



# REG **REVIEW**<sup>SM</sup>

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## **FMCSA Proposes Permanent Crash Preventability Determination Program**

Citing strong motor carrier participation in a pilot program, the Federal Motor Carrier Safety Administration (FMCSA) is proposing a permanent crash preventability determination program to gain additional data to recognize possible safety risks.

The pilot program, started in August 2017 by FMCSA, reviewed more than 5,600 crashes submitted by truck and bus companies to determine if a crash could have been prevented by the motor carrier. The program showed that about 94 percent of the crashes reviewed were found to be not preventable by the motor carrier or commercial driver.

FMCSA's action proposes a transition to a long-term crash preventability determination program for FMCSA. The agency is proposing the removal of not preventable crashes from the Safety Measurement System (SMS) Crash Indicator Behavior Analysis Safety Improvement Category (BASIC), expanding the types of crashes that can be evaluated from eight to 15.

The FMCSA will accept public comments on the proposed program changes for 60 days following publication in the Federal Register. Comments can be submitted at [regulations.gov](http://regulations.gov) at Docket No. FMCSA-2014-0177.

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## **New OSHA Alert Focuses on Working Safely in Hot Weather**

A new OSHA Alert offers information and resources to protect workers from heat-related illness when performing activities in high temperatures and humid conditions. Symptoms of heat-related illness include fainting, dizziness, nausea, and muscle spasms.

Employers can help keep workers safe by:

- Providing water, frequent rest breaks, and shade.
- Allowing time to build a tolerance for working in the heat.
- Offering training on the hazards of heat exposure and how to prevent illness
- Developing an emergency action plan on what to do if a worker shows signs of heat-related illness.

## **Employees Sue Over Large Wellness Incentives**

An employer's wellness incentive penalties were high enough that over 5,000 employees brought a class action suit. The employees were required to participate in the company's wellness program or pay a fine adding up to \$1,300 annually.

The penalty in the employer's program is among the highest in the country, deducting \$25 from non-participants' weekly paycheck. The program required participants to undergo a health risk assessment, which involved divulging protected information (including prior insurance claims data) and submit to invasive medical exams and testing, that included a strict schedule of exams, testing, and vaccination, including mammograms, colonoscopies, and blood testing. Some participants were also required to consult with a health coach if they had certain risk variables. These mandates, employees thought, along with the penalty, made the program less than voluntary, as would otherwise be required under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

Under the ADA, an employer is prohibited from requiring a medical exam or making medical inquiries of an employee, unless the employer has a reasonable belief, based on objective evidence, that the employee is unable to perform the job's essential functions because of a medical condition, or the employee will pose a direct threat because of a medical condition. The ADA has a narrow exception to this, regarding wellness programs, as long as the inquiries and exams are voluntary. The GINA provisions are similar, but they apply to genetic information, which can come from family members.

In 2000, the Equal Employment Opportunity Commission (EEOC) indicated that a wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate. Fast forward to 2016, when the EEOC had rules regarding incentives for wellness programs, and the rules allowed employers to impose financial penalties for non-participation in a wellness program without rendering the program involuntary. The limit for such penalties was 30 percent of the insurance premium an individual would pay.

The EEOC was sued over the rules, however, and they were struck down, leaving employers with no real guidance regarding incentive levels. In the meantime, the company in the law suit established its new wellness program.

This case is still underway, so we won't know the outcome for a while. The EEOC is working on new regulations regarding such incentives, which are scheduled for December 2019. This case and the upcoming rules act as reminders for employers to keep an eye out the results and the rules, so they can act to steer clear of a similar situation.

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## **EPA Lowers Limits on Lead Dust on Floors, Window Sills**

EPA has issued a final rule revising the dust-lead hazard standards (DLHS) from 40 micrograms ( $\mu\text{g}$ ) of lead in dust per square foot ( $\text{ft}^2$ ) to 10  $\mu\text{g}/\text{ft}^2$  on floors and from 250  $\mu\text{g}/\text{ft}^2$  to 100  $\mu\text{g}/\text{ft}^2$  on window sills. The Agency says the tighter standards will protect children from the harmful effects of lead exposure, and will help property owners, lead paint professionals, and government agencies identify lead hazards in residential paint, dust, and soil. The standards apply in most pre-1978 housing and child-occupied facilities. The rule also finalizes EPA's proposal to make no change to the definition of lead-based paint (LBP) because it says insufficient information exists to support a change.

