

## DOT/FMCSA - Noteworthy Updates

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The Federal Motor Carrier Safety Administration (FMCSA) announced on 12/27/19 that it will increase the annual percentage rate of random drug testing from an average of 25% to 50% of the average driving positions. The FMCSA estimates 2.1 million tests and a \$20 million increase in costs in 2020 under this revised rule. In 2018, the last survey conducted of positive test results, the estimated positive results for random drug screens was 1% of all tests.

As of 1/6/20, the FMCSA's drug and alcohol clearinghouse is operational, despite early technology glitches, and serves as an online data repository from which employers, state regulatory agencies, and law enforcement can check a CDL holder's drug and alcohol violations. Beginning 1/6/2023, states must query the Clearinghouse in response to an application for a CDL. Currently, queries by state agencies are voluntary.

On 1/15/20, the FMCSA issued a request for comment on designing and conducting a study into commercial truck crash-factors. The study would replace the 2003 causation study that has been the foundation for FMCSA policy decisions but which reflects outdated technology and old regulations. In addition to updating old results, fatal crashes increased 52% from 2009 to 2018, which has regulators looking for answers. The FMCSA suggests that the study collect ELD and crash event data, such as hard-braking or speeding, to make the findings more comprehensive and accurate. Comments will be received through 3/16/20.

On 1/13/20, the FMCSA issued its decision that the California Meal and Rest Break rule is a safety regulation that is more stringent than the FMCSA's Hours of Service (HOS) rules with no added benefit and is otherwise incompatible with the federal rules. As such, the California rules are preempted by the federal rules and are not enforceable.

On 12/16/19, the deadline to migrate to Electronic Logging Devices (ELDs) from Automatic On-Board Recording Devices (AOBRDs) expired. As such, the 12/15/2015 ELD rule is fully implemented and mandatory with limited exception such as for commercial motor vehicles with model year 2000 or older.

On 11/4/19, the FMCSA issued a notice of proposed rulemaking that proposes to reduce regulatory costs on commercial busses by removing an information collection burden on carriers. Specifically, the FMCSA proposes rescinding the requirement that drivers submit driver-vehicle inspection reports (DVIRs) when no defects or deficiencies are found. The FMCSA estimates that drivers spend 2.4 million hours completing "no-defect" DVIRs, which the FMCSA estimates will result in a savings of \$74 million.

## ERISA Liens: Another Concern Prior to Settlement?

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*Delfino*

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans. In the context of workers' compensation claims or civil litigation, the subject of ERISA is usually raised when an ERISA health plan pays for the medical care of an employee or Plaintiff.

In workers' compensation claims that are denied, an employee will regularly continue to receive medical treatment paid for by his employer-provided group health plan. When the claim moves towards a settlement, the question then becomes whether the health plan needs to be refunded for the amount paid to medical providers?

The first question that needs to be answered is whether the health plan that paid for the medical treatment is an ERISA plan. Generally, most employer-provided group health plans will be covered by ERISA. There are certain ERISA exceptions for plans that are established or maintained by governmental entities or churches, but when dealing with a workers' compensation claim it is safe to assume that a group health plan operated by a private employer is covered by ERISA.

Once you conclude that a group health plan is covered by ERISA, the workers' compensation carrier or Employer then needs to determine if the group plan is the type of ERISA plan that mandates reimbursement. In determining whether the ERISA plan needs to be reimbursed for the medical expenses paid, the workers' compensation carrier or Employer needs to determine if the ERISA plan is a self-funded plan or an insured plan. A self-funded plan is one where the Employer directly pays for the medical treatment received by the plan participants. An insured plan is a plan wherein Employees pay premiums to an insurance company and then that insurance company pays for the medical treatment. Generally, only if an ERISA plan is self-funded by the Employer will ERISA's federal exemption apply. As such, if the ERISA plan is self-funded, the issue of reimbursement is likely something you are going to have to deal with at the time of settlement. If the plan is an insured plan, even if covered by ERISA, then ERISA's federal exemption will likely not apply and reimbursement will not be an issue you need to address.

The issue of dealing with ERISA liens is somewhat muted in the area of workers' compensation, as it is usually the same party that both paid for medical treatment under a group health plan (the Employer) and is funding a settlement (the Employer). Therefore, even if the ERISA health plan is self-funded, Plaintiff's attorneys will usually request a waiver of any right to reimbursement from the Employer as part of the settlement.

Dealing with a self-funded ERISA lien is somewhat more complicated in a civil claim, as the party who paid for the medical treatment (the Employer) is not the same party who is funding a settlement (normally a third-party). Therefore, in the context of a civil claim, an Employer has less of an incentive to waive their right to reimbursement, which can complicate a proposed settlement.



## Attorney Spotlight: Williams Britt

*Williams is an attorney in the Charlotte office. His practice focuses in the area of workers' compensation. Extremely passionate about his work, Williams possesses a strong ability to relate to others and ensures that each client receives the highest quality representation possible.*

**Q: Why did you become a lawyer?**

**WB:** It is something that I always knew I wanted to do. My great grandfather, grandfather and father were/are all lawyers. I knew ever since I was young that following in my family's footsteps was something that I naturally felt drawn to.

**Q: What is your proudest moment?**

**WB:** My proudest moment was being sworn in as a fourth generation attorney in my family, and knowing that my parents and deceased grandparents were proud of me.

**Q: What keeps you busy on the weekends?**

**WB:** If Wake Forest is playing, I am watching. Other than that, I spend my free time hanging out with friends, riding my bike, and exploring all of the new restaurants and breweries around Charlotte.

**Q: What is your favorite vacation destination?**

**WB:** Without a doubt, the beach. I have been going to Holden Beach, NC my entire life.

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