FTA Drug and Alcohol
REGULATION UPDATES
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Issue 78

# DOT Publishes Final Rule

On May 2, 2023, DOT published a final rule that, among other items, authorizes employers to use oral fluid drug testing as an alternative testing methodology to urine drug testing. Although the final rule is effective June 1, 2023, DOT oral fluid testing cannot be implemented until the Department of Health and Human Services (HHS) certifies at least two laboratories for oral fluid testing, which has not yet been done. For more information, view the rule.

# Conference Success in San Diego!

The 16th Annual FTA Drug and Alcohol Program National Conference, held in San Diego, CA, on March 14-16, 2023, was well received by the approximately 600 in-person attendees and an additional 450 virtual participants. Iyon Rosario, FTA Senior Drug and Alcohol Program Manager, delivered the welcome statement and introduced Dr. Melanie Barrington, Director of the Office of Safety Review in the FTA Office of Transit Safety and Oversight (TSO), who delivered opening remarks. Patrice Kelly, from the Office of the Secretary (OST), Office of Drug and Alcohol Policy and Compliance (ODAPC), provided the keynote address. Ms. Kelly discussed recent updates to the DOT rule, 49 CFR Part 40, the required procedures for conducting workplace drug and alcohol testing for the federally regulated transportation industry.

The conference offered 20 additional breakout sessions, with several sessions streamed to a virtual audience. The variety of topics provided participants the opportunity to choose sessions based on the individual needs of their employers and their own level of expertise. In-person and virtual participants were encouraged to interact with peers and speakers via the Whova conference app. Additionally, in-person participants were able to have candid conversations and ask questions of Iyon Rosario, Patrice Kelly, the FTA Drug and Alcohol Audit team, the FTA Drug and Alcohol Project Office staff, and various other industry experts including Medical Review Officers (MROs), Substance Abuse Professionals (SAPs), and Transportation Safety Institute (TSI) instructors.

Thank you to all who attended and contributed to the success of the 16th Annual FTA Drug and Alcohol Program National conference. We look forward to planning the next year's conference and hope you can join us!

Presentations from the conference are available on the FTA Drug and Alcohol Program webpage.

## In this Issue



U.S. Department of Transportation
Federal Transit Administration

# Contractor and Subrecipient Compliance

Grantees are required to ensure their covered contractors and subrecipients comply with FTA's drug and alcohol testing regulation, per 49 CFR § 655.81.

Many grantees review the annual Management Information System (MIS) reports submitted by each employer as part of their oversight effort. Such grantees look for unusual or unexpected testing information and then promptly contact the relevant employer to ask for clarification.

Proactive grantees often have each applicable contractor/ subrecipient submit testing summaries at regular intervals throughout the year, perhaps matching the frequency with each random testing selection list that is generated. These summaries can be prepared by the contractor/ subrecipient, or, if a Third Pary Administrator (TPA) is used, they may be transmitted directly to the grantee for review. This kind of periodic assessment allows grantees to identify potential compliance issues as they occur and helps to ensure drug and alcohol programs are well run throughout each year.

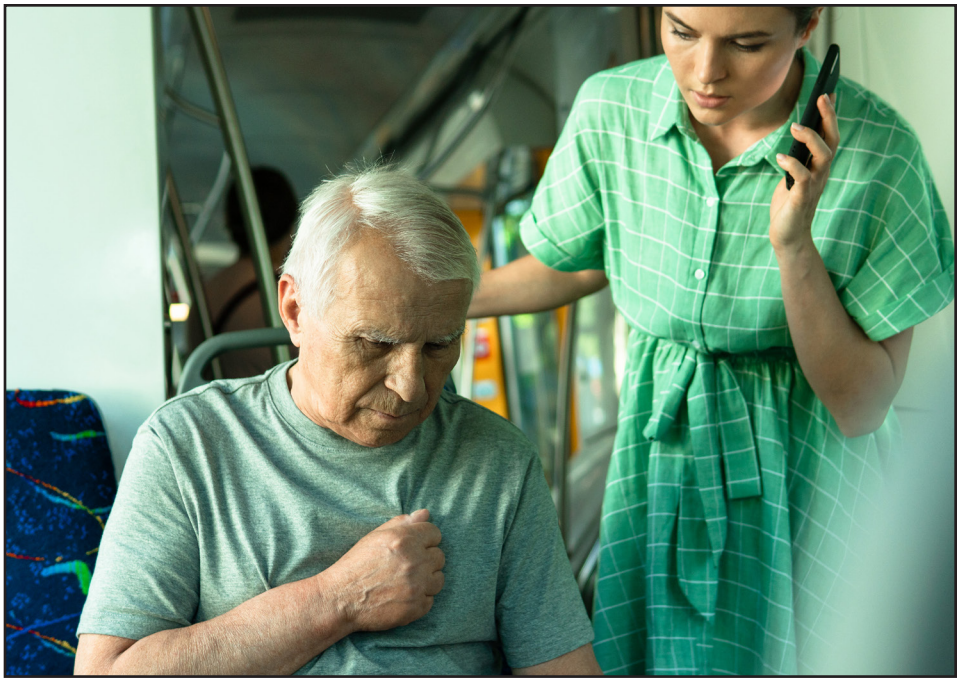
Other oversight suggestions for grantees include visiting and assessing a contractor's/ subrecipient's collection site, sharing training resources, providing contractors with compliant forms (e.g., post-accident decision-making form, notification form, or reasonable suspicion form), or helping to resolve challenges to test results.

