October 2009

Mandatory Direct Observation Collections for Return-to-Duty and Follow-Up Testing

On July 30, 2009, the Office of Drug and Alcohol Policy and Compliance (ODAPC) published a Final Rule in the Federal Register, that restores mandatory direct observation collections for all return-to-duty and follow-up testing. This direct observation rule is to be applied to all return-to-duty, safety-sensitive transportation industry employees who have already failed or refused to take a prior drug test.

Mandatory direct observation for return-to-duty and follow-up testing is to begin on August 31, 2009. All employees who undergo return-to-duty and follow-up tests on and after the effective date must have their collections observed by testing personnel. This includes employees currently in follow-up testing programs who will still be in those programs on and after August 31, 2009.

The Final Rule on direct observations may be found on the Federal Register website at: http://edocket.access.gpo.gov/2009/pdf/E9-18156.pdf

As a result of this latest mandate, the following sections of the Implementation Guidelines have been updated to reflect this testing requirement.

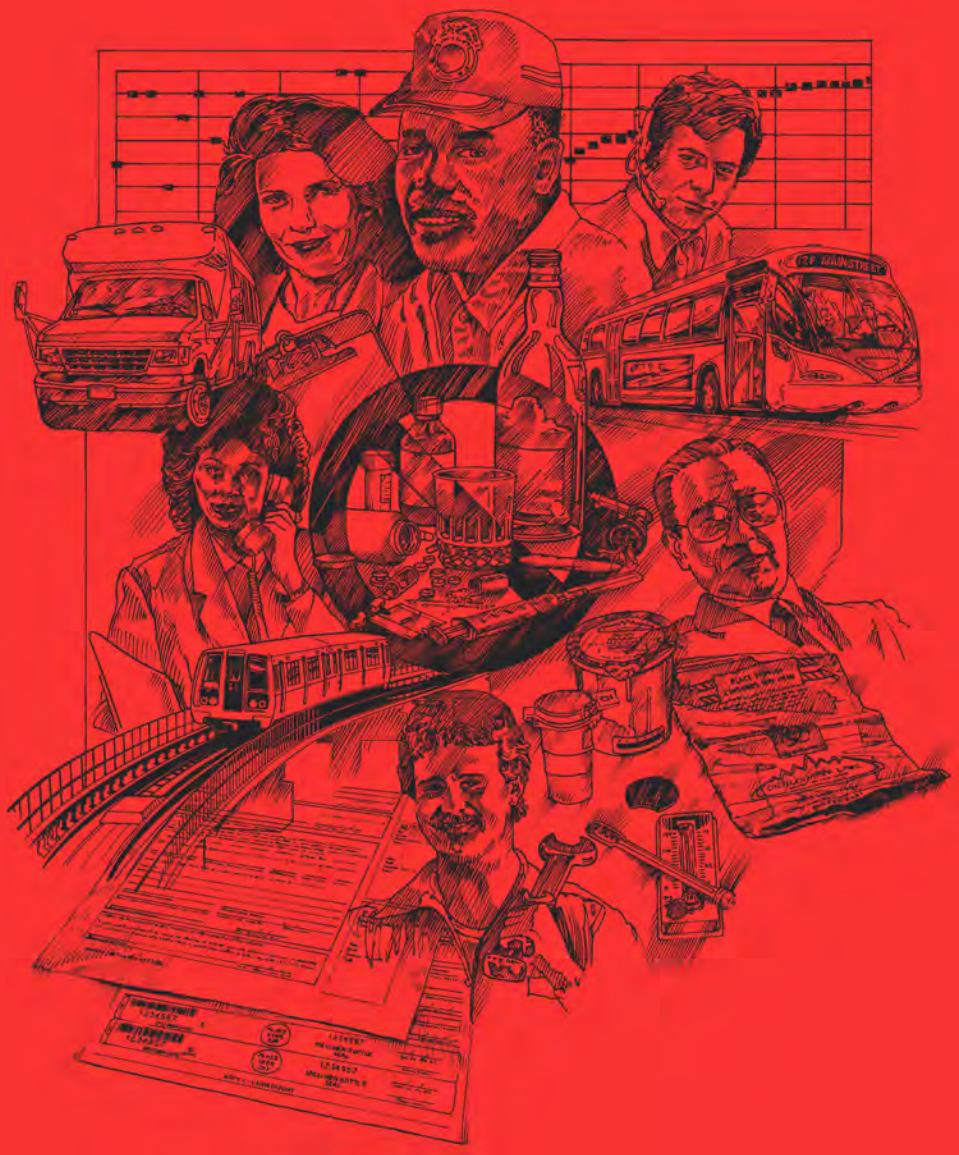
- Chapter 7. Drug Testing Procedures – **Observed Collections** (pages 7-12 to 7-14)
- Appendix H. Terms and Definitions – **Return-to-duty test** (page H-11)
- Appendix I. 49 CFR Part 40 – Updated August 31, 2009
- Appendix J. Self-Assessment Checklist – ***Observed Collections*** (page J-14)

U.S. Department
of Transportation

Federal Transit Administration

Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit

Revised October 2009



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13. ABSTRACT (Maximum 200 words)

These guidelines will assist transit agencies in developing drug and alcohol testing programs that comply with regulations of the Federal Transit Administration (FTA). These regulations were first published in the *Federal Register* on February 15, 1994, as *Prevention of Prohibited Drug Use in Transit Operations* (49 CFR Part 653) and *Prevention of Alcohol Misuse in Transit Operations* (49 CFR Part 654), and later revised and combined into one regulation (49 CFR Part 655) on August 1, 2001. These guidelines are directed to transit agencies receiving federal funding under sections 5307, 5309, and 5311 of the Federal Transit Act, and section 103(e)(4) of title 23 of the U.S. Code. In addition, these guidelines will assist state agencies that receive FTA funding and contractors who perform safety-sensitive services for transit agencies.

These guidelines provide a comprehensive, up-to-date summary of the regulatory requirements, incorporating into one publication all of the guidance the FTA has issued over the past several years including technical assistance, letters of interpretation, audit findings, newsletters, training classes, and public speaking engagements. The pertinent regulations are cross-referenced throughout the text and are reprinted in their entirety in Appendix I. Forms, checklists, and lists of additional information and services are provided throughout the document. The companion volume to this guide (*Best Practices* manual) discusses "best practices" used by employers to establish and maintain compliant testing programs.

14. SUBJECT TERMS
Drugs and alcohol, drug and alcohol testing, best practices, public transit, safety, accidents, Federal Transit Administration, FTA, regulations, safety-sensitive, testing procedures, policy, training, record keeping

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METRIC/ENGLISH CONVERSION FACTORS

ENGLISH TO METRIC	METRIC TO ENGLISH
LENGTH (APPROXIMATE)	**LENGTH (APPROXIMATE)**
1 inch (in) = 2.5 centimeters (cm)	1 millimeter (mm) = 0.04 inch (in)
1 foot (ft) = 30 centimeters (cm)	1 centimeter (cm) = 0.4 inch (in)
1 yard (yd) = 0.9 meter (m)	1 meter (m) = 3.3 feet (ft)
1 mile (mi) = 1.6 kilometers (km)	1 meter (m) = 1.1 yards (yd)
	1 kilometer (km) = 0.6 mile (mi)
AREA (APPROXIMATE)	**AREA (APPROXIMATE)**
1 square inch (sq in, in^2) = 6.5 square centimeters (cm^2)	1 square centimeter (cm^2) = 0.16 square inch (sq in, in^2)
1 square foot (sq ft, ft^2) = 0.09 square meter (m^2)	1 square meter (m^2) = 1.2 square yards (sq yd, yd^2)
1 square yard (sq yd, yd^2) = 0.8 square meter (m^2)	1 square kilometer (km^2) = 0.4 square mile (sq mi, mi^2)
1 square mile (sq mi, mi^2) = 2.6 square kilometers (km^2)	10,000 square meters (m^2) = 1 hectare (ha) = 2.5 acres
1 acre = 0.4 hectare (he) = 4,000 square meters (m^2)	
MASS - WEIGHT (APPROXIMATE)	**MASS - WEIGHT (APPROXIMATE)**
1 ounce (oz) = 28 grams (gm)	1 gram (gm) = 0.036 ounce (oz)
1 pound (lb) = 0.45 kilogram (kg)	1 kilogram (kg) = 2.2 pounds (lb)
1 short ton = 2,000 pounds (lb) = 0.9 tonne (t)	1 tonne (t) = 1,000 kilograms (kg)
	= 1.1 short tons
VOLUME (APPROXIMATE)	**VOLUME (APPROXIMATE)**
1 teaspoon (tsp) = 5 milliliters (ml)	1 milliliter (ml) = 0.03 fluid ounce (fl oz)
1 tablespoon (tbsp) = 15 milliliters (ml)	1 liter (l) = 2.1 pints (pt)
1 fluid ounce (fl oz) = 30 milliliters (ml)	1 liter (l) = 1.06 quarts (qt)
1 cup (c) = 0.24 liter (l)	1 liter (l) = 0.26 gallon (gal)
1 pint (pt) = 0.47 liter (l)	
1 quart (qt) = 0.96 liter (l)	
1 gallon (gal) = 3.8 liters (l)	
1 cubic foot (cu ft, ft^3) = 0.03 cubic meter (m^3)	1 cubic meter (m^3) = 36 cubic feet (cu ft, ft^3)
1 cubic yard (cu yd, yd^3) = 0.76 cubic meter (m^3)	1 cubic meter (m^3) = 1.3 cubic yards (cu yd, yd^3)
TEMPERATURE (EXACT)	**TEMPERATURE (EXACT)**
[(x-32)(5/9)] °F = y °C	[(9/5) y + 32] °C = x °F

