

DOT Publishes Federal Register Notices Regarding Its Oral Fluid Drug Testing Rule

On June 21, DOT published three notices in the Federal Register related to oral fluid drug testing:

- Technical amendments clarifying existing provisions and addressing errors or omissions from the May 2, 2023 final rule. These amendments do not make significant substantive changes to Part 40, but correct errors that might be confusing to stakeholders. This final rule is effective June 21, 2024.
- A direct final rule (DFR) that provides temporary qualification requirements for mock oral fluid monitors, identifies which individuals may be present during an oral fluid collection, and clarifies how collectors specify that a sufficient volume of oral fluid was collected. Effective on August 5, 2024 unless DOT receives adverse comments by July 22, 2024.
- A notice of proposed rulemaking (NPRM) containing the same amendments in the DFR mentioned above to amend 49 CFR Part 40 for use if adverse comments are received on any provisions in the DFR. If no adverse comment is received, no further action will be taken on the NPRM.

For more information, view the notices on DOT's Office of Drug and Alcohol Policy and Compliance (ODAPC) [website](#).

Employee Identification

Prior to an FTA drug or alcohol test, the collector or technician is required to verify the identity of the employee, as described in [49 CFR 40.61\(c\)](#) and [49 CFR 40.241\(c\)](#). In nearly all cases, this will be accomplished with the employee presenting a photo ID issued by the employer (e.g., a company ID) or a Federal, state, or local government (e.g., a driver's license or passport). Faxes or copies of a photo ID are not acceptable as positive identification. IDs without a photo (e.g., a social security card) are

also not acceptable.

Occasionally, an employee may not have a photo ID, such as when they misplace their wallet. In these cases, an employer representative – but never a co-worker or other employee being tested – may identify the employee. The collector or technician may also contact a Designated Employer Representative (DER) to verify the employee's identity if the employee cannot produce positive identification.

In this Issue

- 2 [FTA's Test Reclassification Procedures](#)
- 5 [Random Testing Selection for Drugs and Alcohol Program Manager](#)
- 7 [Contingency & Transition Plans](#)



U.S. Department of Transportation
Federal Transit Administration

17th Annual FTA Drug and Alcohol Program National Conference

The 17th Annual FTA Drug and Alcohol Program National Conference was recently held in

Atlanta, GA on April 2-4. The conference offered 24 unique sessions, with most running twice over the three days, allowing participants to choose the sessions most relevant to their employers' needs and professional experience. The speakers included FTA's Senior Drug and Alcohol Program Manager, Iyon Rosario, FTA's Drug and Alcohol Program Manager, Toni Clay, ODAPC Deputy Director, Bohdan Baczara, FTA Drug and Alcohol Project Office staff from the Volpe Center, FTA Drug and Alcohol compliance auditors, transit employer Drug and Alcohol Program Managers (DAPMs), and

other drug and alcohol testing industry experts. This conference offered participants a unique opportunity to learn from and ask this large array of experts questions.

This year's in-person conference had over 600 participants. Many attendees expressed that the information they learned at the conference will be valuable in strengthening their agencies' drug and alcohol testing programs. Participants also appreciated the opportunity to network with their peers and exchange best practices for compliance. Presentations for the conference are available for download at the [FTA Drug and Alcohol Conference](https://www.fta.dot.gov/drug-alcohol-program) website under the "Presentations & Course Descriptions" tab.



FTA's Test Reclassification Procedures

At times, a test is conducted incorrectly. For example, consider a DOT test performed on an employee who does not fall under the requirements of FTA and Part 655, or a DOT test performed on a safety-sensitive employee in error with a verified positive result. Mistakes happen, but what do you do now?

Positive Test Reclassification

FTA places significant importance on the reclassification of a positive DOT test. Assessing the degree to which regulations

apply to an employee determines if downgrading a test result is justified.

To request a reclassification of a positive DOT test to a non-DOT test, the employer (DER/DAPM) must email the FTA Drug and Alcohol Program Managers at FTA-DAPM@dot.gov. The employer must also send certain documentation to FTA for review as part of these requests (e.g., Alcohol Testing Forms (ATFs), Drug Testing Custody and Control Forms (CCFs) medical review

officer (MRO)-verified results), which should be password protected, with the password sent in a separate email.

