

## Information Release: Lawsuits, Grievances, and Unemployment and Worker's Compensation Proceedings

All employers are required to maintain records of their drug and alcohol testing program consistent with the provisions set forth in 49 CFR Part 655.71 and Part 40, Subpart P. Employers are prohibited from releasing information pertaining to a covered employee including individual test results or medical information about an employee to any person or organization without the employee's specific written consent unless specifically authorized by the regulation. One area of confusion revolves around when information can be released in response to lawsuits initiated by the employee, lawsuits initiated by third parties, grievances, unemployment compensation proceedings, and worker's compensation claim investigations.



Lawsuits Initiated by the Employee (e.g., wrongful discharge, harassment, discrimination)—Employers and service agents are allowed to release information

regarding the employee's drug and alcohol test results without the employee's written consent if the test results are relevant to the

*(Continued on page 2)*

## Using SAP Networks and Brokerages

An employee who violates a DOT drug and alcohol rule must complete the Substance Abuse Professional (SAP) return-to-duty process before resuming a safety-sensitive function for any covered employer, per 40.285(a). While FTA-regulated employers commonly refer employees directly to local SAPs, it is also acceptable to refer them to a regional or national SAP network or brokerage. A SAP network/brokerage is a third-party service agent that maintains a list of SAPs, and assists employees and employers in finding and working with a

SAP (see page 15 of ODAPC's Substance Abuse Professional Guidelines).

When a network or brokerage is used, it is critical to remember the network/brokerage must refer the employee to qualified SAPs, just as the employer would. While the network/brokerage may employ a case manager to help coordinate the process, this person may never stand in the shoes of the SAP. Specifically, this means:

- Network/brokerage personnel may not influence the SAP's evaluation and recommendations; the SAP must function independently.

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U.S. Department of Transportation  
Federal Transit Administration

# Information Release: Lawsuits, Grievances, and Unemployment and Worker's Compensation Proceedings (Continued from cover)

case. Information may only be released to parties to the suit.

Lawsuits Initiated by Third Parties (e.g., accident victims)—Employers and service agents may release test information in a criminal or civil action when a court of competent jurisdiction determines the information applies to the case and issues an order directing the employer to produce the information. The employer may release the information only with a binding stipulation noting the decision maker to whom it is released will make it available only to parties to the proceeding. Information cannot be

released to law enforcement agencies or others during initial fact-finding or initial investigation procedures prior to receipt of the court order.

Grievances—Union representatives may not have access to employee drug or alcohol test results without the written consent of the employee. However, employers and service agents may disclose information to an arbitrator if the employee files a grievance going to arbitration.

Worker's Compensation and Unemployment Compensation Hearings—Employers and service agents are permitted

to disclose drug and alcohol test results any time an employee files an unemployment or worker's compensation claim to receive benefits when the drug or alcohol test results are pertinent to the proceeding. The information may only be released to the decision maker in the proceeding.

Any time an employer or service agent releases information to a third party without the employee's specific written consent, the employer or service agent must immediately notify the employee in writing of the release. ●

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## Correct MRO Information on Forms

On May 28, 2014, the National Laboratory Certification Program (NLCP) issued a notice addressing incorrect Medical Review Officer (MRO) information on Federal Custody and Control Forms (CCFs) used for drug tests. Per §40.45(c)(2), Step 1, Part B, of the CCF requires the MRO's name, address, phone, and fax numbers to be correctly identified as part of each collection, and is usually preprinted at the laboratory before it is sent to the employer or collection site.

NLCP inspectors observed that information on a specimen's CCF and the corresponding electronic test result sometimes contain differing MRO information. Per NLCP's notice, when such a discrepancy

exists, the laboratory itself must verify the MRO's information in its own computer system. It must then ensure the collection site has the correct information. Additionally, the laboratories must also ensure their clients (covered employers) receive new CCFs containing accurate and valid contact information in Step 1, Part B.

The notice states that "it is incumbent upon the laboratory to be proactive and take steps to prevent the use of outdated information which may lead to a violation of donor confidentiality." NLCP acknowledges that this may involve substantial reprinting by the laboratories, but the importance of correct information out-

weighs the potential burden on HHS-certified labs.

