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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
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ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Adoption of FMCSA and TSA Waivers and Exemptions Related to COVID-19

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 10/21/2020 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):

DMV amends OAR 735-063-0220 to provide for CDL-required excepted interstate and non-excepted intrastate commercial motor vehicle (CMV) operators to maintain medical qualification during the COVID-19 state of emergency. Ordinarily, the Federal Motor Carrier Safety Administration (FMCSA) requires CDL-required non-excepted CMV operators to maintain medical qualification in accordance with regulations codified at 49 Code of Federal Regulations (CFR) Parts 383 and 391. In addition, DMV administrative rule reflects this requirement and requires CDL-required excepted interstate and non-excepted intrastate CMV operators to maintain medical qualification under rules comparable to those promulgated by FMCSA for CDL-required non-excepted interstate CMV operators. On March 24, 2020, FMCSA issued a waiver entitled, "Waiver in Response to the COVID-19 Emergency – for State, CDL Holders, CLP Holders, and Interstate Drivers Operating Commercial Motor Vehicles" (FMCSA Waiver) providing for CDL-required non-excepted interstate CMV operators to retain medical qualification based on prior medical qualification acquired on or after March 1, 2020, until June 30, 2020. In order to qualify, individuals must have maintained medical qualification based on proof of medical qualification issued for a period of 90 days or longer to qualify under the FMCSA Waiver. Effective July 1, 2020, FMCSA reissued the waiver in order to extend these provisions until September 30, 2020. FMCSA's authority to grant such waivers is primarily codified at 49 U.S.C. §§31136 and 31315.

However, the FMCSA Waiver does not apply to CDL-required excepted interstate and non-excepted intrastate CMV operators, because such individuals are only required to maintain medical qualification by Oregon administrative rule. Previously, DMV promulgated a temporary rule providing that DMV would refrain from cancelling the commercial driving privilege (CDP) of CDL-required excepted interstate and non-excepted intrastate CMV operators on equivalent terms to the FMCSA waiver for CDL-required non-excepted interstate CMV operators. DMV's temporary rulemaking will expire on November 22, 2020. Now, DMV amends OAR 735-063-0220 on a permanent basis in order to provide specifically for all CDL-required CMV operators licensed by DMV to maintain medical qualification under the terms

equivalent to those specified by FMCSA's waiver for CDL-required non-excepted CMV operators. DMV has provided for continued medical qualification because DMV cannot know when FMCSA will discontinue the waiver. DMV intends to promulgate a temporary rule suspending the medical qualification provided by OAR 735-063-0220(6) when FMCSA ceases to reissue the waiver. Subsequently, DMV intends to conduct a further permanent rulemaking in order to remove OAR 735-063-0220(6) and return to DMV's prior medical qualification requirements. DMV advises all CDL-required CMV operators to continue to submit proofs of medical qualification to DMV as soon as possible. Please note that DMV's automated system may make automatic changes that do not reflect the amendment to OAR 735-063-0220(6).

DMV amends OAR 735-063-0290 to provide for full use of a Transportation Security Administration (TSA) exemption regarding expiration of TSA security threat assessments (STAs) for commercial driver license (CDL) holders with hazardous material endorsements (HME). DMV administers the HME program in accordance with regulations promulgated by FMCSA and TSA. The TSA Exemption ("Exemption from Renewal of the Hazardous Materials Endorsement Security Threat Assessment for Certain Individuals") permits States to grant an extension, up to 180 days, if the individual's STA expires between March 1, 2020, and July 31, 2020. Subsequently, on July 31, 2020, TSA extended the TSA Exemption ("Notice To Extend Exemption From Renewal of the Hazardous Materials Endorsement Security Threat Assessment for Certain Individuals") to run from March 1, 2020, to October 29, 2020. Previously, DMV promulgated a temporary rule providing for DMV to refrain from cancellation of commercial driving privileges (CDP) related to STA requirements for CDL-holders with HMEs as an initial implementation of the TSA exemption. Now, DMV amends OAR 735-063-0290 on a permanent basis in order to provide for individuals with qualifying STA expirations to receive a 180-day STA extension, as permitted by TSA. Individuals with STAs expiring between March 1, 2020, and October 29, 2020, will receive a single 180-day STA extension.

