

Clearinghouse Rule 15-065

**STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY**

The State of Wisconsin Department of Transportation Proposes an Order to Repeal s. Trans 115.01 (Note); to Repeal and Recreate ss. Trans 115.02 (8); to Repeal s. Trans 115.02 (12)(Note); to Amend ss. Trans 115.04 (1)(a)2., (3)(c), (g), (i), (k); to Create s. Trans 115.04 (3)(n); to Amend ss. Trans 115.05 (1)(g), (2)(a), (e), (5)(b), (c), 115.07 (1), (2), (3), (4)(intro.); to Create s. Trans 115.07 (4)(f)3.; to Amend s. Trans 115.09(title); and to Create s. Trans 115.09 (4) Relating to Third Party Testing and Affecting Small Businesses

PROPOSED RULEMAKING ORDER

INTRODUCTION

The Statement of Scope for this rulemaking, SS 090-14, was approved by the Governor of the State of Wisconsin Scott Walker on August 18, 2014, published in Register No. 705A on September 14, 2014, and approved by the Secretary of the State of Wisconsin Department of Transportation (“DOT”) Mark Gottlieb, P.E., on October 10, 2014.

DOT proposes an Order to repeal s. Trans 115.01 (Note); to repeal and recreate ss. Trans 115.02 (8); to repeal s. Trans 115.02 (12)(Note); to amend ss. Trans 115.04 (1)(a)2., (3)(c), (g), (i), (k); to create s. Trans 115.04 (3)(n); to amend ss. Trans 115.05 (1)(g), (2)(a), (e), (5)(b), (c), 115.07 (1), (2), (3), (4)(intro.); to create s. Trans 115.07 (4)(f)3.; to amend s. Trans 115.09(title); and to create s. Trans 115.09 (4) relating to third party testing.

ANALYSIS

Statutes interpreted: ss. 343.16 (1)(b), Stats.

Statutory authority: ss. 85.16(1), 343.02, 343.03 (1)(a) and (b), 343.16 (1)(a) and (b), Stats.

Explanation of agency authority: Under s. 85.16(1), Stats., DOT's Secretary is authorized to make reasonable and uniform orders and rules deemed necessary. Under s. 343.02, Stats., DOT is required to administer and enforce the issuance of operator licenses and state identification cards and may promulgate rules DOT's Secretary considers necessary to do so. Under s. 343.03 (1)(a) and (b), DOT is required to institute a classified driver license system that meets all federal standards. Under s. 343.16 (1)(a), DOT is required to conduct written and skills tests, and s. 343.16 (1)(b) authorizes DOT to contract with and use certain third party testers and examiners in conducting Commercial Driver's License ("CDL") skills tests.

Related statutes or rules: ss. 85.16(1), 343.02, 343.03 (1)(a) and (b), 343.16 (1)(a) and (b), Stats. and ch. Trans 115, Admin. Code.

Brief summary of the proposed rule: DOT's policies and procedures authorizing persons other than DOT employees to conduct CDL skills tests are contained in ch. Trans 115, Admin. Code. CDL applicants are required to take these CDL skills tests. Of import, ch. Trans 115, Admin. Code implements federal regulations contained in 49 C.F.R. part 383, Commercial Driver's License Standards; Requirements and Penalties, and 49 C.F.R. part 384, State Compliance with Commercial Driver's License Program. These federal regulations, which implement the Commercial Motor Vehicle Safety Act of 1986 ("CMVSA"), were recently amended. These amendments affect both how third party testers conduct skills tests and how DOT administers the third party testing program. DOT must comply with these amendments by July 2015, and amending ch. Trans 115, Admin. Code is the most effective way to comply. Additional amendment to ch. Trans 115, Admin. Code is necessary to ensure codification of compliance with

changes to state law and improvements to business process since the last time DOT update ch. Trans 115, Admin. Code. The objective of the rule will not change. The proposed changes to ch. Trans 115, Admin. Code will accomplish the following:

- Assign the Federal Motor Carrier Safety Administration (“FMCSA”) as the federal agency responsible for enforcing the Federal Motor Carrier Safety Regulations. In turn, establish that new applicants for third party tester authority must allow the FMCSA to inspect and audit its operations, facilities and records as they relate to its third party testing program for the purpose of determining whether the applicant is qualified to be granted authority and establish that third party testers must allow the FMCSA to conduct scheduled and unscheduled examinations, inspections, and audits.

- In accordance with state and federal law, prohibit third party testers that are driver training schools from administering any test or examination of a person who has received training from that third party tester or from any person who controls, is controlled by, or is under the common control of the third party tester. This entails including a provision to this effect and removing an outdated statement that private driver training schools are prohibited from becoming third party testers.

