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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 735
DEPARTMENT OF TRANSPORTATION
DRIVER AND MOTOR VEHICLE SERVICES DIVISION

FILED

09/24/2024 12:43 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Commercial driving privileges issuance, renewal and cancellation; federal Drug and Alcohol Clearinghouse

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 10/21/2024 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S)

In 2021, the Federal Motor Carrier Safety Administration (FMCSA) finalized regulations to require State Driver's Licensing Agencies (such as DMV) to access and use information obtained through the federal Drug and Alcohol Clearinghouse (DACH), an FMCSA-administered database containing driver-specific controlled substance and alcohol records. State Driver's Licensing Agencies that do not act to remove the commercial driving privileges (CDP) from a person who has a drug and alcohol driving prohibition risk having federal highway funds withheld. This proposed rulemaking is in response to the passage of Oregon Laws 2023, chapter 400, section 8, (Oregon Revised Statutes (ORS) 807.166), which requires DMV to adopt rules necessary to administer DACH for Oregon CDP holders.

DACH is a secure online database that gives employers and government agencies real-time access to information about commercial driver license (CDL) holder drug and alcohol program violations. DACH contains records of violations of drug and alcohol prohibitions in 49 CFR Part 382, Subpart B, including positive drug or alcohol test results and test refusals. According to FMCSA, the purpose of DACH is to improve highway safety by ensuring the commercial learner permit (CLP) and CDL holders with violations described in 49 CFR Part 382, Subpart B, do not operate a commercial motor vehicle (CMV) until they complete a return-to-duty process and can lawfully resume driving.

Following the federal regulations adopted by FMCSA, DMV will query the DACH database prior to issuance of CDP. If DACH indicates the applicant is prohibited from operating a CMV, DMV will not issue, renew or replace CDP to the applicant. This rulemaking also authorizes DMV to query DACH, or receive information from DACH, while the person holds CDP. When DMV receives information from DACH that a person has a prohibited status, DMV will cancel the person's CDP. When a person is denied issuance or renewal, or their CDP privileges are cancelled because of information from DACH, the person may be issued a Class C noncommercial driver license and may qualify to reinstate their CDP when DACH states that the person is no longer prohibited from operating a CMV.

This rulemaking also adds definitions and provides other processes and procedures for the administration of DACH.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Oregon Laws 2023, Chapter 400 - https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2023orlaw0400.pdf

Federal Register containing the DACH federal rule - <https://www.federalregister.gov/documents/2016/12/05/2016-27398/commercial-drivers-license-drug-and-alcohol-clearinghouse>

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

DMV does not believe this rulemaking will affect racial equity in this state. DMV is required by state law, ORS 807.166, administer DACH for Oregon CDP purposes. As a "State Driver's Licensing Agency," DMV must also comply with federal law to check the driver's status by querying DACH prior to issuing, renewing, transferring, or upgrading a CDL. If the reply to the query indicates the driver is prohibited from operating a CMV, FMCSA's regulations require that DMV remove the CDP privilege from the driver license or deny the issuance or renewal of CDP, or risk loss of federal highway funds. DMV does not control how FMCSA maintains DACH or the requirements for controlled substance and alcohol testing. Therefore, DMV's rulemaking is for the purposes of complying with state and federal law.

To the extent DMV's proposed rules exercise discretion in implementing DACH in Oregon, in refusing to issue or renew CDP, or in cancelling CDP for violation of DMV's implementing rules, DMV does not believe race plays a part in someone's decision to partake in drugs and alcohol, which may result in a violation of 49 CFR Part 382, Subpart B. However, the human factor of deciding whom to test can be impacted by race due to unconscious or conscious bias. Under federal regulations, testing is required in the following instances: pre-employment, post-collision, random, reasonable suspicion, return-to-duty, and follow-up. Of those, only reasonable suspicion and follow-up involve subjective analysis. Federal limits temper what is "reasonable suspicion." Federal regulations define "reasonable suspicion" as, "specific, contemporaneous, and articulable observations of the appearance, behavior, and speech or body odors of the driver" (49 CFR §382.307). Supervisors who would initiate testing based on reasonable suspicion must undergo specific training on alcohol misuse and controlled substance use to be able to properly assess reasonable suspicion (49 CFR §382.603). Follow-up testing is conducted following return to "safety-sensitive functions" after a federal DOT drug or alcohol regulation violation. A safety-sensitive worker is one who holds a job that can impact both their own safety and the safety of the public. Safety sensitive for CDL holders is when they operate vehicles that that can carry 16 people or more, or vehicles that transport hazardous materials. The frequency and type of follow-up testing is determined by a Substance Abuse Professional (SAP). SAPs assess and clinically evaluate individuals who have committed a DOT drug or alcohol regulation violation and want to return to the performance of safety-sensitive functions (49 CFR § 40.291). Covered drivers are subject to at least six unannounced follow-up tests in the first 12 months of safety-sensitive duty. While there is an element of subjectivity to deciding when to conduct these tests as well, SAPs are heavily regulated under the regulations. Therefore, to the extent possible, any racial bias risk is mitigated.