The final rule takes effect January 6, 2020.

## **Cal/OSHA Cites Two Employers for Carbon Monoxide Poisoning Incident**

Cal/OSHA has cited two employers for serious accident-related health and safety violations after workers were poisoned by carbon monoxide while in a confined space. In December 2018, two plumbers were working in a crawl space replacing underground sewer pipes for an airline caterer. They were using a gasoline-powered saw to cut through concrete when they were overcome by carbon monoxide gas emitted from the equipment, causing one of the workers to lose consciousness. Emergency crews assisted the workers, one of whom was hospitalized for two days.

Cal/OSHA's investigation found that the catering company did not inform the plumbing company that the crawl space was a permit-required confined space, and did not provide information on the potential hazards posed by entering the space. Cal/OSHA also found that the plumbing company did not have a safety and health program and did not train workers. In addition, the employer did not develop a confined space program, take steps to mitigate the hazards, and did not have a rescue plan.

Cal/OSHA cited the plumbing company \$50,850 for eight violations, including two serious accident-related, two serious, and four general in nature. The serious accident-related violations were cited for the company's failure to implement a permit-required confined space program and its failure to train its employees on working safely in confined spaces. The serious violations were cited for the company's failure to develop and implement a written permit space program and failure to obtain information about permit space hazard and provide that information to the workers entering the space.

The catering company was cited for \$18,000 in proposed penalties for one serious accident-related violation for failing to communicate with the plumbing company about confined space hazards and precautions.

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## **EPA proposes RFS volumes for 2020, biomass-based diesel volumes for 2021**

EPA Administrator Andrew Wheeler issued a proposed rule under the Renewable Fuel Standards (RFS) program that would set the minimum amount of renewable fuels that must be supplied to the market in 2020, as well as the biomass-based diesel volume standard for 2021.

The key elements of the proposed rule are:

- “Conventional” renewable fuel volumes, primarily met by corn ethanol, would be maintained at the implied 15-billion-gallon target set by Congress.
- Advanced biofuel volumes for 2020 would increase to 5.04 billion gallons, which is 0.12 billion gallons higher than the 2019 standard.
- The cellulosic biofuel volume requirement of 0.54 billion ethanol-equivalent gallons for 2020 is based on EPA's production projection, which is 0.12 billion ethanol-equivalent gallons higher than the cellulosic biofuel volume finalized for 2019.
- The biomass-based diesel (BBD) volume for 2021 would be maintained at 2.43 billion gallons, the same as the 2020 standard.

The Clean Air Act requires EPA to set annual RFS volumes of biofuels that must be used for transportation fuel for four categories of biofuels: total, advanced, cellulosic, and biomass-based diesel. EPA implements the RFS program in consultation with the U.S. Department of Agriculture and the U.S. Department of Energy.

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## **FMCSA Accepting Comments on CDL Skills Test Proposal**

As announced on July 1, the Federal Motor Carrier Safety Administration (FMCSA) is officially seeking public comments about a proposal that would presumably shorten the wait to obtain a commercial driver's license (CDL).

The FMCSA is proposing a rule to allow states to permit a third-party skills test examiner to administer CDL skills tests to applicants to whom the examiner has also provided skills training. This practice is currently prohibited under FMCSA rules.

The FMCSA said this option could help alleviate CDL skill testing delays and reduce inconveniences and costs for third-party testers and CDL applicants without negatively impacting safety.

Section 383.75(a)(7) of the Federal Motor Carrier Safety Regulations prohibits a third-party skills test examiner who is also a skills instructor from administering the CDL skills test to an applicant who received skills training from that examiner.

Comments can be submitted at the federal eRulemaking portal [regulations.gov](https://www.regulations.gov) under docket number FMCSA-2018-0292. The deadline for submitting comments is September 9, 2019.

