summer, tests may only be administered when the drivers return to duty.

If some drivers continue to perform safety-sensitive functions during the summer, such as driving buses for summer school, an employer could not choose to forego all random selections each summer. Such a practice would compromise the random, unannounced nature of the random testing program. The employer would test all selected drivers actually driving in the summer. With regard to testing drivers not driving during the summer, the employer has two options. One, names of drivers selected who are on summer vacation may be returned to the pool and another selection made. Two, the selected names could be held by the employer and, if the drivers return to perform safety-sensitive functions before the next random selection, the test administered upon the drivers' return.

Finally, it should be noted that reductions in the number of drivers during summer vacations reduces the average number of driving positions over the course of the year, and thus the number of tests which must be administered to meet the minimum random testing rate.

*Question 4:* Are driver positions that are vacant for a testing cycle to be included in the determination of how many random tests must be conducted?

*Guidance:* No. The FMCSA random testing program tests employed or utilized drivers, not positions that are vacant.

*Question 5:* May an employer use the results of another program in which a driver participates to satisfy random testing requirements if the driver is used by the employer only occasionally?

*Guidance:* The rules establish an employer-based testing program. Employers remain responsible at all times for ensuring compliance with all of the rules, including random testing, for all drivers which they use, regardless of any utilization of third parties to administer parts of the program. Therefore, to use another's program, an employer must make the other program, by contract, consortium agreement, or other arrangement, the employer's own program. This would entail, among other things, being held responsible for the other program's compliance, having records forwarded to the employer's principal place of business on 2 days notice, and being notified of and acting upon positive test results.

*Question 6:* Once an employee is randomly tested during a calendar year, is his/her name removed from the pool of names for the calendar year?

*Guidance:* No, the names of those tested earlier in the year must be returned to the pool for each new selection. Each driver must be subject to an equal chance of being tested during each selection process.

*Question 7:* Is it permissible to make random selections by terminals?

*Guidance:* Yes. If random selection is done based on locations or terminals, a two-stage selection process must be utilized. The first selection would be made by the locations and the second selection would be of those employees at the location(s) selected. The selections must ensure that each employee in the pool has an equal chance of being selected and tested, no matter where the employee is located.

*Question 8:* When a driver works for two or more employers, in whose random pool must the driver be included?

*Guidance:* The driver must be in the pool of each employer for which the driver works.

*Question 9:* After what period of time may an employer remove a casual driver from a random pool?

*Guidance:* An employer may remove a casual driver, who is not used by the employer, from its random pool when it no longer expects the driver to be used.

*Question 10:* If an employee is off work due to temporary lay-off, illness, injury or vacation, should that individual's name be removed from the random pool?

*Guidance:* No. The individual's name should not be removed from the random pool so long as there is a reasonable expectation of the employee's return.

*Question 11:* Is it necessary for an owner-operator, who is not leased to a motor carrier, to belong to a consortium for random testing purposes?

*Guidance:* Yes.

*Question 12:* If an employer joins a consortium, and the consortium is randomly testing at the appropriate rates, will these rates meet the requirements of the alcohol and controlled substances testing for the employer even though the required percent of the employer's drivers were not randomly tested?

*Guidance:* Yes.

*Question 13:* Is it permissible to combine the drivers from the subsidiaries of a parent employer into one pool, with the parent employer acting as a consortium?

*Guidance:* Yes.

*Question 14:* How should an employer compute the number of random tests to be given to ensure that the appropriate testing rate is achieved given the fluctuations in driver populations and the high turnover rate of drivers?

*Guidance:* An employer should take into account fluctuations by estimating the number of random tests needed to be performed over the course of the year. If the carrier's driver workforce is expected to be relatively constant (i.e., the total number of driver positions is approximately the same) then the number of tests to be performed in any given year could be determined by multiplying the average number of driver positions by the testing rate.

If there are large fluctuations in the number of driver positions throughout the year without any clear indication of the average number of driver positions, the employer should make a reasonable estimate of the number of positions. After making the estimate, the employer should then be able to determine the number of tests necessary.

*Question 15:* May an employer or consortium include non-DOT-covered employees in a random pool with DOT-covered employees?

*Guidance:* No.

*Question 16:* Canadians believe that their laws require employer actions be tied to the nature of the job and the associated safety risk. Canadian employers believe they will have to issue alcohol and drug testing policies that deal with all drivers in an identical manner, not just drivers that cross the border into the United States. If a motor carrier wanted to add cross border work to an intra-Canadian driver's duties, and the driver was otherwise qualified under the FMCSA rules, may the pre-employment test be waived?