- Codify the use of electronic scheduling of CDL skills tests and the requirement that no skills test be conducted prior to two calendar days from when it was scheduled.

- Codify the use of electronic reporting of successful CDL skills test results; provide that, in addition to first class mail, unsuccessful CDL skills test results may be submitted by other means as directed by DOT; provide that, in addition to CDL skills test score sheet form provided by DOT, unsuccessful skills test results may be submitted using other means as directed by DOT;

and require that all CDL skills test results must be submitted to DOT within 48 hours of the grading of the CDL skills test.

- Establish that a third party tester must conduct a minimum of 10 CDL skills tests per year and establish that a third party examiner must conduct a minimum of 10 CDL skills tests per year for different individuals.

- Require third party examiners to submit to an initial nationwide criminal background check by means authorized by DOT and disqualify any third party examiner who has been convicted of a felony within the past 10 years or convicted of any crime involving fraudulent activity prior to the application.

- Establish that DOT must conduct on-site inspections and audits of third party testers at least once every two years.

- Provide that DOT may determine the effectiveness of third party testers by having DOT employees co-score a CDL skills test along with a third party examiner to compare results.

- Establish that a private or non-governmental third party tester must maintain a bond in an amount sufficient to pay for retesting of drivers in the event the third party tester or one or more of its examiners is involved in fraudulent activities related to conducting the CDL skills tests for CDL applicants.

- Establish that third party examiner applicants attending CDL skills test examiner training must submit course fees and satisfy all fingerprinting requirements prior to the training.

- Remove the requirement that a third party examiner's social security number appear on the third party examiner's identification certificate.

- Clarify that the requirement that a third party examiner must take part in all DOT required training includes retaking full, partial, or specialized CDL skills test examiner training

when warranted as a result of performance or compliance issues and establish that a person who has not had a valid certificate in the preceding 2 years shall retake the full CDL skills test examiner training as sanctioned by DOT.

- Establish that a third party tester's primary place of business, occupied structures, and records are locked and secured when such facilities are not in use.

Summary of, and comparison with, existing or proposed federal statutes and regulations intended to address the activities to be regulated by the proposed rule: There are a number of recently amended federal regulations contained in 49 C.F.R. part 383, Commercial Driver's License Standards; Requirements and Penalties, and 49 C.F.R. part 384, State Compliance with Commercial Driver's License Program which implement the CMVSA and address the activities the proposed rule intends to regulate:

- In relevant part, 49 C.F.R. s. 383.75(a)(8)(i) provides that a State may authorize a third party tester to administer the skills tests specified in subparts G and H of 49 C.F.R. part 383 if the state has an agreement with the third party containing, among other things, a provision allowing the FMCSA or its representatives, and the State to conduct random examinations, inspections, and audits of its records, facilities, and operations without prior notice. Similarly, 49 C.F.R. s. 384.229 requires a State to conduct various auditing, monitoring, and tracking functions of third party testers and examiners.

- In relevant part, 49 C.F.R. s. 383.75(a)(7) provides that a skills tester that is also a driver training school is prohibited from administering a skills test to an applicant who was trained by the training school, subject to a limited exception.

- In relevant part, 49 C.F.R. s. 383.75(a)(8)(viii) provides that a State may authorize a third party tester to administer the skills tests specified in subparts G and H of 49 C.F.R. part 383

if the state has an agreement with the third party containing, among other things, a provision requiring the third party tester to submit a schedule of CDL skills test appointments to the State no later than two business days prior to each test.

- In its entirety, 49 C.F.R. s. 383.75(b) provides that the third party tester must notify the State driver licensing agency through secure electronic means when a driver applicant passes skills tests administered by the third party tester.

- In relevant part, 49 C.F.R. s. 383.75(c) provides that the State must revoke the skills testing certification of any examiner who does not conduct skills test examinations of at least 10 different applicants per calendar, subject to a limited exception.

- In its entirety, 49 C.F.R. s. 383.75(a)(8)(ii) provides that a State may authorize a third party tester to administer the skills tests specified in subparts G and H of 49 C.F.R. part 383 if the state has an agreement with the third party containing, among other things, a provision requiring all third party skills test examiners to meet the qualification and training standards of 49 C.F.R. s. 384.228. In turn, and in its entirety, 49 C.F.R. s. 384.228(g) requires the State to complete a national criminal background check of all skills test examiners prior to certifying them to administer CDL skills tests. Similarly, 49 C.F.R. s. 384.228(h) requires the State to complete a national criminal background check of all State and third party test examiners at the time of hiring and complete a national criminal background check of any State and third party current test examiner who has not had a national criminal background check. This provision further provides that criteria for not passing this criminal background check must include at least the following: (i) any felony conviction within the last 10 years; and (ii) any conviction involving fraudulent activities.

