

# FTA Drug and Alcohol REGULATION UPDATES

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## FTA's Drug Abuse Awareness Video is Now Available!

This new video describes the effects and consequences of prohibited drug use on personal health, safety, and the work environment, and on the signs and symptoms that may indicate prohibited drug use. This video meets the 60-minute training requirement of section 655.14(b)(1) for covered employees. The video can be viewed at <https://transit-safety.fta.dot.gov/DrugAndAlcohol/Tools/DrugAwarenessVideo>.



## Revenue Vehicle Control/Dispatch is Not a “Catch-All” Employee Category

One of the safety-sensitive functions defined in section 655.4 is “controlling dispatch or movement of a revenue service vehicle.” The phrase “controlling movement” has resulted in some confusion, and in some cases has become a “catch-all” to include employees, especially supervisors, who may not actually perform a safety-sensitive function, but instead oversee an employee who does.

FTA has provided clear direction when addressing this category of employee, stating call-taking, scheduling, and assigning routes are

not considered safety-sensitive functions. This category also excludes functions performed by operations supervisors, such as day-to-day management, when such functions do not include communication concerning specific, detailed, and contemporaneous route/turn instruction to individual operators. Simply having a supervisory role over employees performing safety-sensitive functions is not in and of itself justification for classification as a covered employee; one must instead actually perform or may be called to perform a safety-sensitive function.

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U.S. Department of Transportation  
Federal Transit Administration

## Fees & \$40.25 Testing Histories

FTA would like to remind all covered employers—and their service agents—information required

to be released to a gaining employer under the requirements of §40.25 may not be delayed or withheld for

any reason, such as pending the payment of any cost, fee, or reimbursement.

# Direct Observation Criteria

Section 40.67 defines criteria for when a directly observed collection must be conducted.

Employers must send an employee for a directly observed collection with no advance notice if the MRO determines a specimen provided earlier was suspicious (see §40.67(a) for specific details), or because the collection is for a return-to-duty or follow-up test.

Collectors must immediately conduct a collection under direct observation when instructed to do so by the DER, or in the following situations:

- the collector observed suspicious materials brought to the collection site
- the employee's conduct clearly indicates an attempt to tamper with a specimen

- the temperature of the original specimen is out of range
- the appearance of the original specimen indicates tampering

If at least one of these criteria is not met, then a directly observed collection is prohibited. Thus, there is no case in which the employer may "decide" to require collection under direct observation using their own authority.

## Discovery of Drug Paraphernalia is Not Cause for Reasonable Suspicion Testing



Credit: 123rf/Sasin Paraksa

Section 655.43 requires reasonable suspicion testing be conducted when a trained supervisor or other company official makes specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee.

While the discovery of drug paraphernalia may be reason to conduct a face-to-face interview with the employee, a trained supervisor/company official must still observe actual signs and symptoms of drug use or alcohol misuse.

### Does Your Collection Site Perform Directly Observed Collections?

FTA-covered employers should be aware, some collection sites—including large national providers—have internal policies prohibiting their staff from acting as the observer when a directly observed urine collection is required by Part 40 (e.g., for all return-to-duty and follow-up tests, or when a provided urine sample's temperature is out of range, etc.).

In these cases, it is the employer's responsibility to ensure testing under direct observation is accomplished. Note: the observer must be the same gender as the donor, but does not need to be a trained collector, medical professional, or even affiliated professionally with the collection site or the transit employer.

FTA recommends all covered employers reach out to their collection sites to verify their disposition on directly-observed tests, and to plan accordingly if the vendor will not provide observers as part of their service.

# FTA Accidents and Vehicle Operation

Section 655.4 defines an accident as an event associated with the operation of a vehicle where at least one of the following thresholds occurs:

1. A person dies
2. A person suffers bodily injury and immediately receives medical attention away from the accident scene
3. For events where the public transportation vehicle is a bus,

electric bus, van, or automobile, at least one vehicle incurs disabling damage and is transported away from the scene

4. For events where the public transportation vehicle is a rail car, trolley car, trolley bus, or vessel, the vehicle is removed from operation

Post-accident testing under FTA authority is prohibited when events

occur that are not associated with vehicle operation. Consider a case where a bus passenger is having chest pain or a seizure and requires transport to a hospital. Even though the passenger required immediate medical attention away from the scene, the event described has nothing to do with vehicle operation. Thus, it is not an FTA accident and FTA testing is prohibited.

## Post-Accident Testing Criteria: Medical Attention Away from the Scene

As stated in section 655.4, an FTA post-accident testing threshold is reached when any individual involved in the accident goes directly from the scene to receive medical treatment. The individual can be transported by any means. For example, if an individual is immediately driven to their doctor by a friend or family member, FTA post

-accident testing would be required (unless the employee's performance can be completely discounted as a contributing factor to the accident). As the employer, you are not required to verify whether the



Credit: 123rf/Wavebreak Media LTD

individual actually sought medical attention.

