FTA Drug and Alcohol
REGULATION UPDATES
December 2021
Issue 73

# MIS Trainings Available Through MS Teams

The FTA Drug and Alcohol Program Office will host training sessions focused on Management Information System (MIS) reporting. These free training sessions will run approximately 90 minutes and will provide an overview of MIS instructions and expectations. The target audience is those who submit the MIS reports for their organization. The sessions will feature a live demonstration using the DAMIS website. The presenter will be available to answer questions.

Please visit the training page on the FTA Drug and Alcohol Program website for more information and to register for a session.

# MIS Reports due March 15

MIS notification letters will be sent out at the end of December to the certifying official listed on the previous year's reports and will include the Grantee's new login information. If changes to the certifying official's contact information need to be made, contact the FTA Drug and Alcohol Project Office. DAMIS will open on January 1, 2022 to accept 2021 data; MIS reports are due on March 15, 2022.

Grantees who have not received their notification letters by mid-January should contact the FTA Drug and Alcohol Project Office at fta.damis@dot.gov or 617-494-6336.

# Daylight Saving Time: Make Sure Clocks Were Changed

Reminder: Breath Alcohol Technicians should have changed the clock on the Evidentiary Breath Testing device(s) to reflect the end of Daylight Saving Time on November 7, 2021.

## In this Issue



U.S. Department of Transportation
Federal Transit Administration

# Previous Employer Checks

FTA Drug and Alcohol Regulation Updates newsletter Issue 65 discusses that an applicant's signature on an information release signed under the requirements of 49 CFR § 40.25 must be ink-on-paper. If you are an employer who receives a request for information under § 40.25 and the employee's signature is an electronic signature or the signature looks questionable, the information should not be released. You should document your concerns and ask the requesting employer for an updated release of information form that includes a proper, wet signature.

If the requesting employer is unresponsive or disagrees with your request for updated information, you may contact the FTA Drug and Alcohol Project Office for assistance at fta.damis@dot.gov or 617-494-6336.

## Return-to-Work Agreements after a DOT Violation Must Not Include Follow-Up Testing Specifics

49 CFR Section 40.309 requires that an employee returning to safety-sensitive duty following a DOT violation must undergo unannounced follow-up alcohol and/or drug testing, as directed by the Substance Abuse Professional (SAP). Some employers, under their own authority, require the covered employee to sign a return-to-work agreement, which provides the terms and conditions governing the employee's resumption of safety-sensitive functions. In these agreements, employers must refrain from providing the employee with any specifics about their follow-up testing plan, as follow-up testing must be unpredictable. The agreement may indicate that follow-up testing will occur, however the employee must not be made aware of the number of follow-up tests, or the timeframe in which they will be subject to follow-up testing, beyond what is stated in the regulations (i.e., minimum of six tests in the first year, for a period of up to five years).

## FTA Minimum Random Testing Rates

FTA published a Federal Register notice to announce the CY2022 Drug and Alcohol Random Testing Rates for transit employers. The minimum random drug testing rate will remain at 50 percent and the random alcohol testing rate will remain at 10 percent.

# 60-Minute Drug Awareness Video

FTA-covered safety-sensitive employees are required by 49 CFR § 655.14(b) to receive at least 60 minutes of training on the effects and consequences of prohibited drug use on personal health, safety, and the work environment, as well as the signs and symptoms that may indicate prohibited drug use. FTA provides a 60-minute drug awareness video, which meets this requirement. This free video can be found on the FTA Drug and Alcohol Program website at https://transit-safety.fta.dot.gov/DrugAndAlcohol/Tools/DrugAwarenessVideo/.

# Delays in Drug Sample Analysis

As a consequence of numerous events – ranging from the COVID-19 public health emergency and its associated supply-chain fractures to hurricanes and wildfires – some DOT-covered employers are currently experiencing notable delays in their receipt of drug test results. Delays in processing drug test results can begin from the moment a specimen leaves the collection site. Delivery delays due to weather, shipping facility problems, and system outages can add days or even weeks to the time a specimen takes to reach the laboratory. Once it reaches the laboratory, processing slow-downs and back-logs can further delay the analysis. Major weather events and other disruptions not only slow specimen travel time but can also delay the delivery and supply of other equipment and components used in specimen analysis.

Employers need to monitor the testing cycle in order to keep their testing programs compliant. For example, a three-week delay for a pre-employment test can mean a delay in hiring, training, and putting a potential employee into covered duty. If testing delays become more frequent, drug and alcohol program managers should anticipate the extra time needed and plan accordingly. Communication with your Medical Review Officer (MRO), Third Party Administrator (TPA), and collection site may help isolate the source of the delays and allow you to make informed program decisions. Additionally, if delays become predictable, employees or applicants should be made aware that test results may be many days away. Though delays can be frustrating and even disruptive, FTA and DOT drug and alcohol testing regulations must be followed.