- As briefly noted above, 49 C.F.R. s. 384.229 provides that to ensure the integrity of the CDL skills testing program, the State must, at least once every 2 years, conduct unannounced, on-site inspections of third party testers' and examiners' records, including comparison of the CDL skills test results of applicants who are issued CDLs with the CDL scoring sheets that are maintained in the third party testers' files.

- In its entirety, 49 C.F.R. s. 383.75(a)(8)(iii)(B) provides that a State may authorize a third party tester to administer the skills tests specified in subparts G and H of 49 C.F.R. part 383 if the state has an agreement with the third party containing, among other things, a provision allowing the State to have State employees co-score along with the third party examiner during CDL skills tests to compare pass/fail results.

- In its entirety, 49 C.F.R. s. 383.75(a)(8)(v) provides that a State may authorize a third party tester to administer the skills tests specified in subparts G and H of 49 C.F.R. part 383 if the state has an agreement with the third party containing, among other things, a provision requiring the third party tester to initiate and maintain a bond in an amount determined by the State to be sufficient to pay for re-testing drivers in the event that the third party or one or more of its examiners is involved in fraudulent activities related to conducting skills testing for applicants for a CDL.

Comparison with similar rules in Illinois, Iowa, Michigan, and Minnesota: Illinois, Iowa, Michigan, and Minnesota have similar laws, all of which are described below:

- Illinois: Illinois's third-party certification program is contained, in part, within 92 Ill. Admin. Code s. 1030.60. Illinois offers two types of licenses, one for third party testers ("third-party certifying entity") and one for third party examiners ("third-party certification safety officer"). In Illinois, third-party certifying entities may certify only those driver applicants

employed and on the payroll of the entity at the time of certification. Third-party certifying entities shall not engage in or permit any type of fraudulent activity, with reference to either any certified individual or the Illinois Secretary of State. Each third-party certifying entity must have at least one employee who is licensed as a third-party certification safety officer. Third-party certifying entities must provide each employee or member who takes and passes the skills tests with documentary proof that serves as evidence to the Illinois Secretary of State, Department of Driver Services (“ISSDDS”) that the individual has successfully passed the skills tests administered by the third-party certifying entity. Third-party certifying entities must submit completed application forms to the ISSDDS for each main office, branch office, and third-party certification safety officer. Third-party certifying entities must allow ISSDDS and the FMCSA to conduct random examinations, inspections, and audits without prior notice and must allow ISSDDS to conduct on-site inspections at least annually. ISSDDS must annually re-examine a sample percentage of the certified employees or members to compare pass/fail results and determine the percentage of certified individuals employed by, or who are members of, the third-party certifying entity. The Illinois Secretary of State must deny an application for a third-party certifying entity license to any commercial driver training school. The Illinois Secretary of State must deny a third-party certification safety officer license if the individual is an owner or instructor of a commercial driver training school or has been convicted of driving under the influence of alcohol and/or other drugs, leaving the scene of a fatal accident, reckless homicide, reckless driving, or similar out-of-state offenses within 10 years prior to the date of application or has been convicted two or more times of any of these offenses or combination of these offenses within 20 years prior to the date of application.

- Iowa: Iowa's legislature very recently authorized the Iowa Department of Transportation to promulgate rules allowing for third parties other than and in addition to community colleges to conduct the CDL skills tests. For instance, 2014 Iowa Senate File 2355 provides that the Iowa Department of Transportation may by rule designate third party testers to administer the driving skills tests required for a commercial driver's license, provided that: (1) the driving skills test is the same as that which would be administered by the state; (2) the third party tester contractually agrees to comply with 49 C.F.R. s. 383.75 as adopted by rule by the Iowa Department of Transportation; (3) any skills test examiner used by the third party tester meets the requirements of 49 C.F.R. s. 383.75 and 49 C.F.R. s. 384.228, as adopted by rule by the Iowa Department of Transportation; (4) any third party tester besides a community college is an Iowa based motor carrier or its subsidiary that has its principal office within Iowa and operates a commercial driver training facility in Iowa; and (5) if required, the third party tester conduct a number of skills examinations in excess of the number required under 49 C.F.R. s. 383.75 in order to remain qualified as a third party tester.

