

# JOINING A CONSORTIUM

Note: The use of a consortia does not eliminate your compliance responsibilities under the FMCSA rules. The consortium is your agent; you the employer remain responsible for full compliance.

Implementing your controlled substances use and alcohol misuse program is a significant undertaking. It will involve planning, contracting, administrative, legal, and monitoring efforts, which even some large employers may find among the most complex and demanding elements of their safety programs. Small employers may be more seriously challenged.

One common method of reducing these challenges and their associated costs is the formation of consortia for testing and related services. The term consortium is defined by the FMCSA regulations as including, but not limited to, a group of employers who join together to administer DOT drug and alcohol testing programs. FMCSA encourages all employers to consider the possible business advantages of forming or joining consortia. Moreover, FMCSA requires individual owner/ drivers be in a random pool consisting of two or more persons (382.103(b)).

The regulations allow you to form or to join consortia comprised of employers of any transportation modes subject to DOT alcohol and controlled substances testing regulations.

## ADVANTAGES OF CONSORTIA

Employers that form or join a consortia generally do so for one or more of the following reasons:

Lower costs

Greater expertise

Reduced administrative burden

Lower Costs.

Like all businesses, controlled substances testing laboratories incur overhead costs (e.g., training, recordkeeping, reporting, billing, and other administrative activities) as part of doing business. The same is true of collection sites, BATs, MROs, SAPs. When only a relatively few tests are conducted or a few drivers are evaluated, these costs on a per unit basis can be substantial. When larger numbers of tests are conducted or drivers are evaluated, the overhead costs can be spread over a much larger base, and the per unit costs are minimized as economies of scale are achieved.

In the extreme case, an employer with a low volume of business may have difficulty finding a laboratory to take its business at any reasonable price. For example, when testing services are purchased by small employers, each individual test is likely to cost much more than it would cost a large employer. The per test cost for a large purchaser may be a third or more less than that for a small purchaser.

Consortia allow several small purchasers to combine their service needs and to buy in bulk, thereby realizing substantial savings.

### **Greater Expertise**

The FMCSA and DOT regulations are not simple. Although the regulations were carefully crafted for all employers, experience from earlier FMCSA programs, from other transportation modes, and from other industries indicates that you may experience unusual situations where it is not clear what your responsibilities are under the regulations. The regulations establish minimum standards. Many decisions are left to local management. Typically, management's position will be reflected in your policy statements and your operating procedures. Beyond this, however, neither FMCSA nor any other organization can anticipate every situation that will arise when you implement your program.

Many of the issues left to local option (e.g., number of random pools, when random testing of long distance drivers will occur) can have significant effects on program costs and efficacy and should be carefully considered as you develop your policy. A consortium, particularly one with a professional manager, can help you decide which of the permissible approaches are best for your company.

Regardless of who has responsibility for your controlled substances use and alcohol misuse program, that manager will almost certainly have additional job responsibilities. In the cases of small employers and owner operators, those other responsibilities may be especially varied, and some of them may be quite dissimilar from administering a controlled substances use and alcohol misuse program.

Joining a consortium allows employers to pool resources to hire a professional manager to run the program. Depending upon the size of the consortium, the manager may be full or part time, and his or her salary, as well as consortium expenses, may be recovered through the money saved on expenditures for testing services.

A professional consortium manager does not, for example, have to learn the many laws, regulations, policies, and procedures covering day to day fleet operations. His or her attention need not be diverted by scheduling or equipment maintenance. The manager can devote full attention to the testing regulations and your testing program. He or she can be the expert in this area, and you can be the expert in vehicle movement and maintenance.

### **Reduced Administrative Burden**

The administrative burden of operating programs in compliance with the regulations can be substantial. Procuring services, training employees and program personnel, maintaining chains of custody, and collection equipment and facilities, maintaining the random pool and completing random selection and notification, quality assurance, and recordkeeping and reporting can each be time consuming activities. Taken together, they can be daunting to an employer that wants to operate a first class safety program.

A consortium can assume responsibility for any or all of these activities; and because the services are provided for all employers as a whole, the costs to an individual employer are substantially less than if each employer were to provide these services on its own.

