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WORKPLACE DRUG & ALCOHOL TESTING
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Top 5 DOT policy fixes for 2018

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There have been many significant regulatory changes at the U.S. Department of Transportation, as well as issues at the state level that affect employers of workers who are subject to DOT requirements.

In 2015, the most recent year for which the DOT is reporting, the DOT assessed fines or settled Notices of Claim totaling approximately $33.8 million. In 2014, the total was approximately $36.3 million. Fines for individual motor carriers ranged from approximately $7,000 to $160,000.

Taking time to implement these five fixes now will help to bring your drug and alcohol testing program into compliance, avoid DOT fines related to your program, and make your workplace both safer and drug-free.

FIX No. 1: Update your DOT drug-testing policy to include opioids. Effective January 1 of this year, the DOT updated the testing panel to include four synthetic opiates (now called "opioids" by the DOT) that are all available legally by prescription. This includes drugs with the brand names OxyContin, Percodan, Percocet, Vicodin, Lortab, Norco, Dilaudid, and Exalgo. Because these are legal prescription medications, employers must be sure to comply with the anti-discrimination and reasonable accommodation provisions of the Americans with Disabilities Act when an employee discloses the use of these medications or tests positive.

FIX No. 2: Update your driver job descriptions, your fitness-for-duty policy, and your driver accommodation protocol. Employers should have an independent fitness-for-duty evaluation performed – in compliance with DOT standards – whenever an employee tests positive for opioids. For workers who are subject to the requirements of the Federal Motor Carrier Safety Act or the Federal Transit Administration, the fitness-for-duty evaluation must be performed by a Certified Medical Examiner. ***In Jarvela v. Crete Carrier Corp.***, the U.S. Court of Appeals for the **Eleventh Circuit** recognized that an employer had broad authority to make fitness-for-duty determinations.

The job description should clearly state that compliance with all applicable DOT standards is an "essential function" of a driving position, and should specify any qualification requirements that your company

imposes in addition to the DOT requirements. You should decide in advance of a "crisis" whether you can accommodate drivers who aren't "fit for duty" by reassigning them to non-driving jobs, such as work on the loading dock. (If you can accommodate some drivers in this way, but not all, then you should also decide in advance how to prioritize accommodation needs – for example, whether you are going to prioritize by relative seniority.)

FIX No. 3: Add the FMCSA/FTA Clearinghouse Regulations to your policy. These final regulations, which require covered employers to promulgate a policy on use of controlled substances and misuse of alcohol, became effective January 5, 2017, even though the database will not go live until 2020. These Clearinghouse regulations contain a list of specific items that the policies must include. Training on these regulations and forms will take a massive effort, so the sooner you start the better.

FIX No. 4: Require DOT-covered employees to disclose, pre-duty, any legal prescription medications that might affect their ability to drive safely. This is specifically authorized in the DOT regulations. In addition to the obvious safety benefit of such a policy, it can also mean that the time the employee spends in the fitness-for-duty process may become a disciplinary suspension for failure to disclose the medication, rather than paid leave. This type of requirement will also help if you are in a medical marijuana state. (Use of medical marijuana violates DOT requirements.)

FIX No. 5: Require DOT-covered employees to disclose any arrests for off-duty DUIs, as well as convictions and the terms of any "diversion" program as a result of off-duty driving while impaired by alcohol or drugs. Disclosure of DUI arrests and convictions is obvious, but diversions may require more explanation. A diversion program – for example, requiring an individual to attend classes or complete rehabilitation – may be available in some states for first-time offenders. Although the terms vary from state to state, in some cases the diversion does not technically require a prior "conviction" for DUI. (In other jurisdictions, diversion is more akin to a suspended sentence post-conviction, and the offender may be able to have the conviction expunged.)

Some states with diversion programs are currently requiring the use of an "interlock device" on vehicles operated by an offender during the diversion period. **Legislation recently signed into law by Alabama Gov. Kay Ivy is an example.** The individual has to breathe into the device before the vehicle will start. If the individual has alcohol in his or her system, the ignition locks temporarily, preventing operation of the vehicle. Installation of the interlock device can cost as much as $300, and the offender normally has to pay a monthly rental fee for use of the device, as well. The Alabama law specifically provides that employers are under no obligation to put interlock devices on vehicles operated by their employees.

The DOT fitness-for-duty standards provide that "[d]riving under the influence of alcohol, as prescribed by State law," is a disqualifying offense. Thus, you should require DOT-covered employees to disclose any DUI "events" no later than the next business day after the arrest. You should also decide in advance whether you will suspend drivers with DUI arrests, or assign them to non-driving positions, while they await final adjudication. DOT-covered employees should also be required to fully disclose the terms of any diversion program in which they are participating so that you can act accordingly.

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Making these five critical fixes now will get your DOT policy into regulatory compliance, allow you to maintain a fleet of drivers who are fit for duty, keep the roadways safe, and reduce the legal risk for your company.

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