# FTA Post-Accident Tests When a Medical Emergency or Slip and Fall Occurs

It is a common misconception that a medical emergency, such as a heart attack, stroke, or seizure, occurring on a covered vehicle would trigger an FTA post-accident test. It is important to remember that an FTA post-accident test would only be performed if an accident as defined by FTA has occurred.

FTA defines an accident under 49 CFR § 655.4 as an "occurrence associated with the operation of a vehicle" resulting in a fatality, injury requiring immediate treatment away from the scene, disabling damage to any involved vehicle, or the removal of a rail car, trolley car, trolley bus, or vessel from operation. The types of medical emergencies noted in the paragraph above are not associated with the operation of the vehicle and therefore an FTA post-accident test must not be conducted.

As stated in Issue 48 of the Regulation Updates Newsletter, each slip and fall incident should be evaluated on the information available at the scene, and the employer must decide if the slip and fall was associated with the operation of the vehicle. If the accident investigation reveals the operation of the vehicle did not cause the slip and fall, an accident has not occurred and no FTA post-accident testing is conducted.



# An Employee Who States They Cannot Provide a Sufficient Specimen Must Still Follow Shy Bladder Process

When an employee states they are unable to provide a urine specimen, for any reason, the collector must still require that employee to attempt to provide a specimen. If after the initial attempt, the employee is unable to provide a sufficient urine specimen (i.e., 45mL of urine), the collector must follow the "shy bladder" procedures described in 49 CFR § 40.193.

In some cases, the employee may have a permanent or long-term disability that precludes them from providing a sufficient urine specimen. In these cases, the employee remains subject to FTA-required testing (e.g., random testing). When notified, the employee must proceed to the collection site, attempt to provide a specimen, and must sit out the three-hour "shy bladder" period like any other employee. While this may be inconvenient, the employer (through the MRO) must verify at each testing event that the donor remains physically unable to produce a sufficient specimen.

## Service Agents Must Not Act as Intermediaries in the Transmission of Alcohol Test Results of 0.02 or Higher

49 CFR § 40.255(a) requires the breath alcohol technician (BAT) to immediately notify the designated employer representative (DER) of any confirmation alcohol test result of 0.02 or greater. The notification must be in a confidential manner and must be conducted by any means that ensures the DER receives the result immediately (e.g., by phone). The alcohol confirmation test result of 0.02 or greater may not be transmitted through a TPA or other service agent.

## 1:1 Sessions Available

The FTA Drug and Alcohol Project Office is now offering scheduled 30-minute sessions with a member of the FTA Drug and Alcohol Project team for discussion or training on a specific topic. Sessions may be one-on-one or you may have multiple members of your staff participate. By scheduling a session, you will be able to ask specific questions of the FTA Drug and Alcohol team to help you build and maintain a compliant drug and alcohol program at your organization. These sessions also offer you the opportunity to get real-time feedback on your program as well as guidance for specific scenarios.

To schedule a session, please email fta.damis@dot.gov with your availability and what you would like to discuss.

# Contractors File Their Own MIS Reports

All contracted employers with employees performing safety-sensitive functions must submit their own MIS report. A grantee contracting out safety-sensitive work cannot include contracted employees in the grantee's own MIS data. Likewise, a contractor who sub-contracts out safety-sensitive work cannot group employees from multiple employers into a single MIS report.

Just like other safety-sensitive service providers, armed security firms must file their own MIS reports. The grantee, or another contracting employer, is not allowed to report armed security guards on their own MIS report if those guards are employed by a contracted security firm.

