



U.S. Department
of Transportation

**Federal Motor
Carrier Safety
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

FMCSA-D&A-CLEAR-NEP(2023-03-08)

NOTICE OF ENFORCEMENT POLICY

March 8, 2023

Introduction

Under this Enforcement Policy, if a commercial driver's drug or alcohol violation is based on an employer's "actual knowledge" of the issuance of a traffic citation for driving a commercial motor vehicle (CMV) while under the influence of controlled substances (drugs) or alcohol (DUI) to the driver, and that citation later results in a non-conviction, the Federal Motor Carrier Safety Administration (FMCSA or the Agency) will not:

- (1) Prohibit the driver from driving based on the driver's failure to complete the return-to-duty (RTD) treatment and testing process;
- (2) Cite employers with a violation for using such drivers who have not completed the RTD process following non-conviction; or
- (3) Enforce related reporting requirements for employers of such drivers.

As used in this Notice, the term "non-conviction" means that the charge of DUI in a CMV is dismissed without the imposition of any fines, court costs or other punitive actions, or there is an unvacated adjudicated finding of not guilty. Terms that States may use to indicate a dismissal include Nolle Prosequi (Nolle Pros'd or Nolle Prossed), withdrawn, or discontinued. The term "non-conviction" does not include pleading guilty to a lesser charge (e.g., reckless driving).

Regulatory Discussion

The FMCSA provides notice of changes to its enforcement of the following regulations pertaining to CMV drivers and employers and the Agency's Drug and Alcohol Clearinghouse (Clearinghouse):

- (1) Regarding 49 CFR 382.503(a), which provides that a driver who engages in the use of drugs or alcohol as prohibited under 49 CFR part 382, subpart B (subpart B), or refuses to submit to a required drug or alcohol test, shall not perform safety-sensitive functions until completing RTD requirements in accordance with 49 CFR part 40, subpart O (subpart O) and that no employer

shall permit a driver who has violated subpart B to perform safety-sensitive functions until the driver has complied with the RTD requirements in subpart O:

The Agency will not enforce the requirements in 49 CFR 382.503(a), when a driver violates subpart B, based on the employer's actual knowledge of the issuance of a citation for DUI in a CMV and the citation results in non-conviction. The prohibition against driving a CMV or performing other safety-sensitive functions continues to apply after the actual knowledge violation is reported to the Clearinghouse and before non-conviction is determined.

(2) Regarding 49 CFR 382.605, which requires that the RTD process be completed in accordance with subpart O:

The Agency will not enforce the RTD requirement in 49 CFR 382.605 when a driver violates subpart B, based on their employer's actual knowledge of the issuance of a citation for DUI in a CMV and the citation results in non-conviction.

(3) Regarding 49 CFR 382.217(e), which provides that no employer may permit or authorize a driver to operate a CMV during any period in which the employer determines that a driver is not in compliance with the RTD requirements in subpart O, if the employer has actual knowledge, as defined in 49 CFR 382.107, that the driver has (1) used alcohol while performing safety-sensitive functions in violation of § 382.205; (2) used alcohol within four hours of performing safety-sensitive functions in violation of § 382.207; or (3) used a controlled substance:

The Agency will not enforce 49 CFR 382.217(e) when a driver violates 49 CFR 382.205 or 382.207, or uses a controlled substance, based on their employer's actual knowledge of the issuance of a citation for DUI in a CMV and the citation results in non-conviction.

(4) Regarding 49 CFR 382.705(b)(1)(ii) and (v), which require that employers report negative RTD test results and the driver's completion of follow-up testing to the Clearinghouse:

The FMCSA will not enforce the employer reporting requirements for RTD and follow-up testing when a driver violates subpart B, based on their employer's actual knowledge of the issuance of a citation for DUI in a CMV and the citation results in non-conviction.

This Notice pertains to RTD requirements for *only* those drivers: (i) whose violations of FMCSA's drug or alcohol use prohibitions in subpart B are based on the employer's knowledge of the issuance of a citation for DUI in a CMV, as set forth in 49 CFR 382.107; and (ii) the citation results in non-conviction, as explained above. Requirements to complete RTD as a result of drug and alcohol violations other than those arising from an employer's actual knowledge of a citation are unaffected by this Notice.

Background and Rationale

The FMCSA's drug and alcohol use and testing regulations are set forth in 49 CFR part 382 and include procedures governing the Drug and Alcohol Clearinghouse in subpart G. A driver who

has violated the alcohol or drug prohibitions in 49 CFR part 382, subpart B, must not perform safety-sensitive functions, including operating a CMV, until complying with the RTD requirements in subpart O. Employers must not permit a driver to perform safety sensitive functions if the driver has not complied with subpart O requirements.

As defined in 49 CFR 382.107, the term “actual knowledge,” for purposes of subpart B, means actual knowledge by an employer that a driver has used alcohol or controlled substances based on the employer's direct observation of the employee, information provided by the driver's previous employer(s), *a traffic citation for driving a CMV while under the influence of alcohol or controlled substances* or an employee's admission of alcohol or controlled substance use, except as provided in § 382.121.