*Guidance:* The FMCSA has long required, since the beginning of the drug testing program in 1988, that transferring from intrastate work into interstate work requires a "pre-employment" test regardless of what type of testing a State might have required under intrastate laws. This policy also applied to motor carriers that had a pre-employment testing program similar to the FMCSA requirement. The FMCSA believes it is reasonable to apply this same interpretation to the first time a Canadian or Mexican driver enters the United States.

This policy was delineated in the Federal Register of February 15, 1994 (59 FR 7302, at 7322). The FMCSA believes motor carriers should separate drivers into intra-Canadian and inter-State groups for their policies and the random selection pools. If a driver in the intra-Canadian group (including the random selection pool) were to take on driving duties into the United States, the driver would be subject to a pre-employment test to take on this driving task. Although the circumstance is not actually a first employment with the motor carrier, such a test would be required because it would be the first time the driver would be subject to part 382.

*Question 17:* May an employer notify a driver of his/her selection for a random controlled substances test while the driver is in an off-duty status? [Editor's Note]

*Guidance:* Yes. Part 382 does not prohibit an employer from notifying a driver of his/her selection for a random controlled substances test while the driver is in an off-duty status.

If an employer selects a driver for a random controlled substances test while the driver is in an off-duty status, and then chooses to notify the driver that he/she has been selected while the driver is still off-duty, the employer must ensure that the driver proceeds immediately to a collection site. Immediately, in this context, means that all the driver's actions, after notification, lead to an immediate specimen collection. If the employer's policy or practice is to notify drivers while they are in an off-duty status, the employer should make that policy clear to all drivers so that they are fully informed of their obligation to proceed immediately to a collection site.

If an employer does not want to notify the driver that he/she has been selected for a random controlled substances test while the driver is in an off-duty status, the employer could set aside the driver's name for notification until the driver returns to work, as long as the driver returns to work before the next selection for random testing is made.

Employers should note that regardless of when a driver is notified, the time the driver spends traveling to and from the collection site, and all time associated with providing the specimen, must be recorded as on-duty time for purposes of compliance with the hours-of-service rules.

*Question 18:* Is it permissible to select alternates for the purpose of complying with the Random Testing regulations? [Editor's Note]

*Guidance:* Yes, it is permissible to select alternates. However, it is only permissible if the primary driver selected will not be available for testing during the selection period because of long-term absence due to layoff, illness, injury, vacation or other circumstances. In the event the initial driver selected is not available for testing, the employer and/or C/TPA must document the reason why an alternate driver was tested. The documentation must be maintained and readily available when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

*Question 19:* A motor carrier uses a consortium/third party administrator (C/TPA) to conduct its random selection of driver names. The C/TPA has many motor carriers in its random selection pool. The C/TPA has set up its random selection program to pick driver names and notifies the motor carrier whose driver the C/TPA has selected. The motor carrier notifies the C/TPA the driver is presently on long-term absence due to layoff, illness, injury, or vacation. The motor carrier also notifies the C/TPA it does not expect the driver to return to duty before the C/TPA's next selection of driver names. The C/TPA then randomly orders and selects a driver's name from the motor carrier that employs the driver who is unavailable rather than selecting the next name on the random selection list. Is this a scientifically valid and impartial method for selecting drivers for random testing in a motor carrier's program? [Editor's Note]

*Guidance:* This procedure is a scientifically valid method for selecting driver names. This method is similar to methods used by organizations, including the Department of Labor's Bureau of Labor Statistics, to randomly order, select, and substitute names for sampling with replacement of groups of individual and companies. This procedure has a small degree of theoretical bias for a simple random sampling selection procedure. The theoretical bias, though, is so minimal the FMCSA does not believe the agency should prohibit its use.

This method is useful for operational settings, such as FMCSA's motor carrier random testing program. The method is less impartial toward drivers than other theoretical methods, but maintains a deterrent effect for both motor carriers and drivers. This method should deter motor carriers from claiming drivers are unavailable each time the C/TPA selects one of its drivers, thereby never having its drivers subject to actual random tests.

In addition, employers and C/TPA's should establish operational procedures that will ensure, to the greatest extent possible, that the primary selections for random testing are tested. The operational procedures should include procedures that will ensure the random selection lists are updated in a timely manner. The updates will ensure that drivers who are no longer available to an employer will not be counted in the random selection lists. The operational procedures should also outline the measures for selecting alternates, including documenting the reasons for using an alternate.

*Question 20:* If an employer is subject to random testing for only a partial calendar year, how should the employer determine the number of random tests required during the year to achieve the appropriate testing rate? (Examples: new employers that begin operating midway through the calendar year; employers which merge or split midway through the calendar year; Canadian or Mexican carriers that begin U.S. operations midway through the calendar year.)