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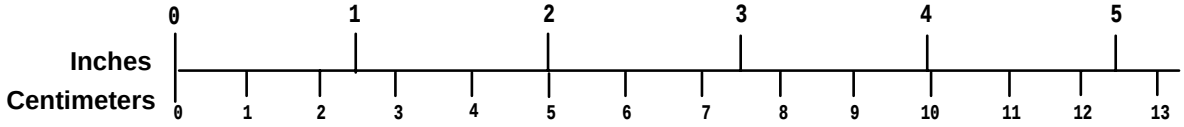

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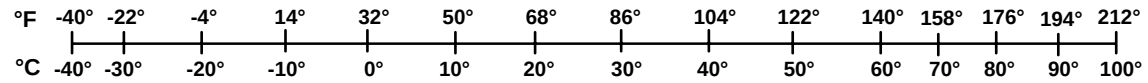

For more exact and or other conversion factors, see NIST Miscellaneous Publication 286, Units of Weights and Measures. Price $2.50 SD Catalog No. C13 10286

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Chapter 1. INTRODUCTION

Section 1. PURPOSE AND SCOPE OF THESE GUIDELINES

The Federal Transit Administration (FTA) recognizes that prohibited drug use and alcohol misuse affect everyone in the United States. In response to passage of the Omnibus Transportation Employee Testing Act of 1991, FTA published two regulations in February 1994, prohibiting drug use and alcohol misuse by transit employees and requiring that transit agencies test for prohibited drug use and alcohol misuse. These regulations were published as 49 CFR Part 653, *Prevention of Prohibited Drug Use In Transit Operations*, and 49 CFR Part 654, *Prevention of Alcohol Misuse in Transit Operations*. These regulations were updated on August 1, 2001, and consolidated into one regulation. The new regulation, 49 CFR Part 655, *Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations,* incorporates guidance that FTA previously issued through letters of interpretation, newsletters, training classes, and compliance audits.

In addition, the Department of Transportation (DOT) issued 49 CFR Part 40 *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, on December 1, 1989, which prescribed testing methods. Following the publication of several amendments, letters of interpretation, and DOT program guidelines, the regulation underwent a major revision. The revised 49 CFR Part 40 was published on December 19, 2000, with an effective date of August 1, 2001. Complete copies of the regulations are located in Appendix I.

To assist transit agencies in implementing these regulations, FTA and DOT have developed a complement of technical assistance tools including procedural manuals and reports, training workshops, videos, seminars, and Web-based resources. Central to this technical assistance effort is FTA's publication of the

Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit, Best Practices manual, and the quarterly FTA newsletter *Drug and Alcohol Regulation Updates*.

Together, these three publications will provide covered employers with the necessary information to become and remain compliant with the regulations. The ultimate goal for FTA and the U.S. transit industry is to achieve a drug- and alcohol-free workforce in the interest of the health and safety of employees and the public. Other resources are discussed in Section 3 of this chapter.

Implementation Guidelines

These guidelines are written to assist employers in developing compliant programs based on the revised FTA and DOT rules. Employers with well-established drug and alcohol testing programs can also use these guidelines to assess their level of compliance, validate policies and procedures, and identify areas that require modification based on the revised FTA and DOT rules.

These guidelines provide a comprehensive, up-to-date summary of the regulatory requirements, incorporating into one publication all of the guidance FTA has issued over the past several years through technical assistance, letters of interpretation, audit findings, newsletters, training classes, and public speaking engagements.

These guidelines explain the various elements of a compliant program and contain examples of documents, checklists, forms, and procedures that may be used by individual transit system employers in formulating their programs. The following required elements of a drug and alcohol program are discussed:

- Policy and procedure development
- Employee and supervisor education and training
- Testing categories
- Drug testing procedures
- Alcohol testing procedures
- Substance Abuse Professionals (SAPs)
- Record keeping and reporting

All FTA-covered employers were required to be in compliance with the revised DOT procedures for drug and alcohol testing (49 CFR Part 40) and the FTA regulations on the prevention of alcohol misuse and prohibited drug use (49 CFR Part 655) by August 1, 2001. These requirements are unaffected by the size of the transit agency, the number of vehicles in the fleet, or the number of employees. All covered employers who perform FTA safety-sensitive duties following these dates, must be in compliance prior to conducting these duties.

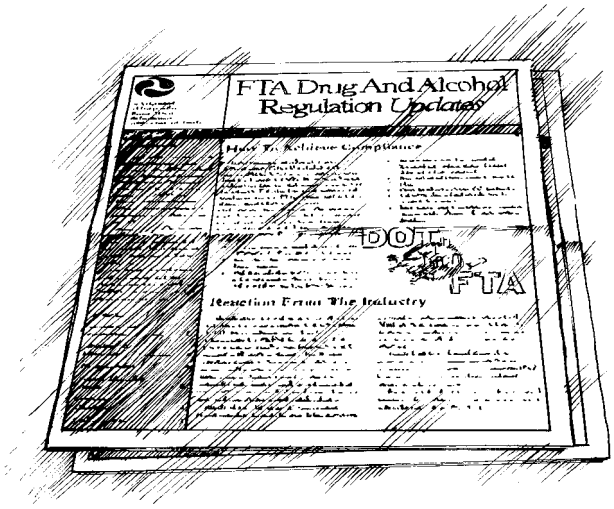
Transit employers may go beyond these requirements to incorporate additional features (such as Employee Assistance Programs and additional testing circumstances) that are not mandated by FTA regulations. Additional provisions that go beyond the regulatory requirements must be clearly represented as features included under the authority of the transit agency and not the FTA-mandated program. For example, if you test for drugs other than the specific five that FTA requires, you must make the employees aware that they are being tested for those additional drugs under the authority of the transit agency, not FTA. A separate specimen must also be collected to analyze the additional drugs.

Policies and procedures beyond the regulatory scope are not addressed in this manual to avoid confusion and misinterpretation over which provisions are requirements of the regulation and which are additional features. Discussion of best practices and examples of additional policies and procedures are included in the *Best Practices* manual that serves as a sister document to this publication.

Best Practices

The *Best Practices* manual was published to supplement the Implementation Guidelines by providing examples of "real world" policies, procedures, sample forms, and narrative descriptions of approaches that have been successfully used by transit employers to effectively manage their drug and alcohol testing programs. Though the regulations are very comprehensive and address each of the major components of a legally defensible program, the regulations represent only the minimum requirements. Transit employers are encouraged to develop a program that goes beyond these minimum requirements to reflect the unique nature of the employer, operating environment, labor/management relationship, and existing policies and procedures.

The examples provided in the *Best Practices* manual represent materials that transit employers have found effective to help them efficiently manage their programs, and to comply with the regulations. In some cases, multiple examples are given to address the same issue or requirement. These best practices are not required methods of implementation, but are examples of how some systems have dealt with particularly difficult issues.



