FTA Drug and Alcohol REGULATION UPDATES

December 2024

Issue 83

2025 National Conference is Coming to Kansas City

The 18th Annual FTA Drug and Alcohol Program Conference will be in Kansas City, MO on March 18-20, 2025. For more information, visit the FTA Drug and Alcohol Program Website. Registration is scheduled to open at this website on February 4, 2025.

Calendar Year 2024 MIS Reporting

The Drug and Alcohol Management Information System (DAMIS) will open in January 2025 for employers to submit their 2024 drug and alcohol testing data, due March 15, 2025.

FTA will contact registered grantees via fta.damis@dot.gov to verify the email addresses associated with the employer. Individuals with email addresses previously registered in DAMIS will be able to log in to the system the first week of January using their registered email address and login.gov credentials.

Additionally, FTA will mail notification letters to all grantees with instructions on accessing DAMIS when there is not a registered email associated with that grantee or if the employer has new users they would like to register to access DAMIS. New users can obtain an activation code to register an email address with DAMIS using login.gov by contacting the FTA Drug and Alcohol Project Office.

If you have had changes in relevant staff since last year, please contact the FTA Drug and Alcohol Program Office at fta.damis@dot.gov or 617-494-6336 to make changes to contact information.

2025 FTA Minimum Random Testing Rates

The FTA 2023 MIS data showed that drug positive rates were higher in 2023 than in 2022 (i.e., 1.09 percent to 1.23 percent). Because the reported positive rate remains above 1.0 percent, the minimum random testing rate will remain at 50 percent for drugs. The random testing rate for alcohol will remain at 10 percent in 2025.

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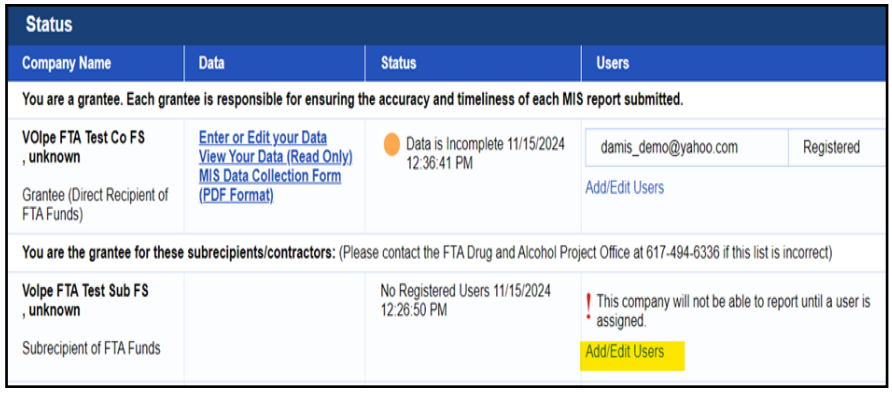
U.S.Department of Transportation
Federal Transit Administration

Changes to Subrecipient/Contractor Lists in DAMIS

The FTA Drug and Alcohol Project Office is now accepting updates to grantee's subrecipient, and contractor lists for 2024 MIS reporting. Please email your list of changes to fta.damis@dot.gov.

Upon logging in to DAMIS in January, grantees will need to review their list of subrecipients/ contractors as well as the users registered to each employer, to verify accuracy. Grantees must then inform their subrecipients/ contractors they can submit MIS data.

Grantees with subrecipients/ contractors that need to register new users will send an activation code to the new users' email address from DAMIS. MIS reporting instructions can be found on the FTA Drug and Alcohol website.