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## **OSHA Updates Whistleblower Protection Program Website**

OSHA recently redesigned its whistleblower protection program website to improve navigation for employers and employees seeking information on the topic. The site includes information on more than 20 statutes enforced by the Agency and uses video to showcase the covered industries, which include the railroad, airline, and securities industries.

Resources include FAQs, data and statistics, fact sheets, policy documents, statute summaries, and more.

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## **Labor Secretary Records New PSAs on Storm Recovery Safety**

Secretary of Labor Alexander Acosta has recorded five new public service announcements (PSAs) discussing how to keep workers safe as they perform cleanup and recovery operations following hurricanes, floods, and tornadoes.

The 30-second audio messages, in English and Spanish, cover potential hazards posed by chainsaws, downed power lines, unstable surfaces, contaminated floodwaters, and mold exposure.

## Are Your Drivers Ready for Brake Safety Week?

Brake Safety Week takes place in mid-September, but it's never too early to make sure that drivers are paying special attention to their [brakes](#) during pre- and post-trip [inspections](#).

Brake violations accounted for 45 percent of all out-of-service vehicle violations during last year's three-day Roadcheck Inspection campaign. Brake violations also accounted for seven of the top 20 most frequently cited vehicle violations in 2018.

Brake care standards are addressed in the Federal Motor Carrier Safety Regulations in 49 CFR [§393.45](#).

To ensure your drivers make it through Brake Safety Week unscathed — and every [inspection](#) regardless of the time of year — follow this checklist below as a guide.

- Make sure that all brake hoses are long enough and flexible enough to accommodate all normal motions of the parts they are attached to.
- Ensure that brake hoses are secured against chaffing, kinking, or other mechanical damage. Use cable ties to secure hoses if necessary.
- Make sure brake hoses cannot touch any part of the exhaust system or any other source of high temperatures.
- Check for any hoses that are worn down to a second color or where nylon braids are visible, indicating excessive wear.
- Check each hose connection for leads, constrictions, or other conditions that could adversely affect breaking performance.
- Check for any bulges when air pressure is applied.
  - If using coiled, nonmetallic brake tubing to hook up the trailer, make sure:
    - The tubing has a straight segment (pigtail) and each end that is at least 2 inches long and is encased in a spring guard (or similar) that prevents kinking at the fitting; and
    - The spring guard has at least 2 inches of closed coils (or similar device) where it connects to the fitting and which extends a least 1.5 inches into the coiled segment of the tubing (beyond its straight segment).

If any modifications were made to any brake hoses, tubing, assemblies, or end fittings, make sure they comply with the manufacturing standards in [§571.106](#).

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## Recognizing Background Stressors in the Workplace

Everyone knows that the work environment can cause [stress](#), and some causes (like the need to meet production demands) may be outside your ability to control as a safety professional. However, you may be able to reduce other sources of environmental stress.

Even within the safety realm, some stressors cannot be avoided. For example, wearing a respirator for extended periods does contribute to stress — but if the job requires wearing a respirator, eliminating the stressor probably isn't possible.

Other background stressors, such as constant noise, might be reduced. While excessive noise can cause [stress](#), even lower levels of continual background noise may contribute as a background stressor. Employees might not notice background stressors because they tend to be constant. While a sudden noise might make you jump, an ongoing background noise seems like it could be ignored. However, it still affects the body, and those effects stack up over time.

Initial negative effects could include sleep disorders, headaches, irritability, and even digestive problems or increased alcohol use. According to the National Institute of Mental Health, continued strain from routine [stress](#) may contribute to more serious health problems such as heart disease, high blood pressure, diabetes, and depression or anxiety.

Employees may not even be aware that the workplace stressors are contributing factors, yet these problems not only impact health and attitude (headaches and irritability certainly affect a worker's attitude) but they also negatively impact productivity.

### **Identifying and addressing stressors**

In addition to background noise, other environmental stressors could include light (too much or not enough), working in hot or cold environments, the presence of allergens, and strenuous physical work or poor ergonomics.

You probably already evaluate the workplace for ergonomic concerns, but consider looking for other stressors such as noise, light, temperature extremes, and even allergens. Addressing these stressors may not be quick, easy, or cheap. Mounting new lights, adjusting HVAC systems to control temperature, installing sound baffles to reduce noise, or adding air filters to reduce allergens all come with costs.