Negative Test Reclassification

FTA approval is not required to reclassify a negative DOT test to a non-DOT test. Documentation of the reason the test was conducted incorrectly should be maintained with the testing documents. The employer should also ensure that the test is not included on that year's Management Information System (MIS) report.

Policy Changes & Board Approval

FTA requires its covered employers to disseminate a drug and alcohol testing policy adopted by its governing board (or other responsible party, as applicable). Policy requirements are set forth in [49 CFR 655.15](#). While this section requires the employer's board "adopt" the policy that

is then made available to all covered employees, FTA allows some policy statement changes to be made without requiring further board adoption/approval. Technical corrections often do not require additional adoption, while substantive changes do.

Technical corrections – such

as adding a regulatory citation, updating the DER's contact information, or fixing a typo – can usually be implemented without formal approval. These are nominal administrative adjustments that ensure policies remain compliant with the regulations without altering their meaning.

However, when it comes to substantive revisions – such as redefining the employer's disposition regarding violations, dilute-negative test results, or pre-employment alcohol testing – board review and adoption is required. Any time revisions have significant implications for covered employees, board re-adoption should be obtained to ensure compliance with the requirement for the distributed policy statement to be endorsed by the governing body.



Defining Dispatch

Company officials are deemed to be covered employees only if they perform any of the safety-sensitive functions outlined in [49 CFR 655.4](#). The regulation does not define job classifications or titles as safety-sensitive positions, rather it defines the duties which, when performed by employees, are considered to be safety-sensitive functions.

For example, FTA identifies the "controlling dispatch or movement of a revenue service vehicle" to

be a safety-sensitive function. Many transit agencies use the term "dispatcher" to describe employees who handle scheduling, route assignments, call-taking, and/or controlling direction or movement of operators. In this case, a "dispatcher" at a transit agency may not be performing a safety-sensitive function since FTA has provided clear guidance that call-taking, scheduling, route assignment, and/or supervisory roles are not

considered safety-sensitive. The interpretation of "controlling movement" has occasionally led to confusion, resulting in the inclusion of employees who may not actually perform a safety-sensitive function. "Controlling movement" of a revenue service vehicle involves providing turn-by-turn directions to operators or communicating specific, detailed, and contemporaneous route instructions to individual operators.

What Employers Should Know About Insufficient Drug Specimens

If an employee does not produce a sufficient specimen for a drug test, they must be offered an opportunity to have a medical evaluation to determine whether the insufficient specimen was due to a legitimate medical condition. In this situation, a DER must first consult with their MRO, and then direct the employee to obtain an evaluation by a licensed physician acceptable to the MRO within five days (49 CFR 40.193(c)).

If the evaluation concludes that there is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have caused the insufficient specimen, the MRO will verify the test as a refusal. Employers must respond to the result in the same way as any other DOT violation: the employee must be referred to Substance Abuse Professionals



(SAPs), and may not return to safety-sensitive work until they have completed the return-to-duty requirements of 49 CFR Part 40 Subpart O.

In contrast, if the evaluation concludes that a medical condition has, or with a high degree of probability could have caused the insufficient specimen, the MRO will verify the test as cancelled. Accordingly, employers may not take any further action with

respect to the employee (49 CFR 40.193(i)).

In the event that the test type requires a negative result (i.e., a pre-employment, return-to-duty, or follow-up test) and the evaluation concludes that the insufficient specimen was due to a long-term medical condition, the employee must receive an additional medical evaluation to assess clinical evidence of prohibited drug use, per 49 CFR 40.195. Based on this evaluation, the MRO will verify the test as either negative (if clinical evidence of drug use is not found) or cancelled (if clinical evidence of drug use is found). Employers must respond to these test results in the same way as typical negative or cancelled results, as applicable.