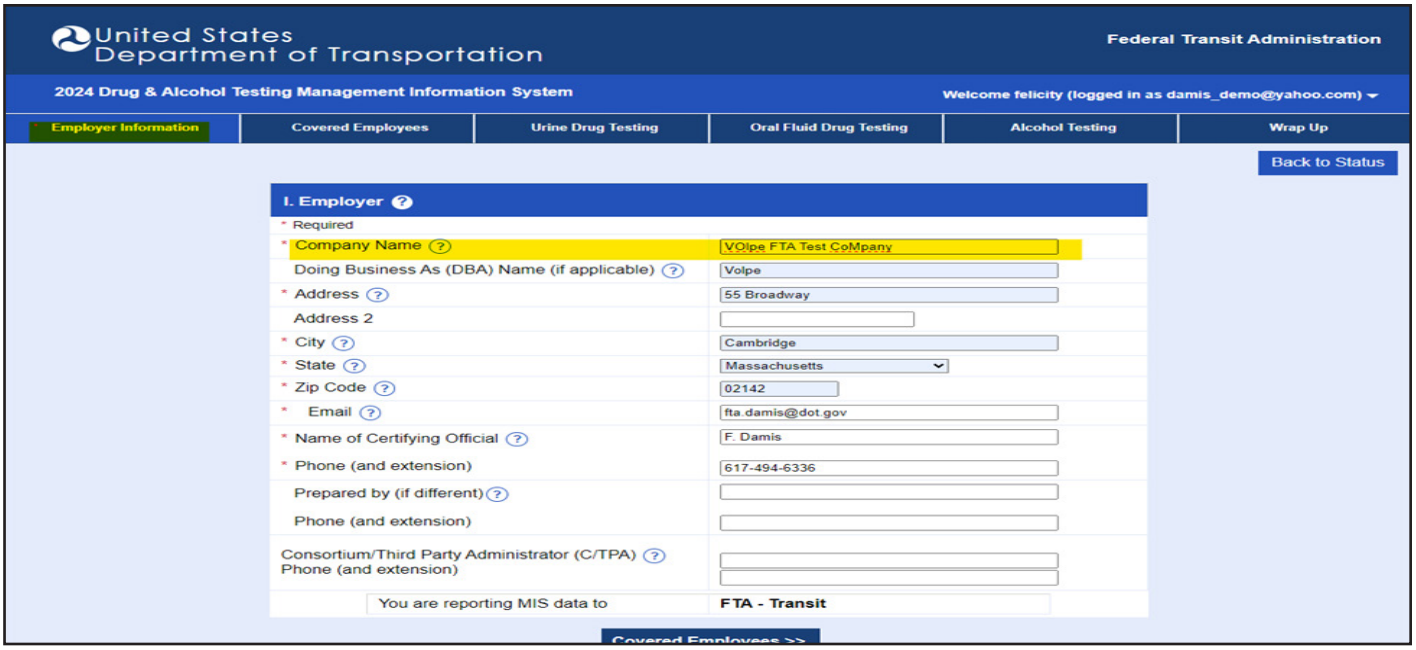


DAMIS Users Reporting MIS Data to Multiple Modes

New for 2024 MIS reporting, users reporting to multiple DOT modes (e.g., FTA and FMCSA) may register an email address with more than one mode. Previously, DAMIS only allowed for an email address to be registered to one company across all modes, such that an employer reporting MIS data to two modes would need two separate email addresses to submit the two MIS reports. Now, one email address can be used to report both data submissions.

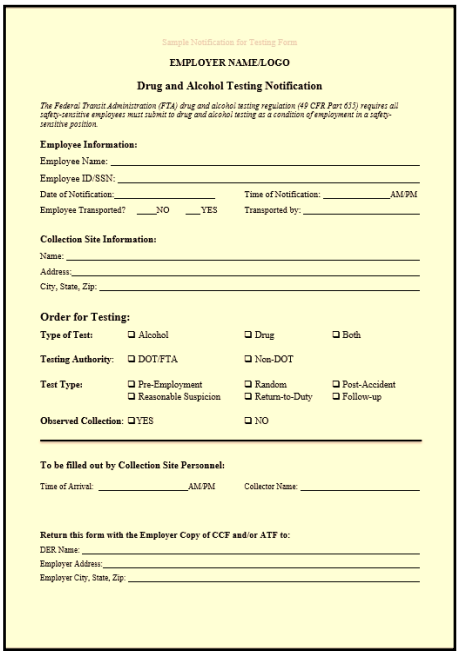
Confirming Employer Information in DAMIS

Reminder: When accessing DAMIS, employers should check that the information contained in the Employer Information section is correct. These fields are editable, including the "Company Name" field.



