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FMCSA Doubles Random Drug Testing Rate for 2020; Alcohol Rate Unchanged

The minimum annual percentage rate for random controlled substances testing for commercial motor vehicle (CMV) drivers requiring a commercial driver's license (CDL) will increase for 2020.The Federal Motor Carrier Safety Administration (FMCSA) announced on December 27, 2019, that carriers must randomly drug test 50 percent of their average number of driver positions starting January 1, 2020. That's double the 25 percent average number of positions for required testing in 2019. FMCSA also announced that the minimum annual percentage rate for random alcohol testing will remain at 10 percent.

Under federal rules, FMCSA must increase the minimum annual random percentage rate when the data received under the reporting requirements for any calendar year indicate a reported positive rate of equal or greater than 1.0 percent. Based on 2018's FMCSA Drug and Alcohol Testing Survey, the positive rate for controlled substances from random testing increased to 1.0 percent. The estimated positive usage rate for drugs in 2016 and 2017 was 0.7 percent and 0.8 percent, respectively.

Given a relatively low positive rate, carriers may feel just a small increase in the number of drivers who are no longer eligible to perform their duties due to positive test results.

However, the FMCSA estimates that the economic impact of the increased positive test rate will result in a $50 million to $70 million increase in industry costs due to more drivers needing to be tested. Carriers will need to plan for these increased administrative costs, including not only the cost of testing, but a possible doubling of the time spent on notifications to drivers and related administrative work.

FMCSA Begins Implementing Beyond Compliance Program

The Federal Motor Carrier Safety Administration (FMCSA) will begin gathering information from motor carriers as it considers implementing the Beyond Compliance program. The Beyond Compliance program would give incentives to motor carriers that adopt proven safety tools, technologies, or practices. The agency is seeking approval from the White House to survey a select group of roughly 100 motor carriers that have above-average safety programs.

The program stems from the 2015 Fixing America's Surface Transportation Act, or FAST Act. The FMCSA first collected input on this from carriers in April 2015.

The FMCSA plans to collect existing data from a select group of motor carriers.

Public comments on the FMCSA's plan to survey these carriers will be accepted through February 18, 2020. Comments can be submitted to the regulations.gov website at docket number FMCSA-2018-0328.

OSHA Issues Temporary Enforcement Policy for Certifications from Crane Institute Certification

OSHA has issued a temporary enforcement policy for crane operator certifications issued by Crane Institute Certification (CIC). OSHA requires crane operators engaged in construction activity to be certified by an entity accredited by a nationally recognized accrediting agency, and CIC no longer holds this accreditation.
Until further notice, OSHA will not accept CIC certifications — including recertification's — issued on or after December 2, 2019.

However, OSHA does not intend to cite employers for operating equipment that violates that requirement if their operators, in good faith, obtained CIC-issued certifications *prior* to December 2, 2019, with the belief the certifications met the standard's requirements.

OSHA says it will revisit the policy when CIC provides evidence that it is accredited in accordance with the regulations.

OSHA Corrects Walking-Working Surfaces standard

On December 17, OSHA issued corrections to its walking-working surfaces (WWS) and fall protection systems standards. While the Agency notes the corrections mostly reflect typographical, formatting, and clerical errors, some provide more information and/or clarification about the standards' requirements. None of the corrections affect or change employers' existing rights or obligations.
The corrections include:

- Ladders (1910.23) — OSHA revised 1910.23(d)(4) to state that 42 inches is the minimum — not the exact — measurement for fixed ladder side rail extensions. The Agency says it intended workers to have sufficient handholds "at least 42 inches" above the highest level on which they will step when reaching the access level or landing platform served by a ladder.
- Stairways (1910.25) — OSHA clarified that all articulated stairs used in general industry, not just those serving floating roof tanks, are exempt from the WWS standard.
- Personal fall protection systems (1910.140) — OSHA says that in the 2016 final rule, it mistakenly added the requirement that the gate strength of snaphooks and carabiners be proof tested to 3,600 pounds in all directions instead of adding the intended requirement that the gate of snaphooks and carabiners be capable of withstanding a minimum load of 3,600 pounds without the gate separating from the nose of the snaphook or carabiner body by more than 0.125 inches.
- OSHA notes that proof testing of the gates of snaphooks and carabiners could be destructive to the equipment, rendering them unsafe for workers in the field. OSHA corrected the gate strength provision

to be consistent with the ANSI/ASSE Z359.12-2009 consensus standard, Connecting Components for Personal Fall Arrest Systems, as originally intended.

The corrections take effect December 17, 2019.