However, if employees identify one of those items as a source of [stress](#), the cost may be worth the effort. Try translating the cost into productivity terms. For example, the cost of an adjustment might equal the cost of ten sick days, or a certain percentage of productivity. If the alteration could save more than it costs, the expense may be worthwhile

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## **Are More Truck Drivers Under 21 on the Horizon?**

Truck drivers under the age of 21 are nothing new.

Many states allow younger drivers to operate [commercial motor vehicles \(CMVs\)](#) within their states, though they may not be allowed to cross state lines for work purposes.

However, for interstate commerce, the [Federal Motor Carrier Safety Administration \(FMCSA\)](#) now allows certain 18- to 20-year-olds with military training to operate [CMVs](#). This is due to a three-year pilot program that started in July 2018.

Now, the [FMCSA](#) might give additional younger drivers opportunities to drive trucks across the country.



### Even more youngsters?

FMCSA is considering expanding the pool of available [CMV](#) drivers between the ages of 18 and 21. In May, the [FMCSA](#) began taking input on the types of training, qualifications, driving limitations, and vehicle safety systems younger drivers may need during a pilot program.

The public has been asked to comment on the potential of a pilot program and the [FMCSA](#) is accepting comments through August 14.

The comment period could pave the way for approval of a pilot program. If the program is approved, it could lead to a rule change placing younger drivers on the road for interstate trucking.

### Current regulations

[Section 391.11](#) of the Federal Motor Carrier Safety Regulations currently prohibits anyone under the age of 21 from operating a [CMV](#) in interstate commerce. Limited exceptions do exist for certain farm vehicles and private passenger carriers.

### Taking sides

The proposal has created a significant amount of discussion from proponents and opponents of the potential rule change.

Opponents cite safety reasons for not allowing 18-to-20-year-olds to operate in an interstate capacity, citing lack of maturity and lack of over-the-road experience as negatives.

Proponents of lowering the age say it gives young people another career option out of high school and draws them to trucking at a younger age, before they are exposed to other careers.

It's a storyline that [RegSense](#) will be following — and you can learn more about the issues here — as the topic, and the pilot program, continues to develop.

### Where do you stand?

If you're considering hiring younger drivers, check out the comments at [Regulations.gov](#) or provide comments of your own to learn other perspectives on the subject. You can access the docket at number FMCSA-2018-0346 and see what industry stakeholders' thoughts are on the topic.

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## Preventing Human Error in the Workplace

According to recent studies, 80-90 percent of serious injuries are caused by human error. Today, employers emphasize the importance of safety and accident prevention and yet every year, many workers are seriously injured or die while on the job.

While many incidents may be caused by poor work environments or machine/equipment failure, other factors such as human behavior are likely to also play a key role. That doesn't mean the employee is to blame whenever an incident occurs, but rather, that underlying factors exist that may contribute to employees' unsafe actions.

## The factors

Workers learn many habits throughout their careers and sometimes those habits can be dangerous. A few factors that contribute to human error in the workplace include:

- Complacency,
- horseplay,
- overconfidence,
- drug or alcohol use,
- overexertion,
- mental health,
- tiredness/lack of sleep, and
- haste/rushing work.

Remember, the factors above may contribute to an incident, but that doesn't mean the employee is always at fault.

## Drug and alcohol use

Let's use drug and alcohol use in the workplace as an example. Many employers are familiar with [OSHA's](#) recent improved tracking of work-related injuries and illness rule which addresses drug and alcohol testing requirements. That rule does not prohibit drug and alcohol testing. But it does say that employers must limit post-incident testing to situations where drug use is likely to have contributed to the incident **AND** where a drug test can accurately identify impairment caused by drug use.

For example, say a shelf was overloaded and its contents fell on an employee. In this case, the faulty shelving is the cause of the injury, not the employee's impairment. Now on the other hand, if the employee were weaving while he walked and used a forklift and crashed into the shelving, you may have reason to believe that substance abuse was the cause.

## Your responsibility

Employers must take caution before conducting post-incident drug tests and limit them to situations where drug use is likely to have played a role. In any case where incidents and even near-misses occur, try to identify where the employee may lack knowledge of safety protocol and train him or her accordingly.