FISCAL AND ECONOMIC IMPACT:

See statements below.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost

of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) Currently, 49 CFR Part 382, Subpart B, prohibits CDP drivers who violate that subpart from operating a CMV. It also requires the CDP driver's employer to prevent the person from operating one of the business's CMVs. Currently, violations do not require DMV to cancel CDP or prevent the driver from operating a CMV. DACH was implemented by the FMCSA to ensure the CDP drivers do not operate a CMV when they are prohibited due to a violation of 49 CFR Part 382, Subpart B. Under ORS 807.166, DMV must adopt rules to implement DACH in Oregon. As part of the implementation, DMV must refuse to issue or renew CDP or cancel CDP for these drivers, which will prevent them from legally operating a CMV. DMV believes this will have a significant economic impact on the CDP driver. It could result in the loss of livelihood for persons employed as CMV drivers until that person is able to remove the DACH prohibition and obtain CDP. The driver may incur costs associated with regaining their CDP. However, DMV is unable to quantify the economic impact to the drivers because pay differs among CDP drivers, the inability to obtain employment requiring CDP if DMV does not issue CDP, and the length varies for a refusal to renew or cancellation, as the length of time before the driver completes the return-to-duty process impacts the issuance of CDP. In addition, there is an economic impact on drivers resulting from establishing a process for enforcing existing law meant to prevent people from driving who have violated alcohol and drug restrictions under federal law.

Similarly, there may be costs incurred by businesses that result from DMV refusing to issue or renew CDP or imposing a cancellation on the CDL privileges of an employee of the business. Again, that economic impact would come from enforcing existing law already meant to prevent those drivers from driving. DMV is unable to quantify the economic impact on the business because DMV is unable to quantify the number of drivers impacted or the length of cancellations.

DMV will be querying DACH and responding to information from DACH, adding cancellations to CDP drivers' driving records, refusing to issue or renew CDP and discussing the consequences with applicants, fielding phone calls from drivers and employers, conducting administrative reviews for refusals to issue or renew and cancellations, removing notations on driver records, and processing applications for new CDP once the person is eligible for CDP. DMV is unable to quantify the economic impact on DMV because DMV does not know how many refusals to issue or renew or cancellations will be done by DMV.

(2) There are no costs to small businesses to implement this rulemaking. However, there may be costs incurred by small businesses that result from DMV refusing to issue or renew CDP or imposing a cancellation on the CDL privileges of an employee of the small business. Again, that cost would come from enforcing existing law already meant to prevent those drivers from driving.

(a) All small businesses who employ CDL drivers may experience costs associated with finding a new, qualified CDL driver because their employee's CDL privileges have not been issued or renewed by DMV or were cancelled by DMV due to a drug and alcohol violation. DMV is unable to quantify the economic impact on the business.

(b) None.

(c) None.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

DMV sent draft rules to 14 organizations representing small businesses. No responses were received.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

DMV is implementing the federal regulation and not going beyond what is required.

RULES PROPOSED:

735-001-0050, 735-063-0205, 735-063-0315

AMEND: 735-001-0050

RULE SUMMARY: DMV is adding to the list of circumstances when DMV will provide an administrative review.