This mandate is important to employers as the personal information of donors (your employees) may be inadvertently distributed to the wrong individuals if Step 1, Part B, is not completed correctly. An additional concern with incorrect MRO information is an employee may be unaware of who is authorized to contact them to discuss their test results.

As an employer, if you discover incorrect MRO information on your testing forms, immediately contact your testing laboratory and require a new supply of accurate CCFs. ●

## Important Announcement!



Ilyon Rosario has been named the Program Manager for the FTA Drug and Alcohol Program! Ilyon had been Acting Program Manager since March of 2013 but her position became official in July of 2014. Congratulations Ilyon!

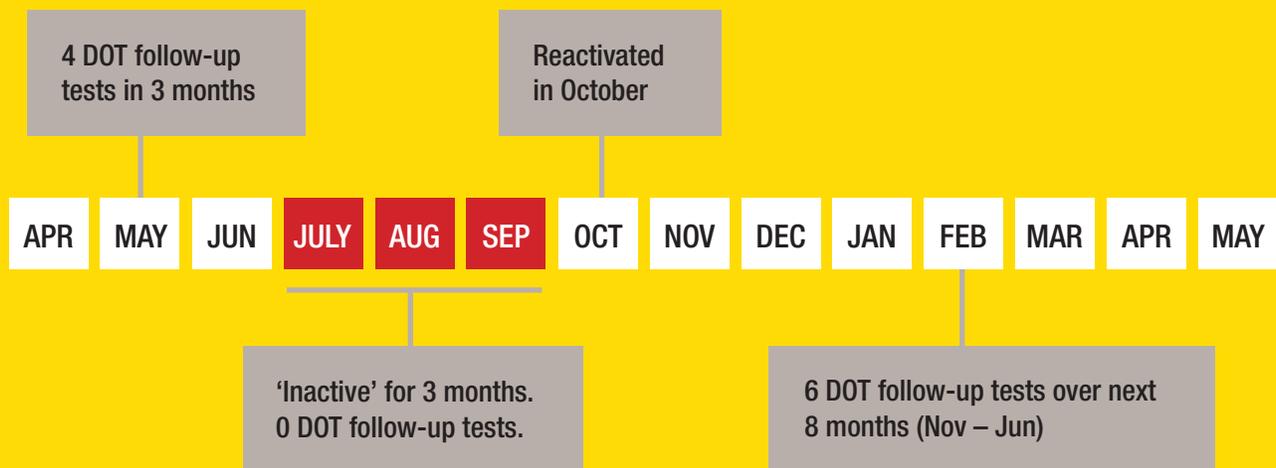
# Follow-up Testing and Extended Absences

Employers with “second chance” programs are often puzzled about how to properly administer follow-up testing when an employee is absent for extended periods. In those instances when the employee takes a leave of absence, the employer must pause follow-up testing until safety-sensitive duties are resumed, per §40.307(e).

Consider a seasonal employee who works for three months and takes the first four of ten follow-up tests required by the follow-up testing plan. The employee is on inactive status and is activated three months later. The employer must distribute the remaining six follow-up tests over the next nine working months, as opposed to six calendar months.

Because of the requirement to pause testing during those times when the employee is inactive, the maximum 60-month duration of follow-up testing may sometimes extend beyond five calendar years. ●

**Follow-up testing plan = 10 DOT follow-up tests in first 12 months.**



## Annual MIS Reporting

**Reminder!** Drug and Alcohol Management Information System (DAMIS) packages will be sent out in late December for 2014 annual reporting. Reports are due March 15th, 2015, and online reporting will open January

1, 2015 at <https://damis.dot.gov>. New user names and passwords for Federal Transit Administration (FTA) Grantees will be included in the reporting packages. If you are an FTA Grantee and do not receive your reporting package by January 7th, please

contact the FTA Drug and Alcohol Project Office at [fta.damis@dot.gov](mailto:fta.damis@dot.gov) or **617-494-6336**.