During the COVID-19 emergency, it may be impractical for some commercial drivers to renew their STAs, as measures to prevent the spread of COVID-19 may affect the ability of persons holding CDP to present themselves in-person at a TSA enrollment center for the collection of fingerprints and applicant information. Without a new STA, TSA's regulations prevent States from renewing or extending the expiration of the individual's State-issued HME. DMV has authority to adopt rules regarding the process and frequency for obtaining an STA and, to the extent practicable, make its rules uniform with any applicable federal regulations related to the holding of a CDL with HME, pursuant to ORS 807.173(1)(a) and (3). TSA requires individuals to begin the process of seeking STA renewals no later than 60 days before the end of the extension granted by the TSA Exemption. Please note that DMV's automated system may make automatic changes that do not reflect the amendment to OAR 735-063-0290(7).

DMV's amendment of OAR 735-063-0290 does not waive the requirement for new HME applicants to obtain STAs before CDL issuance. In addition, the TSA Exemption notes that TSA will continue to vet individuals receiving STA extensions and TSA retains full authority to revoke STAs for individuals for whom "derogatory information becomes available." Similarly, DMV retains full authority to cancel CDP when notified by TSA that an individual is a security threat.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

FMCSA Waiver: <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-03/FMCSA%20CDL%20Waiver-3.24.20.pdf>

FMCSA Waiver reissuance: https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-06/FMCSA%20CDL%20Waiver-Reissued_V_6%20Final.pdf

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) DMV does not anticipate significant costs related to the amendment of OAR 735-063-0220 and 735-063-0290.

DMV's computer system will automatically issue cancellations related to both medical qualifications and STA expirations when the applicable federal waivers or exemptions expire. DMV may experience a small increase in expenditures related to configuring the computer system to accommodate these changes.

(2) Small motor carriers are included within small businesses. Individual motor carriers may choose to track expiration of their employees' extended STA and medical qualification expirations. DMV cannot easily quantify such costs for small businesses.

(2)(a) Small businesses are not directly subject to this rulemaking, but small motor carriers may choose to track the effects of these rule amendments on their employees. DMV cannot easily quantify the number of small business with an interest in tracking this information.

(2)(b) Small motor carriers may experience small costs related to tracking the expiration of their employees' extended STA and medical qualification expirations. DMV cannot easily quantify these costs because small motor carriers may track this information using different methods.

(2)(c) None

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

DMV sent the 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 making these changes as a direct result of COVID 19 and the exceptions made by the federal government. These changes enable CDL drivers to continue to operate their vehicles.

RULES PROPOSED:

735-063-0220, 735-063-0290

AMEND: 735-063-0220

RULE SUMMARY: DMV amends OAR 735-063-0220 to provide for CDL-required excepted interstate and non-excepted intrastate commercial motor vehicle (CMV) operators to maintain medical qualification if they were medically qualified on or after March 1, 2020, exceptions.

CHANGES TO RULE:

735-063-0220

Proof of Medical Qualification for a CDL or CLP ¶

- (1) Proof of medical qualification for a person who certifies a driving type of non-excepted interstate is:¶¶
- (a) A CDLIS record that indicates the person is medically qualified to operate a CMV in interstate commerce; or¶¶
 - (b) A valid unexpired Medical Examiner's Certificate that conforms to the requirements of 49 CFR 391.43. When indicated on the certificate, the Medical Examiner's Certificate must be accompanied by one or both of the following:¶¶
- (A) A valid unexpired notice of exemption issued by FMCSA under the provisions of 49 CFR 381.300 to 381.330.¶¶
 - (B) A valid unexpired SPE certificate issued by FMCSA under the provisions of 49 CFR 391.49.¶¶
- (2) Proof of medical qualification for a person who certifies a driving type of excepted interstate or non-excepted intrastate is:¶¶
- (a) The proof required under section (1)(a) of this rule; or¶¶
 - (b) A valid unexpired Medical Examiner's Certificate that conforms to the requirements of 49 CFR 391.41. When indicated on the certificate, the Medical Examiner's Certificate must be accompanied by a valid unexpired Waiver of Physical Disqualification issued by DMV under the conditions described in OAR 735-063-0240.¶¶
- (3) A Medical Examiner Certificate, notice of exemption, SPE certificate and a Waiver of Physical Disqualification is valid for up to two years.¶¶
- (4) DMV may require a valid unexpired Medical Examiner's Certificate that conforms to the requirements of 49 CFR 391.43 be submitted showing it was issued after the date of a mandatory or non-mandatory report submitted on the driver that resulted in DMV taking action under the At-Risk Driver Program.¶¶
- (5) For purposes of section (4) of this rule, when indicated on the Medical Examiner's Certificate, the certificate must be accompanied by one or more of the following: a notice of exemption, SPE certificate or a Waiver of Physical Disqualification.¶¶
- (6) Notwithstanding section (2) of this rule, an individual certifying as excepted interstate or non-excepted intrastate who was medically qualified on or after March 1, 2020, retains medical qualification. In order to qualify under this section, an individual must have valid proof of medical qualification that was issued for a period of 90 days or longer. This section does not apply to an individual requiring a notice of exemption issued by FMCSA.
- Statutory/Other Authority: ORS 184.619, 49 CFR 381.300 - 381.330 and 391.41 - 391.49, 802.010, 807.040
Statutes/Other Implemented: ORS 807.040, 807.100