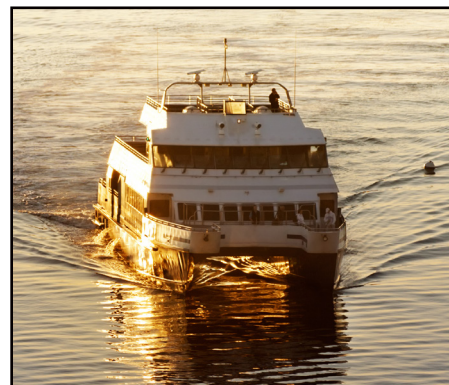
FTA-funded Ferry Operators Must Comply with FTA's Random Alcohol Testing Requirements

FTA-funded ferryboat operators are in compliance with FTA drug and alcohol testing requirements when they comply with United States Coast Guard (USCG) drug and alcohol testing requirements. However, per 49 CFR 655.3(c), ferryboat operators must also comply with FTA random alcohol testing requirements, as the USCG requires random testing for drugs only. USCG-covered employees may be combined with FTA- or other DOT-covered employees

in the random testing pool. In this circumstance, the minimum random testing rate must be at least equal to the highest rate required by each of the DOT agencies represented in the random pool.

In addition to the random testing requirements of 49 CFR 655.45, ferryboat operators must comply with the provisions of 49 CFR Part 655 subpart G, which describes consequences for violations, and subpart H, which covers

administrative requirements including records retention, MIS reporting, and access to facilities and records.



Random Testing Selection for Drugs and Alcohol

When a random selection list is generated, covered employees may be selected for drug testing, alcohol testing, or both. This

does not mean that an employee selected for both drug and alcohol must be tested for both at the same time. The employee can be

notified for drug testing one day and then be notified for alcohol testing later during the same selection period.

Order of Random Testing

The order in which employees are listed on the random selection list does not dictate the order in which employees must be notified for testing. Due to different work schedules and other factors such as vacations and the performance of non-safety sensitive functions, the generated list may not

provide the most practical order. Employers must ensure random testing is completed to meet the requirements of 49 CFR 655.45 (i.e., to meet the minimum rates and to ensure a reasonable spread throughout the year, hours of the day, and days of the week, that is both unannounced and

unpredictable).

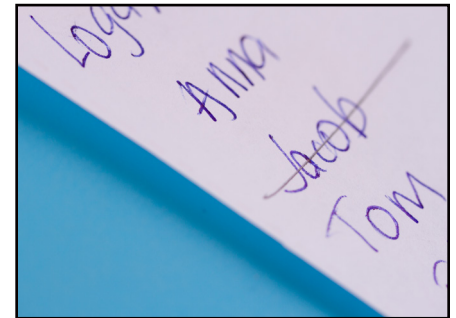
The only exception to this is when the employer chooses to use alternates. The employer may not arbitrarily pick an employee from the list. Alternates must be tested in the order they were selected.

Using Alternates

If a DOT-covered employee selected for random testing is legitimately unavailable for testing for the entire random selection period, the employer must document the reason why that employee is unavailable. In such cases, FTA allows for alternates to be tested during the same selection period. An alternate may replace an employee on the original random selection list only when it is certain that the original employee cannot be tested during that selection period. An alternate may not be tested when the originally selected employee is out the day of the scheduled test but will return prior to the end of the selection period.

Using alternates is not a requirement, but an option for an employer. All random selections, including the selection of alternates, must be made by a scientifically valid method.

Management has no discretion as to who will be selected. FTA recommends, if possible, extra names be drawn in the first few random selection periods to ensure that the current minimum 50 percent/10 percent requirement is met, eliminating the necessity for alternate selections. However, if an employer decides to select alternates, it can be done in two ways: 1) specifically select and identify employees as alternates when the original random selection list is generated; or 2) select an alternate during the random selection period, as needed. When an employer discovers an employee selected for testing will not be available for the remainder of the testing period, it is legitimate to make a random selection of an alternate employee to be tested. In both methods of selecting alternates, the type of test (drug, alcohol,



or drug and alcohol) will be the same as the employee they are replacing. An employee selected as an alternate can only be tested as an alternate (i.e., not used to complete past selection period incomplete random testing) and employees must be tested in the order in which they appear on the alternate list. *Note: to ensure compliance with the equal chance requirement of 49 CFR 655.45(e), alternates must not be listed alphabetically.* In some random selection periods, it is probable that some or all the alternates on the list will not be tested.