Please note: user names and passwords change each year. ●

# Reading the Temperature Strip—Doing it Right

A critical component of the specimen collection process is checking the temperature of the specimen to ensure it is within the acceptable range of 90.0° and 100°F. If the specimen is outside the acceptable temperature range, the collector is to immediately begin a new collection under direct observation. Even though collectors trained to perform DOT collections should be aware of this requirement, observations and interviews with numerous collectors indicate they have not been trained in how to read the temperature strip on the collection cup.

The collection kit used to collect the specimen has been standardized and the specifications are defined in Appendix A of Part 40. The collection kit includes a single-use collection cup made of plastic and large enough to easily catch and hold at least 55 mL of urine. The cups must have graduated volume markings clearly noting levels of 45 mL and above. The cups must have a temperature strip attached to provide temperature readings

between 90° and 100°F. The temperature strips used have circular dots at the 90°, 92°, 94°, 96°, 98°, and 100° marks. If the dot is green in color, the temperature immediately above the dot is the tempera-

## **The collection kit used to collect the specimen has been standardized and the specifications are defined in Appendix A of Part 40.**

ture of the specimen. If the dot color is tan, the temperature is 1 degree less than the temperature immediately above the dot. A temperature strip with a green dot at 94° is 94°, but a temperature strip with a tan dot at 94° is actually 93°. Knowing how to read a temperature tape especially at the 90° dot is critical as a tan dot at 90° is actually 89° and out of the acceptable

temperature range. A temperature strip with no green or brown dots also indicates the temperature is out of range.

Collectors should also be aware occasionally a temperature strip may not be activated and provide no reading. If this is the case, the collector has the responsibility (49 CFR Part 40.205) to take corrective action. In this case, the collector may pour the specimen into another collection cup to obtain a temperature reading or attach another temperature strip (provided by the manufacturer of the original cup) to the outside of the collection cup to obtain a reading. Additionally, some donors have been known to attach fake temperature strips with acceptable readings (available online) over the top of the actual temperature strip in an attempt to mislead the collector. If a collector notices the temperature reading is not consistent with the level of warmth expected when the collector handles the specimen, the collector can pour the specimen into another collection cup or use another temperature strip to verify the temperature. ●

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## Blind Specimens Required for Large Employers and Consortia

A blind specimen is a specimen submitted to a laboratory for quality control testing purposes with a fictitious identifier so that the laboratory cannot distinguish it from an employee specimen. Employers and Consortia with an aggregate of 2,000 or more DOT-covered-employees must send blind specimens to the laboratories

they use. Any laboratory to which the employer or consortia send 100 or more specimens per year must be sent blind specimens. A number equivalent to 1 percent of the specimens sent to that individual laboratory must be transmitted to the lab, up to a maximum of 50 specimens per quarter. Blind specimens must be spread

evenly through the calendar year. These requirements apply to consortia as well as employers. Specific numbers of negative, positive, adulterated or substituted blind specimens must be sent and certified by the supplier. For additional information, view 49 CFR Part 40.103. ●

# Common Collection Site Errors



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FTA has compiled a list of the most frequent procedural errors performed by collectors during DOT-regulated drug tests from reviews of over 600 collection sites nationwide. The list begins with the most common error and provides the percentage of sites that made a particular error.