- Michigan: Michigan's third-party testing program is authorized under Mich. Comp. Law s. 257.309(4), which provides that the Michigan Secretary of State is prohibited from issuing an original operator's license without an examination that includes a driving skills test conducted by the Michigan Secretary of State or by a designated examining office. The Michigan Secretary of State may enter into an agreement with another public or private corporation or agency to conduct a driving skills test. Before the Michigan Secretary of State authorizes a person to administer a corporation's or agency's driver skills test, that person or examiner must complete both a state and federal bureau of investigation fingerprint based criminal history check through the Michigan Department of State Police. In an agreement with another public or private

corporation or agency to conduct a driving skills test, the Michigan Secretary of State must prescribe the method and examination criteria to be followed by the corporation, agency, or examiner when conducting the driving skills test and the form of the certification to be issued to a person who satisfactorily completes a driving skills test.

- Minnesota: Minnesota's third party testing program is contained within Minn. R. 7410.6000 *et seq.* The Minnesota Public Safety Commissioner may only designate as a third party testing program an entity that is, among other things, either a motor carrier, a school bus company, a postsecondary school, a school district, a motorcycle safety course, or a public transit authority. An applicant to the third party testing program must agree to allow representatives of the Federal Highway Administration and the Minnesota Public Safety Commissioner to conduct random examinations, inspections, and audits of the testing operation without prior notice. An applicant to the third party testing program must also allow on-site inspections by agents of the Minnesota Public Safety Commissioner to determine compliance with Minn. R. 7410.6000 *et seq.* On at least an annual basis, agents of the Minnesota Public Safety Commissioner are permitted to either: (1) take tests actually administered by the third party testing program as if applicants; (2) test a sample of drivers who were examined by the third party testing program to compare pass/fail results; or (3) conduct a road test or skills test simultaneously with the third party tester to compare test results. Upon request, no less than 48 hours in advance, the third party testing program must provide the Minnesota Public Safety Commissioner with the schedule of times and dates that skills tests and road tests will be given. The Minnesota Public Safety Commissioner must send a letter of approval indicating the third party testing program may administer road tests and must issue a certificate to each approved tester, a copy of which must be on file in the office of the third party testing program. Third party testing programs must provide a record of examination, on a format

obtained from or approved by the Minnesota Public Safety Commissioner, to an individual who has passed a road test or a skills test for a commercial motor vehicle license or endorsement. Generally, a third party tester may not simultaneously be an instructor in a licensed or approved driver education program. The third party testing program shall report the number of skills tests administered annually by all third party testers employed by the program. This report must be in writing or in electronic format approved by the Minnesota Public Safety Commissioner and received within 45 days of the end of each calendar year. To maintain certification as a third party tester, an individual must, among other things, conduct at least 12 road tests or skills tests annually over each 24-month period from the date of initial issuance of a third-party tester certificate.

Summary of the factual data and analytical methodologies that the agency used in support of the proposed rule and how any related findings support the regulatory approach chosen for the proposed rule: The vast majority of the provisions contained within this rule are replications of rules promulgated by the federal government that apply to third party testers and state governmental entities responsible for implementing a third party testing program. DOT already complies with nearly all of these federal requirements. DOT nevertheless seeks to memorialize these efforts by promulgating its own administrative rules that mirror those the federal government has already enacted. In establishing the bond amount required under 49 C.F.R. s. 383.75(a)(8)(v) and proposed under this rulemaking, DOT's Division of Motor Vehicles ("DMV") consulted with its Risk Management Section and bond companies to develop bond tiers based on the number of annual CDL skills a third party tester conducts. This bonding schedule has been in effect since January 2015.

Analysis and supporting documentation used in support of the determination of the proposed rule's effect on small businesses:

DOT identifies many third party testers as small businesses. The rule's primary fiscal and compliance impacts on small business will involve the bonding requirement, which is based on the number of skills tests the third party tester conducts in a year. As noted above, DOT's DMV consulted its Risk Management Section and bond companies to develop bond tiers based on the number of annual CDL skills a third party tester conducts.

Proposed rule's effect on small businesses: Third party testers have been required to comply with this federal bonding provision since January 2015. Accordingly, DOT estimates that the promulgation of this rule will have a minimal financial impact on third party testers that are small businesses. Similarly, many of the process-related requirements contained within recent federal regulations such as scheduling procedures have already been effectuated. This rule's intent is to provide certainty and clarity at the state level. The agency contact person listed below is also the small business regulatory coordinator for this proposed rule. This proposed rule, fiscal estimate, and other related documents may be viewed at <https://health.wisconsin.gov/admrules/public/Home>.

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Place Where Comments Should Be Submitted and Deadline:

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RULE TEXT

SECTION 1. s. Trans 115.01 (Note) is repealed in its entirety.