Why Use a Notification Form?

Many employers use a notification form when sending an employee for drug and/or alcohol testing. Such a form is typically presented to the employee, who then provides it to the collection site upon arrival for testing. FTA does not require employers to use a notification form, but there are several reasons why their use is a best practice.



Sample Notification for Testing Form

EMPLOYER NAME/LOGO

Drug and Alcohol Testing Notification

The Federal Transit Administration (FTA) drug and alcohol testing regulation (49 CFR Part 655) requires all safety-sensitive employees must submit to drug and alcohol testing as a condition of employment in a safety-sensitive position.

Employee Information:

Employee Name: _____

Employee ID/SSN: _____

Date of Notification: _____ Time of Notification: _____AM/PM

Employee Transported? ___NO ___YES Transported by: _____

Collection Site Information:

Name: _____

Address: _____

City, State, Zip: _____

Order for Testing:

Type of Test: ❑ Alcohol ❑ Drug ❑ Both

Testing Authority: ❑ DOT/FTA ❑ Non-DOT

Test Type: ❑ Pre-Employment ❑ Random ❑ Post-Accident ❑ Reasonable Suspicion ❑ Return-to-Duty ❑ Follow-up

Observed Collection: ❑ YES ❑ NO

To be filled out by Collection Site Personnel:

Time of Arrival: _____AM/PM Collector Name: _____

Return this form with the Employer Copy of CCF and/or ATF to:

DER Name: _____

Employer Address: _____

Employer City, State, Zip: _____

A notification form can be used to inform the employee that the test is being conducted under FTA authority, as required by 49 CFR 655.17. The form can also be used to comply with 49 CFR 40.14 requirements for providing collectors with the information necessary for carrying out a test. Employers may find that providing this information on a notification form helps to avoid common collection site paperwork errors (e.g., the marking of an FTA test as an FMCSA test).

A common practice is for collection sites to record an employee's time of arrival on a notification form. By comparing this time to the time at which an employee was notified to proceed for testing, an employer can determine if an employee proceeded immediately to the collection site, as required by 49 CFR 655.45(h).

The notification form can also relay other valuable information. For example, the form could remind employees of the consequences for leaving a collection site prior to completing a test or provide records-transmission instructions to the collection site. Once oral fluid testing is an available option for DOT drug testing, the form could also provide the collection site with the employer's standing orders for which specimen type should be collected.

See the Tools and Resources page on FTA's drug and alcohol program website for a sample Notification for Testing Form.

Notification Forms Must Not Include Expected Arrival Time for Random Tests

Part 655.45(h) requires that a covered employee who is notified of selection for random drug or random alcohol testing proceed to the test site immediately. Some employers have established their own time limits (e.g., 10, 30, 60 minutes) within which an employee must arrive at the testing site and have included these limits or an expected arrival time on their notification forms. However, this practice is not permissible because it provides a time period for arrival that contradicts the regulatory requirement to "proceed to the test site immediately". While employers should have an expected arrival time in mind to assess whether an employee arrived at the collection site "immediately," this information must never be disclosed to the employee or be included on the notification form.

At the time of notification, the employee must be instructed to proceed immediately for testing. Employers should reasonably estimate the employee's travel time, and if possible, communicate the expected arrival time to the collection site. The employer may request that collection site personnel document the time of the employee's arrival so the estimated and actual arrival times can be compared to determine whether the employee complied with the 49 CFR 655.45(h) requirement to proceed immediately for testing. FTA provides a sample Drug and Alcohol Testing Notification form, which may be used for documentation purposes.