***Updates* Newsletter**

The Implementation Guidelines is a comprehensive summary of the regulations and supercedes previous guidance provided by FTA. Given the dynamic nature of the drug and alcohol testing industry and the practical insights obtained following implementation of the regulations, it is expected that additional clarifications, corrections, explanations, and procedural guidance will be necessary overtime to supplement these guidelines. Consequently, FTA publishes a quarterly newsletter entitled, *FTA Drug and Alcohol Regulation Updates,* which keeps covered employers informed of the regulatory clarifications,

corrections, and any new FTA interpretations. The newsletter is a continuance of the guidelines, and as such, each page of the newsletter references the section of the guidelines to which it relates. To be added to the mailing list for the newsletter, please register on FTA's homepage (transit-safety.volpe.dot.gov) or fax your request to FTA's Office of Safety and Security at (202) 366-7951. If you would like additional copies of these guidelines, you may reproduce as many copies as you need. You may also download copies from the FTA's Office of Safety and Security homepage. A list of Web addresses is provided in the Sample Documentation section of this chapter.

Section 2. HOW TO USE THESE GUIDELINES

These guidelines are a ready reference for those in the transit industry who must develop and implement programs to control substance abuse. The guidelines are organized by subject, and each subject is addressed in the general order it would be confronted in the actual formulation and implementation of a drug and alcohol program.

Each major subject is discussed in a separate section. Corresponding reference documents, forms, and checklists are included in the Sample Documentation section at the end of each chapter. These materials were designed to meet the minimum regulatory requirements contained in 49 CFR Parts 40 and 655.

Material in the Appendices amplifies basic information in the guidelines, identifies additional resources or references, and provides specific detailed information on subjects that may be ancillary to the guidelines or applicable only to certain situations or transit operations. You should read Appendix H, "Terms and Definitions," first if you are unfamiliar with some of the language used.

The information in this document addresses only the regulatory minimum and does not cover any additional aspects of a substance abuse management program. The information presented, however, is essential in developing and assessing a compliant, comprehensive, and defensible program.

These guidelines do not take precedence over or alter any requirement established under FTA or DOT regulations. Certain key words are used throughout the text to assist you in differentiating between required program elements and optional suggestions for a better program.

Section numbers from the regulations are also used to more clearly define regulatory requirements. For example, §655.4 means this regulation is specifically mentioned in 49 CFR Part 655, Section 4. Similarly, §40.25 references 49 CFR Part 40 Section 25.

To clarify some difficult subjects and give practical guidance on how to address many of these issues, explanatory flow charts, decision trees, checklists, and tables have been provided in these guidelines.

Recommendation: Know the Regulations

Every transit employer's Drug and Alcohol Program Manager (DAPM) should read and re-read the regulations several times. If possible, the DAPM should participate in periodic conferences, workshops, and informational meetings on the subject as they become available. The DAPM should ask questions of other transit system program managers, State Department of Transportation staff, the FTA Office of Safety and Security staff, as well as other people in the community that have knowledge of the subject. With each new reading, questions, or discussion, subtleties of the regulation will be uncovered and new or differing interpretations will be found. The process should be considered ongoing and requires a certain degree of tenacity. An ongoing effort to know and remain up-to-date with the regulations is essential to maintain a compliant program.

Section 3. OTHER RESOURCES

While every attempt has been made to make these guidelines complete, FTA has produced additional manuals, training aids, and informational reports to further assist transit employers in the successful implementation of a compliant program. For instance, Chapter 6 "Types of Testing," provides a general discussion on the random testing portion of your drug and alcohol program. However, FTA published a separate publication, the *Random Drug Testing Manual*, to provide detailed guidance on how to implement a comprehensive and defensible random drug testing regimen as part of an overall substance abuse management program. The USDOT, Office of Drug and Alcohol Program Compliance also publishes procedural guidelines for service agents including collection site personnel, Medical Review Officers (MRO), and Substance Abuse Professionals (SAP). Where appropriate, these additional resources are identified.

The Sample Documentation section at the end of this chapter contains a list of sources of additional information that you may wish to acquire to assist in the implementation and evaluation of your substance abuse management program. The *FTA Drug and Alcohol Regulation Updates* newsletter is another source of information, as it announces the publication of new materials and includes a list of resource materials that is kept current.

Regulatory Text

Statements in this manual that refer to **regulatory requirements** contain the words "**shall**" or "**must**: (e.g., "A substance abuse management program shall include a policy statement…"). Program elements **not** explicitly **required** by regulations, but suggested as an integral part of successful implementation are generally addressed using the word "**should**." **Optional** elements, or those program features that have several acceptable alternatives, are normally expressed by use of the word "**may**."

FTA's Web site (www.fta.dot.gov) can also be accessed to obtain accurate and up-to-the-minute information about the FTA drug and alcohol testing regulations and related topics. This site provides various links which access information from different FTA offices. You can read FTA's mission statement, strategic plan, news releases, calendar of events, regional office information, and messages from the Administrator.

Under "Offices," you can visit the Office of Chief Counsel to view FTA's drug and alcohol testing letters of interpretation and the *Federal Register* where you can download the exact text of relevant regulatory changes and FTA interpretations. The interpretations clarify and explain FTA's regulatory intent regarding actual, practical, and operational problems experienced by transit employers. You can also obtain information directly from the Office of Safety and Security by accessing "Program Management" and then "Safety." Or, you can visit the National Transit Library to perform searches on key words or topics. Direct homepage addresses for these and other relevant Web sites are provided in the Sample Documentation section at the end of this chapter.

The FTA also provides technical assistance through training workshops and seminars. Through the Transportation Safety Institute (TSI), FTA provides a course on substance abuse program management and self-assessment. The course provides an overview of the regulations including all updates, relevant FTA interpretations, the audit process, and best practices. The workshop format promotes a high level of interaction and includes hands-on use of a program self-assessment checklist. The TSI courses are provided on a cost-recovery basis with enrollment controlled by the host. For more information regarding these courses, call TSI at (405) 954-3682. FTA also periodically offers regional seminars that provide an overview of the regulations. These seminars are designed to accommodate large numbers of attendees and are presented in a lecture hall format.

Sample Documentation

SOURCES OF ADDITIONAL INFORMATION AND OTHER PUBLISHED DOCUMENTATION

Documentation	Source
Drug and Alcohol Consortia Manual *Drug and Alcohol Testing Results: 1995, 1996, 1997, 1998, 1999, 2000 and subsequent Annual Reports* *Random Drug Testing Manual*	Office of Safety and Security Federal Transit Administration 400 Seventh Street, S.W. Room 6432 Washington, DC 20590 Fax Requests: (202) 366-7951
Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit (Revised 2001) *Identification of Drug Abuse and/or Alcohol Misuse in the Workplace: An Interactive Training Program (with video)* *FTA Drug and Alcohol Regulation Updates*	Web site: www.transit-safety.volpe.dot.gov
Urine Specimen Collection Procedures Guideline *Substance Abuse Professional Guidelines* *Medical Review Officer Guidelines*	U.S. Dept. of Transportation Office of Drug and Alcohol Program Compliance 400 Seventh Street, S.W. Room 9404A Washington, DC 20590 (202) 366-DRUG
Drug and Alcohol Abuse Prevention and the ADA: An Employer's Guide	The Institute for a Drug-Free Workplace 1225 I Street, N.W. Suite 1000 Washington, DC 20005 Phone: (202) 842-7400 Fax: (202) 842-0011 www.drugfreeworkplace.org

Web Sites

DHHS-Certified Laboratories, Center for Substance Abuse Prevention:	www.workplace.samhsa.gov/ResourceCenter/lablist.htm
Federal Register	www.gpoaccess.gov/fr/index.html
FTA Drug and Alcohol Management Information System (DAMIS) Reporting	www.transit-safety.volpe.dot.gov/damis www.transit-safety.volpe.dot.gov/Safety/DAMIS.asp
FTA Office of Safety and Security	www.transit-safety.volpe.dot.gov
FTA Office of Chief Counsel	www.fta.dot.gov/office/chiefc/index.html
FTA Letters of Interpretation	www.fta.dot.gov/library/legal
National Highway Traffic Safety Administration (NHTSA), Conforming Products Lists (CPL)	www.nhtsa.dot.gov
Office of Drug and Alcohol Program Compliance	www.dot.gov/ost/dapc
Substance Abuse and Mental Health Services Administration (SAMHSA)	www.samhsa.gov