BLS: Fatal Workplace Injuries up 2 Percent From Previous Year

A total of 5,250 people lost their lives at work in 2018, an increase of 2 percent over 2017, according to the Census of Fatal Occupational Injuries (CFOI), which was released by the Bureau of Labor Statistics (BLS) on December 17. The fatal work injury rate remained unchanged at 3.5 per 100,000 full-time equivalent (FTE) workers.

Fatalities by type of incident

Data show work injuries involving transportation incidents — the majority of which were roadway collisions with another vehicle — remained the most common fatal event in 2018, accounting for 40 percent of work-related deaths. This did not change from 2017.

Increases were found in the following areas:

- Contact with objects and equipment — up 13 percent, driven by a 39 percent increase in workers caught in running equipment or machinery and a 17 percent increase in workers struck by falling objects or equipment.
- Unintentional overdoses due to nonmedical use of drugs or alcohol while at work — up 12 percent, which is the sixth consecutive annual increase.
- Violence and other injuries by persons or animals — up 3 percent, due to an 11 percent increase in work-related suicides.

Fatal falls, slip, and trips *decreased* 11 percent. The decline was due to a 14 percent drop in falls to a lower level, the lowest since 2013.

Fatalities by occupation

- Driver/sales workers and truck drivers had the most fatalities of any broad occupation group, while among all detailed occupations, heavy and tractor-trailer drivers had the most fatalities.
- Logging workers, fishers and related fishing workers, aircraft pilots and flight engineers, and roofers all had fatality rates more than 10 times the all-worker rate of 3.5 fatalities per 100,000 FTE workers.
- Police and sheriff's patrol officer fatalities were up 14 percent.

Independent workers

The BLS describes independent workers as "involved in a work relationship that is finite and involves a single

task, short-term contract, or freelance work." The data show an increase in fatal injuries to Independent workers, from 613 in 2017 to 621 in 2018.

Occupations with the most fatal work injuries to independent workers in 2018 were heavy and tractor trailer-truck drivers, followed by first-line supervisors of construction trades and extraction workers, and construction laborers.

OSHA to Convene SBREFA Panel for Possible Tree Care Operations Standard

OSHA recently notified the SBA Office of Advocacy and the Office of Information and Regulatory Affairs (OIRA) of its intent to convene a Small Business Advocacy Review (or SBREFA) panel within the next 60 days for a possible tree care operations standard. At that time, the Agency will meet with small entity representatives to review related background materials that may be included in a future rulemaking.

OSHA says the potential tree care operations standard could cover employees exposed to hazards in tree care operations (including pruning, maintaining, repairing, or removing trees), as well as establish safe work practices for such operations.

Potentially regulated entities would include tree trimmers and pruners who engage in daily tree care operations work, as well as companies, municipalities, and organizations that occasionally perform tree care and removal as part of their operations (e.g., residential and commercial construction and remodeling, landscaping, golf course maintenance, power and pipeline clearing, certain agricultural operations, etc.).

Once the SBREFA panel is formally convened, OSHA will make its background materials available to the public in the rulemaking docket.

More Compliance Relief for Employers

The federal government's holiday spirit continues in earnest, as more employer-friendly changes have been made. As part of the federal budget/spending bill, signed on December 20, Congress included some alterations that employers will likely find attractive. They include the following:

- The Affordable Care Act's Cadillac tax, which was to be imposed on group health plans that provided rich benefits and was to become effective January 2020, was totally repealed. While the target was high-cost plans, even moderate-cost plans would eventually have been caught up in the tax.
- The Setting Every Community Up for Retirement Enhancement SECURE) Act, which was also included in the spending bill, eases compliance burdens on defined-contribution and defined-benefit retirement plans by increasing the business tax credit for plan startup costs to make setting up 401(k) plans more affordable for small businesses, allowing unaffiliated employers to offer their workers a 401(k) through a multiple employer plan (MEP) with eased compliance requirements compared to current MEPs, delaying required retirement distributions from 401(k) plans to age 72, up from age 70 ½, allowing automatic-enrollment safe-harbor 401(k) plans to increase the cap on automatically raising payroll

contributions, creating a 401(k) safe harbor from liability for offering in-plan annuities, and reducing annual testing requirements on "frozen" defined-benefit pension plans closed to new hires.

- The Work Opportunity Tax Credit (WOTC) is a federal tax credit available to employers for hiring individuals from certain target groups who have consistently faced significant barriers to employment. It has been extended to December 31, 2020.
- E-Verify has been extended until September 30, 2020.
- The tax credit for employers providing paid family and medical leave has been extended through 2020.