# Employees Covered by FTA and FMCSA

Some employees perform safety-sensitive duties regulated by more than one DOT modality, such as a school bus driver ([Federal Motor Carrier Safety Administration] FMCSA) who also operates a transit vehicle (FTA). Employers must ensure these employees are sent for DOT testing under the correct modal authority and that Step 1(D) of the CCF, which identifies the authorizing agency, is correctly marked.


For pre-employment and random tests, employees must be sent for testing under the authority of the mode that regulates more than 50 percent of their time performing safety-sensitive functions. If a driver primarily operates a revenue service vehicle, employers simply follow FTA – and not FMCSA – rules related to these test types for that employee.

In situations involving reasonable-suspicion or post-accident testing, employers must choose the mode regulating the employee's functions at the time of the triggering event. Thus, if a dual-mode driver has an accident while operating a transit bus, any resulting test would occur under FTA authority.

With return-to-duty and follow-up testing, employees must be sent for testing under the same authority as the non-negative test that resulted in referral to a SAP. For example, if an employee is sent for a random drug test under FTA authority and fails to arrive at the collection site, the subsequent return-to-duty and follow-up tests would be performed under FTA authority.

# Two Tests for One Event: Which is the Test of Record?

There are several instances in which one testing event may require a second collection. It is important for employers to understand the required actions in these cases, as well as the MIS reporting requirements.

*When a drug test is cancelled, and the Medical Review Officer (MRO) requires a second collection under direct observation (e.g., after an invalid test result with no valid medical explanation – see 49 CFR § 40.159):*

The employer must send the employee immediately to the testing site for a second collection under direct observation. The cancelled test and the result of the recollection should both be included in the MIS report.

*When a drug test is cancelled due to a fatal flaw (see 49 CFR § 40.199):*

If a pre-employment, return-to-duty, or follow-up test is cancelled: Since a negative test result is required in this case, the employee must return to the testing site for a recollection. (Note, in the case of a pre-employment test, the recollection would be unobserved.) For this event, you would report the cancelled test and report the result of the second drug test on the MIS report.

If a random, post-accident, or reasonable suspicion test is cancelled: No further action is required. You would include the cancelled test on your MIS report.

*When a urine specimen should have been collected under direct observation, but was not:*

49 CFR § 40.67(n) requires that the employee return immediately for recollection under direct observation. The result of the recollection is the result of record, and only this result is reported.

*If a drug test result is negative and dilute:*

If the dilute specimen's creatinine concentration was greater than or equal to 2 mg/dL but less than or equal to 5 mg/dL, 49 CFR § 40.67 requires a second collection take place under direct observation. In this case, the second test is the test of record. Only the result of the retest is included on the MIS report.

If the dilute specimen's creatinine concentration was greater than 5 mg/dL, 49 CFR § 40.197 allows the employer to direct the employee to take another test. (The employer's decision whether to require recollection must be specified in its drug and alcohol policy statement.) If a second test is conducted, only the result of the second test is recorded on the MIS report. Otherwise, the initial negative result is reported.

## Virtual FTA Substance Abuse Seminars Available

FTA Substance Abuse Training Seminars are being held virtually via MS Teams. These free half-day training sessions provide an overview of FTA Drug and Alcohol regulations, program requirements, and current issues covering 49 CFR Part 655 and Part 40. The presenter is also available to take questions from attendees. The targeted audience for the seminars is anyone who administers and/or assists in administering an FTA-authorized testing program, with the goal of providing essential information to facilitate compliance with drug and alcohol testing regulations. Scheduled trainings will be posted at https://transit-safety.fta.dot.gov/DrugAndAlcohol/Training/ and interested attendees may register to attend. If you are unable to attend the current schedule of sessions and are interested in scheduling a half-day training session, contact the FTA Drug and Alcohol Project Office at fta.damis@dot.gov or 617-494-6336.

# Laboratory Summary Reports

**What are they?** Laboratories must send employers reports containing a detailed summary of each employer's (not each consortium's) drug testing data as reported by the laboratory. The data must show the number of tests completed by category, test result, and drug(s) found in positive results. It must also show the number of specimens rejected for testing, organized by reason. Employers can use summary reports to keep track of their drug testing data, maintain their program compliance (e.g., employers can verify whether their program policy was followed after a negative-dilute result), identify any discrepancies in their records, learn if they missed any data (e.g., a fatal flaw they were unaware of), and verify the number of tests completed by their collection site against the billing information.