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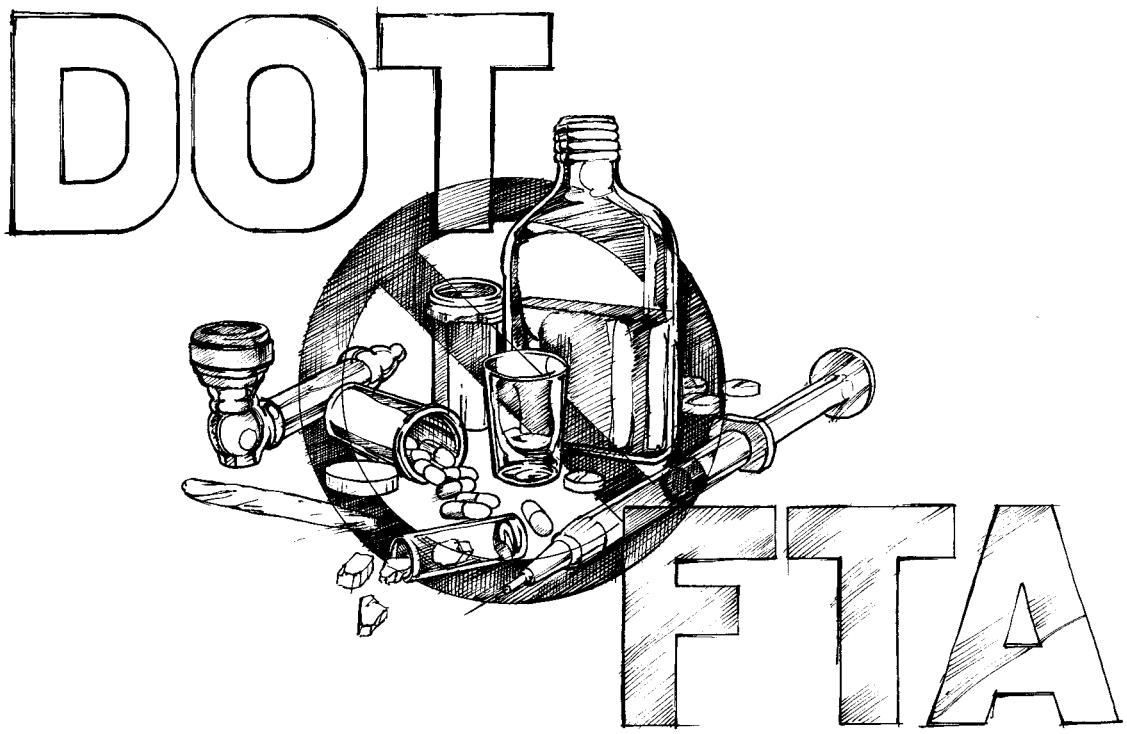


Chapter 2. REGULATORY OVERVIEW

Implementing or updating an FTA-required drug and alcohol program may require you to modify existing substance abuse policies and programs, or in some cases, develop entirely new programs. Since the critical program element is drug and alcohol testing of employees in positions that require the performance of safety-sensitive functions. It is in this context that you must formulate drug and alcohol policies, communicate them to your employees, and conduct drug and alcohol tests. The goals of these activities are to enhance worker productivity and safety and to ensure positive acceptance of the program. In keeping with the stated objective of enhancing productivity and safety, you are encouraged to make your drug and alcohol program an integral part of your overall system safety program plan. Failure of an employer to develop a program and implement the program in compliance with this regulation may result in the suspension of federal transit funding.

Section 1. WHAT THE REGULATIONS REQUIRE

The FTA regulations require the following program elements be implemented:

- A policy statement on prohibited drug use and alcohol misuse in the workplace including consequences (see Chapter 4, "Policy Development and Communication").

- An employee and supervisor education and training program (see Chapter 5, "Training").

- A drug and alcohol testing program for prohibited substances for employees and applicants for

employment in safety-sensitive positions (see Chapter 6, "Types of Testing," Chapter 7, "Drug Testing Procedures," and Chapter 8, "Alcohol Testing Procedures").

- Referral of the employee who has violated the drug and alcohol regulations to a Substance Abuse Professional (see Chapter 9 "Substance Abuse Professional, Rehabilitation and Treatment").

- Administrative procedures for record keeping, reporting, releasing information, and certifying compliance (see Chapter 10, "Administrative Requirements").

Violations

Throughout this document, you will see references to "violations" of or "violating" the requirements. These terms will refer to any safety-sensitive employee who has:

- A verified positive drug test
- An alcohol concentration of 0.04 or greater
- Refused to submit to a test
- Adulterated or substituted a specimen

Section 2. APPLICABILITY

Who Must Participate?

Any recipient or subrecipient of federal financial assistance under 49 United States Code (USC) Sections 5307, 5309, or 5311 of the Federal Transit Act as amended, or any recipient of federal financial assistance under Section 103(e)(4) of Title 23 of the United States Code must comply with these regulations (§655.3). Generally, these are transit agencies that receive FTA funding and state agencies that assist in distributing FTA funding to transit agencies. Section 5310 operators that do not receive any Section 5307, 5309, or 5311 funding are exempt from the FTA drug and alcohol regulations, but may be covered by the Federal Motor Carrier Safety Administration's (FMCSA) drug and alcohol testing regulation if the vehicle operators are required to hold Commercial Driver's Licenses (CDL).

The regulations also apply to any contractor who performs safety-sensitive functions for a recipient or subrecipient of federal assistance as defined above. Exempt are contractors of rural operators, including those that receive Section 5311 funding and operators that serve populations under 200,000 and receive funding through the Section 5309 discretionary capital funding program and the Section 5307 urban funding program, including Job Access.

Some transit agencies could be affected by drug and alcohol testing regulations of more than one USDOT modal agency. These include transit agencies operating ferry boats, commuter railroads, or vehicles that require operators to hold Commercial Driver's Licenses (CDLs). In those cases, FTA has coordinated responsibility with the other modal agencies to minimize overlapping requirements.

U.S. Coast Guard. The U.S. Coast Guard (USCG) will be deemed in concurrent compliance with the testing requirements of 49 CFR Part 655 when they comply with the USCG's chemical and alcohol testing requirements. However, ferry operations will remain subject to FTA's random alcohol testing requirements because the USCG does not have a similar requirement.

Federal Railroad Administration. The Federal Railroad Administration (FRA) and FTA have agreed that commuter railroad operators who receive FTA funds are exempt from compliance with FTA's testing regulations. However, these operators must certify to FTA as specified in Section 655.83 that they are in full compliance with the FRA substance abuse regulations set forth in 49 CFR Part 219 for its railroad operations. A sample certification letter can be found in the Sample Documentation section at the end of this chapter. The recipient must follow Part 655 requirements for its non-rail safety-sensitive operations, if any.

Commercial Driver's Licenses. The Federal Motor Carrier Safety Administration (FMCSA) and FTA have agreed that transit agencies with safety-sensitive employees holding CDLs are covered by the FTA drug and alcohol regulations. However, individual CDL holders remain subject to FMCSA sanctions and other ramifications for FMCSA rule violations, which are not included in the FTA drug and alcohol regulations (i.e., loss of CDL for one year following a positive alcohol test of 0.04 or greater).

The regulations promulgated by each of the USDOT modes are very similar and address the same basic principles. However, the regulations are different in that they reflect the operating environment and regulatory authority unique to each mode. Since many transit systems are associated with other entities that fall under the FMCSA rule, they have assumed incorrectly that a program that is compliant with one modal administration's regulation will also be in compliance with the other's regulation. The regulations are similar, but they are not identical. The primary areas of difference between the FTA and FMCSA regulations are summarized in the Sample Documentation section at the end of this chapter.

What happens in these cases?

The public transit industry is complex, representing a variety of operating environments, system designs, modes of operation, and organizational structures. As such, several issues have arisen regarding the applicability of the FTA regulations in different situations. The following guidance is provided on the most commonly raised of these issues.