*Response:* The number of random tests required can be computed in the same manner as for any employer that has large fluctuations in the number of driver positions during the year. Use the formulas  $T = 50\% \times D/P$  for controlled substance testing and  $T = 10\% \times D/P$  for alcohol testing, where T is the number of tests required, D is the total number of drivers subject to testing, and P is the number of selection periods in a full calendar year. For any selection period during which the carrier was not subject to 382.305, simply enter a zero in the driver calculations. Example: A carrier starts operating in August and decides to test quarterly (P = 4). It has 16 drivers subject to testing in the third quarter and only 12 drivers subject to testing in the fourth quarter.  $D = 0 + 0 + 16 + 12 = 28$ .  $D/P = 28/4 = 7$ .  $T = 50\%$  of 7, or 3.5, which must be rounded up to 4. The carrier must test 4 drivers for controlled substances between its first day of operation in August and the end of the year. Following the requirement to spread testing reasonably throughout the year, two drivers should be tested during the third quarter and two during the fourth quarter.

### 382.307 REASONABLE SUSPICION TESTING

*Question 1:* May a reasonable suspicion alcohol test be based upon any information or observations of alcohol use or possession, other than a supervisor's actual knowledge?

*Guidance:* No. Information conveyed by third parties of a driver's alcohol use may not be the only determining factor used to conduct a reasonable suspicion test. A reasonable suspicion test may only be conducted when a trained supervisor has observed specific, contemporaneous, articulable appearance, speech, body odor, or behavior indicators of alcohol use.

*Question 2:* Why does 382.307(b) allow an employer to use indicators of chronic and withdrawal effects of controlled substances in the observations to conduct a controlled substances reasonable suspicion test, but does not allow similar effects of alcohol use to be used for an alcohol reasonable suspicion test?

*Guidance:* The use of controlled substances by drivers is strictly prohibited. Because controlled substances remain present in the body for a relatively long period, withdrawal effects may indicate that the driver has used drugs in violation of the regulations, and therefore must be given a reasonable suspicion drug test.

Alcohol is generally a legal substance. Only its use or presence in sufficient concentrations while operating a CMV is a violation of FMCSA regulation. Alcohol withdrawal effects, standing alone, do not, therefore, indicate that a driver has used alcohol in violation of the regulations, and would not constitute reasonable suspicion to believe so.

*Question 3:* A consignee, consignor, or other party is a motor carrier employer for purposes of 49 CFR parts 382 through 399. They have trained their supervisors in accordance with 49 CFR 382.603 to conduct reasonable suspicion training on their own drivers. A driver for another motor carrier employer delivers, picks up, or has some contact with the consignee's, consignor's, or other party's trained supervisor. This supervisor believes there is reasonable suspicion, based on their training, that the driver may have used a controlled

substance or alcohol in violation of the regulations. May this trained consignee, consignor, or other party's supervisor order a reasonable suspicion test of a driver the supervisor does not supervise for the employing/using motor carrier employer?

*Guidance:* No, the trained supervisor may not order a reasonable suspicion test of a driver the supervisor does not supervise for the employing/using motor carrier employer. Motor carrier employers may not conduct reasonable suspicion testing based "on reports of a third person who has made the observations, because of that person's possible credibility problems or lack of appropriate training."

The trained supervisor for the consignee, consignor, or other party may, however, choose to do things not required by regulation, but encouraged by the FMCSA. They may inform the driver that they believe the driver may have violated Federal, State, or local regulations and advise them not to perform additional safety-sensitive work. They may contact the employing/using motor carrier employer to alert them of their reasonable suspicion and request the employing/using motor carrier employer take appropriate action. In addition, they may contact the police to request appropriate action.

*Question 4:* Are the reasonable suspicion testing and training requirements of 382.307 and 382.603 applicable to an owner-operator who is both an employer and the only employee?

*Guidance:* No. The requirements of 382.307 and 382.603 are not applicable to owner-operators in non-supervisory positions. 382.307 requires employers to have a driver submit to an alcohol and/or controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of part 382. Applying 382.307, Reasonable Suspicion Testing, to an owner-operator who is an employer and the only employee contradicts both "reason" and "suspicion" implicit in the title and the purpose of 382.307. A driver who has self-knowledge that he/she has violated the prohibitions of subpart B of part 382 is beyond mere suspicion. Furthermore, 382.603 requires "all persons designated to supervise drivers" to receive training that will enable him/her to determine whether reasonable suspicion exists to require a driver to undergo testing under 382.307. An owner-operator who does not hire or supervise other drivers is not in a supervisory position, nor are they subject to the testing requirements of 382.307. Therefore, such an owner-operator would not be subject to the training requirements of 382.603.