While these are all generally good news, employers might not be as happy about one aspect of the bill. The annual PCORI fee, which had been set to expire for plan years ending after September 30, 2019, was extended for another 10 years. The fee, required to be reported only once a year on the second quarter Form 720 and paid by its due date, July 31, is based on the average number of lives covered under the applicable group health policy or plan.

IRS Extends Paid FMLA Tax Credit

As part of a Congressionally passed tax extension bill, the expiration of the paid family and medical leave tax credit is expected to be delayed from December 31, 2019 to December 31, 2020. The provisions are found in the Internal Revenue Service (the IRS for any extraterrestrial alien species reading this) regulations. The change applies to wages paid in taxable years beginning after December 31, 2019. The President is expected to sign the bill.

This is a general business tax credit employers may claim, based on wages paid to qualifying employees while they are on family and medical leave, subject to certain conditions. The credit is equal to a percentage of wages employers pay to qualifying employees while they’re on paid family and medical leave.

Employers need not otherwise be covered under the FMLA to claim the credit. Instead, they must have a written policy in place that meets certain requirements, including providing:

- At least two weeks of paid family and medical leave (annually) to all qualifying employees who work full time (prorated for employees who work part time), and
- The paid leave is not less than 50 percent of the wages normally paid to the employee.

The policy must allow at least two weeks of paid family and medical leave (prorated for part-time employees) for all qualifying employees. For any qualifying employees not covered by the FMLA, the employer needs to make sure it will not interfere with, restrain, or deny any right under the policy. Employers also need to make sure they will not discharge or discriminate against any individual for opposing any practice prohibited by the policy.

Not all employees are eligible. To be eligible, employees must have worked for the company for at least one year and, for the preceding year, had compensation of not more than a certain amount. The IRS is still working on what that amount is. To give you a ballpark example, for employers claiming a credit in 2018, employees

had to have earned no more than $72,000 in 2017. The employee must also take the leave for a reason that qualifies under the FMLA.

Many states now mandate paid leave for reasons that might qualify under the federal FMLA, so employers in those states might be wondering how the credit could apply. For purposes of the tax credit, however, the paid leave made available to an employee is considered family and medical leave only if it's:

- Specifically designated for one or more FMLA purposes and not used for any other reason, and
- Not paid by a state or local government or required by state or local law.

Therefore, unfortunately, employers may not use state-mandated paid leave to claim the credit. While not all employers are doing cartwheels over this development, but for employers that offer paid family leave, the new credit may be a worthy benefit.

Employers May Offer More Perks, Benefits with Clarity on "Regular Rate" of Pay

Without much fanfare, on December 12, 2019, the Department of Labor (DOL) issued a major announcement that impacts employers from coast-to-coast. In a news release, the DOL revealed a list of perks and benefits that employers do NOT have to include when figuring out an employee's regular rate of pay.

Why is this a big deal? In a nutshell, this new rule gives employers much needed guidance on calculating pay. Because it makes things easier for employers to calculate wages (particularly what gets included in overtime pay), it opens the door for them to offer a wider variety of perks and benefits to employees.

Previously, employers were unsure about how to calculate the cost of perks and benefits when determining the regular rate. Thus, many employers simply avoided offering certain extras (like free gym memberships).

Under the FLSA, overtime pay must be calculated at one-and-one-half times an employee's regular rate of pay. What goes into the regular rate of pay? Well, that's been sticking point for employers for years, hence the excitement about this new rule.

Perhaps shadowed by other political happenings in the country currently, the DOL figuratively padded into the room like a little mouse with this big win (or piece of cheese) for both employers AND employees. When does that ever happen at the federal level? (err …. hardly ever).

This is the first major change to these regulations (the regular rate requirements) in more than 50 years! There should at least be a cake or something.

Now, armed with better information, employers may expand their benefit offerings to attract and retain more workers. Employees, in turn, may also reap the rewards.

The new rule states that employers may *exclude* the following perks and benefits from an employee's regular rate of pay, meaning these don't get counted toward overtime pay:

- The cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- Payments for unused paid leave, including paid sick leave or paid time off;
- Payments of certain penalties required under state and local scheduling laws;
- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred "solely" for the employer's benefit; and clarifies that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se "reasonable payments";
- Certain sign-on bonuses and certain longevity bonuses;
- The cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples and
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

The Final Rule also includes additional clarification on other forms of pay, like discretionary bonuses and "call-back" pay. The new rule takes effect on January 15, 2020. Happy New Year, indeed!