**When are they sent?** The reports must be sent semi-annually by January 20 and July 20, with each report presenting data for the prior six-month period (i.e., for January 1 to June 30 or July 1 to December 31). When there are fewer than five tests during this period, a report will not be sent.

**Why is this important?** 49 CFR Part 40 requires HHS-certified laboratories to send summary reports to each employer. Note that if the employer's drug and alcohol testing program is audited, the employer will be asked to present their most recent laboratory summary reports to FTA.

For more on this topic, see "Semi-Annual Statistical Summaries" in FTA's Drug and Alcohol Regulation Updates Issue 59.

## Keep Non-DOT Tests Separate

49 CFR Sections 655.71 and 40.333 dictate that DOT drug and alcohol program records be maintained in a secure location with controlled access. The Office of Drug and Alcohol Policy and Compliance (ODAPC) clarifies "controlled access" in What Employers Need to Know About Drug and Alcohol Testing, stating that only employees with an official "need to know" should have access to these records. ODAPC provides further guidance in the same document stating, "You must keep Department of Transportation (DOT) test records separated from your company-authority test records."

# Voluntary Self-Referral Programs Must Be Non-DOT

Many employers encourage employees to seek assistance if they believe they have a problem with drugs or alcohol that has not been detected by the DOT testing program. These employers often add provisions within their drug and alcohol policy allowing employees to make a self-referral to obtain the necessary treatment to address these issues. Such provisions must require that the self-referral occurs before notification of a federally required test (i.e., an employee may not request assistance to avoid submitting to a DOT test).

Where 49 CFR Part 655 does not address self-referrals, any actions taken must be performed under the sole authority of the employer. The employee must not be referred to a SAP, as this is a DOT-specific term describing a person who evaluates employees who have violated a DOT drug and alcohol regulation. Instead, the person should be referred to the employer's Employee Assistance Program (EAP) or a similar external service.

An industry best practice removes the self-referring employee from safety-sensitive duties during treatment, and mirrors the DOT return-to-duty process by requiring the employee to participate in a follow-up testing program. All drug or alcohol testing that may be conducted as part of a self-referral evaluation, treatment, or aftercare program must be performed under the employer's authority using non-DOT testing forms, and must not be reported on the employer's annual MIS report.

# Shy Bladders & Removal from Safety-Sensitive Functions

All DOT-covered stakeholders are reminded that employees may not be removed from performing safety-sensitive functions pending the receipt of a verified result from the MRO during a "shy bladder" evaluation period.

The shy-bladder evaluation is integral to the MRO's verification process when an individual does not produce a sufficient amount of urine for a drug test. Accordingly, the outcome of the event cannot be verified until the MRO has obtained all required information (e.g., the evaluating physician's determination), and the employer cannot take action based on preliminary information, as doing so would be considered "standing down" the employee and would violate the stand-down prohibition established at 49 CFR § 40.21.

That said, employers who would prefer employees to not perform covered functions during the "shy bladder" evaluation period may consider the following option:

- Employers may establish standard duty-removal requirements that apply starting from a testing event. For instance, an employer may prohibit employees required to take a post-accident test from returning to safety-sensitive duty until a negative result is received. Should an employer establish such a requirement, it must apply to all employees and should be described in the employer's written drug and alcohol policy. This practice is most common when post-accident and reasonable suspicion tests are performed.

Without a duty-removal policy, employees may not be removed from performing safety-sensitive functions until the MRO provides a verified report requiring such action.

# Employers May Not Adjust SAP Testing Plans

Once the Substance Abuse Professional (SAP) determines an employee has complied with their prescribed education and/or treatment plan, it is the SAP's responsibility to establish a written follow-up testing plan. The follow-up testing plan must be on the SAP's letterhead, signed and dated by the SAP and a copy must be presented directly to the Designated Employer Representative (DER). Per 49 CFR § 40.307(c), the SAP is the sole determiner of the number and frequency of follow-up tests, and is the sole determiner for whether these tests will be for drugs, alcohol, or both. Other stakeholders are prohibited from altering a SAP's follow-up testing plan. Employers, per § 40.307(d)(4), must never impose additional testing requirements, such as tests conducted under company authority, that exceed the SAP's follow-up testing plan.

*The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. Employers should refer to applicable regulations, 49 CFR Part 655 and Part 40 for Drug and Alcohol Program requirements.*

***Regulation Updates***

Produced By:
Federal Transit Administration
Office of Transit Safety & 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

Cahill Swift, LLC
240 Commercial Street
Boston, MA 02109