

11th Annual FTA Drug and Alcohol Program National Conference A Success!

The 11th Annual FTA Drug and Alcohol Program National Conference, held March 22–24 in Sacramento of this year, was a great success! With 23 courses, nearly 600 participants had many interesting and new opportunities to learn whether they were new to DOT and FTA drug and alcohol testing and compliance, or if they were long-time industry employees. Registrants hailed from 47 states as well as the District of Columbia, Puerto Rico, American Samoa, Saipan, and the Virgin Islands. Fifty-five percent of participants had previously been to an FTA Drug and Alcohol Annual Conference, while 45 percent reported it was their first time attending. The top five most beneficial courses reported were: Reasonable Suspicion Testing, Common DAPM Mistakes and How to Correct Them, Post-Accident Thresholds and Scenarios, Experienced DAPM, and Beginner DAPM. A resounding 96 percent of attendees reported their expectations were met. ●



Federal Motor Carrier Safety Administration Lowers Drug Testing Rate

Effective January 1, 2016 the Federal Motor Carrier Safety Administration (FMCSA) lowered its random required drug-testing rate from 50 percent to 25 percent, the same as FTA's rate. 49 CFR Part 40.347 allows employers with covered employees of more than one DOT agency to combine employees in a random pool. Many FTA covered-employers hire both FTA- and FMCSA-covered employees. 40.347(b)(1) states "If you combine employees from more than one transportation industry, you must ensure that the random

testing rate is at least equal to the highest rate required by each DOT agency." Prior to FMCSA lowering its required random testing rate, if an employer combined FMCSA- and FTA-covered employees in the same random pool, those employees would be required to be randomly tested at the higher FMCSA random-testing rate of 50 percent. With the lowering of the rate by FMCSA to the same level of FTA, employers can now maintain a single pool, if so desired, tested at 25 percent. ●

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U.S. Department of Transportation
Federal Transit Administration

Ubers, Lyfts, and Ride-Sourcing: Do the Regulations Apply?



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The FTA drug and alcohol testing regulations apply to all contract service providers who “stand in the shoes” of the transit system by providing transportation services to public transit patrons to make or complete a trip. These services are only exempt from the regulations when there are multiple service providers unknown to the transit agency because the choice is made by the passenger. The exemption is provided based on the recognition of the practical impossibility of regulating service providers when the transit agency cannot anticipate which carrier will be selected for a specific trip. As a result, applying the regulation depends on the degree of “passenger choice” in selecting the service provider. In the case of traditional taxi service, if the transit system subsidizes services from only one company (i.e., exclusively Uber) leaving the passenger with no choice but to use the one service,

the company is then considered to be “standing in the shoes” of the transit system and is required to have an FTA-compliant drug and alcohol testing program. In this case, the transit system knows which carrier will provide the service and must impose the regulations on the single carrier.

...Applying the regulation depends on the degree of “passenger choice” in selecting the service provider.

If, on the other hand, the transit system uses more than one ride-sourcing company (i.e., Uber, Lyft, and the local cab company), and the passenger chooses one, the companies are exempt from FTA regulations. In this case, the transit system cannot anticipate which carrier will be selected and therefore, it would be practically impossible to impose the regulations on multiple carriers. Even though the subsidy may be paid directly to the service provider, the choice of who provides the trip and gets the subsidy is ultimately the passenger’s choice with no influence or direction from the transit system. The rules governing ride-sourcing are consistent with FTA’s rules for taxicabs.

The fact that drivers may be independent contractors rather than employees of the carrier is also irrelevant as the transit system has the relationship with the company, not the individual drivers. ●

What Employers Need to Know About Monitoring Collection Sites

The Office of Drug and Alcohol Policy and Compliance (ODAPC) published a new brochure, “What Employers Need to Know About Monitoring Collection Sites” to help employers understand what they can do to monitor collection sites performing DOT drug and alcohol tests for their safety-sensitive employees.