CHANGES TO RULE:

735-001-0050

Administrative Review ¶¶

(1) A person who is entitled to an administrative review by DMV under ORS chapter 809 or section (34) of this rule may request an administrative review.-An administrative review may be requested by:¶¶

(a) Completing a request on-line at <https://DMV2U.oregon.gov>;¶¶

(b) Faxing a request to (503) 945-5497; or¶¶

(c) Mailing a request to DMV, Administrative Review, 1905 Lana Ave. NE, Salem, Oregon 97314.¶¶

(2) A request for an administrative review must include sufficient information for DMV to identify the person.¶¶

(3) A request for an administrative review may include the following information:¶¶

(a) The person's full name, date of birth, mailing address, and customer number; and¶¶

(b) Any evidence that shows the person is not subject to the suspension, cancellation, or revocation that is the subject of the administrative review.¶¶

(4) In addition to those circumstances specified in ORS 809.140 and 809.440, Driver and Motor Vehicle Services Division of the Department of Transportation (DMV) will provide an administrative review of a suspension, revocation, ~~or~~ cancellation or denial of issuance action for:¶¶

(a) Failure to install or maintain installation of an ignition interlock device under ORS 813.602;¶¶

(b) Failure to complete and pass a security threat assessment required for a hazardous materials endorsement from the federal Transportation Security Administration (TSA) or being assessed as a security threat by TSA under ORS 807.173;¶¶

(c) Failure to submit proof of medical qualification to operate a commercial motor vehicle under ORS 807.100(2);¶¶

(d) Failure to pay a judgment under ORS 809.415(1);¶¶

(e) A lapse in making future financial responsibility filings under ORS 809.415(3)(c) or 807.240(3)(e);¶¶

(f) Notification from the superintendent of a hospital under ORS 807.700;¶¶

(g) A request by a school superintendent or a school district board under ORS 339.254;¶¶

(h) Notice received by DMV that a vehicle is totaled, wrecked, dismantled, disassembled or substantially altered under ORS 819.030.¶¶

(i) Cancellation of commercial driving privileges due to failure to complete entry-level driver training as required by rules adopted pursuant to ORS 807.085.¶¶

(j) Instances when the federal Drug and Alcohol Clearinghouse indicates the driver is prohibited from operating a commercial motor vehicle under ORS 807.166.

Statutory/Other Authority: ORS 184.619, 802.010, 809.440

Statutes/Other Implemented: ORS 809.440

RULE SUMMARY: DMV proposes to add the definition of "commercial driving privileges" or "CDP" and "DACH."

CHANGES TO RULE:

735-063-0205

Definitions ¶¶

Except as otherwise provided in these OAR 735, division 63 rules the following definitions apply to OAR 735, division 63:¶¶

- (1) "AAMVA" means the American Association of Motor Vehicle Administrators.¶¶
- (2) "Accident records" include, but are not limited to DMV records, police reports, crash reports or other reports from motor carriers.¶¶
- (3) "CDL" means commercial driver license.¶¶
- (4) "CDLIS" means the Commercial Driver's License Information System operated by AAMVA for FMCSA.¶¶
- (5) "CDL Third Party Examiner" means an individual certified by DMV to administer CDL skills tests through a CDL Third Party Tester.¶¶
- (6) "CDL skills test" means a three-part test to determine a CDL applicant's driver competency, consisting of: a pre-trip vehicle inspection, a basic control skills test and an on-road drive test.¶¶
- (7) "CDL Third Party Tester" means a person authorized by DMV to operate a CDL skills testing program and provide CDL Third Party Examiner(s) to administer CDL skills test.¶¶
- (8) "CLP" means a commercial learner driver permit issued under ORS 807.285.¶¶
- (9) "CMV" means commercial motor vehicle, as defined in ORS 801.208.¶¶
- (10) "Commercial driving privileges" or "CDP" has the meaning set forth in ORS 801.207.¶¶
- (11) "Conviction record" means an official record showing a determination of guilt by a court of law upon a plea, verdict, finding, or unvacated bail forfeiture.¶¶
- (112) "CSTIMS", means the Commercial Skills Test Information Management System, a web-based system for scheduling and reporting CDL skills tests information and results.¶¶
- (123) "DACH" means the FMCSA Drug and Alcohol Clearinghouse.¶¶
- (14) "Disqualifying condition" is a medical condition(s) not meeting FMCSA physical qualification standards as set forth in 49 CFR 391.41(b).¶¶
- (135) "DMV" means the Oregon Department of Transportation, Driver and Motor Vehicle Services Division.¶¶
- (146) "Driving type" means a certification by an applicant or holder of a CDL or CLP for one of the following:¶¶
 - (a) Non-excepted interstate: the person operates or expects to operate in interstate commerce;¶¶
 - (b) Excepted interstate: the person operates or expects to operate in interstate commerce but engages exclusively in transportation or operations excepted under 49 CFR 390.3(f), 391.2, 391.68 or 398.3; or¶¶
 - (c) Non-excepted intrastate: the person operates only in intrastate commerce.¶¶
- (157) "ELDT" means Entry-Level Driver Training required under 49 CFR Part 380, Subpart F.¶¶
- (168) "Fifth wheel hitch" has the meaning set forth in ORS 801.275.¶¶
- (179) "FMCSA" means the Federal Motor Carrier Safety Administration of the United States Department of Transportation.¶¶
- (1820) "First-time Real ID" means the first time DMV issues an Oregon Real ID to an applicant and may be issued as an original, renewal or replacement driver license, driver permit or identification card, depending on the privilege that the applicant possesses.¶¶
- (219) "Intrastate commerce" has the meaning set forth in 49 CFR 390.5 and includes any trade, traffic or transportation taking place exclusively within Oregon.¶¶
- (202) "Lawful status" means, for the purpose of applying for a Real ID driver license, driver permit or identification card, has the meaning set forth in 6 CFR 37.3.¶¶
- (213) "Medical Determination Officer" means a physician, nurse practitioner or physician assistant, licensed to provide health care services by the State of Oregon, and is employed or designated by DMV to make medical determinations of a driver's medical eligibility for driving privileges.¶¶
- (224) "Medical Specialist" means a person who is licensed as a doctor of medicine, a doctor of osteopathic medicine, an optometrist or an audiologist.¶¶
- (235) "Physician" has the meaning set forth in ORS 807.710.¶¶
- (246) "Real ID" has the meaning set forth in ORS 807.450, and is marked with the distinguishing feature of a star in the upper right corner.¶¶
- (257) "SPE certificate" means a Skill Performance Evaluation certificate issued by FMCSA pursuant to 49 CFR 391.49 to a person who demonstrates the ability to safely operate a CMV in spite of limb impairment or loss.¶¶
- (268) "TPR" means the Training Provider Registry, an electronic system operated by FMCSA to list certified