- 1.** Collectors do not explain testing procedures to donors as the collection begins (74%), such as showing donors the instructions on the back of the Chain of Custody Form (CCF). Collection sites are also permitted to reproduce the back of the form and post it in the collection area.
- 2.** Collectors complete Step 4 of the CCF before donors are instructed to fill out Step 5 (69%). Thus, collectors are prematurely certifying that Step 5 has been completed, effectively providing false statements.
- 3.** Donors are instructed to write the date on the bottle seals in Step 3 (55%). Collectors, not donors, are required to complete this step.
- 4.** Enclosures are not fully secured and contain areas to conceal paraphernalia, adulterants such as cleaning supplies, or even specimens from previous donors (44%). This is one of the most serious infractions within the program.
- 5.** Donors are not instructed to empty their pockets before entering an enclosure (38%). Requiring pockets to be emptied protects against donors using unauthorized materials.
- 6.** Collectors do not put bluing in the toilet (32%). Bluing prevents donors from using clear water to dilute their specimen or to reconstitute a synthetic urine specimen.
- 7.** Donors are not required to wash their hands before the collection begins (32%).
- 8.** Collectors do not check the enclosure before the collection begins (30%). Checking the enclosure before the collection secures potential concealment areas and removes potential adulterants. It also protects donors from accusations of interference since existing materials or paraphernalia secreted in by a previous donor will not be regarded as having been left by the current donor.
- 9.** Donors are not required to remove their outer garments before entering the enclosure (28%). Removing outer garments like jackets or other loose-fitting outer clothing protects against donors using unauthorized materials.
- 10.** Donors are instructed to initial the bottle seals (Step 3) while the seals are still affixed to the CCF (23%). Each step in the chain of custody process is critical in maintaining the integrity and defensibility of the test. The seals are not to be completed until they are attached to the bottles, indicating that both the collector and the donor agree that the specimen within the bottle belongs to the donor.
- 11.** Donors are not allowed to keep their wallet or cash when emptying their pockets (21%). This step protects both the donor and the collector from accusations of theft or risk of loss.
- 12.** Collectors do not check what donors write in Step 5 (20%). Errors can include inaccurate or transposed dates or omitted names or signatures.

Because these steps are specific requirements of 49 CFR Part 40, collectors who do not follow them jeopardize the integrity of the tests and endanger the efficacy of employers' drug testing programs. It is important to speak to your collection site and verify that not only are these steps understood, but that they are correctly performed. ●

## FTA Drug and Alcohol Training Available

FTA will be sponsoring upcoming training sessions to provide essential information to facilitate covered employers' compliance with the drug and alcohol testing regulations (49 CFR Part 655 and Part 40). These free, one-day trainings are available on a first-come, first-serve basis. The schedule for these trainings will be coming out shortly and will be posted on the website below as they are scheduled.

<http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training>

If you are interested in hosting a one-day training session, contact the FTA Drug and Alcohol Project Office at [fta.damis@dot.gov](mailto:fta.damis@dot.gov) or **(617) 494-6336** for more information.

### The Transportation Safety Institute Training Schedule

FTA's strategic training partner, the **Transportation Safety Institute (TSI)** will offer the following upcoming courses:

- Substance Abuse Management and Program Compliance. This 2½-day course for DAPMs and DERs shows how to evaluate and self-assess an agency's substance abuse program and its compliance with FTA regulations.
- Reasonable Suspicion Determination for Supervisors. This half-day seminar educates supervisors about the FTA and DOT regulations requiring drug and alcohol testing of safety-sensitive transit workers, and how to determine when to administer reasonable suspicion drug and/or alcohol tests.

There is a small attendance/materials fee. For more information, please call **(405) 954-3682**.

To register, go to: <http://www.tsi.dot.gov> or <http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training>.

## Using SAP Networks and Brokerages (Continued from cover)

- Network/brokerage personnel may not determine the employee's compliance with the SAP's treatment/education requirements.
- The network/brokerage may not interfere in the SAP's ability to communicate personally with and directly receive documentation from the employee's treatment/education provider(s).
- The network/brokerage may not dictate the employee's follow-up testing plan (i.e., the type, number, and frequency of tests).

Additionally, the network/brokerage may never substitute its own letterhead for the SAP's professional letterhead, or

require that the SAP do so. Per page 18 of the Substance Abuse Professional Guidelines:

“What the DOT wants to avoid is a SAP network provider requiring the SAP to use the provider's letterhead rather than that of the SAP. The DOT also wants to avoid another service agent that contracts the SAP's services to require the contracted SAP to use the service agent's letterhead. There should be no appearance that anyone changed the SAP's recommendations or that the SAP's report failed to go directly from the SAP to the employer. In addition, DOT wants to ensure that an employer and

DOT agency representatives can readily contact the SAP at the address listed on the letterhead.”