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## FAQs on walking-working surfaces

When the changes to the [walking-working surface](#) regulations took effect in January 2017, they included quite a number of changes. The following are some questions that we continue to receive about some of the changes.

### **What is the maximum distance between support posts for guardrails?**

The regulations don't specify a maximum distance between the supporting posts. However, the guardrail must be strong enough to support 200 pounds of force applied horizontally, which may affect the spacing. In addition, if the guardrail has intermediate vertical members (uprights between the top and bottom rails), the gaps should be no more than 19 inches (see [1910.29](#)).



**Do cages have to be removed from fixed ladders?**

No, cages do not have to be removed from fixed [ladders](#), whether over or under 24 feet. The regulation explicitly addresses this at [1910.28\(b\)\(9\)\(iv\)](#), stating, “The employer may use a cage or well in combination with a personal fall arrest system or ladder safety system provided that the cage or well does not interfere with the operation of the system.” [OSHA](#) noted that cages or wells may allow workers to rest while climbing and working on fixed ladders.

**When can I use a designated area for fall protection?**

A designated area may be used when working on low-slope roofs (also called flat roofs) in two situations. First, if employees will be working 15 feet or more from the edge, a designated area may be used; at this distance, it doesn’t matter how long the workers are on the roof. Second, if the work will be at least 6 feet (but less than 15 feet) from the edge, a designated area may be used if the work is temporary and infrequent, such as changing an air conditioner filter once per month. For work performed within 6 feet of the edge, a designated area cannot be used.

**Can we use chains as fall protection at a loading dock?**

Maybe. [OSHA](#) does not specifically allow or prohibit chains. If used, chains must be equivalent to a guardrail, so at least two chains would be needed because a guardrail must have a top rail and mid rail. A single chain would be a violation. In addition, the chains must be able to withstand 200 pounds of force, and should be tight enough so that a person could not fall between the chains and the dock edge.

**Are wheel chocks required for trailers at loading docks?**

Employers must use some method to prevent the trailer from moving. [OSHA](#) gives examples of wheel chocks or sand shoes, but other methods could be effective, such as dock locks. Note that even if the dock ramp is inclined so the trailer sits at an angle, a trailer could still move, so an additional methods (like chocks or locks) would still be required to prevent movement.

**How often do portable ladders have to be inspected?**

Any portable [ladder](#) (whether wood or metal) must be inspected before the first use on each shift. If a ladder will not be used that day, you don’t need to inspect it. However, the first time a ladder is taken out for use each shift, it must be checked for defects. If any problems are found, the ladder must be removed from service for repair or replacement.

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## **AOBRD to ELD conversion checklist**

Motor carriers are federally mandated to transition from automatic on-board recording devices (AOBRDs) to [electronic logging devices \(ELDs\)](#) to record hours of service (HOS) by the compliance deadline of December 16, 2019, a final conversion date that was established two years ago.

Research indicates that while more and more carriers are starting to make the transition, a significant amount are still holding out even though the date is less than five months away.

If you’re in the process of transitioning or plan on starting soon, follow this checklist during your move to [ELDs](#).

## Set policies and procedures

- Update policies and procedures to reflect the differences between the devices.
- Update responsibilities of affected personnel.
- Verify that HOS compliance is a condition of employment and falsification or tampering with ELDs will not be tolerated.

## Establish a training program

- Create or update training policies for affected personnel on how to operate ELDs.
- Select a training team to facilitate ELD implementation.
- Train drivers and supervisors to operate ELDs at a high level.
- Train your supervisors and the audit teams on how to detect falsification methods.

## Assign responsibilities

- Develop security standards.
- Establish an implementation timeline.
- Determine who will install the ELDs.
- Define the communication process for issue resolution.
- Obtain and test your devices to ensure everything works properly.

## Avoid the rush

Establishing implementation before the last minute will help make the last, required step into the [ELD](#) world much smoother for everyone in your company, from drivers and dispatchers to technology and compliance people.

Those who wait until the very end may find themselves scrambling to get technology issues, policies, and training done before the deadline, subjecting their companies to potential compliance penalties.