## Remote Post-Accident Determinations

FTA-covered employers are responsible for ensuring alcohol and drug testing takes place after accidents. It is imperative to note, FTA requires the decision be made promptly, using the best information available at the time of the event. Because post-accident testing is time-sensitive, employers should not undertake a prolonged investigation (e.g., returning to the garage to review video from the vehicle), but should instead make a decision as

soon as possible after the event transpires. While most transit accidents occur within a limited geographic area where a trained supervisor or company official can respond in person in a timely fashion, FTA recognizes that some employers operate across very large areas, and may have operators who are involved in incidents that take place at locations significantly farther away

from a supervisor/company official. In these instances, FTA allows the supervisor/company official to make their determination remotely, using the best tools available. This may include discussing the event with the operator, any witnesses, and available law enforcement personnel. If testing is appropriate, the employer must then make every effort to complete post-accident alcohol and drug testing within the timeframes established in §655.44.

# Another Successful FTA Drug and Alcohol Program National Conference!



The 13<sup>th</sup> Annual FTA Drug and Alcohol Program National Conference held in Fort Lauderdale on May 8-10 was highly regarded by the over 550 participants, conference speakers, DOT drug and alcohol Federal representatives, FTA drug and alcohol auditors, and industry experts. Iyon Rosario, FTA Drug and

Alcohol Program Manager gave opening remarks and introduced the keynote speaker Patrice Kelly, Director of Office of the Secretary of Transportation's Office of Drug and Alcohol Policy and Compliance. Ms. Kelly presented on recent updates to the DOT rule, 49 CFR Part 40, describing the required procedures for conducting workplace drug and alcohol testing for the federally-regulated transportation industry. The conference offered twenty-two additional sessions, allowing the participants the opportunity to choose sessions based on their individual needs and expertise. This year, we

introduced the FTA Drug and Alcohol Conference app on Whova. We received exceptional feedback on the app and its offered features, and we are happy to announce we will use this platform again for the 14<sup>th</sup> Annual FTA Drug and Alcohol Program National Conference.

We would like to thank everyone who took the time to fill out conference evaluation forms; your feedback drives planning for the next conference. If you would like to provide additional comments, email the FTA Drug and Alcohol Project office at [FTA.DAMIS@dot.gov](mailto:FTA.DAMIS@dot.gov).

## 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). FTA provides these trainings at a host site and opens them to the public on a first-come, first-serve basis. Trainings are led by the FTA Drug and Alcohol Program and Audit Team Members.

For a schedule of upcoming trainings 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](mailto:fta.damis@dot.gov) or (617) 494-6336 for more information.

## The Transportation Safety Institute (TSI) Training

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 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 Part 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>.

# Ask the Experts

## **Will FTA be providing guidance on how we should handle an MRO “safety concern”?**

DOT’s regulation has always required the MRO to report the employee’s medication use/medical information to a third party (e.g. the employer, health care provider responsible for the employee’s medical qualifications), if the MRO determines in his or her reasonable medical judgement the employee’s continued performance of safety-sensitive functions is likely to pose a significant safety risk.

The revisions to Part 40 simply modified the timing when the MRO communicates a significant safety risk. As of January 1, 2018, the employee has up to five business days from the date the MRO reports a verified negative test result to have the prescribing physician contact the MRO and determine if the medication can be changed to one that does not pose a significant safety risk. Only after the MRO communicates with the prescribing physician, or after five business days, whichever is shorter, will the MRO provide this information to the employer should the MRO determine a significant safety risk still exists.

## **We have supervisors who could move a revenue service vehicle, in the case of an emergency, such as occurred with a major flood three years ago. Should those supervisors be considered safety-sensitive if this is the only time they would perform a safety-sensitive function?**

Any personnel who perform an FTA-defined safety-sensitive function only in a time of emergency are not considered to be safety-sensitive and should not be in the random testing pool. It is hopeful every employee would perform necessary tasks to ensure the safety and well-being of their fellow employees and the public in this case.

## **We are the Grantee hiring two employees from our safety-sensitive contractor. We know they have been in their D&A program; do we need to perform pre-employment drug tests?**

Yes, each employer must ensure each covered employee or applicant has a pre-employment drug test with a verified negative result before performing any safety-sensitive functions.

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# Expired CCFs

The 2014 version of the Federal Custody and Control Form (CCF) may not be used after June 30, 2018. For more context, please see "Revised Federal Drug Testing CCF" from the January 2018 special edition of *FTA Drug and Alcohol Regulation Updates*.

If an expired CCF is used after June 30, the following actions must be taken, per 40.203(d)(3) and §40.205(b)(2). If the test was collected in accordance with Part 40's procedures, the collector must provide a signed

statement affirming the expired form contains all information needed for a valid DOT drug test. This memorandum must state the incorrect form was used inadvertently or as the only means of conducting a test, in circumstances beyond the collector's control. It must also list the steps taken to prevent future use of expired DOT forms.

If this required memorandum is not created, then the test is canceled.