Timing of Death for a 'Fatal' Accident

Per 49 CFR 655.44(a)(1), post-accident testing should take place as soon as practicable following an accident involving the loss of human life and should be conducted on any covered employee whose performance could have contributed to the accident.

The decision to send an employee for testing must be made using the best information available at the time of the decision and should not be reversed based on details that emerge later. For example, if an individual is injured in an accident but the employee(s)' performance was completely discounted as a contributing factor to the accident, the covered employee(s) in question would not be sent for post-accident testing if an individual died later as a result of injuries sustained in the accident. FTA only considers an accident fatal if an individual died at the scene.

It is important in all cases of an accident to document the decision to test or not. The FTA Drug and Alcohol Program Office has several tools available to facilitate documentation, including a sample Decision Making Form.

Keep Random Testing Pools Up-To-Date

Employers must regularly review and update the list of covered employees included in their FTA random testing pool. In doing so, per 49 CFR 655.72(e), employers must ensure (1) all covered employees are in the random testing pool, and (2) only covered employees are in the pool.

When covered employees are newly hired for a safety-sensitive position or are transferred into safety-sensitive job functions, they must be added to the random pool. Likewise, when covered employees are terminated from or transferred out of safety-sensitive functions, they must be promptly removed from the pool.

Beyond updating the pool to account for employee turnover and transfers, employers should also pay careful attention to the job functions considered safety sensitive. At some employers, the actual job functions performed by some employees may change while their job titles remain the same. For example, perhaps a "Dispatch Coordinator" at one time performed covered dispatching functions (see Issue 81 of FTA's *Drug and Alcohol Regulation Updates*), but their responsibilities have since shifted to solely scheduling and assigning routes. In this case, they are no longer a covered employee and must be removed from the random pool, even though their title has not changed.

Using Temporary Staff for Safety-Sensitive Functions

Employees or contractors who perform safety-sensitive functions on a temporary or short-term basis are subject to the same drug and alcohol testing requirements as those who perform these functions on a permanent basis. Though short-term assignments or contracts are temporary in nature, when they involve safety-sensitive functions, they are covered by 49 CFR 655.