This brochure describes three levels of commonly practiced collection site monitoring. The outline and description of each level gives Drug and Alcohol Program Managers the knowledge to pick and choose the best level, or a combination of levels to efficiently and effectively monitor their collection sites. ●

| | |
|----------------|---------------------------------|
| LEVEL 1 | The Desk Audit |
| LEVEL 2 | Collection Site Visits |
| LEVEL 3 | Enhanced Collection Site Review |

For more information and to download the brochure, click the link. https://www.transportation.gov/odapc/employer_brochure

Common Mistakes and How to Fix Them



An accident occurred which met the FTA minimum thresholds, but we did not conduct a test. What do we do now?

If the time period for conducting the testing (32 hours from the time of the accident for drugs and 8 hours for alcohol) has elapsed, document what occurred and why the test was not performed. File the documentation in the appropriate drug and alcohol file. Investigate why the mistake was made and take the necessary corrective action (i.e., retrain staff, modify standard operating procedures, etc.) to ensure the same mistake will be avoided in the future. If necessary, provide additional tools to assist staff such as a suggested post-accident decision making form or Post-Accident Threshold lanyard cards available from FTA’s website at: <https://transit-safety.fta.dot.gov/DrugAndAlcohol>.

Credit: 123rf.com

Follow the Plan: Quality Assurance Plans (QAPs)

The manufacturers of Evidential Breath Testing (EBT) and Alcohol Screening Devices (ASDs) must include with each device, the QAP or instructions for its use and care consistent with the QAP. Each user (employer or service agent) of the EBT/ASD must follow the manufacturer’s instructions. Users of an EBT must maintain records of the inspection, maintenance, and calibration of the device as specified by the QAP. Sections § 40.233 and § 40.235 provide additional details for the requirements of use. ●

49 U.S.C Section 5339 Buses and Bus Facilities Grants Program Established

The Moving Ahead for Progress in the 21st Century Act (MAP-21) established a new Section 5339 Buses and Bus Facilities Grants program (Bus Program), changing the program from discretionary to formula. Funding is allocated to states and territories and designated recipients in urbanized areas. The purpose of the new Bus Program is to assist eligible recipients in replacing, rehabilitating, and purchasing buses and

related equipment, and to construct bus-related facilities, thus allowing grantees to address replacement and capital expansion needs.

In the interest of safety in transit operations, recipients of funding from the Section 5339 Buses and Bus Facilities Grants Program, 5307 Urbanized Area Formula Program, 5309 Fixed Guideway Capital Investment Grants, 5311 Formula

Grants for Rural Program, and other programs as determined by the Secretary of Transportation are required by 49 U.S.C. 5331 to establish Drug and Alcohol Testing Programs.

Note: Recipients of 5309 funding are still required to have a Drug and Alcohol Testing Program in place. ●

Reclassifying DOT Drug Tests

ODAPC has set forth the following guidance to help employers understand what steps to take when contemplating if and how to reclassify a drug test from DOT to non-DOT.

For drug tests with a positive, adulterated, and/or substituted result, the request to change a test must be made with the respective DOT agency Drug and Alcohol Program Manager (e.g. FTA, FMSCA, etc.). In these cases, Program Managers will need to know whether the employee is actually covered under their regulations, and whether the circumstances

surrounding a covered employee's selection for testing met specific DOT agency standards. Program Managers will also need to know the test result and the number. In all cases for which the DOT Agency Program Manager determines the positive, adulterated, and/or substituted result is a non-DOT test rather than a DOT test, documentation of the determination must be included in the test record, and is sufficient on its own to formalize the reclassification.

For negative drug tests mistakenly conducted as DOT tests, ODAPC has determined no safety risk exists. Accordingly,

there is no need to consult with the DOT agency Program Manager on whether to reclassify the test. The employer should simply review the facts of the case, determine whether the test should be DOT or non-DOT, and create a memorandum explaining their determination.

Contact information for FTA's Program Manager, Iyon Rosario, is as follows: Iyon.Rosario@DOT.GOV or 202-366-2010. Note: reclassified tests should not be included on MIS reports. ●

Are Taxicab Companies Covered under FTA Drug and Alcohol Testing Regulations?