Contractors Covered Under the Regulations of Other Modes. Many transit systems contract with safety-sensitive contractors who are already required to comply with the drug and alcohol testing regulations of other modes (i.e., FMCSA). If these contractors are able to segregate the employees who provide transit service from those who perform safety-sensitive functions for the other modes, the employer is required to establish programs for each group of employees allowing for the corresponding differences in the modal rules.

However, if the contractor's employees perform safety-sensitive functions for both transit and another mode, the employer must determine which modal administration regulates the majority (>50 percent) of the employees' who perform safety-sensitive functions covered under the USDOT. Once determined, the employee will be subject to pre-employment and random testing under the regulatory authority of the primary modal administration. The assignment of regulatory authority for reasonable suspicion and post-accident testing will depend on the function an employee is performing at the time of the incident/accident. Return-to-duty and follow-up tests will be assigned to the modal administration that generated the initial positive test result.

Brokerages and Human Service Agency Transportation Coordination. Agencies that provide several transportation programs under one umbrella such as a brokerage or a human service transportation coordination system need only test the public transportation component of the services as long as the services are distinctly separate. Specifically, if there is no intermixing of funds or personnel, the services are considered separate and the non-FTA funded transportation programs are not subject to FTA's drug and alcohol testing rules. However, if the program is integrated, the service is provided under contract interchangeably, and/or the service is funded all or in part by federal transit funds, the service providers are included.

The only exception is when the brokerage is set up as a user-side subsidy program where the passengers choose which service provider they will use. In this case, the service provider is exempt because the broker or agency has no contract with the service provider, and no control over the passengers' decision-making. In situations where there is some minimal overlap of duties or shared responsibilities of staff (i.e., backup driver in an emergency, shared dispatcher), FTA considers this "incidental overlap," and does not require coverage of the individuals performing the incidental job functions.

Pass-Through Funding. In situations where a transit system serves only as a conduit to pass-through non-FTA funding to another transportation

agency, FTA has concluded that the latter is not covered by the regulations. The pass-through funds must be clearly identified and distinct from other FTA funds.

Taxicab Operators. The regulations apply to taxicab operators when the transit provider enters into a contract with one or more entities to provide taxi service as part of the public transit service. Drug and alcohol testing rules do not apply to taxicab operators when service is provided where patrons are allowed to choose the taxicab companies that will provide the service.

Charters, Vehicle Leases, and Motor Pools. Transit systems will sometimes formally or informally lease their revenue service vehicles to provide charter services or to supplement human service transportation programs. In some cases, the arrangements are made on an incidental or ad hoc basis. In others, the arrangements are well established, formalized, and provided on a routine basis.

The regulations state that the drug and alcohol rules apply to any entity that performs a safety-sensitive function (i.e., operation of a revenue service vehicle, including when not in revenue service) consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement between the parties.

Consequently, transit systems that have established an ongoing relationship with other agencies or companies to provide revenue service vehicles, must require that these entities establish and maintain drug and alcohol testing programs compliant with the FTA regulations for the portion of the business that uses these vehicles.

In instances where vehicles are provided on a one-time or incidental basis, and there is no ongoing relationship (i.e., mayor drives a bus in a parade, radio personality drives a bus during a vehicle rodeo), the regulations do not apply.

Section 5310 Specialized Transportation Program. Since the FTA regulations apply only to recipients of Section 5307, 5309, or 5311 funding, or any recipient of federal financial assistance under Section 103(e)(4) of Title 23 of the U.S. Code, those operators receiving only Section 5310 funding are not required to comply with the FTA testing regulations. However, those Section 5310 recipients who have drivers holding CDLs must comply with FMCSA's drug and alcohol testing programs (49 CFR Part 382).

Section 3. SAFETY-SENSITIVE FUNCTIONS

What Employees are Affected?

Employees of FTA recipients, subrecipients, and contractors who perform safety-sensitive functions must be included in an FTA compliant substance abuse management program (§655.4). FTA defines "safety-sensitive" functions as follows:

- Operating a revenue service vehicle including when not in revenue service.
- Operating a nonrevenue service vehicle that requires drivers to hold CDLs.
- Controlling dispatch or movement of a revenue service vehicle. Since job duties and responsibilities of dispatchers vary by transit system, each employer must decide whether the agencies' dispatcher performs any functions that would pose a substantial immediate threat to public safety if impaired by drugs or alcohol. If the employer decides there is no threat, the dispatcher should be excluded. If the employer determines the dispatcher could impact public safety, those individuals should be included.
- Maintaining revenue service vehicles or equipment used in revenue service including repairs, component overhaul, and rebuilding.

  The rule requires that all maintenance contractors who stand in the shoes of an urbanized system serving a population of 200,000 or more to perform engine repair, revenue service vehicle repair, equipment repair, and component rebuild/ overhaul must have a compliant program that meets the same standards as the transit system. A written contract between a grantee and its contractor is not required for the rule to apply.

  If the grantee routinely uses the same contractor for overhaul/rebuilding work, and the contractor expects to perform the grantee's overhaul/rebuilding

work based on a past relationship, then the contractor is covered under the rule. The rule does not apply when overhaul/rebuilding work is done on a one-time, incidental or emergency basis, where there is no long-term contract or ongoing relationship between the grantee and its contractors. Maintenance work covered under the manufacturer's warranty is excluded.

Only the first-tier maintenance contractors are included, thus, maintenance subcontractors (e.g., second tier) are not covered by the regulations. See the decision tree provided in the Sample Documentation section at the end of this chapter for further clarification.

FTA excludes maintenance contractors that perform services for grantees that receive funding under Section 5309, 5307, and 5311 and serve an area under 200,000 in population.

- Providing security and carrying a firearm on transit vehicles, transfer points, and transit facilities open to the public. This does not include transit administration buildings and garage security. Similarly, local law enforcement officers who provide security services for transit systems as part of their everyday police activities and who are not under the day-to-day control or direct supervision of the transit system, are not covered by the FTA regulations.

Supervisors of employees in these categories, who do not themselves perform these functions, are excluded. Only supervisors who perform one of the safety-sensitive functions are covered.

Recommendation

Determine Who is Safety-Sensitive

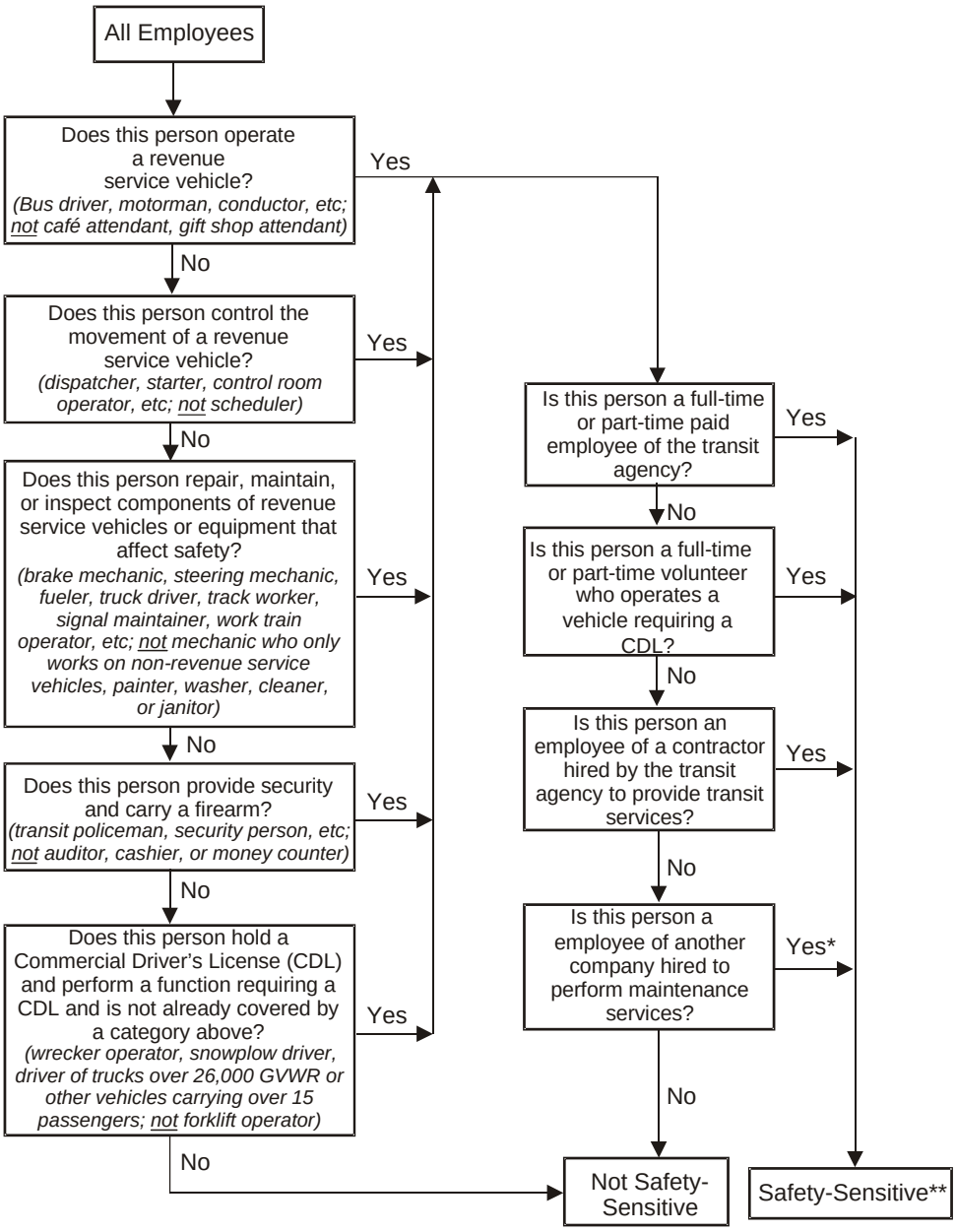
Transit systems often have several employee job classifications that, on the surface, do not appear to be safety-sensitive (i.e., secretary, bus washer, general manager). However, a system should not rely on job titles alone, but rather consider the actual job functions that each employee performs when determining their safety-sensitive status. For example, a secretary who fills in for a dispatcher during lunch breaks, a bus washer who drives the revenue service vehicles from the storage area to the wash bay, or a general manager who occasionally switches out vehicles, should all be considered safety-sensitive even though this safety function would not necessarily be reflected in their job title.