Beyond cost savings and expertise, is practicality. Particularly for small employers, maintaining of a random pool and selecting drivers for random testing can be difficult.

The regulations permit you to develop a consortium that pools the drivers of all consortium members for the purposes of random testing (382.305). As a result, it is easier to test at the required random rates, and there is more uncertainty regarding who will be tested.

Even in larger systems, the consortium approach to managing random selection has an advantage. Random testing has traditionally concerned drivers and their representatives. Some fear that, if an employer wished to target a driver, the employer could manipulate the random process to ensure that the driver was selected repeatedly or at specific times. Delegation of the random selection process to the consortium can minimize employer control and driver concerns.

An employer that employs only himself/herself as a driver must join a random pool consisting of two or more drivers. The FMCSA believes these individuals, by definition, cannot select themselves for a random test. The test therefore cannot be unannounced and the intent of the random testing provisions of the law and regulations cannot be met by individuals who are not members of a random pool consisting of two or more drivers.

Similarly, employers who have only a few drivers must go to extra effort to ensure that random tests are distributed evenly throughout the year as required by regulations (382.305(k)). If an employer must only complete a few random tests, and those tests are completed prior to the end of the year, the employer must complete additional tests that year or make other special accommodations so that no driver may be comfortable that all random testing has been completed for the year. Because of this, small employers not in consortia will likely conduct random testing at effective rates greater than those in the regulations (currently 10 percent for alcohol and 50 percent for controlled substances) (382.305). Because consortia are designed to increase the effective size of small employers, employers who join consortia do not have this problem and their program costs and administrative burden will be reduced.

Using a consortium may distance employers from the actual operation of the testing program; however, employers remain responsible for program actions. Therefore, employers should exercise due diligence in selecting a consortium and monitor performance as appropriate. Employers should consult their attorneys for specific information regarding how a consortium might best be structured and operated to minimize liabilities. As noted before, the use of a consortium does not eliminate your compliance responsibilities under FMCSA rules. The consortium is your agent; you, the employer, remain responsible for full compliance.

## **ADDITIONAL CONSIDERATIONS IN ESTABLISHING CONSORTIA**

Although there are many advantages, particularly for small employers, in establishing consortia, the advantages do entail costs. You should consider the implications of those costs to your organization prior to establishing or joining a consortium. Allowances must be made for

Shared design

Reduced control

Financial considerations

### **Shared Design**

As a consortium is essentially a committee and because compromise is inherent in the nature of all committees, it is possible that you may need to compromise on some of the nonregulated elements of your controlled substances use and alcohol misuse program design. For example, you may join a consortium that has a core of services that comply with FMCSA and DOT regulations. Still, that consortium may not offer other elements (e.g., rehabilitation) that you consider important in your program.

### **Reduced Control**

If you operated your own program, the managers in charge of it would be your managers, and they would operate according to your own policies and procedures under your sole control. This will not be the case in a consortium. As a result, it will be more difficult to make changes in the program, and changes that you do make will take longer than if you operated your own program. Conversely, the consortium may make changes in the program that you do not wish to have made, but may be powerless to avoid.

Your best protection against this reduced control is a sound contract with the consortium. While you still may not be able to make unilateral changes, at a minimum you can ensure compliance with all applicable laws and regulations. You might also limit the ability of the consortium to make changes without your approval, and might provide for your timely withdrawal from the consortium if circumstances warrant.

### **Financial Considerations**

Although the net financial results of a consortium should be to reduce your substance abuse program costs, financial risks exist. Failure of some consortium members to pay their costs may increase the financial burden on other members under some consortium models.

In addition, it is a common practice for consortia to require a membership payment in addition to payments for services as they are delivered. This membership payment may support initial services such as policy development or educational materials. Charging a membership fee is a reasonable and common practice, and in virtually all cases, the membership fee will be less than the initial investment in an in-house program. Nonetheless, the membership fee may be several times the cost of a single controlled substances test, and small employers who anticipate joining consortia should expect the fee and budget accordingly.