AMEND: 735-063-0290

RULE SUMMARY: DMV amends OAR 735-063-0290 to provide for full use of a Transportation Security Administration (TSA) exemption regarding expiration of TSA security threat assessments (STAs) for commercial driver license (CDL) holders with hazardous material endorsements (HME).

CHANGES TO RULE:

735-063-0290

Requirements for Issuance and Retention of a Hazardous Materials Endorsement ¶¶

(1) To obtain, retain or renew a CDL with a hazardous materials endorsement, a person must be qualified. To qualify for a hazardous materials endorsement a person must:¶¶

(a) Qualify for commercial driving privileges or have a valid Oregon CDL.¶¶

(b) Pass a hazardous materials endorsement knowledge test for an original endorsement or a renewal.¶¶

(c) Pass a security threat assessment (security check) from the Transportation Security Administration (TSA) in accordance with 49 CFR Part 1572, including receipt by DMV of a notice from TSA showing the person does not pose a security threat. A person must pass a TSA security check:¶¶

(A) Within four years and nine months prior to the date DMV issues an original hazardous materials endorsement;¶¶

(B) At intervals of not more than five years from the date of the person's most recent TSA security check; and¶¶

(C) Any other time required by DMV.¶¶

(d) Pay all required fees, which include, but may not be limited to, any applicable issuance fee and hazardous materials knowledge test fee.¶¶

(2) A person is no longer qualified for a hazardous materials endorsement if:¶¶

(a) DMV receives a notice of threat assessment from TSA requiring cancellation of the hazardous materials endorsement;¶¶

(b) DMV receives notice from TSA indicating the person did not pass the security threat assessment; or¶¶

(c) The person fails to complete and pass a TSA security check as described in section (1) of this rule.¶¶

(3) If DMV determines a person is no longer qualified for a hazardous materials endorsement under this rule, DMV will cancel the person's commercial driving privileges. Upon cancellation the person must immediately surrender to DMV the CDL showing the hazardous materials endorsement. If the person otherwise qualifies and pays a replacement fee, DMV will issue a CDL without a hazardous materials endorsement or a class C non-commercial driver license.¶¶

(4) The person may request an administrative review of the cancellation of the person's CDL. The issues for the administrative review are limited to whether:¶¶

(a) When required, the person completed and passed a TSA security check as described in section (1) of this rule.¶¶

(b) DMV received a notice from TSA showing the person does not qualify for a hazardous materials endorsement.¶¶

(c) The person is the same person named on the notice.¶¶

(5) An applicant for an Oregon CDL with a hazardous materials endorsement who presents a valid CDL with a hazardous materials endorsement issued by another state must still qualify for an original hazardous materials endorsement as set forth in section (1) of this rule.¶¶

(6) If the person passes a TSA security check within one year from the date the person's CDL with a hazardous materials endorsement was canceled under section (2)(c) of this rule and otherwise qualifies for the CDL and endorsement, DMV will reissue the CDL with a hazardous materials endorsement after payment of a replacement fee. If the cancellation has been in effect for more than one year, the person must reapply for the hazardous materials endorsement as an original endorsement and must take all required tests, pay all required fees and pass the required TSA security check.¶¶

(7) Notwithstanding section (1)(c) and (2)(c) of this rule, a person with a TSA security check that expires between March 1, 2020, and October 29, 2020, receives a single extended TSA security check of 180 days.

Statutory/Other Authority: ~~49 USC sec. 5103a~~, ORS ~~184.616~~, 184.619, 802.010, 807.173, 49 USC sec. 5103a
Statutes/Other Implemented: ORS 807.170, 807.173, 807.350, 809.310