#### **382.401 RETENTION OF RECORDS**

*Question 1:* Many small school districts are affiliated through service units which are, in essence, a coalition of individual districts. Can these school districts have one common confidant for purposes of receiving results and keeping records?

*Guidance:* Yes. Employers may use agents to maintain the records, as long as they are in a secure location with controlled access. The employer must also make all records available for inspection at the employer's principal place of business within two business days after a request has been made by an FMCSA representative.

#### **382.403 REPORTING OF RESULTS IN A MANAGEMENT INFORMATION SYSTEM**

*Question 1:* The FMCSA regulations are written on an annual calendar year basis. Will foreign motor carriers, using this system, work from July 1 to June 30, or is everything to be managed on a six-month basis for the first year and then fall into annual calendar years subsequently?

*Guidance:* All motor carriers must manage their programs and report results under 382.403, if requested by FMCSA, on a January 1 to December 31 basis. This means that foreign motor carriers will report July 1 to December 31 results the first applicable year.

#### **382.405 ACCESS TO FACILITIES AND RECORDS**

*Question 1:* May employers who are subject to other Federal agencies' regulations, such as the Nuclear Regulatory Commission, Department of Energy, Department of Defense, etc., allow those agencies to view or have access to test records required to be prepared and maintained by parts 40 and/or 382?

*Guidance:* Federal agencies, other than those specifically provided for in 382.405, may have access to an employer's driver test records maintained in accordance with parts 40 or 382 only when a specific, contemporaneous authorization for release of the test records is allowed by the driver.

*Question 2:* Must a motor carrier respond to a third-party administrator's request (as directed by the specific, written consent of the driver authorizing release of the information on behalf of an entity such as a motor carrier) to release driver information that is contained in records required to be maintained under 382.401?

*Guidance:* Yes. However, the third-party administrator must comply with the conditions established concerning confidentiality, test results, and record keeping as stipulated in the "Notice: Guidance on the Role of Consortia and Third-Party Administrators (C/TPA) in DOT Drug and Alcohol Testing Programs" published on July 25, 1995, in Volume 60, No. 142, in the Federal Register. Motor carriers must comply completely with 49 CFR 382.413 and 382.405 as well as any applicable regulatory guidance. Please note that written consent must be obtained from the employee each time part 382 information is provided to a C/TPA, the consent must be specific to the individual or entity to whom information is being provided, and that blanket or non-specific consents to release information are not allowed.

*Question 3:* May employers allow unions or the National Labor Relations Board to view or have access to test records required to be prepared and maintained by parts 40 and/or 382, such as the list(s) of all employees actually tested?

*Guidance:* Unions and the National Labor Relations Board may have access to the list(s) of all employees in the random pool or the list(s) of all employees actually tested. The dates of births and SSNs must be removed from these lists prior to release. However, access to the employee's negative or positive test records maintained in accordance with Parts 40 or 382 can be granted only when a specific, contemporaneous authorization for release of the test records is allowed by the driver.



*Question 4:* May an employer (motor carrier) disclose information required to be maintained under 49 CFR part 382 (pertaining to a driver) to the driver or the decision maker in a lawsuit, grievance, or other proceeding (including, but not limited to, worker's compensation, unemployment compensation) initiated by or on behalf of the driver, without the driver's written consent?

*Guidance:* Yes, a motor carrier has discretion without the driver's consent as provided by 382.405(g), to disclose information to the driver or the decision maker in a lawsuit, grievance, or other proceeding (including, but not limited to, worker's compensation, unemployment compensation) initiated by or on behalf of the driver concerning prohibited conduct under 49 CFR part 382.

Also, an employer (motor carrier) may be required to provide the test result information pursuant to other Federal statutes or an order of a competent Federal jurisdiction, such as an administrative subpoena, as allowed by 382.405(a) without the driver's written consent.

*Question 5:* What is meant by the term "as required by law" in relation to State or local laws for disclosure of public records relating to a driver's testing information and test results?

*Guidance:* The term "as required by law" in 382.405(a) means Federal statutes or an order of a competent Federal jurisdiction, such as an administrative subpoena. The Omnibus Transportation Employee Testing Act of 1991, and the implementing regulations in part 382, require that test results and medical information be confidential to the maximum extent possible. (Pub. L. 102-143, Title V, sec. 5(a)(1), 105 Stat. 959, codified at 49 U.S.C. 31306). In addition, the Act preempts inconsistent State or local government laws, rules, regulations, ordinances, standards, or orders that are inconsistent with the regulations issued under the Act.