Similarly, the network/brokerage may not act as the intermediary in the transmission of the SAP's reports to the employer (unless the employee is an owner/operator, in which case the SAP may send reports to the owner/operator's consortium/third-party administrator). Section 40.311(a) states: “As the SAP conducting the required evaluations, you must send the written reports required by this section in writing directly to the DER and not to a third party or entity for forwarding to the DER.” ●

# Reminder to Medical Review Officers (MROs) Verifying an Employee's Prescription

As a reminder, when a donor provides a prescription for a non-negative laboratory test result, as the MRO, you are responsible for determining whether the medical explanation is legitimate.

In your role as the “gatekeeper” in this process, you must review and take all reasonable and necessary steps to verify the authenticity of all medical records the employee provides (see 49 CFR Section 40.141(b)). For example:

- Call the pharmacy to verify the legitimacy of the prescription; and
- Call the donor's treating physician if you have suspicions or questions.

In accordance with 49 CFR Sections 40.137(c), 40.139(b), and 40.145(e), the donor has the burden of proof that a legitimate medical explanation exists. The donor must present information meeting this burden at the time of the verification interview. You may extend the time available for the donor to present the information for up to 5 days. If the donor fails to provide the information you have requested (e.g., does not produce a prescription or does not



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facilitate the treating physician's contact with you), you may proceed in making your determination.

Any time you make the determination to verify a laboratory positive result negative because of a legitimate medical explanation, you may have a responsibility to raise fitness-for-duty considerations in accordance with 49 CFR Section 40.137(e) (4) and 40.327. In raising these concerns, you are only authorized to provide infor-

mation learned through your verification interview with the employee's employer, a physician or health care provider responsible for determining the employee's medical qualifications under a DOT agency's safety regulations, a Substance Abuse Professional (SAP) evaluating the employee as part of the return to duty process, a DOT agency, or with the National Transportation Safety Board during the course of an accident investigation. ●

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## Must Show the Backs of the Forms

Immediately after providing positive identification but before requiring the employee to complete step 2 of the Alcohol Testing Form (ATF) or remove outer clothing, Part 40 requires the Breath Alcohol Technician (BAT)/Screening Test Technician (STT) or collector to show the

employee the instructions on the back of the ATF or Custody and Control Form (CCF), respectively, for an alcohol screening test or urine collection. Showing the back of these forms is part of the regulatory requirement specified at 40.241(e) and 40.61(e) to have the BAT/ STT and collector explain the testing process. Showing

the back of the form allows the employee the option of reading the steps as the BAT/STT and urine collector explain verbally. The instructions referred to are present only on the backs of Copy 3 (Alcohol Technician Copy) of the ATF and Copy 5 (Donor Copy) of the CCF. ●

# Shy Bladder—the Three-Hour Period

In a shy bladder scenario, 49 CFR Part 40.193 allows an employee “up to three hours” to provide a sufficient urine specimen, following the first unsuccessful attempt. The collector must inform

limit and holds true even if, within the three hours, a testing event occurs which requires the donor to supply an additional specimen. There is no additional three-hour time period provided, nor is any time

time and an end time. An hour into the three-hour period, the employee provides a specimen with temperature out of range. The collector orders an immediate collection under direct observation and requires that

**The collector must inform the employee of the time at which the three-hour period begins and the time the three-hour period ends.**

the employee attempt to provide a specimen. The employee does not provide a specimen under direct observation procedures. The employee is not provided an additional three-hour period in which to provide the directly observed specimen, the end time is still the original end time, three hours from the first unsuccessful attempt. If the original end time from the first unsuccessful attempt is reached and a sufficient specimen has not been provided then the collection is discontinued. ●



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the employee of the time at which the three-hour period begins and the time the three-hour period ends. In addition, 40.193 requires the collector to “discontinue the collection,” if the donor has not provided a sufficient specimen within those three hours. The three-hour period is a strict

added to the remainder of the original three-hour period. The original three-hour end time is adhered to.