Volunteers are exempt from the FTA drug and alcohol testing requirements unless they are required to operate a vehicle that requires a Commercial Drivers License. FTA defines volunteers as non-employees who perform a service as a charitable act without the expectation of receiving benefit. Those who provide charitable services in return for some benefit (i.e., workfare, community service as an alternative to a criminal sentence, academic credit, or payment by another agency) remain covered by the rule. Volunteers who receive mileage reimbursement **only** are not considered to receive a benefit and as a result, are not covered. However, volunteers who receive remuneration in excess of their personal expenses incurred while

performing the volunteer service are considered a covered employee.

Figure 2-1 shows a process you can follow to determine whether an employee performs a safety-sensitive function. Figure 2-2 gives further details on the categories of employees working in positions that are considered safety-sensitive.

Since job titles and corresponding duties are not consistent from system to system, individual job functions should be considered, rather than job titles. If an individual performs any of the safety-sensitive job functions, then that individual should be classified as such.



* Except maintenance contractors that perform service for recipients of Section 5311 funding or recipients of Section 5307 or 5309 recipients that serve communities of less than 200,000 population

** Supervisors who perform safety-sensitive functions are also included

Figure 2-1. Safety-Sensitive Process to Determine Safety-Sensitive Employees

Safety-sensitive employees are those who…	Definition	Examples of employees to include	Examples of employees to exclude	National Transit Database Labor Category #	National Transit Database Form 404 Line #
Operate revenue service vehicles	Person operating or working as a crewman on revenue service vehicles at any time	• Bus driver • Motorman • Conductor • Yard driver	• Gift shop attendant • Café attendant	031 030	02
Dispatch or control revenue service vehicles	Person controlling movement of revenue service vehicles	• Dispatcher • Starter • Tower Operator	• Scheduler	012 020	01
Maintain revenue service vehicles or other equipment used in revenue service	Person repairing and maintaining revenue service vehicles or other equipment used in revenue service	• Mechanic • Wheelchair lift repairman • Work train operator • Track worker • Signal maintainer	• Mechanic (who only works on non-revenue service vehicles) • Painter • Washer • Janitor • Cleaner	051* 061* 062* 071* 081* 091* 101* 121* 122* 123* 124* 126* 141*	05 06
Provide security and carry a firearm	Person who provides security to protect persons or property	• Transit police officer • Security personnel who carry firearms	• Auditor • Cashier • Security personnel who do not carry fire-arms	151 161	03 04
Hold a Commercial Driver's License (CDL)	Any other transit employee who holds a CDL and performs a function requiring a CDL and not already covered by a category above	• Wrecker operator • Snowplow driver • Drivers of trucks over 26,000 GVWR or other vehicles carrying over 15 persons	• Forklift operator	051* 061* 062* 071* 081* 091* 101* 121* 122* 123* 124* 126* 141*	05 06

These labor classifications may relate to several categories of safety-sensitive employees.

Notes: National Transit Database reports are filed annually by Section 5307 and 5309 transit operators. These cross-references are provided to assist you in identifying any safety-sensitive employees.

Contractors who provide maintenance service to Section 5311 recipients or Section 5307 or 5309 recipients who serve areas with a population of 200,000 or less, are exempted from compliance.

Supervisors who perform safety-sensitive functions are included

.

Figure 2-2. Safety-Sensitive Employee Matrix

Section 4. EMPLOYER RESPONSIBILITIES

Establish Drug and Alcohol Program Manager

Each transit employer covered under the FTA regulations should have one individual designated as the Drug and Alcohol Program Manager (DAPM) who is responsible for administering the program. The DAPM responsibilities are often assigned to an existing employee with other related duties in human resources, personnel, or risk management. Often the DAPM is responsible for record keeping, preparation of the annual Management Information System (MIS) report, administering and scheduling the random testing process, and serving as the Designated Employer Representative (DER), or liaison with the drug and alcohol testing service agents. Even though not required, identifying a DAPM as a single point of contact for the program is a critical component of a successful testing program.

Policy Statement

You must adopt a policy statement on substance abuse in the workplace (§655.15). At a minimum, the policy must include the following:

- Identity of the person, office, branch, and/or position designated by the employer to answer questions about the employer's anti-drug use and alcohol misuse program.
- The categories of employees who are subject to testing.
- A description of the prohibited behavior and conduct.
- A description of the specific circumstances under which an employee will be tested (pre-employment, random, etc.).
- A description of the testing procedures that will be used to test for the use of illegal drugs and alcohol misuse, protect the employee and the integrity of the testing process, safeguard the validity of the test results, and ensure the test results are attributed to the correct employee.
- A statement of the requirement that a covered employee submit to drug and alcohol testing.
- A description of the kind of behavior that constitutes a refusal to test, and statement that a refusal constitutes a violation of the policy.

- A description of the consequences for violating the drug and alcohol regulations including the mandatory FTA requirements, and the consequences for an alcohol concentration of 0.02 or greater, but less than 0.04.

A detailed discussion on the specific requirements of the drug and alcohol program policy statement is provided later in Chapter 4, "Policy Development and Communication." An employer may impose additional requirements as long as the employee is informed that the additional requirements are included under the employer's authority and the provisions are not contrary to, or inconsistent with the provisions set forth in the rule.

Education and Training

You must provide educational materials that explain the requirements of the FTA drug and alcohol testing regulations (§655.14) and your policies and procedures to meet these requirements for all safety-sensitive employees. Information on the effects and consequences of substance abuse on personal health, safety, and the worksite, as well as indicators of substance abuse, must be provided.

Supervisors must receive additional training on the physical, behavioral, and performance indicators of substance abuse and alcohol misuse if they are responsible for determining when a reasonable suspicion test is required. Chapter 5, "Training," provides greater detail on the training requirements for employees and supervisors.

Testing

You must establish a drug (§655.21) and alcohol (§655.31) testing program that follows FTA regulations for drug testing (Chapter 7, "Drug Testing Procedures") and alcohol testing (Chapter 8, "Alcohol Testing Procedures"). The types of tests are:

- Pre-employment
- Reasonable suspicion
- Post-accident
- Random
- Return-to-duty
- Follow-up.