The FMCSA believes the only State and local officials that may have access to the driver's records under 382.405(d) and 49 U.S.C. 31306, without the driver's written consent, are State or local government officials that have regulatory authority over an employer's (motor carrier's) alcohol and drug testing programs for purposes of enforcement of part 382. Such State and local agencies conduct employer (motor carrier) compliance reviews under the FMCSA's Motor Carrier Safety Assistance Program (MCSAP) on the FMCSA's behalf in accordance with 49 CFR part 350.

### **382.413 RELEASE OF ALCOHOL AND CONTROLLED SUBSTANCES TEST INFORMATION BY PREVIOUS EMPLOYERS**

*Question 1:* What is to be done if a previous employer does not make the records available in spite of the employer's request along with the driver's written consent?

*Guidance:* Employers must make a reasonable, good faith effort to obtain the information. If a previous employer refuses, in violation of 382.405, to release the information pursuant to the new employer's and driver's request, the new employer should note the attempt to obtain the information and place the note with the driver's other testing information (59 FR 7501, February 14, 1994).

*Question 2:* Within 14 days of first using a driver to perform safety-sensitive functions, an employer discovers that a driver had a positive controlled substances and/or 0.04 alcohol concentration test result within the previous two years. No records are discovered that the driver was evaluated by an SAP and has been released by an SAP for return to work. The employer removes the driver immediately from the performance of safety-sensitive duties. Is there a violation of the regulations?

*Guidance:* Based on the scenario as presented, only the driver is in violation of the rules.

*Question 3:* Must an employer investigate a driver's alcohol and drug testing background prior to January 1, 1995?

*Guidance:* No. The first implementation date of the part 382 testing programs was January 1, 1995. 382.413 requires subsequent employers to obtain information retained by previous employers that the previous employers generated under a part 382 testing program. Since no employer was allowed to conduct any type of alcohol or drug test under the authority of part 382 prior to January 1, 1995, no tests conducted prior to 1995 are required to be obtained under 382.413. An employer may, however, under its own authority, request that a driver who was subject to part 391 drug testing provide prior testing information.

*Question 4:* Must a motor carrier respond to a third-party administrator's request (as directed by the specific, written consent of the driver authorizing release of the information on behalf of an entity such as a motor carrier) to release driver information that is contained in records required to be maintained under 382.401?

*Guidance:* Yes. However, the third-party administrator must comply with the conditions established concerning confidentiality, test results, and record keeping as stipulated in the "Notice: Guidance on the Role of Consortia and Third-Party Administrators (C/TPA) in DOT Drug and Alcohol Testing Programs" published on July 25, 1995, in Volume 60, No. 142, in the Federal Register. Motor carriers must comply completely with 382.413 and 382.405 as well as any applicable regulatory guidance. Please note that written consent must be obtained from the employee each time part 382 information is provided to a C/TPA, that the consent must be specific to the individual or entity to whom information is being provided, and that blanket or non-specific consents to release information are not allowed.

### **382.501 REMOVAL FROM SAFETY-SENSITIVE FUNCTIONS**

*Question 1:* What work may the driver perform for an employer, if a driver violates the prohibitions in subpart B?

*Guidance:* A driver who has violated the prohibitions of subpart B may perform any duties for an employer that are not considered "safety-sensitive functions." This may include handling of materials exclusively in a warehouse, regardless of whether the materials are considered hazardous as long as safety-sensitive functions are not performed. Safety-sensitive functions may not be performed until the individual has been evaluated by an SAP, complied with any recommended treatment, has been re-evaluated by an SAP, has been allowed by the SAP to return to work and has passed a return to duty test.

### **382.503 REQUIRED EVALUATION AND TESTING**

*Question 1:* If (1) a driver has a verified positive test result for controlled substances or an alcohol concentration of 0.04 or greater and (2) the driver subsequently obtains a verified negative result for controlled substances or a test result of less than 0.04 alcohol concentration without having been evaluated by a substance abuse professional (SAP), may the motor carrier accept the subsequent test results and ignore the requirement to refer the driver to an SAP for evaluation and possible treatment?

*Guidance:* No. A motor carrier must have a report from an SAP showing that the driver has been evaluated and may return to work because he or she:

- (1) Does not need treatment;
- (2) Needs part-time outpatient treatment, but may continue to drive while being treated on his or her off duty time; or
- (3) Needed full-time outpatient or inpatient treatment, has received such treatment, and is ready to return to driving.

The driver must also pass a return to duty controlled substances or alcohol test that complies with all of the requirements of parts 40 and 382.

### **382.507 PENALTIES**

*Question 1:* What is the fine or penalty for employers who refuse or fail to provide Part 382 testing information to a subsequent employer?