For example, an employee does not provide a sufficient specimen and is allowed three-hours to provide a sufficient specimen. The employee is provided with a start

## 10th Annual National Conference Registration Online Now!

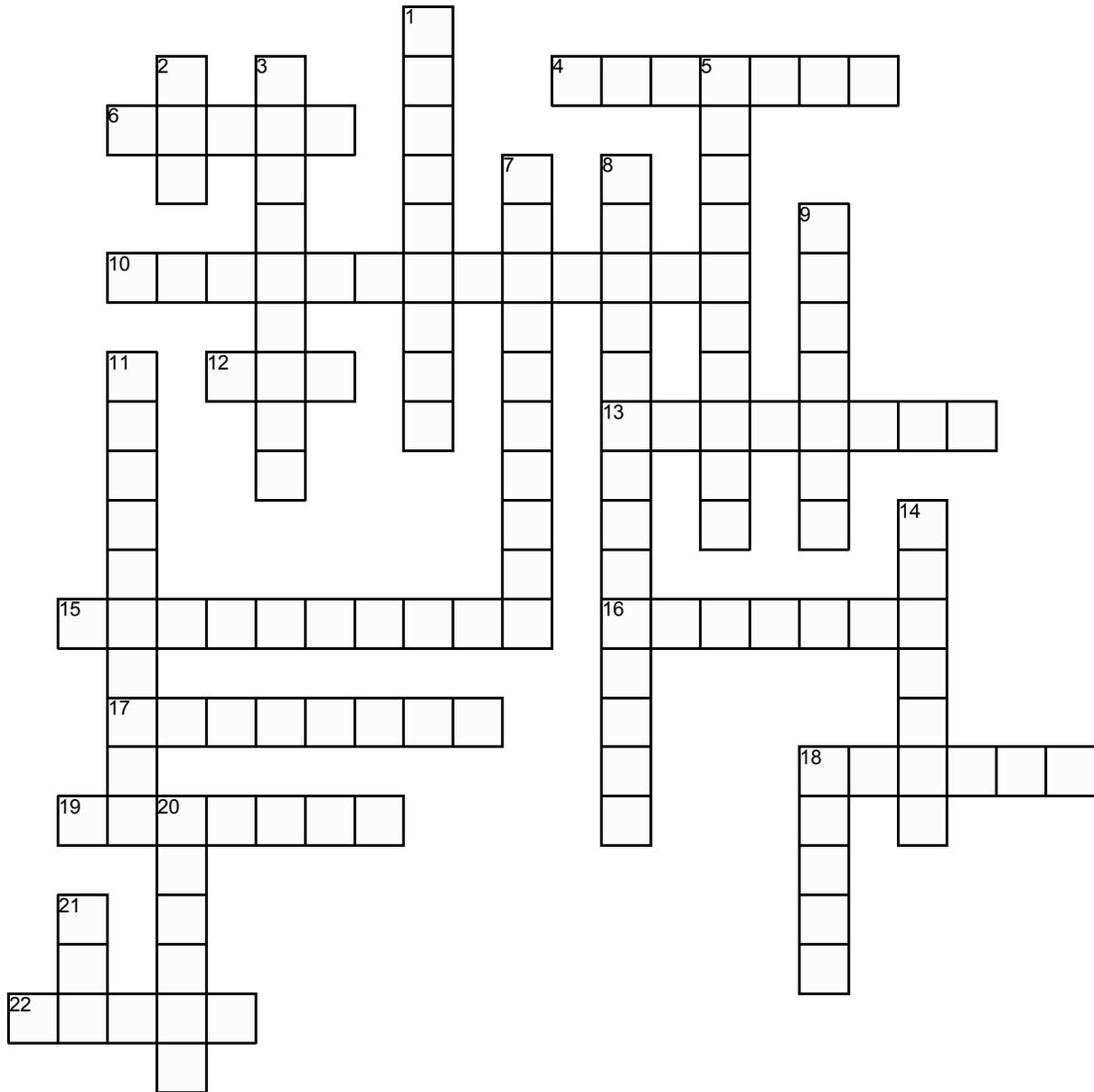
The FTA Drug and Alcohol Program National Conference is back for the 10th year, growing in popularity each year thanks to your passion and commitment for ensuring the safety of the traveling public! This year’s conference promises to be just as exciting and informative as the previous nine, with new courses, speakers, and networking opportunities. The conference is going to take place in Atlanta, GA April 28–30th, 2015, at the Hyatt Regency Atlanta. For more information on the conference and to register, please visit our website.