Credit: 123rf.com

FTA recognizes the practical difficulty of administering a drug and alcohol testing program to taxicab companies providing incidental transit service. Therefore, FTA drug and alcohol testing rules do apply to the taxicab company when a transit provider enters into a contract with the company to provide transit service. When a patron of a transit system which receives FTA funding can randomly choose from a number of taxicab service providers, FTA testing regulations do not apply to those taxicab companies. If there is only one taxicab company from which to choose, the regulations apply to that taxicab company. ●

Substance Abuse Professionals as Gatekeepers

DOT requires Substance Abuse Professionals (SAPs) to view the public as their client, and not an employee who may have been referred to them or an employer who may reimburse them.

Per 40.293 “What is the SAP’s function in conducting the initial evaluation of an employee?” subsection (f) states: “For purposes of your role in the evaluation process, you must assume that a verified positive test result has conclusively established that the employee committed a DOT drug and alcohol violation. You must not take into consideration in any way, as a factor in determining what your recommendation will be, any of the following:

(1) A claim by the employee that the test

was unjustified or inaccurate;

(2) Statements by the employee that attempt to mitigate the seriousness of a violation of a DOT drug or alcohol regulation (e.g., related to assertions of use of hemp oil, “medical marijuana” use, “contact positives,” poppy seed ingestion, job stress); or

(3) Personal opinions you may have about the justification or rationale for drug and alcohol testing.”

In accordance with ODAPC’s SAP Guidelines and section 40.291(b), the SAP is never an advocate for the employer or employee. The SAP professionally evaluates employees with DOT drug or alcohol violations and recommends appropriate education/treatment, follow-up tests, and

aftercare. These recommendations must, to the greatest extent possible, protect public safety in the event the employee returns to a safety-sensitive position.

Because a critical function of the SAP is to protect the public interest in safety, it is not uncommon for an employee to be deemed ineligible to return to safety-sensitive duties for non-compliance with education/treatment requirements set by the SAP. Employers must expect and support the specialized determinations of the SAPs to whom their employees may be referred. Understanding this role helps ensure an additional level of safety and preventative scrutiny is applied to the public safety components of transit and transportation. ●

REMINDER 2016 DOT Random Testing Rates

The following chart outlines the annual minimum drug and alcohol random testing rates established within DOT agencies and the U.S. Coast Guard for 2016.



Credit: 123rf.com

| DOT Agency | 2016 Random Drug Testing Rate | 2016 Random Alcohol Testing Rate |
|--|-------------------------------|----------------------------------|
| Federal Motor Carrier Safety Administration [FMCSA] | 25% | 10% |
| Federal Aviation Administration [FAA] | 25% | 10% |
| Federal Railroad Administration [FRA] | 25% | 10% |
| Federal Transit Administration [FTA] | 25% | 10% |
| Pipeline & Hazardous Materials Safety Administration [PHMSA] | 25% | N/A |
| United States Coast Guard [USCG] (now with the Dept. of Homeland Security) | 25% | N/A |

Do My Contractors Fall under the FTA Regulations?

The regulations apply to any contractor who performs safety-sensitive functions for a FTA recipient or subrecipient of federal financial assistance. The only exception is for maintenance contractors of rural operators receiving Section 5311 funding and urban operators serving populations under 200,000 and receiving funding through Section 5307, Section 5309, and Section 5339. All other contractors providing safety-sensitive functions must have a drug and alcohol testing program that is fully compliant with 49 CFR Part 655.

The definition of safety-sensitive function for contractors is the same as for transit system employees. The simple question to ask is whether or not the activity performed by the contractor would be considered safety-sensitive if performed by transit agency personnel. To further clarify, the following table is provided:

