Carrier Compliance Programs

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The Federal Motor Carrier Safety Administration (FMSCA) of the US Department of Transportation sets forth the rules and regulations that motor vehicle carriers must follow when hiring and monitoring all new applicants and employed truckers. It is imperative that carriers are aware that proper and compliant driver qualification is an ongoing process. Pre-employment investigations and screenings are but the first steps toward compliance.

Inattention to FMCSA rules may lead to safety and liability issues for a carrier. Should a trucker become involved in a crash and it is later found that the carrier did not follow federally mandated hiring and qualification rules, then carriers may face substantial civil liability for negligent hiring or retention and/or face significant fines and penalties. While the rules and steps are many, carriers may greatly simplify compliance by implementing a clear and comprehensive lifecycle hiring and employment process—from prescreening to annual monitoring and record retention. The information below may serve as general guidance for such a comprehensive compliance program.

During the hiring and qualification process for any new driver, the carrier must ensure that required documentation is completed, investigations performed, and actions taken. In addition, carriers are urged to takes advantage of federal driver informational databases such as the Pre-employment Screening Program (PSP). The following guidance outlines the steps carriers should take during the application, hiring, and employment process.

I. Pre-employment Steps

a. The Employment Application

FMSCA rules govern what information the carrier must solicit from potential employees in an employment application. The information obtained in the application aids in the subsequent background investigation and inquiry.

The application must include:

+ The issuing state, number, and expiration date of each unexpired Commercial Drivers License (“CDL”) or permit that has been issued to the applicant;
+ The nature and extent of the applicant's experience in the operation of MVs, including the type of equipment which he/she has operated;
+ A list of all MV crashes in which the applicant was involved within three years preceding the date applicant is submitted, including the date and nature of each;
+ A list of all MV violations within three years prior to application; and
+ A statement setting forth in detail the circumstances beyond any denial, revocation, or suspension of any license, permit or privilege to operate a MV.[1]

The carrier must notify the applicant that the information supplied concerning previous employers may be used and employers will be contacted to verify employment and obtain the applicant's crash and drug/alcohol testing history. The carrier must also inform the driver of his/her due process rights with respect to reviewing, correcting, and rebutting statements made by their previous employers.[2]

b. The Background Investigation and Inquiry

Within 30 days of the date employment begins, the carrier must:

Obtain motor vehicle records (“MVRs”) from each state in which the applicant held an MV license or permit within the last three years.

Most states require that MVR requests be submitted in a prescribed form, which is often available online.[3]

Conduct or implement a background check for each new driver (see the proceeding list).

The investigation may be conducted via personal or telephone interview, letter, or any other appropriate means.[4]

To fulfill the FMSCA background check requirements, the carrier must:

Contact each DOT-regulated employer who employed the driver during the preceding three years.[5]

File the investigation results—or documentation showing an effort to obtain the information—within 30 days of employment.

Keep a written record of each previous-employer contact, including name and address, date of contract, and the information received about the driver.

If desired, the driver/applicant can request to review the information provided by his/her previous employer(s) and can contest the information.[6]

c. Additional Discretionary Background Check Measures

To promote carrier due diligence, the FCMSA enables carriers to electronically access driver inspection and crash records contained in the Motor Carrier Management Information System (“MCMIS”), an information repository, and the Pre-employment Screening Program (“PSP”). Both programs are run by the FMSCA. Carriers may access a PSP report as part of their employment screening process. PSP allows carriers to search a commercial driver's five-year crash and three-year inspection history through its system, regardless of state or jurisdiction.[7]

The PSP report contains different information than a motor vehicle report contains, and obtaining a PSP report for a driver does not satisfy the carrier's requirement to obtain relevant MVRs, described above. However, many states have Employer Notification Systems (“ENS”), which send automatic updates to the requestor when a driver's license status changes, a crash occurs, or a conviction is posted to the driver's record. It is important to be aware that the information contained within MVRs and reports can differ by state, so obtaining both state MVRs and accessing PSP reports is advisable to maintain compliance and to comprehensively evaluate employees.

II. Employment Obligations

At least once every 12 months, a carrier must make an inquiry to obtain the MVR of each driver it employs, covering at least the preceding 12 months. The inquiry must be made to the appropriate agency of every state in which the driver held a CDL or permit during the time period. The carrier's inquiry must look into evidence showing whether a driver violated applicable MV laws, such as speeding, reckless driving, and OUI.[8]

The following records retention measures must be followed:

+ The records must be maintained in “a secure location with controlled access.”
+ The records must only be accessed by people directly involved in the hiring process.
+ The records must be kept for the length of employment plus three years.[9]

III. Employee Protections

The FMSCA rules and regulations as well as the Federal Credit Reporting Act (“FCRA”) creates further obligations for carriers in connection with the proper use and retention of applicant and employee information. The FCRA potentially impacts carriers' employment checks in two key respects.

First, if a carrier uses a third-party business to conduct their background check—for instance, to retrieve an applicant's MVRs—then that third party is considered a consumer reporting agency and the carrier must provide a

disclosure that includes the following:

A standalone form;

An authorization from the driver acknowledging that they received the disclosure and give their consent; and

A copy of the “Summary of Your Rights Under the Fair Credit Reporting ”[10]

In addition, to access an employee's PSP report from FMSCA, the carrier must also be FCRA-compliant, ensuring that (a) the carrier will not conduct a screening without the trucker applicant's written consent; (b) any information that is released to such person will not be released to any person or entity other than the carrier requesting the screening services or the applicant, unless authorized by law; and (c) provide a procedure for the trucker applicant to correct inaccurate information in the System in a timely manner.[11]

Thus, to satisfy FCRA requirements, if a carrier will now or in the future conduct background checks through a third party or access an employee's PSP report, then the carrier should have each employee sign a FCRA disclosure at their hiring. A proper FCRA disclosure is a standalone form that clearly and fairly provides notice to the new hire about the check/PSP report and sets forth a procedure for the new hire to correct information produced as a result of the inquiry, including a copy of the “Summary of Your Rights Under the Fair Credit Reporting Act.”

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[1] 49 C.F.R. § 391.21
[2] § 391.21(d)
[3] § 391.23
[4] § 391.23
[5] The information solicited from the previous employer must include general employment data about the driver and information about any crashes involving the driver. For drivers who were subject to DOT drug/alcohol testing, specific information about the driver's drug/alcohol violations and rehabilitation.
[6] 49 C.F.R. § 391.23
[7] 49 U.S.C. § 31150
[8] 49 C.F.R. § 391.25
[9] 49 C.F.R. § 391.51
[10] The Fair Credit Reporting Act, 15 U.S.C. § 1681, et. seq.
[11] 49 U.S.C.A. § 31150; see also Mowrer v. United States Dep't of Trans., 14 F.4th 723, 727 (D.C. Cir. 2021)

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