Contractor Oversight

FTA recipients/subrecipients are fully responsible for the compliance of their safety-sensitive contractors. Therefore, each system should have a procedure to ensure that all covered contractors comply with the rules. The FTA regulation (§655.73(i)) allows employees to disclose drug and alcohol testing information, including individual test results, to the state oversight agency or grantee required to certify compliance to FTA. Transit systems should not assume that contractors are knowledgeable about the regulatory requirements or that they have compliant policies or programs. If contractors are unwilling or unable to comply with the regulations, the transit system must discontinue using the contractor for the performance of safety-sensitive duties, or they will jeopardize their FTA funding. See Chapter 12 for additional information.

Service Agent Oversight

Transit employers are responsible for the integrity of their drug and alcohol

testing program and the quality of testing services provided by service agents. Consequently, transit employers must monitor the quality of its testing service agents including collection sites, medical review officers, and substance abuse professionals. The employer should not assume that its service agents are following the correct procedures defined in 49 CFR Part 40, or that they are truly knowledgeable about the FTA regulations. Instead, employers should provide sufficient oversight to ensure compliance and to take corrective action when warranted.

Administrative Requirements

You must maintain certain testing records (§655.71). Such records and other personal data associated with the testing program are subject to certain conditions for release. Annual reports summarizing the test results must be prepared, and upon request, submitted to FTA (§655.72). You must certify compliance with the regulations each year (§655.83). Further discussion of the administrative requirements are found in Chapter 10, "Administrative Requirements."

Section 5. STATE AND LOCAL ISSUES

Preemption

The FTA regulations (§655.6) preempt any state or local law, rule, regulation, or order when:

- Compliance with both the state or local requirement and these regulations is not possible; or
- Compliance with the state or local requirement is an obstacle to accomplishing and executing any requirement of these regulations.

However, these regulations do not preempt any state criminal laws that impose sanctions for reckless conduct leading to loss of life, injury, or damage to property.

Some states have enacted laws permitting the use of "medicinal marijuana" when recommended by a physician. The federal government does not recognize the medicinal use of marijuana as a legitimate medical explanation, and as such, any positive result attributed to such use will be considered a violation of these regulations.

Litigation

Occasionally, FTA employers' drug and alcohol testing programs are challenged in court. If litigation could affect the federal drug and alcohol testing program or individual FTA-assisted

projects, the employer should notify FTA immediately. Early notification of potentially significant litigation provides FTA more options and opportunities to defend its programs. Even if FTA does not participate directly in the litigation, FTA can provide background information and technical assistance. Do not notify FTA about routine personnel matters or minor accidents, but the appropriate FTA regional counsel or the Office of the Chief Counsel should be notified once it becomes clear that an FTA program or regulation is at issue. A summary of relevant court rulings is provided in the Sample Documentation section of this chapter.

Section 6. WHAT THE REGULATIONS DO NOT REQUIRE

The FTA regulations focus on public safety, and therefore, they do not address a number of concerns considered internal affairs of transit agencies. Some of the issues that are **not** included in the FTA regulations are:

- The FTA does not require testing of nonsafety-sensitive employees (although you may choose to do so under your own separate authority).
- The FTA does not require that you provide an Employee Assistance Program (EAP) (although you may and are encouraged to do so).
- The FTA does not require a second-chance policy or employee rehabilitation and reinstatement (although you may do so).

You may expand upon the regulatory requirements to tailor a program to meet specific needs. However, your policy should be very specific about what activities are conducted under federal regulations and what activities are conducted under your system's own authority.

Going Beyond the Regulatory Requirements

Whenever you expand your drug and alcohol program beyond the regulatory requirements and include aspects not specifically required by the regulations, you must ensure that the employee is aware of which parts are FTA regulatory requirements, and which are your own extensions beyond the regulation. For example, if you wish to test nonsafety-sensitive employees you may do this under your own authority, but you must establish a separate testing pool of those employees.

The FTA *Best Practices* manual is an excellent resource for identifying efficient and effective practices that meet and go beyond the regulatory requirements. The manual contains sample policy language, forms, training aids, and procedures.

Testing for Other Substances

Although FTA regulations only require urine testing for five specified drugs and breath testing for alcohol, you may wish to include other substances that may be prevalent in your local area. Most testing laboratories offer urine-testing protocols for dozens of drugs including a panel of nine typical "drugs of abuse" (amphetamines, cocaine, marijuana, opiates, phencyclidine,

methadone, methaqualone, barbiturates, and benzodiazepines). Recently, laboratories have developed testing protocols for the drug Ecstasy (methylenedioxymethamphetamine, or MDMA). If you wish to test for other than the five drugs specified by the regulation, you must collect a separate urine specimen in addition to the FTA specimen and notify the employee that this specimen is being tested under company authority. The testing must be kept separate to ensure that the integrity of the FTA-mandated tests are not compromised.

Providing an Employee Assistance Program

Employee Assistance Programs are not required by the FTA regulations. However, many employers provide these services, which are valued as a cost-effective employee benefit. In many cases, EAPs provide SAP services. EAPs are traditionally offered by the employer, by a health care provider under contract with the employer, or by a health care provider not affiliated with the employer. If an EAP is available, it should be noted in the policy statement.

Section 7. THE CONSEQUENCES OF FAILURE TO COMPLY

Each recipient of FTA funds under 49 U. S. Code 5307, 5309, or 5311 or under 23 U.S. Code 103(e)(4) must certify compliance with these requirements on an annual basis or lose its eligibility for FTA federal funding (§655.82). Entities that receive FTA funding through Section 5307 and Section 5309 in urbanized areas certify as part of their annual list of Certifications and Assurances for FTA Grants and Cooperative Agreements.

If a state certifies a transit system's compliance, then it is responsible to ensure the system is complying with the requirements. Subsequently, the state DOT's must certify annually on behalf of their Section 5311 and Section 5309 recipients whose funding they administer. Since rural systems do not necessarily receive funding on an annual basis, FTA recommends that states should require annual letters from each of its current subrecipients certifying compliance with the drug and alcohol testing regulations. A sample letter is provided in the Sample Documentation section of this chapter.

A Section 5307, 5309, or 5311 subrecipient, through the administering state, is subject to funding suspension (§655.82). A recipient is subject to criminal sanctions and fines for false statements or misrepresentation under 18 U.S. Code 1001.

Sample Documentation

Certification of Compliance of 49 CFR Part 655 for FTA Recipients

Date _____

Address of Your FTA Regional Office
Or
State Department of Transportation

_____

_____

I, _____, _____,
(Name) (Title)

certify that _____ and its contractors, as required,
(Name of Recipient)

have established and implemented an anti-drug and alcohol misuse prevention program(s) required by 49 CFR Part 655. I further certify that the employee training conducted under this part meets the requirements of 49 CFR Part 655.14.

Sincerely,

(Name)
(Title)

Certification of Compliance for FTA Recipients Regulated by the FRA

(Certifying compliance with 49 CFR Part 655)

Date _____

Address of Your FTA
Regional Office

_____

_____

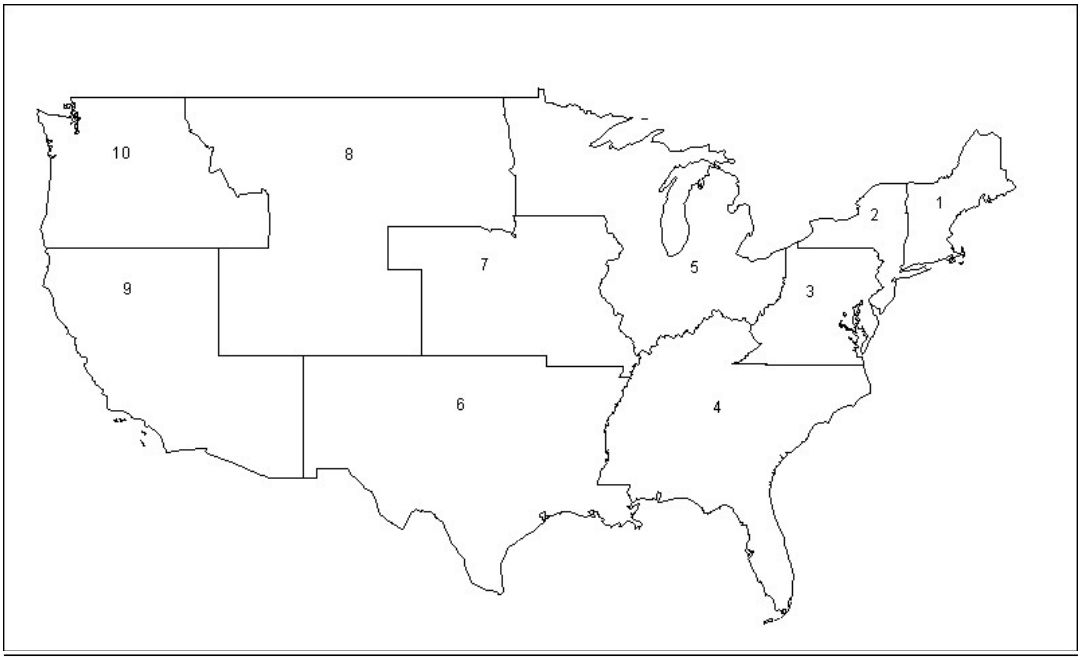
I, _____, _____,
(Name) (Title)