The requirement for individual MIS reports for each contracted employer remains true even if the contracting employer manages some or all aspects of the contracted employer's testing program. For example, a transit agency may fully manage the random testing program for an armed security contractor. Those random tests, however, must still be recorded on the security firm's own MIS report.

# No Direct Observation, but Initial Test is Positive

49 CFR § 40.67(n) requires an employer who learns that a collection should have been directly observed but was not, to direct the employee to go for an immediate recollection under direct observation. However, if prior to sending the employee for the recollection, the employer is notified by the MRO that the initial collection resulted in a verified positive result or of a refusal to test (e.g., the specimen was substituted or adulterated), the recollection would not be necessary. If the recollection was somehow performed, the result of record would be the verified positive or refusal from the initial collection.

# What Do I Do if My Covered Employee has a DUI on Private Time?

In the event an employee is arrested and/or convicted of driving under the influence (DUI) while operating their privately-owned vehicle, the employment consequences, if any, are given under the employer's own authority. The employer is not allowed to conduct any DOT testing based solely on the DUI arrest/conviction. If the employee is suspended from performing safety-sensitive functions and is removed from the random testing pool for a period of 90 or more days, the employee must take a DOT pre-employment drug test with a verified negative result prior to resuming safety-sensitive functions.

# Records Maintained by a TPA Must be Accessible for Minimum Retention Periods

49 CFR § 655.71 specifies which records covered employers are required to maintain, and for how long. DOT regulations allow drug and alcohol program records to be received and maintained by a service agent, such as a TPA. Many employers have access to their TPA's secure portal, where they can view their drug and alcohol testing records. If records are maintained by a TPA, employers must ensure they have access to all records for the minimum retention periods defined in the FTA regulations. Employers are reminded that when storing records electronically, they must be easily accessible, legible, and formatted and stored in an organized manner.

# Preparing Records for an Upcoming Audit

A critical component of FTA's drug and alcohol compliance audits is a comprehensive review of testing records and related documentation. About a week before each audit, the audit's team leader will distribute lists of specific testing events that have been selected for examination. These lists are organized by test type (pre-employment, random, post-accident, etc.).

For the on-site records review portion of the audit, the employer must present paper copies of the full testing record for all selected testing events. To facilitate an efficient audit, it is critical that the testing records be pulled/printed and organized prior to the audit team's arrival.

For all test types, the employer will be instructed to present applicable Custody and Control Forms, MRO-verified results, and Alcohol Testing Forms. Additional documentation requests for each testing record will vary based on the test type. For example, previous employer drug and alcohol checks will be requested for pre-employment testing events. The list below provides additional examples of associated documents to be presented with selected testing events. Note that this list is not comprehensive.

- *Random*: original random selection lists
- *Post-accident*: full accident report
- *Reasonable Suspicion*: supervisor's reasonable suspicion report
- *Positive & Refusals*: documentation of SAP referral
- *Return-to-Duty & Follow-up*: SAP reports and follow-up testing plan

## Drug and Alcohol Substance Abuse Trainings Available

The FTA Drug and Alcohol Project Office continues to offer in-person, full-day Substance Abuse Training Seminars at no cost to your organization. There are also virtual trainings available, including half-day versions of the Substance Abuse Training sessions and 90-minute special topic seminars, covering such issues as MIS Reporting, Random Pools and Selections, and Post-Accident Scenarios. To view upcoming sessions please visit our training page. To inquire about a special topic session, please email fta.damis@dot.gov.

### The Transportation Safety Institute (TSI) Training Schedule

FTA's strategic training partner, TSI, will offer the following upcoming courses:

**Substance Abuse Management and Program Compliance**. This three-day course for DAPMs and DERs will show how to evaluate and self-assess an agency's substance abuse program and its compliance with FTA regulations.

**Reasonable Suspicion and Post-Accident Testing Determination.** This half-day seminar is designed to educate participants on DOT/FTA regulations requiring drug and alcohol testing of safety-sensitive transit workers. The focus will be on specific training requirements for those employees (e.g., dispatchers, supervisors, managers, etc.) who will be making the determination of when to administer reasonable suspicion and post-accident drug and/or alcohol tests for safety-sensitive employees. This seminar meets and exceeds the requirements under 49 CFR § 655.14(b)(2).

There is a small attendance/materials fee. For more information, please call (405) 954-3682. To register, go to: http://www.tsi.dot.gov.