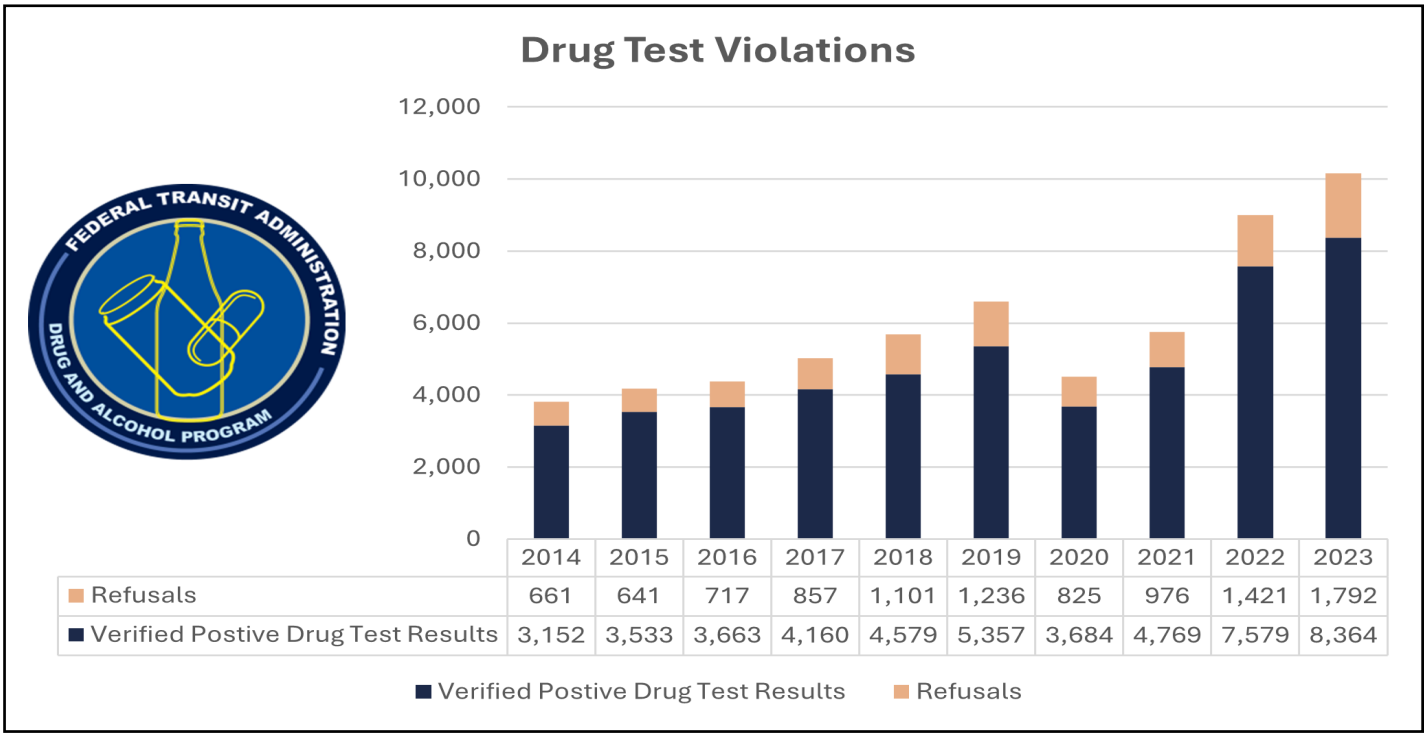
Per 49 CFR 655.4, a covered employee is "a person, including an applicant or transferee, who performs or will perform a safety-sensitive function for an entity subject to this part".

An FTA-covered employer who utilizes an employment or temp agency to fill safety-sensitive positions is responsible for ensuring that those employees comply with the requirements of 49 CFR 655. Each of those covered employees must receive a verified negative pre-employment test prior to performing safety-sensitive functions, be in a random pool, and be subject to FTA-authorized testing, the same as any covered employee performing safety-sensitive functions.

Temp agencies may have insufficient knowledge or means to establish and manage an FTA compliant program. In these cases, the FTA grantee may include the temp agency covered employees in their drug and alcohol program. Whatever the method, FTA grantees must ensure compliance of all covered employees under its umbrella.

FTA Employers Report More than 10,000 Drug Testing Violations in 2023

FTA has collected testing results data from FTA-covered employers since 1995 through the annual MIS reporting requirement. For the first time, covered employers have reported more than 10,000 drug testing violations (i.e., verified positive drug test results and refusals to take a drug test) in a calendar year. The increase, shown below, occurred with a mostly stable number of covered employees across the years.