Are Large Product Heating, Aging Furnaces Confined Spaces? OSHA Says Yes

In a recent Letter of Interpretation (LOI), OSHA addresses whether the definition of confined space applies to large product heating and aging furnaces. Such furnaces are used to heat product parts using natural gas to temperatures ranging from 700°F to 2200°F to facilitate material processing.
One of the requirements in the definition of confined space is that it must have a limited or restricted means of entry or exit. The LOI addresses questions on whether this applies to the furnaces.

OSHA says yes, based on the following:

- Stepping into furnaces that are 22 to 29 inches above the building floor, which would require more than one step (9.5 inches) to climb up, may be considered restricted.
- The furnaces' doors are actuated remotely, so an employee within this space cannot walk out of the space without restriction.
- If some special means of access such as ladders, and temporary, movable, spiral, or articulated stairs are needed to enter the space, they may be considered a limited or restricted means of egress making the space confined under the standard.

General industry employers should follow the regulations at 1910.146 to determine their obligations regarding confined space work.

OSHA Updates NEP on Amputation Hazards in Manufacturing

OSHA has issued an update to its National Emphasis Program (NEP) on amputation hazards in manufacturing industries. The NEP provides updated guidance for Compliance Safety and Health Officers (CSHOs) conducting inspections in manufacturing workplaces having machinery and equipment that can potentially cause amputations.

Of note, OSHA is now using amputation reports that employers have made, as well as BLS incident rate and amputation rate data for selecting industries likely to have equipment that could cause amputations. According to OSHA, 75 NAICS codes are covered under the NEP (all manufacturing) and can be found in Appendix B of the compliance directive (CPL 03-00-022).

OSHA regional and area offices will implement a 90-day outreach program that supports the NEP. During this period, the manufacturing industries with NAICS codes listed in Appendix B will be offered outreach prior to undergoing inspections under the NEP. Outreach also will include recordkeeping requirements under 1904.39, dealing with the reporting of work-related amputations.

What's Involved in Hazard Communication Training

Hazard communication (HazCom) remains one of OSHA's Top 10 violations from year to year. While the regulation at 1910.1200 has numerous requirements, one that often trips up employers is training.

Who needs to be trained and when?

All employees must be provided with information and training on hazardous chemicals in their work area at the time of their initial assignment (prior to being exposed to a chemical), and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area.

The regulations allow you to design information and training to cover categories of hazards, such as flammability or carcinogenicity, or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets (SDSs).

What does "exposure" mean?

The regulations at 1910.1200(c) define "exposure or exposed" to mean "that an employee is subjected in the course of employment to a chemical that is a physical or health hazard, and includes potential (e.g. accidental or possible) exposure. "Subjected" in terms of health hazards includes any route of entry (e.g. inhalation, ingestion, skin contact or absorption.)"

What information needs to be covered in training?

Employees must be made aware of any operations in their work area where hazardous chemicals are present, and the location and availability of the employer's written hazard communication program, including the required list(s) of hazardous chemicals, and SDSs.

Training must include at least:

- Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area, such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.;
- The physical, health, simple asphyxiation, combustible dust, and pyrophoric gas hazards, as well as hazards not otherwise classified (HNOC), of the chemicals in the work area;
- How employees can protect themselves from these hazards, including specific procedures the employer has in place to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment (PPE) to be used; and
- The details of the hazard communication program developed by the employer, including an explanation of the labels received on shipped containers and the workplace labeling system used by their employer; the safety data sheet, including the order of information and how employees can obtain and use the appropriate hazard information.

Safety Incentives and Injury Recordkeeping

About a year ago, OSHA published a memorandum clarifying its position regarding safety incentive programs and post-injury drug testing. The agency has long opposed incentive programs that discourage injury reporting, so the clarification was helpful. Also, some of OSHA's earlier statements appeared to substantially restrict post-incident drug testing.

Although memos can change, OSHA has announced plans to memorialize the position outlined in the memo by revising the regulation. A proposed rule is expected in November 2020.

Incentives and testing allowed

The recordkeeping rule at 1904.35(b)(1)(iv) states, "You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness." In the memo, OSHA stated that this provision "does not prohibit workplace safety incentive programs or post-incident drug testing."

The memo noted that many employers establish incentive programs and conduct drug tests to promote safety, and clarified that such programs would be in violation of that rule only if the employer took action to penalize an employee for reporting an injury.

Obviously, if injuries do not get reported, you could not address the underlying hazards to prevent future injuries. Consistently enforcing safety rules (whether or not an injury was reported) helps demonstrate that

you're serious about eliminating risks, not merely concerned with reducing recorded injuries. Rewarding employees for reporting near-misses and hazards, and encouraging involvement in safety programs should help reduce injuries by improving safety, rather than just reducing the number of reported injuries.