| CONTRACTOR | FUNCTIONS | SAFETY-SENSITIVE |
|---|---|--------------------------------------|
| Provides Revenue Service | Any contractor providing bus drivers, paratransit drivers, rail operators, motormen, conductor, or yard drivers to operate service | Yes |
| Facility or Track Construction | Construction contractors building maintenance or storage facilities, tracks, stations, or other capital projects | No |
| Fuel, Materials, and Equipment Providers | Vendors who supply and deliver fuel, parts, consumables, or equipment manufactured off site | No |
| Revenue Service Vehicle Maintenance and Repair | Contractors conducting preventative maintenance, scheduled maintenance, repairs, road call repairs, electrical system repairs, tire maintenance, etc. | Yes; Rural and Small Urban Exempt |
| Track and Fixed-Guideway Maintenance | Contractors providing hands-on maintenance on the system including rail, electrical infrastructure, train control, track and ROW, worker, signal and communications maintenance, substations, line crew, etc. | Yes; Rural and Small Urban Exempt |
| Vehicle Overhaul and Rebuilds | Contractors who overhaul and rebuild engines, parts, and vehicles used in revenue service | Yes; Rural and Small Urban Exempt |
| Non-Revenue Service Vehicle Maintenance | Contractors maintaining utility vehicles and other non-revenue service vehicles and equipment | No |
| Vehicle Manufacture | Vendors manufacturing vehicles, rail cars, and related equipment | No |
| Vehicle Warranty Work | Contractors providing repairs under warranty | No |
| Maintenance of Other Equipment Used in Revenue Service | Contractors providing lift and other accessibility feature repairs; communications system repairs | Yes; Rural and Small Urban Exempt |
| Storage and Maintenance Facility Maintenance | Contractors providing janitorial services, building maintenance, grounds maintenance, etc. | No |

Do My Contractors Fall under the FTA Regulations?

| CONTRACTOR | FUNCTIONS | SAFETY-SENSITIVE |
|---|---|---|
| Security with Firearms | Contractors providing security personnel who carry firearms | Yes; Active Police Officers under the Supervision of the Police Department Are Not Included |
| Non-Revenue Commercial Motor Vehicle Operators | Contractors providing CDL holders to operate non-revenue service transit commercial motor vehicles | Yes |
| Dispatching and Controlling Movement of Revenue Service Vehicle | Contractors providing dispatchers, starter, tower operators, or other employees that control the movement of revenue service vehicles | Yes |
| Schedulers | Contractors providing driver, vehicle, or trip scheduling services | No |
| System Management | Contractors providing Executive Director or management team personnel not performing any safety-sensitive functions | No |
| Tire Retreaders | Contractors who retread tires for revenue service vehicles | Yes; Rural and Small Urban Exempt |
| Tire Changers | Contractors who change tires on revenue service vehicles | Yes; Rural and Small Urban Exempt |