SECTION 2. s. Trans 115.02 (8) is repealed and recreated to read:

Trans 115.02 (8) “FMCSA” means the federal motor carrier safety administration.

SECTION 3. s. Trans 115.02 (12)(Note) is repealed in its entirety.

SECTION 4. ss. Trans 115.04 (1)(a)2., (3)(c), (g), (i) and (k) are amended to read:

Trans 115.04 (1)(a)2. Certification that the primary place of business is safe, ~~and~~ meets all requirements of state law and local ordinances, and, along with all records, is locked and secured when not in use.

Trans 115.04 (3)(c) Allow ~~FHWA~~ FMCSA and the department to conduct scheduled and unscheduled examinations, inspections and audits.

Trans 115.04 (3)(g) Ensure that the CDL skills tests are conducted in accordance with the requirements of ch. Trans 104 and the instructions provided by the department. All CDL skills tests shall be scheduled using electronic means as authorized by the department no later than two business days prior to each test.

Trans 115.04 (3)(i) Notify the department within 48 hours of each driver applicant who passes the pre-trip inspection, the basic controls and road test portion of the CDL skills test using electronic means as authorized by the department and notify the department of each driver applicant who fails the basic controls and road test portion of the CDL skills test in the following manner:

1. By first class mail or using other means as directed by the department.
2. Within ~~72~~ 48 hours.

3. On a CDL skills test score sheet form provided by the department or using other means as directed by the department.

Trans 115.04 (3)(k) Administer a minimum of ~~42~~ 10 CDL skills tests per year for different individuals.

SECTION 5. s. Trans 115.04 (3)(n) is created to read:

Trans 115.04 (3)(n) If the third party tester is also a driver training school, not administer a skills test to an applicant who was trained by that training school.

SECTION 6. ss. Trans 115.05 (1)(g) (2)(a), (e), (5)(b) and (c) are amended to read:

Trans 115.05 (1)(g) Have had no conviction involving fraudulent activities, and W~~within~~ 4 10 years prior to application and subject to ss. 111.321, 111.322 and 111.335, Stats., have had no felony conviction.

Trans 115.05 (2)(a) Full name, home and business addresses, date of birth, ~~social security number,~~ operator's license number, and telephone number.

Trans 115.05 (2)(e) Date and place applicant successfully passed department sanctioned CDL examiner training course. An original application shall be accompanied by written proof verifying passage of the course, prepayment of course fees to the department, and completion of the department's fingerprinting process.

Trans 115.05 (5)(b) Take part in all department required training courses, including retaking full, partial, or specialized CDL skills test examiner training when warranted because of performance or compliance issues, workshops, and seminars. A person who has not had a valid certificate in the past 4 years shall retake department sanctioned CDL training.

Trans 115.05 (5)(c) Conduct a minimum of ~~42~~ 10 CDL skills tests per year for different individuals in accordance with this chapter and current instructions provided by the department.

SECTION 7. ss. Trans 115.07 (1), (2), (3), (4)(intro.) are amended to read:

Trans ss. 115.07 (1) A new applicant for third party tester authority shall allow the ~~FHWA~~ FMCSA and the department to inspect and audit its operations, facilities and records as they relate to its third party testing program, for the purpose of determining whether the applicant is qualified to be granted authority.

(2) A third party tester who has been granted authority shall allow the department and ~~FHWA~~ FMCSA to inspect and audit its third party testing program to determine whether it remains in compliance with this chapter.

(3) The department and ~~FHWA~~ FMCSA may perform inspections and audits at any time with or without prior notice to the third party tester.

(4) Inspections and audits shall be conducted at least ~~annually~~ biennially and shall include an examination of all of the following:

SECTION 8. s. Trans 115.07 (4)(f)3. is created to read:

Trans 115.07 (4)(f)3. Having department employees co-score along with the third party examiner during CDL skills tests.

SECTION 9. s. Trans 115.09(title) is amended to read:

Trans 115.09(title) Minimum insurance and bond requirements.

SECTION 10. s. Trans 115.09 (4) is created to read:

Trans 115.09 (4) All third party testers that are not an agency or department of this state or its political subdivisions or another state shall maintain a bond in an amount determined by the department to be sufficient to pay for retesting of drivers in the event the third party tester or one or more of its examiners is involved in fraudulent activities related to conducting skills testing of CDL applicants.

SECTION 11. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

(END OF RULE TEXT)

Signed this ____ day of August 2015.

MARK GOTTLIEB, P.E.
Secretary
State of Wisconsin Department of Transportation