### **TYPES OF CONSORTIA**

Consortia arrangements can be made to provide collectively the same types of services as those available through separate or individual contract arrangements (e.g., education and training, specimen collection, laboratory analysis, MRO services). There are a number of models of consortia, each with its own advantages and disadvantages. The following are examples of four such models:

Purchasing cooperative

Separate entity

Managing partner

External management

### **Purchasing Cooperative**

In a purchasing cooperative model, the consortium contracts for services at a volume price to take advantage of large-volume buying power and management efficiencies. Suppliers would deal directly with each employer. This model is analogous to a cooperative formed by a group of small retailers to purchase merchandise at volume discounts. In this case, the cooperative or consortium negotiates terms and conditions with suppliers. The actual orders for and delivery of goods and services, however, are conducted between the individual members and the suppliers.

### **Separate Entity**

If the number of drivers represented by all consortium members is large enough, it may be cost effective to form a separate entity. The consortium hires a manager whose responsibility it is to provide services at the cost of purchasing the services, plus the costs incurred in operating the consortium. An analogous example is a food cooperative. Consumers form cooperatives because they want the highest quality product at the lowest price.

### **Managing Partner**

In this model, smaller employers contract for services with larger employers subject to DOT controlled substances use and alcohol misuse testing regulations (e.g., state DOT, a transit agency, an airline). A large employer that has the staff and resources to service its own controlled substances use and alcohol misuse testing program may also be able to sell surplus staff time to small employers, thereby providing an economic benefit to both. This model is analogous to a limited partnership in which investors pool resources. Usually the investor with the greatest investment becomes the managing partner with the responsibility of managing and making decisions for the partnership.

### **External Management/Third-Party Administrators**

Under this model, employers contract with a company that provides the services desired. The management company should have demonstrated expertise in the transportation substance abuse field. This model is analogous to a pension fund management service or an insurance health benefits

manager. A given management company may operate more than one consortium. External management may be considered both by consortia and by individual employers.

A consortium of organizations with a full time controlled substances use and alcohol misuse program manager provides the members with specialized expertise without each member having to hire its own specialist to run a program. This can often prove cost-effective since it spreads administrative costs over a greater base, while providing greater expertise than any consortium member is likely to have on its staff without additional hiring.

In many cases, establishing a consortium will require forming a legal entity. The consortium would probably operate as a nonprofit corporation. The consortium would have power to conduct business for its members, enter into contracts, and be their legal representative according to a charter and bylaws. A governing board of the members would be responsible for managing the consortium.

Several nationally based third party managers provide "turn key" services for employers and consortia seeking external management. The FMCSA does not recommend specific providers so those companies' names are not listed here. However, most of them are represented at major industry trade shows. These external managers may operate consortia themselves or may facilitate your entry into an existing consortium that they operate or provide services to. In addition, some DHHS approved laboratories operate consortia and provide external management services.

## **THE IMPORTANCE OF YOUR CONSORTIUM CONTRACT**

Regardless of the model of consortium you select, you should realize that you are entering into a contractual relationship, and your interests should be protected. Although you are implementing the regulations through a consortium, you remain responsible to FMCSA for implementing those regulations. This means that if the consortium is implementing some aspect of the program incorrectly, you are implementing it incorrectly and could be subject to fines and penalties. You should exercise due diligence in selecting a consortium and in monitoring consortium operations.

Depending upon your needs and those of other consortium members, you may purchase a variety of required or optional services from the consortium. Also, depending upon how the consortium is structured, you may be required to purchase all services or may only purchase those you require on an as needed basis. A menu of services might include any or all of the following:

Policy development

Program implementation

DHHS certified laboratory specimen analysis

Collection services

Mobile or on site collection services

BAT (breath analysis technician)

EBT (evidentiary breath testing) equipment

SAP (Substance Abuse Professional)

MRO (Medical Review Officer)

Supervisor training

Driver education

Employee Assistance Program alternatives

Consultation services

Random testing pool management selection and administration

Quality control (blind sample) programs for controlled substances testing

Recordkeeping

Federal report preparation

Regardless of the services you obtain from the consortium, however, you must have a written contract with the consortium manager (382.401(c)(6)(i)). The contract should specify the specific services you are purchasing. The price you will pay and how it is calculated, the schedule upon which you will pay, and any discounts to which you may be entitled.