Employers Can Test Higher than Minimum Rate

The current minimum annual percentage rate for random drug testing is 50 percent of covered employees and the current random alcohol testing rate is 10 percent (88 FR 83597). The FTA Administrator reviews these rates annually and can change them based on the industry's annual reported positive drug and alcohol violation rates.

It is important to note the rates are absolute minimum requirements. Rounding up (i.e., the act of raising a number to the nearest whole number) is not allowed

when calculating an employer's annual random testing rates. Rates below the minimum by a fraction of a percentage point are still considered to not meet the requirements.

It should also be noted that since these rates are *minimum* requirements, FTA-covered employers are free to test at a higher random rate, should they choose to do so. There is no maximum

limit, and employers do not need to state the higher rate in their FTA policy.

Minimum Testing Rates

Drugs: 50%
Alcohol: 10%

Drug and Alcohol Substance Abuse Trainings Available

The FTA Drug and Alcohol Program offers one-day, onsite training on FTA and DOT drug and alcohol testing regulations. FTA also offers virtual special topics training sessions running approximately 90 minutes. Past topics include random testing, post-accident testing, and MIS overview. Information about scheduled onsite and virtual trainings can be found on the program's training [website](#).

If you are interested in hosting an onsite training or have a suggestion for a virtual special topic session, please contact the hotline at 617-494-6336 or 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 determining 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>.

Post-Accident Timing

Employers must mitigate inefficiencies and delays in the post-accident decision-making and testing processes so post-accident testing can be completed as soon as practicable. If a required post-accident alcohol test is not administered within two hours following an FTA-defined accident, 49 CFR 655.44(a)(2)(ii) requires employers to prepare and maintain a record stating the reasons the test was not promptly administered. If the post-accident alcohol test is not administered within eight hours, employers must cease attempts to complete the test and maintain a record of why the test was not completed.

The two-hour and eight-hour windows are calculated from the time of the accident to the time

of the alcohol test, as recorded on the ATF. It is a common misunderstanding that the two-hour and eight-hour time windows are measured from the time of the accident to the time the employee arrived at the testing site.

In many cases, an employee is sent for post-accident testing within two hours of the accident, but due to time spent traveling to the collection site and waiting for the testing process to begin, the alcohol test is not administered until more than two hours have passed. DAPMs should consider the procedures implemented by their organization to ensure compliance with the two-hour delay documentation

requirement when these cases occur. These procedures should include prompt DAPM review of the test time recorded on the ATF, so any necessary additions may be made to documentation completed at the scene of the accident.



Program Manager Contingency & Transition Plans

When feasible, employers should have more than one person with knowledge of FTA drug and alcohol program requirements and organizational processes implemented to comply with those requirements. A secondary DAPM may be needed for essential duties if the primary responsible individual becomes unavailable. Employers should consider whether another person could step into the primary DAPM's role with little-to-no notice and continue implementing a compliant program. Training a secondary DAPM and establishing formal transition plans may help to ensure continued compliance.