*Guidance:* Title 49 U.S.C. 521(b)(2)(A) provides for civil penalties not to exceed \$500 for each instance of refusing or failing to provide the information required by 382.405. Criminal penalties may also be imposed under 49 U.S.C. 521(b)(6).

### **382.601 MOTOR CARRIER OBLIGATION TO PROMULGATE A DRUG AND ALCOHOL POLICY**

*Question 1:* If a driver refuses to sign a statement certifying that he or she has received a copy of the educational materials required in 382.601 from their employer, will the employee be in violation of 382.601? May the driver's supervisor sign the certificate of receipt indicating that the employee refused to sign?

*Guidance:* The employer is responsible for ensuring that each driver signs a statement certifying that he or she has received a copy of the materials required in 382.601. The employer is required to maintain the original of the signed certificate and may provide a copy to the driver. The employer would be in violation if it uses a driver, who refuses to comply with 382.601, to perform any safety sensitive function, because 382.601 is a requirement placed on the employer. The employee would not be in violation if he or she drove without signing for the receipt of the policy. It is not permissible for the driver's supervisor to sign the certificate of receipt; however, it is advisable for the employer to note the attempt, the refusal, and the consequences of such action. Also, please note that the signing of the policy by the employee is in no way an acknowledgment that the policy itself complies with the regulations.

*Question 2:* Does 382.601 require employers to provide educational materials and policies and procedures to drivers after the initial distribution of required educational materials?

*Guidance:* No.

**382.605 REFERRAL, EVALUATION, AND TREATMENT** (*Editorial note by SAPlist.com: These questions and answers were first printed in the Federal Register on April 4, 1997. Therefore, they do not accurately reflect the changes that were made to Part 40 on August 1, 2001. Where they offer conflicting information, the August 1 2001 revision must prevail.*)

*Question 1:* Must an SAP evaluation be conducted in person or may it be conducted telephonically?

*Guidance:* Both the initial and follow-up SAP evaluations are clinical processes that must be conducted face-to-face. Body language and appearance offer important physical cues vital to the evaluation process. Tremors, needle marks, dilated pupils, exaggerated movements, yellow eyes, glazed or bloodshot eyes, lack of eye contact, a physical slowdown or hyperactivity, appearance, posture, carriage, and ability to communicate in person are vital components that cannot be determined telephonically. In-person sessions carry with them the added advantage of the SAP's being able to provide immediate attention to individuals who may be a danger to themselves or others.

*Question 2:* Are employers required to provide intervention and treatment for drivers who have a substance abuse problem or only refer drivers to be evaluated by an SAP?

*Guidance:* An employer who wants to continue to use or hire a driver who has violated the prohibitions in subpart B in the past must ensure that a driver has complied with any SAP's recommended treatment prior to the driver returning to safety-sensitive functions. However, employers must only refer to an SAP drivers who have tested positive for controlled substances, tested 0.04 or greater alcohol concentration, or have violated other prohibitions in subpart B.

*Question 3:* Under the DOT rules, must an SAP be certified by the DOT in order to perform SAP functions?

*Guidelines:* The DOT does not certify, license, or approve individual SAPs. The SAP must be able to demonstrate to the employer qualifications necessary to meet the DOT rule requirements. The DOT rules define the SAP to be a licensed physician (medical doctor or doctor of osteopathy), a licensed or certified psychologist, a licensed or certified social worker, or a licensed or certified employee assistance professional. All must have knowledge of and clinical experience in the diagnosis and treatment of substance abuse-related disorders (the degrees and certificates alone do not confer this knowledge). In addition, alcohol and drug abuse counselors certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission, a national organization that imposes qualification standards for treatment of alcohol-related disorders, are included in the SAP definition.

*Question 4:* Are employers required to refer a discharged employee to an SAP?

*Guidance:* The rules require an employer to advise the employee, who engages in conduct prohibited under the DOT rules, of the available resources for evaluation and treatment including the names, addresses, and telephone numbers of SAPs and counseling and treatment programs. In the scenario where the employer discharges the employee, that employer would be considered to be in compliance with the rules if it provided the list to the employee and ensured that SAPs on the list were qualified. This employer has no further obligation (e.g., to facilitate referral to the SAP; ensure that the employee receives an SAP evaluation; pay for the evaluation; or seek to obtain, or maintain the SAP evaluation synopsis).

*Question 5:* How will the SAP evaluation process differ if the employee is discharged by the employer rather than retained following a rule violation?