Follow-Up Testing Must Be Unpredictable

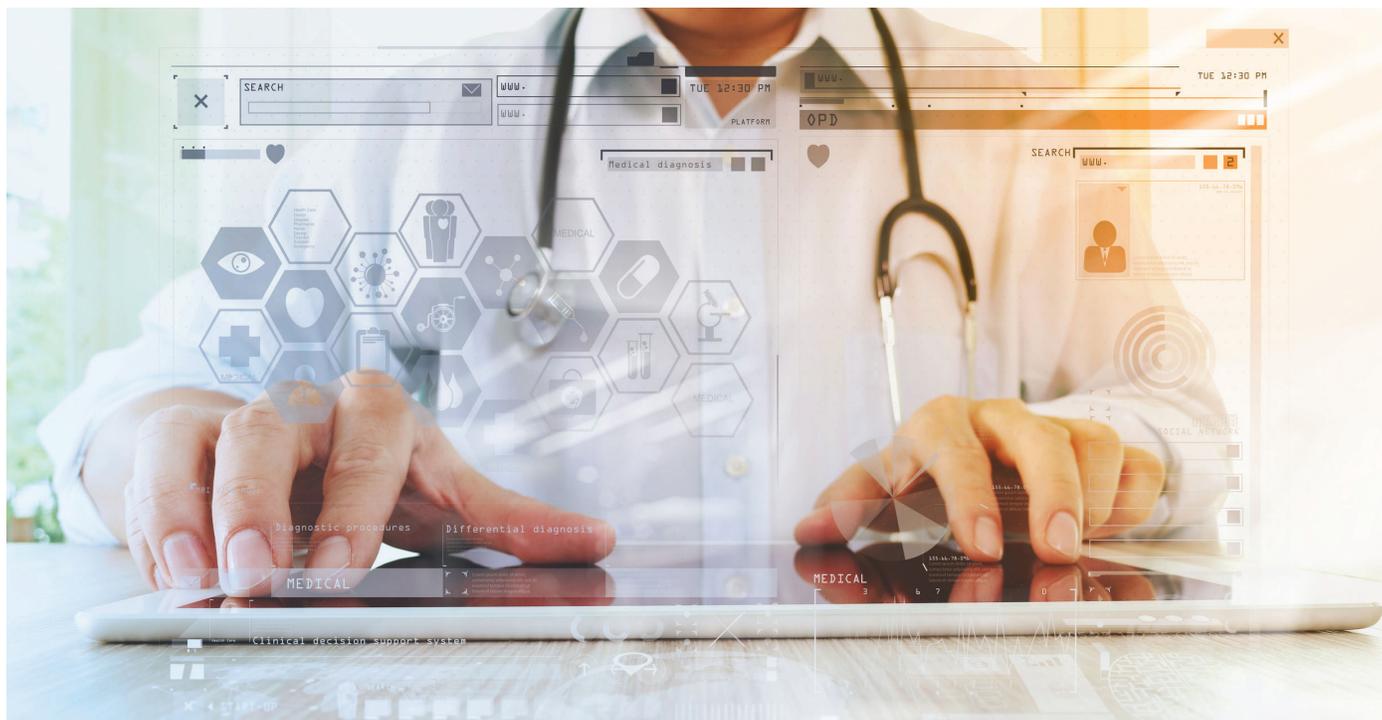
Employers must conduct follow-up testing in accordance with a SAP's prescribed plan. Such plans specify the number of tests to be conducted over a given period, but do not give instruction about the exact dates or times to conduct follow-up tests. Employers must not only follow the scope of a SAP's follow-up testing plan, they must also schedule follow-up tests on dates of their own choosing, ensuring tests are unannounced with no discernable pattern as to their timing and with no advance notice, per section 40.309(b).

One of the most significant follow-up testing errors occurs when an employer adheres to the number of tests required by the SAP's follow-up plan, but conducts tests at predictable dates and times. An example would be a driver who is routinely sent for follow-up testing at the beginning of their shift or at the beginning of each month. Such a driver may quickly realize they are unlikely to be tested at other times.

Since employees in return-to-duty programs have all previously had a DOT drug or alcohol violation, it is necessary

to protect public safety by ensuring their follow-up tests are unpredictable. Like random testing, employees must assume they could be sent for testing any time they might be on duty or performing safety-sensitive functions. ●

Safety Concerns Require Medical Review Officers to Report Medical Information



Credit: 123rf.com

Through the course of the drug test verification process, the Medical Review Officer (MRO) may become aware of an employee's or applicant's medical information raising concerns about the individual's ability to safely perform his/her safety-sensitive function. Medical information may include, but is not limited to, details regarding an individual's medical diagnosis, current condition, treatments, side-effects, prescription or over-the-counter medication use or abuse, contraindications, recovery process; or physical, emotional, or cognitive limitations.

If utilizing "reasonable medical judgment" the MRO determines the medical information obtained indicates the employee is likely to be determined medically unqualified to perform safety-sensitive duties

under the applicable DOT agency regulation or the employee is likely to pose a significant safety risk if allowed to perform safety-

MROs are not only permitted to report this information, they are also required to report this information.

sensitive functions, the MRO is required to report the information to the appropriate third parties without the employee's consent (§40.327). Authorized third parties are limited to the employer, physician, or other health care provider responsible for determining the medical qualification of the employee under an applicable DOT agency safety regulation, a SAP as part of a return-to-duty evaluation, a DOT agency, or the National Transportation Safety Board as part of an accident investigation.

MROs are not only permitted to report this information, they are also required to report this information. The only exception to this requirement is if the law of a foreign country (e.g. Canada) prohibits the MRO from providing the medical information to the employer. ●

Drug and Alcohol Training

FTA sponsors free 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 one-day trainings are available on a first-come, first-serve basis and are led by the FTA Drug and Alcohol Program and Audit Team Members.

For more information about training sessions and to register, go to: <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 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 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 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>.

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