This Notice does not affect the requirement that, if an employer has actual knowledge of a CMV driver's prohibited use of drugs or alcohol, the employer must not permit the driver to perform, or continue to perform, safety-sensitive functions.

The Agency issues this Notice in the interest of fairness to drivers, while continuing to ensure CMV safety. Issuance of a citation for DUI in a CMV is a serious action, which raises legitimate safety concerns that justify a driver's immediate removal from safety-sensitive functions. The driver, nevertheless, should not be required to complete RTD requirements, including directly observed follow-up testing, if the citation resulted in non-conviction. The Agency intends to further address actual knowledge violations based on the issuance of a DUI in a CMV in a forthcoming Notice of Proposed Rulemaking to revise 49 CFR part 382.

RTD Requirements

A commercial driver who violates subpart B must not resume performing safety-sensitive functions until they have been evaluated by a Substance Abuse Professional (SAP), complied with the education or treatment protocol prescribed by the SAP, and achieved a negative RTD test result in accordance with the RTD process set forth in subpart O. In addition, the employer must ensure the driver completes the follow-up testing prescribed by the SAP, which must include a minimum of six unannounced follow-up tests conducted within the 12-month period following the driver's return to safety-sensitive functions. The RTD drug test and all follow-up testing specimens must be collected under direct observation.

Actual Knowledge as Basis for Subpart B Violations and Clearinghouse Reporting

In accordance with 49 CFR 382.705(b)(4), an employer's actual knowledge of a driver's use of drugs or alcohol prohibited by subpart B, based on the employer's actual knowledge of the issuance of a citation for DUI in a CMV, must be reported to the Clearinghouse as a violation of subpart B. As required by 49 U.S.C. 31306a(g)(6) and as set forth in 49 CFR 382.719, all subpart B violation information must remain available to an employer conducting a query of the Clearinghouse for five years, or until the driver completes RTD, including follow-up testing, whichever is later. Employers must also report the driver's negative RTD test result to the Clearinghouse, as well as the driver's completion of follow-up testing, in accordance with 49 CFR 382.705(b)(1)(ii) and (v).

Effects of Non-Conviction

Currently, as set forth in 49 CFR 382.717(a)(2)(i), drivers may request that FMCSA add documentary evidence of non-conviction to an employer's report of actual knowledge that the driver received a traffic citation for DUI in a CMV, if the citation did not result in a conviction.¹ Pursuant to this Notice, if FMCSA receives acceptable documentary evidence of non-conviction of the offense of DUI in a CMV, submitted in accordance with 49 CFR 382.717(a)(2)(i), a driver who has not yet started the RTD process at the time of non-conviction will not be required to do so. Drivers who have started but not fully completed the RTD process will not be required to complete it, including follow-up testing, upon FMCSA's acceptance of documentary evidence of non-conviction.

Drivers who wish to resume safety-sensitive functions *before* non-conviction has been established (i.e., before the citation has been dismissed or the driver is adjudicated not guilty) must comply with the RTD requirements in 49 CFR 382.503(a) and 382.605.

This Notice is consistent with the authority of 49 U.S.C. 31306(e), which provides that the Secretary of Transportation shall decide on the circumstances under which drivers who have violated FMCSA's drug and alcohol use and testing regulations shall be required to participate in a rehabilitation program.²

In accordance with this Notice, when FMCSA receives acceptable documentary evidence of non-conviction, submitted under 49 CFR 382.717(a)(2)(i), FMCSA will indicate in the driver's Clearinghouse record that remaining RTD requirements do not apply. If a driver's CMV operating status is identified in the Clearinghouse as "prohibited" due to non-completion of RTD requirements, FMCSA will change the operating status to "not prohibited." The Agency will notify the driver that this information has been added to their record, as required by 49 CFR 382.707(a).

Actual Knowledge Violation to Remain in Clearinghouse

The FMCSA is required by statute to include in the Clearinghouse records of violations of subpart B. Accordingly, as required by 49 U.S.C. 31306a(g)(6), the actual knowledge violation based on issuance of the citation will remain in the driver's Clearinghouse record even when the citation results in non-conviction, because the violation of subpart B occurred when the citation was *issued*.

¹ Guidance addressing acceptable forms of documentary evidence of non-conviction is available at <https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/what-considered-acceptable-documentary-evidence-non-conviction>.

² Under 49 CFR 1.87(e)(1), the FMCSA Administrator is delegated authority to carry out the functions vested in the Secretary by 49 U.S.C. chapter 313, relating to commercial motor vehicle operators.

Retroactivity

This Notice applies retroactively to drivers who have already submitted documentary evidence of non-conviction, as currently noted in their Clearinghouse record. For these drivers, FMCSA will affirmatively indicate in the driver's record that remaining RTD requirements do not apply. If the driver's operating status is currently "prohibited" due to non-completion of RTD requirements, FMCSA will affirmatively change the operating status to "not prohibited" and will notify the driver in accordance with 49 CFR 382.707(a).

Guidance addressing the implementation of this Notice is available on the [FMCSA Drug and Alcohol Clearinghouse website](#).

Issued: March 8, 2023

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