*Guidance:* After engaging in prohibited conduct and prior to performing safety-sensitive duties in any DOT regulated industry, the employee must receive a SAP evaluation. And, when assistance with a problem is clinically indicated, the employee must receive that assistance and demonstrate successful compliance with the recommendation as evaluated through an SAP follow-up evaluation.

The SAP process has the potential to be more complicated when the employee is not retained by the employer. In such circumstances, the SAP will likely not have a connection with the employer for whom the employee worked nor have immediate access to the exact nature of the rule violation. In addition, the SAP may have to hold the synopsis of evaluation and recommendation for assistance report until asked by the employee to forward that information to a new employer who wishes to return the individual to safety-sensitive duties. In some cases, the SAP may provide the evaluation, referral to a treatment professional, and the follow-up evaluation before the employee has received an offer of employment. This circumstance may require the SAP to hold all reports until asked by the individual to forward them to the new employer. If the new employer has a designated SAP, that SAP may conduct the follow-up evaluation despite the fact that the employee's SAP has already done so. In other words, a new employer may determine to its own satisfaction (e.g., by having the prospective employee receive a follow-up SAP evaluation utilizing the employer's designated SAP) that the prospective employee has demonstrated successful compliance with recommended treatment.

*Question 6:* Do community lectures and self-help groups qualify as education and/or treatment?

*Guidance:* Self-help groups and community lectures qualify as education but do not qualify as treatment. While self-help groups such as Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) are crucial to many employees' recovery process, these efforts are not considered to be treatment programs in and of themselves. However, they can serve as vital adjuncts in support of treatment program efforts. AA and NA programs require a level of anonymity which makes reporting client progress and prognosis for recovery impossible. If the client provides permission, AA and NA sponsors can provide attendance status reports to the SAP. Therefore, if a client is referred to one of these groups or to community lectures as a result of the SAP evaluation, the employee's attendance, when it can be independently validated, can satisfy a SAP recommendation for education as well as a gauge for determining successful compliance with a treatment program when both education and treatment are recommended by the SAP's evaluation.

*Question 7:* Can an employee who has violated the rules return to safety-sensitive functions prior to receiving an SAP evaluation?

*Guidance:* The employee is prohibited from performing any DOT regulated safety-sensitive function until being evaluated by the SAP. An employer is prohibited from permitting the employee to engage in safety-sensitive duties until evaluated. If the evaluation reveals that assistance is needed, the employee must receive the assistance, be re-evaluated by the SAP (and determined to have demonstrated successful compliance with the recommendation), and pass a return-to-duty alcohol and/or drug test prior to performing safety-sensitive duties.

*Question 8:* Can an employer overrule an SAP treatment recommendation?

*Guidance:* No. If found to need assistance, the employee cannot return to safety-sensitive functions until an SAP's follow-up evaluation determines that the employee has demonstrated successful compliance with the recommended treatment. An employer who returns a worker to safety-sensitive duties when the employee has not complied with the SAP's recommendation is in violation of the DOT rule and is, therefore, subject to a penalty.

*Question 9:* Is an employer obligated to return an employee to safety-sensitive duty following the SAP's finding during the follow-up evaluation that the employee has demonstrated successful compliance with the treatment recommendation?

*Guidance:* Demonstrating successful compliance with prescribed treatment and testing negative on the return-to-duty alcohol test and/or drug test, are not guarantees of employment or of return to work in a safety-sensitive position; they are preconditions the employee must meet in order to be considered for hiring or reinstatement to safety-sensitive duties by an employer.

*Question 10:* Can an employee receive the follow-up from an SAP who did not conduct the initial SAP evaluation?

*Guidance:* Although it is preferable for the same SAP to conduct both evaluations, this will not be realistic in some situations. For instance, the initial SAP may no longer be in the area, still under contract to the employer, or still hired by the employer to conduct the service. Additionally, the employee may have moved from the area to a new location. In all cases, the employer responsibility is to ensure that both the initial SAP and the follow-up SAP are qualified according to the DOT rules.

*Question 11:* Who is responsible for reimbursing the SAP for services rendered? Who is responsible for paying for follow-up testing recommended by the SAP?

*Guidance:* The DOT rules do not affix responsibility for payment for SAP services upon any single party. The DOT has left discussions regarding payment to employer policies and to labor-management agreements. Therefore, in some instances, this issue has become part of labor-management negotiations.

Some employers have hired or contracted staff for the purpose of providing SAP services. For some employees, especially those who have been released following a violation, payment for SAP services will become their responsibility. In any case, the SAP should be suitable to the employer who chooses to return the employee to safety-sensitive functions. Employer policies should address this payment issue.