Rate-based programs

Some incentive programs focus on the injury and illness rate, and typically reward employees with a prize or bonus at the end of an injury-free period (whether a month or a year). Such programs are permissible as long as they are not implemented in a manner that discourages reporting.

The memo indicated that even if the employer withholds a prize or bonus because of a reported injury, OSHA would not cite the employer — if the employer "implemented adequate precautions to ensure that employees feel free to report an injury or illness."

Simply telling employees that you won't retaliate may not be good enough, however. The memo suggested taking positive steps to emphasize safety rather than injury rates. Examples of could include:

- Rewarding employees for identifying unsafe conditions;
- Providing training to reinforce reporting rights and emphasize the non-retaliation policy; and
- Evaluating employees' willingness to report injuries and illnesses.

Steps like these shoul d help show that "safety first" is not just an empty slogan.

Whose Rules do Intrastate Carriers Follow?

We hear a lot about the Federal Motor Carrier Safety Regulations (FMCSRs) and how they are the rules for motor carriers engaged in interstate commerce.

But where do intrastate carriers turn for guidelines? States have their own rules separate from those established by the Federal Motor Carrier Safety Administration (FMCSA). Here's a bit of an explanation about how states go about adopting their rules.

Following the feds

If states' rules look mysteriously — or maybe even exactly — like the FMCSRs, that's by design, and the reason for the similarities is simple: money.

The FMCSA encourages states to adopt the FMCSRs, or something equivalent to them, in exchange for federal funds. Since states are eligible to receive multi-million-dollar grants through FMCSA, the incentive for states to adopt the FMCSRs in one form or another is significant.

With 50 states and the District of Columbia, it would be impossible to break down the differences in this space between the different jurisdictions. Each state's adoption can vary. It's on you to learn the exact regulations in your state. RegSense can help with that process in the state section of the website.

State variations

While some states will adopt the FMCSRs with no amendments or changes to their intrastate rules, others will adopt portions of the FMCSRs with varying compliance standards. Often the intrastate adoptions are considered more lenient than interstate compliance requirements.

One area where FMCSA provides states some leeway is for the types of vehicles subject to regulation. For example, the weight threshold for compliance in a state can range from 10,001 pounds all the way up to 26,001 pounds.

Other examples of variations include states granting some flexibility regarding hours of service for short-haul drivers, maximum drive-time, and on-duty time.

While a state's regulations may only vary slightly from the FMCSRs, it is important that drivers and carriers know the differences. Just a little misinterpretation of the rules can mean a lot come audit time.

OSHA Regulatory Agenda Published

About every six months, the federal government publishes a Unified Agenda of agency regulatory and deregulatory actions. The Fall 2019 agenda appeared on November 20, and includes actions from OSHA that may affect safety professionals during the coming year, plus a number of items to watch over the next couple of years.

Finalized soon

OSHA plans to publish several final rules in December 2019. Among other things, these include clarifications to the beryllium standard for general industry, and technical corrections to 27 different standards (fixing typos and correcting graphics). In addition, OSHA plans to deliver final rules expanding exemptions for cranes in railroad work, and revising internal agency procedures for handling employee medical information.

Proposed changes coming

After OSHA publishes a proposed regulation, the agency solicits comments, so a final rule may not appear for a year (or more) after the proposal gets published. Some expected dates of proposed rules on the way include the following:

- In January 2020, updating the Hazard Communication standard to the seventh version of the Globally Harmonized System (the current rule uses the third version of GHS).
- Also in January, incorporating the 2018 ANSI standard for powered industrial trucks (the regulation currently incorporates the 1969 ANSI standard).
- In February, clarifying the standard for welding in construction confined spaces.
- In April, clarifying the handrail requirements for stairways in the walking-working surfaces regulations, based on a September 2019 OSHA memorandum.

Long-term plans

The regulatory agenda also lists long-term actions under consideration, including plans to clarify the requirements for the “fit” of personal protective equipment in construction. However, that proposed rule isn’t expected until November 2020.

Another long-term item involves OSHA’s memorandum from October 2018, clarifying the agency’s position on post-incident drug testing and safety incentive programs. OSHA plans to memorialize this position in the Part 1904 regulations, but doesn’t expect to issue a proposed rule before November 2020.

OSHA is also considering restoring a column to check for musculoskeletal disorders (MSDs) on the OSHA 300 log. The agency did not list a potential date for this, but did clarify that this would not change the existing requirements for when an injury becomes recordable.