# MIS CDL/Non-Revenue Vehicle Category is Not for Supervisors with CDLs

One of the five safety-sensitive functions defined in 49 CFR § 655.4 is "operating a non-revenue service vehicle, when required to be operated by a holder of a Commercial Driver's License (CDL)." When designating an employee as safety-sensitive, and when completing the annual MIS report, employers must be aware of the distinctions of this safety-sensitive function or 'employee category.' Employees in this category must drive a non-revenue service vehicle that requires a CDL holder to legally operate. The non-revenue service vehicle must also be used in connection with keeping revenue vehicles in service. A tow truck or snowplow, when required to be operated by a CDL holder, is an example of such a vehicle. A common error is to include supervisors who may hold a CDL and who operate employer-owned sedans or SUVs, in this employee category. As these supervisor vehicles do not generally require a CDL to operate, it is inappropriate to consider driving these vehicles a safety-sensitive function.

# Random Selections Must be Provided Timely to Ensure Testing at the Beginning of the Testing Period

Selections for random testing must be conducted at least quarterly, although some employers may choose to make selections more frequently. Prior to each random testing period, the random pool must be updated to ensure the selections are made from a current roster of covered employees. Some employers use a TPA to generate their random selection list. Many of these employers often do not get their random selection list until after the testing period has commenced. As a result, no random tests can be performed during the first part of the testing period, creating predictable gaps in the random testing program. To support the deterrent effect of random testing, covered employees must have a reasonable expectation that they may be tested for drugs anytime they are on duty, and tested for alcohol just before, during, or just after the performance of safety-sensitive functions. To accomplish this, employers must ensure they are provided with the random selections at the beginning of the testing period so random tests can be scheduled in an unpredictable manner.

# Collection Services Must Be Available During All Hours When Safety-Sensitive Functions Are Performed

FTA auditors sometimes find that employers do not have procedures in place to conduct DOT drug and alcohol testing outside of normal business hours, or that after-hours collections can occur only in reasonable suspicion and post-accident testing situations. In 49 CFR § 655.45(g), FTA requires covered employers to conduct DOT testing at all times of day when safety-sensitive functions are performed. To meet this requirement, employers must ensure arrangements are made so collection services are available during all hours when employees perform safety-sensitive functions.

# Understanding "Shy Lung" Cases

Covered employers should be familiar with the "shy lung" process outlined in 49 CFR § 40.265. This process addresses situations where a covered employee does not provide a sufficient breath specimen during an alcohol test. In these cases, the breath alcohol technician will offer the employee multiple attempts to provide a specimen. If the technician is ultimately unable to obtain an adequate volume of breath, they must discontinue the process, make a remark on the testing form, and immediately notify the employer.

The "shy lung" process differs significantly from DOT's "shy bladder" process for urine tests, which many employers are familiar with given its relative frequency. In the "shy bladder" process, the employee must be evaluated by a physician who is acceptable to the MRO. After that evaluation, the MRO – and only the MRO – decides whether the employee's inability to provide a urine specimen is valid.

The MRO is never involved in alcohol testing and thus does not oversee the "shy lung" process. In these cases, it is up to the employer to ensure that the employee is evaluated by a suitable physician to determine if there is a legitimate reason for their inability to provide an adequate breath sample. This physician must be acceptable to the employer and should have relevant experience and expertise. If the physician, after reviewing the case and evaluating the employee, determines there is a legitimate reason for the employee's "shy lung," they must then provide the employer with a signed statement to that effect. The test is then cancelled.

If the physician is unable to determine that a medical condition could have prevented the employee from providing the sample, they must provide a signed statement to that effect. This is a refusal to test. The employer must immediately remove the employee from safety-sensitive duties and provide contact information for qualified SAPs. Only the evaluating physician may make this refusal determination – it is not made by the employer or by the MRO.

For a list of the specific information and instructions employers must provide to the physician who will be evaluating a "shy lung" case, see 49 CFR § 40.265(c)(1). For more on who is the decision maker in various DOT refusal-to-test scenarios, see pages 25 to 28 of ODAPC's "What Employers Need to Know about DOT Drug and Alcohol Testing."


***Regulation Updates***

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# SAPs Not Allowed for Non-DOT Violations

An employee who self-refers or tests positive on a non-DOT drug or alcohol test must not be referred to a SAP. 'SAP' is a DOT-specific term describing a person who evaluates employees who have violated a DOT drug and alcohol regulation. Instead, an employee who self-refers or tests positive on a non-DOT test should be referred to the employer's Employee Assistance Program (EAP) or a similar external service.