Regarding follow-up testing recommended by the SAP, when an employer decides to return the employee to safety-sensitive duty, the employer is essentially determining that the costs associated with hiring and training a new employee exceeds the costs associated with conducting follow-up testing of the returning employee. In any case, whether the employer pays or the employee pays, if the employee returns to performance of safety-sensitive functions, the employer must ensure that follow-up testing occurs as required. The employer will be held accountable if the follow-up testing plan is not followed.

*Question 12:* Can the SAP direct that an employee be tested for both alcohol and drugs for the return-to-duty test and during the follow-up testing program?

*Guidance:* If the SAP determines that an employee referred for alcohol misuse also uses drugs, or that an employee referred for drugs use also misuses alcohol, the SAP can require that the individual be tested for both substances. The SAP's decision to test for both can be based upon information gathered during the initial evaluation, the SAP's consultation contacts with the treatment program, and/or the information presented during the follow-up evaluation.

*Question 13:* Can random testing be substituted for required follow-up testing?

*Guidance:* Follow-up testing is directly related to a rule violation and subsequent return to safety-sensitive duty. Random tests are independent of rule violations. Therefore, the two test types are to be separated--one cannot be substituted for the other or be conducted in lieu of the other. Follow-up testing should be unpredictable, unannounced, and conducted not less than six times throughout the first 12 months after the employee returns to safety-sensitive functions. Follow-up testing can last up to 60 months. An employee subject to follow-up testing will continue to be subject to an employer's random testing program.

*Question 14:* If a company has several employees in follow-up testing, can those employees be placed into a follow-up random testing pool and selected for follow-up testing on a random basis?

*Guidance:* Follow-up testing is not to be conducted in a random way. An employee's follow-up testing program is to be individualized and designed to ensure that the employee is tested the appropriate number of times as directed by the SAP. Random testing is neither individualized nor can it ensure that the employee receives the requisite number of tests.

*Question 15:* What actions are to occur if an employee tests positive while in the follow-up testing program?

*Guidance:* Employees testing positive while in follow-up testing are subject to the same specific DOT operating administration rules as if they tested positive on the initial test. In addition, the employees are subject to employer policies related to second violations of DOT rules.

*Question 16:* Can an SAP recommend that six follow-up tests be conducted in less than six months and then be suspended after all six are conducted?

*Guidance:* Follow-up testing must be conducted a minimum of six times during the first twelve months following the employee's return to safety-sensitive functions. The intent of this requirement is that testing be spread throughout the 12 month period and not be grouped into a shorter interval. When the SAP believes that the employee needs to be tested more frequently during the first months after returning to duty, the SAP may recommend more than the minimum six tests or can direct the employer to conduct more of the six tests during the first months rather than toward the latter months of the year.

*Question 17:* Can you clarify the DOT's intent with respect to a SAP's determination that an individual needs education?

*Guidance:* A SAP's decision that an individual needs an education program constitutes a clinically based determination that the individual requires assistance in resolving problems with alcohol misuse and controlled substances use. Therefore, the SAP is prohibited from referring the individual to her or his own practice for this recommended education unless exempted by DOT rules.

*Question 18:* In rare circumstances, it is necessary to refer an individual immediately for inpatient substance abuse services. May the SAP provide direct treatment services or refer the individual to services provided by a treatment facility with which he or she is affiliated, or must the inpatient provider refer the individual to another provider?

*Guidance:* SAPs are prohibited from referring an employee to themselves or to any program with which they are financially connected. SAP referrals to treatment programs must not give the impression of a conflict of interest. However, a SAP is not prohibited from referring an employee for assistance through a public agency; the employer or person under contract to provide treatment on behalf of the employer; the sole source of therapeutically appropriate treatment under the employee's health insurance program; or the sole source of therapeutically appropriate reasonably accessible to the employee.

*Question 19:* What arrangement for SAP services would be acceptable in geographical areas where no qualified SAP is readily available?

*Guidance:* The driver must be given the names, addresses, and phone numbers of the nearest SAPs. Because evaluation by a qualified SAP rarely takes more than one diagnostic session, the requirement for an in-person evaluation is not unreasonable, even if it must be conducted some distance from the employee's home.

*Question 20:* May an employee who tests positive be retained in a non-driving capacity?

*Guidance:* Yes. Before an employee returns to performing safety-sensitive functions, the requirements of 382.605 must be met.

*Question 21:* Are foreign motor carriers required to have an employee assistance program?

*Guidance:* No. The employee assistance program was an element of the original FMCSA drug testing program under 49 CFR part 391, which has been superseded by 49 CFR part 382. All motor carriers under part 382 alcohol and drug testing regulations must refer drivers, who operate in the U.S. and violate the FMCSA's alcohol and drug testing regulations, to a substance abuse professional.