That all services will be delivered in accordance with 49 CFR parts 40 and 382, and other applicable Federal, State and local laws and regulations; that it is the responsibility of the consortium manager to stay current on these requirements; and that the consortium manager will immediately change consortium policies and procedures to comply with changes in laws and regulations. You may agree to renegotiate fees retroactively to the date of the change within 45 days after the change becomes effective if sufficient time is not available prior to the change.

### **The contract term**

Because controlled substances testing prices have fallen steadily, it is probably in your best interest not to negotiate for a term of more than one year unless you have the right to renegotiate price at the end of a year. It is anticipated that initial alcohol testing costs will also decline over several years. Both parties should have the right to break the contract for cause, and you should be able to withdraw on 60 days written notice.

### **Record review**

You should reserve the right to examine consortium facilities, records, and procedures. Review of BAT, urine collection site service records, MRO files, SAP files and laboratory reports may be conducted by an employer official or a third party authorized to access such confidential records and who will hold personal information in confidence.

### **Periodic reporting**

You should require the consortium to provide periodic reports of consortium activities related to your organization. If those services include testing or training, the reports should be in a format analogous to the annual summaries you may be required by FMCSA to submit. The consortium should be responsible for preparing appropriate parts of the MIS report that the employer may be required to submit (382.403).

### **Timeliness requirements**

Since the consortium potentially adds an additional administrative layer to your testing program, you must ensure that it acts expeditiously to avoid negative effects on your drivers or your operations through unnecessary reporting delays. You may wish to negotiate liquidated damages clauses for consortium failures in this area.

### **Quality control requirements**

The consortium should implement appropriate quality control procedures, including blind sample laboratory specimens for controlled substances testing, as required in Part 40.

## **HOW TO EXPLORE CONSORTIA FURTHER**

If you think that a consortium is an option your company should consider, some actions you might take include include the following:

Contact other employers participating in consortia, ask about their experiences, and find out whether their approaches might work for you.

Consider which of the consortium models might best serve your needs. An informed purchasing cooperative may meet the needs of many employers.

### **Separate Entity Model**

If you believe the separate entity model might be best, you have two options: to create or to buy. There may be an existing consortium, perhaps providing testing services to State government or to another transportation mode, that you might join.

Remember, though, other transportation modes subject to their own DOT regulations may have regulatory requirements that differ from those promulgated by FMCSA. For example, over time random testing rates will be adjusted separately for each of the transportation modes, based upon the test



results of the modes' respective industries. Therefore, even though an employer or consortium in another industry may comply with FMCSA regulations today, it may not in the future.

You must ensure that the consortium will comply with the FMCSA regulations in all respects. In addition, if the existing consortium does not provide all required services, you must make separate arrangements for those services. Your system might provide them internally or purchase them elsewhere.

Forming your own consortium from scratch might be the best approach for ensuring that the consortium will be fully compliant with FMCSA regulations. If you pursue this model, you will need to identify other employers interested in participating. Your personal network, statewide industry association, or State department of transportation may be useful in identifying other interested employers, just as they might be useful in helping you identify existing consortia that you might choose to join.

### **Managing Partner Model**

If you are a small employer with a neighboring large employer, this may be a particularly attractive model. Contact the large employer to determine how that operator is implementing the controlled substances use and alcohol misuse regulations. Large employers may have had their own programs for many years. They may be able to accommodate your needs fairly effortlessly and inexpensively.

### **External Management Model**

This model is really a subcategory of the other models. Each of the other models might be internally or externally managed. Indeed, even in the absence of a consortium, an individual employer might choose to contract out the management of its controlled substances use and alcohol misuse program. Several national and regional management companies provide services of varying quality in this area. Some are excellent and may provide you with a better program than you could operate on your own. Others may leave you out of compliance with the FMCSA regulations and subject to fines and penalties. The experience of other employers, particularly those employing CDL holders, will be your best guide. As you select a management company, remember to check references thoroughly and to employ a detailed written contract specifying your requirements.

Courtesy of

**Federal Motor Carrier Safety Administration**

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