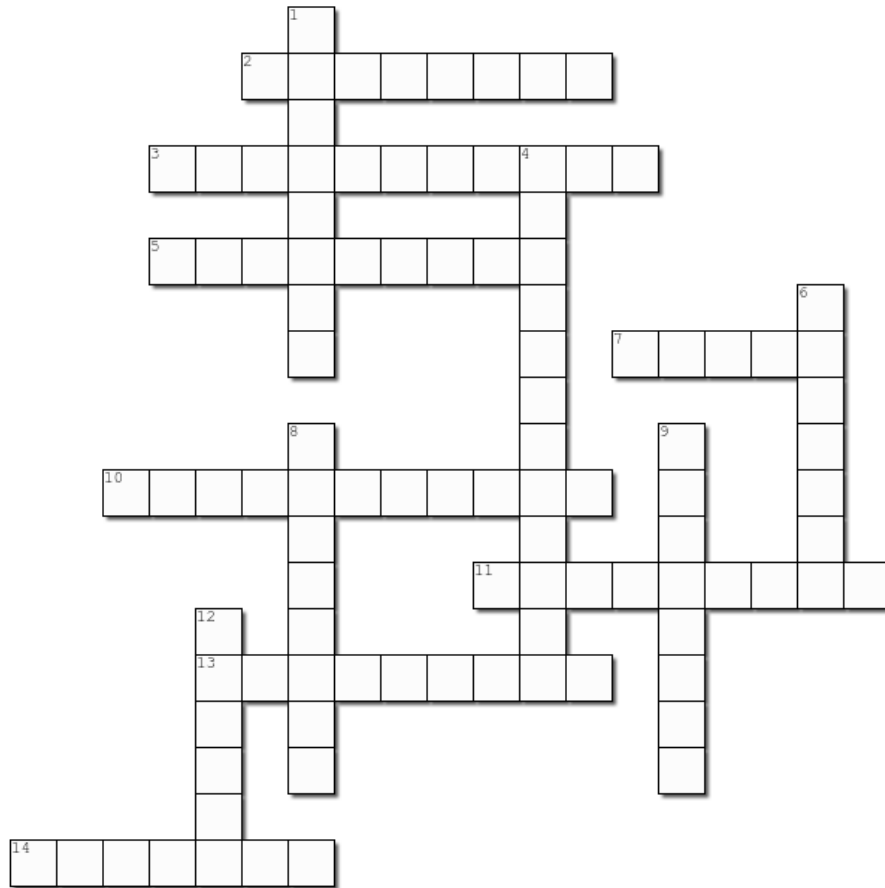
Consider the following scenarios as an exercise for determining whether your organization has appropriate contingency and transition plans in place:

1. The primary DAPM is unreachable for the week (ex: on a camping trip with no cell service). If the MRO attempts to report a positive drug test, would someone be available to receive the result and immediately remove the employee from safety-sensitive duty?
2. The primary DAPM takes an unplanned three-month medical leave. Who will

ensure employees on the current random selection list are still sent for testing, and that random testing spread requirements are followed? Does a second person have access to ATFs, CCFs, and MRO-verified results?

3. The primary DAPM takes a new job and leaves without training their successor. Who would ensure follow-up testing plans are followed without lapses? Would someone ensure DOT drug and alcohol requests continue to be sent to previous employers for any new hires?

Complete the crossword puzzle below. Each of the answers is in one of this issue's articles.



Created using the Crossword Maker on TheTeachersCorner.net

Across

- 2. Employees selected for both drug and alcohol testing can be _____ on separate days for each type of test.
- 3. Alternates for random testing may not be _____ picked from the list.
- 5. These are offered onsite and virtually by FTA.
- 7. Post-accident alcohol test attempts are ceased after _____ hours.
- 10. A _____ plan helps to ensure you have a second/backup DAPM if needed.
- 11. _____ corrections to a policy do not often require additional approval or board adoption.
- 13. When you use another random selection to replace an employee who is unavailable for the entire selection period.
- 14. 50% drug and 10% alcohol are the current _____ annual percentage random testing rates.

Down

- 1. _____ tests can be reclassified only by the FTA Drug and Alcohol Program Managers.
- 4. This type of specimen triggers a medical evaluation.
- 6. Location of the program's 2024 annual conference.
- 8. _____ is only safety-sensitive if the employee is responsible for 'controlling movement'.
- 9. The collector or technician is required to verify the _____ of the employee.
- 12. Ferryboat operators must comply with this type of DOT alcohol testing.

Regulation Updates

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Crossword Puzzle Answer Key

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|---|--|
| <p>Down</p> <ul style="list-style-type: none"> 1. Positive 4. Insufficient 6. Atlanta 8. Dispatch 9. Identity 12. Random | <p>Across</p> <ul style="list-style-type: none"> 2. Notified 3. Arbitrarily 5. Trainings 7. Eight 10. Contingency 11. Technical 13. Alternate 14. Minimum |
|---|--|

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.