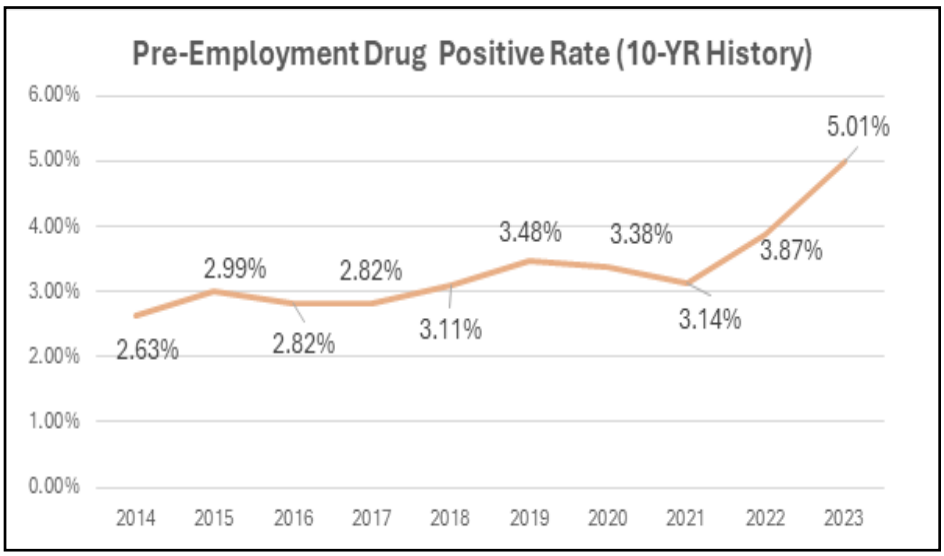


	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Refusals	661	641	717	857	1,101	1,236	825	976	1,421	1,792
Verified Postive Drug Test Results	3,152	3,533	3,663	4,160	4,579	5,357	3,684	4,769	7,579	8,364

The majority of verified positive drug tests and refusals are a result of pre-employment drug testing. Pre-employment drug testing made up 45.7 percent of all FTA-authorized drug testing in 2023 but resulted in 79.8 percent of all verified drug positives and 59.5 percent of total refusals.

The positive rate for pre-employment drug testing is a calculation of the number of verified positive drug test results plus the number of pre-employment refusals divided by the total number of pre-employment test results. The rate, depicted right, has increased significantly over the past decade.

The 2023 positive pre-employment testing rate at 5.01 percent is the highest in the history of the program, increasing dramatically from the previous high of 3.87 percent just one year earlier (2022).



Employers Should Ensure BATs Keep Maintenance Logs

Manufacturers of Evidential Breath Testing devices (EBTs) must specify, in a Quality Assurance Plan (QAP), the requirements for proper use and care of the EBT. The QAP must include the methods used to perform external calibration checks (also known as "accuracy checks"), the tolerances within which the EBT is considered to be in proper calibration, and the intervals at which these checks must be performed. Per 49 CFR 40.233(c), the EBT user (e.g., a breath alcohol technician [BAT]) must follow the QAP, which includes performing accuracy checks at the intervals the QAP specifies. BATs must keep records (e.g., a log) of all accuracy checks, calibrations, and maintenance for two years, as required by section 49 CFR 40.333(a)(3).

It is important for employers to ensure each EBT used is maintained in accordance with the QAP. Per 49 CFR 40.267, if the EBT fails an accuracy check, (i.e., the EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard), all results of 0.02 or above obtained on the EBT since the last valid accuracy check are cancelled. The EBT must also be removed from service until it is repaired.

Split Specimen Testing

In DOT drug testing, an employee who has a verified positive test (or a refusal to test due to adulteration or substitution) has the right to ask for the second "split" sample of their specimen to be tested at a different laboratory. Split specimen collections, in which a donor's specimen is divided into a "primary" and "split" sample upon collection, are a keystone component of all DOT drug testing.

Under 49 CFR Part 40 Subpart H, an employee can request that the Medical Review Officer (MRO) initiate testing to determine if analysis of the split specimen reconfirms the test results for the primary specimen. This request must be made within 72 hours of the MRO notifying the employee of the non-negative result.

While it is the MRO's duty to direct the primary laboratory to send the split specimen to the secondary laboratory for testing, the employer must be aware of the following:

1. The employer is ultimately responsible for making sure the MRO and both laboratories execute their Subpart H (Split Specimen) functions in a timely manner.
2. The employer is prohibited from conditioning split specimen testing on the employee's payment for the test, or even on an agreement from the employee to provide reimbursement for testing. However, the employer may seek reimbursement for these costs through garnishment, collections, collective bargaining, etc. DOT takes no position on who pays for the cost of the test, so long as the employer ensures testing is conducted as required.
3. The employee must remain out of safety-sensitive service while awaiting the results of the split specimen test.

FTA recommends employers review the 49 CFR Part 40 Subpart H requirements within their internal teams and with applicable service agents. This will ensure all aspects of the process are understood and can be executed effectively when the time comes.