<http://transit-safety.fta.dot.gov/danatconf>

If you’d like to make reservations at the Hyatt Regency Atlanta in advance, please use the link here.

[https://resweb.passkey.com/Resweb.do?mode=welcome\\_ei\\_new&eventID=11639441](https://resweb.passkey.com/Resweb.do?mode=welcome_ei_new&eventID=11639441)

# FTA Drug and Alcohol



## **Across**

4. Minimum minutes until confirmation
6. Month of data submission
10. Test type when out 90 or more days
12. FTA D&A 'Hotline', (617) 494-633\_
13. Employee action with seals
15. Employer decides if this position qualifies as safety-sensitive
16. Site of 10th Annual FTA Conference
17. Acceptable dilute
18. Step 1, specify this DOT information
19. Officer who reviews test results
22. Ounces urged to drink

## **Down**

1. Damage that makes it an FTA accident
2. Evaluates positive employee
3. 'S' in STT
5. Required minimum rate for random drug testing
7. Unable to provide 45mL
8. DER can positively provide over the phone
9. In Step 4, must specify company name
11. Access to records to certify this
14. Longest random selection period
18. Security that is covered
20. Creatinine is too low
21. At 0.0\_, remove from safety-sensitive duty

For answers to the puzzle, go to: <http://transit-safety.fta.dot.gov/DrugAndAlcohol>

# Why Calibration Checks are Important— What Documentation is Required

The alcohol testing procedures outlined in 49CFR Part 40, Subparts J through N define in great detail the procedures and equipment to be used to conduct a DOT breath alcohol test. All confirmation tests must be conducted using an Evidential Breath Testing (EBT) device operated by a qualified Breath Alcohol Technician (BAT). In order for a device to be considered an EBT it must, among other things, be capable of conducting air blank tests and external calibration checks, and must be approved by the National Highway Traffic Safety Administration (NHTSA). Devices meeting these standards are listed on the NHTSA Conforming Products List (CPL)

of EBT devices which is updated and periodically published in the Federal Register.

To be listed on the NHTSA Conforming Products List, each EBT device must have a manufacturer-developed quality assurance plan approved by NHTSA (§40.233). The plan must include:

- A designated method or methods to perform external calibration checks of the device;
- Specified minimum intervals for performing external calibration checks accounting for different frequencies of use, environmental conditions (e.g., temperature, altitude, humidity), and context of operation (e.g., stationary or mobile use);
- Specified tolerances on an external calibration check within which the EBT is regarded to be in proper calibration; and
- Specified inspection, maintenance, and calibration requirements and intervals for the device.

The regulation specifically requires the employer to comply with the NHTSA-approved Quality Assurance Plan (QAP) by ensuring the external calibration checks of each EBT are performed as described in the manufacturer's plan. If, during an external calibration check, the EBT

is found to give readings outside of the tolerances for the device, the EBT must be removed from service and all tests performed since the last time the device had an acceptable external calibration check will be canceled.

The employer must also ensure the inspection, maintenance, and calibration of each EBT is performed by the manufacturer, a maintenance representative certified by the device's manufacturer, or an appropriate state agency. The employer must also maintain records of the calibration checks of the EBT and store the EBT in a secure location when not in use. If the employer delegates these duties to a service agent, the employer remains

responsible for ensuring these requirements are met. ●



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## Regulation Updates is Produced By:

Federal Transit Administration  
Office of Transit Safety and Oversight  
1200 New Jersey Avenue, SE  
4th Floor, East Building  
Washington, DC 20590

## Written by:

U.S. Department of Transportation  
John A. Volpe National Transportation  
Systems Center  
55 Broadway  
Cambridge, MA 02142

DigitaliBiz, Inc.  
55 Broadway  
Cambridge, MA 02142

Cahill Swift, LLC  
240 Commercial Street  
Boston, MA 02109

RLS & Associates, Inc.  
3131 South Dixie Highway/Suite 545  
Dayton, OH 45439