training providers and provide access to training providers to report ELDT completion information.¶
(279) "Waiver of Physical Disqualification" or "waiver" means a waiver issued by DMV to a driver who does not meet certain physical qualifications required for drivers of CMVs as set forth in 49 CFR 391.41(b).
Statutory/Other Authority: ORS 184.619, 802.010, 807.450, 807.460, 6 CFR 37.3
Statutes/Other Implemented: ORS 807.040, 807.100, 807.450

ADOPT: 735-063-0315

RULE SUMMARY: DMV proposes to adopt this rule to administer the federal Drug and Alcohol Clearinghouse.

CHANGES TO RULE:

735-063-0315

Commercial Driving Privileges; Federal Drug and Alcohol Clearinghouse; Cancellations

(1) In accordance with ORS 807.166, DMV shall query DACH prior to issuance, renewal or replacement of commercial driving privileges, including upgrading, adding restrictions and transferring a person's CDL privileges.

(2) DMV may not issue CDP to an applicant or renew an applicant's CDL when the query described in section (1) of this rule indicates the driver is prohibited from operating a CMV due to a violation of 49 CFR part 382, subpart B.

(3) DMV may initiate a query with DACH, or receive information from DACH without initiating a query, regarding an Oregon CDP holder.

(4) DMV shall cancel a person's CDP if DMV determines information from DACH indicates the CDP holder is prohibited from operating a CMV.

(5) After DMV cancels a person's CDP under section (4) of this rule, the person may apply to regain an Oregon CDP. When the person applies for CDP, DMV will query DACH as described in section (1) of this rule. DMV will issue CDP to the person only if DACH indicates the person is not prohibited from operating a CMV and all other requirements for issuance of CDP are met.

(6) A person whose CDP has been cancelled under section (4) of this rule may be issued a Class C noncommercial driver license described in ORS 807.031(5) or an identification card described in ORS 807.400, if all other requirements for issuance are met.

(7) If FMCSA notifies DMV that a CDP driver was erroneously placed in a prohibited status in DACH, DMV shall remove any reference to the driver's prohibited status from the CDLIS driver history and terminate the cancellation imposed under this rule. DMV will remove the cancellation from the driver record and restore the record to the status as it existed before the erroneous notification.

(8) Notwithstanding section (9) of this rule, DMV shall record a new sanction added to a CDLIS driver record during the period when DMV records show the driver had a prohibited status.

(9) DMV may not include any details of a DACH cancellation in the CDLIS driver history record for the CDP driver, including: a State-to-State Status request, State-to-State History request, and a Change State of Record request. Statutory/Other Authority: ORS 184.619, 802.010, 807.166, 809.310

Statutes/Other Implemented: ORS 807.166, 49 CFR 382