Thinking About Seeking a Second SAP's Recommendations?

Substance Abuse Professionals (SAPs) evaluate employees with DOT drug or alcohol violations and recommend appropriate education and/or treatment, follow-up testing, and aftercare. According to the Office of Drug and Alcohol Policy and Compliance (ODAPC) SAP Guidelines and 49 CFR 40.291(b), the SAP's role is to serve as an impartial evaluator to protect public interest in safety, and is not to act as an advocate for either the employer or the employee. The SAP's recommendations are based upon the SAP's clinical judgment and must not be altered by the employer. Employers and employees are strictly prohibited from seeking or relying upon a second SAP evaluation if they disagree with the initial qualified SAP's assessment of the employee, as specified in 49 CFR 40.295. The employer must adhere to and carry out the original SAP's follow-up plan. Only the initial SAP is authorized to modify their recommendations based on new or additional information, per 49 CFR 40.307. Employers are also prohibited by 49 CFR 40.307(d)(4) from imposing any testing requirements that exceed the SAP's prescribed follow-up testing plan, including company-authorized tests beyond what the SAP mandates.

Questions on "Second Chance"

Employers giving employees a so-called "second chance" after a violation of FTA's drug and alcohol regulations often have questions about how to create and implement such a policy. Below are answers to some common questions for employers considering second-chance policies to ensure compliance with FTA regulations. Note that FTA does not require nor prohibit "second chance" policies.

How many times can an employee enter the "second chance" program?

FTA has no regulatory requirements for "second chance" policies and thus there is no FTA identified limit to how many times an employee can go through the return-to-duty process. However, your organization can establish a limit as part of your internal policy. FTA recommends that you clearly communicate any limitations to your employees via your policy. Keep in mind that allowing repeated entries into the return-to-duty process may decrease the deterrence effect of drug and alcohol testing.

Do I need to contract with a SAP and cover costs for evaluations and treatment?

Employers must provide contact information for qualified SAPs, but the regulations do not require employers to pay for evaluations or treatment, or even to set up an actual referral appointment. Some employers choose to cover these costs as part of their second chance program, but this is generally driven by business or collective bargaining decisions.

Must I always let the employee return if the SAP approves?

No. While the SAP's determination of program compliance must occur before an employee can take a return-to-duty test, the employer, not the SAP, retains the non-delegable discretion over whether to allow the employee to return to safety-sensitive duties, subject to collective bargaining agreements and other considerations (see 49 CFR 40.305).

Testing Counts!

TISIFAMONTORCONIF

Hint: No expected arrival time

NMETTETAR

Hint: SAP's recommendation

RNTCOAORTCS

Hint: Grantee updates this list

OTRMRAEYP

Hint: Short-term assignment

ASIACYTKNS

Hint: 2025

MOECATNALSNEING

Hint: EBT compliance

TDCCIAESN

Hint: Could be fatal

MSRODAN

Hint: Keep this up-to-date

YIITAMEMEDL

Hint: Proceed in this manner

ESQSIUNOT

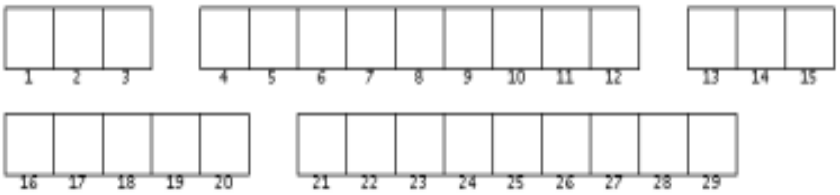
Hint: You might have one regarding policies

DROTIIBEPH

Hint: Split specimen testing

AOCHOLL

Hint: 10%



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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
Volpe National Transportation
Systems Center
220 Binney St
Cambridge, MA 02142

Cahill Swift, LLC
2 Park Plaza
Boston, MA 02116

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