certify that _____ and its contractors, as required,
(Name of Recipient)

have an anti-drug program that meets the requirements of the Federal Railroad Administration's regulations for employees regulated by the Federal Railroad Administration, and have established and implemented an anti-drug and alcohol misuse prevention program regulated under 49 CFR Part 655 for all other covered employees who perform safety-sensitive functions.

Sincerely,

(Name)
(Title)



Federal Transit Administration
Regional Offices
(As of June 28, 2001)

1. John A. Volpe National Transportation Systems Center
   Suite 920
   Kendall Square
   55 Broadway
   Cambridge, MA 02142-1093
   Telephone: (617) 494-2000
   Fax: (617) 494-2497
   Area served: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut

2. Room 429
   One Bowling Green
   New York, NY 10004-1415
   Telephone: (212) 668-2170
   Fax: (212) 668-2136
   Area served: New York, New Jersey, and the U.S. Virgin Islands

3. Suite 500
   1760 Market Street
   Philadelphia, PA 19103-4124
   Telephone: (215) 656-7100
   Fax: (215) 656-7260
   Area served: Pennsylvania, Virginia, West Virginia, Delaware, Maryland, and District of Columbia

4. Atlanta Federal Center
   Suite 17T50
   61 Forsyth Street, S. W.
   Atlanta, GA 30303
   Telephone: (404) 562-3500
   Fax: (404) 562-3505
   Area served: North Carolina, Kentucky, Tennessee, South Carolina, Alabama, Georgia, Florida, Mississippi, and Puerto Rico

5. Suite 2410
   200 West Adams Street
   Chicago, IL 60606
   Telephone: (312) 353-2789
   Fax: (312) 886-0351
   Area served: Illinois, Ohio, Minnesota, Wisconsin, Indiana, and Michigan

6. Room 8A36
   819 Taylor Street
   Forth Worth, TX 76102
   Telephone: (817) 978-0550
   Fax: (817) 978-0575
   Area Served: Texas, Oklahoma, Arkansas, Louisiana, and New Mexico

7. Suite 404
   901 Locust Street
   Kansas City, MO 64106
   Telephone: (816) 329-3920
   Fax: (816) 329-3921
   Area served: Iowa, Kansas, Nebraska, and Missouri

8. Suite 650
   Columbine Place
   216 Sixteenth Street
   Denver, CO 80202-5120
   Telephone: (303) 844-3242
   Fax: (303) 844-4217
   Area served: Colorado, Utah, Montana, Wyoming, South Dakota, and North Dakota

9. Room 2210
   201 Mission Street
   San Francisco, CA 94105-1839
   Telephone: (415) 744-3133
   Fax: (415) 744-2726
   Area served: California, Arizona, Nevada, Hawaii, Guam, American Samoa, and the Northern Mariana's Islands

10. Jackson Federal Building
    Suite 3142
    915 Second Avenue
    Seattle, WA 98174-1002
    Telephone: (206) 220-7954
    Fax: (206) 220-7959
    Area served: Washington, Oregon, Idaho, and Alaska

Relevant Court Rulings

1. Liability of Service Agents

Yasuko Ishikawa v. Lab One

In a highly publicized court case (*Yasuko Ishikawa v. Lab One*), a jury awarded a Delta Air Lines flight attendant $400,000 after a drug-testing laboratory incorrectly reported that she had substituted a specimen. Under DOT regulations, a substituted specimen is considered a test refusal. Consistent with airline policy, the flight attendant was fired even though she insisted she never took drugs and did not alter her urine specimen. Subsequent investigation found that the laboratory had not followed government standards or their own internal testing protocols for conducting validity tests and had incorrectly reported the result as substituted when in fact it was not.

Validity tests are used to determine if the specimen provided consists of normal human urine or whether the specimen was switched, adulterated, or altered in some fashion. The tests measure the pH creatinine concentration and specific gravity of the specimen. Validity testing was not a required part of the DOT testing procedure at the time of the test and therefore, the error was not a violation that resulted in the loss of the laboratory's Department of Health and Human Services (DHHS) certification.

However, the flight attendant sued the laboratory and Delta. The case against Delta was dropped, but the case against the laboratory was heard in a Portland, Oregon court. The jury found that the laboratory was negligent and awarded the flight attendant financially. Even though the number of cases that this laboratory procedural error may have affected is believed to be low, the exact number of individuals that may have fallen victim to this faulty testing is unknown.

The DOT believes this case is important because it holds service agents accountable and lets them know there is the potential for a significant financial cost associated with mistakes that affect the livelihoods of DOT-covered workers. Given this verdict, the pool of potential plaintiffs could increase significantly. This case was also a primary impetus for the inclusion of validity testing in the revised Part 40 regulations. As soon as the DHHS publishes its mandatory guidelines, validity testing that meets these federal guidelines will be a required component of DOT testing. Any laboratory that makes a mistake of this magnitude in the future will also be subject to a Public Interest Exclusion (PIE)(Part 40, Subpart R). The DHHS inspected all certified laboratories and took corrective action as necessary to remedy procedural errors. All certified laboratories are currently believed to be in compliance.

2. Medicinal Use of Marijuana

United States v. Oakland Cannabis Buyers' Cooperative, et al

On May 14, 2001, the U.S, Supreme Court ruled that marijuana may not be distributed to individuals for medical reasons. The case, *United States v. Oakland Cannabis Buyers' Cooperative, et al.*, was decided by a unanimous vote. Even though several states allow patients with a doctor's recommendation to grow, possess, and use the drug for pain, the Supreme Court reiterated that there is no currently accepted medical use recognized by federal law. Since federal law classifies marijuana as an illegal substance and offers no medical exceptions, the court ruled that distribution of the drug is illegal.

The ruling did not address or change existing state laws that allow the medicinal use of marijuana, however, it does mean that marijuana manufacturers and distributors may be prosecuted at the federal level. Each state will need to determine how this ruling impacts their respective state laws.

3. Employee Reinstatement – Public Policy

Eastern Associated Coal Corp. v. United Mine Workers of America

On November 2, 2001 the United States Supreme Court decided the *Eastern Associated Coal Corp. v. United Mine Workers of America* case in which the petitioner asked the court to clarify when courts can overrule arbitrators' decisions when they are contrary to public policy considerations. In this case, an arbitrator reinstated a coal company truck driver to his safety-sensitive position on two separate occasions following positive drug tests for marijuana, concluding that the employer did not have "just cause" to discharge the employee.

The court concluded that the reinstatement of the employee was not contrary to public policy since the Department of Transportation (DOT) regulations leave disciplinary action up to the discretion of the employer. The regulations state the conditions under which an individual who violates the rules (i.e., positive test result) may be returned to safety-sensitive positions. Since the collective bargaining agreement granted the arbitrator authority to interpret the meaning of their contract's language, including such words as "just cause" and the employee was required to successfully complete the return-to-duty process, the arbitrator did not act outside the scope of his contractually delegated authority and did not violate any law or regulation. The arbitrator's award is consistent with DOT rules requiring completion of substance abuse treatment before returning to work following a positive test result.

4. Dispatchers – Safety Sensitive

Gonzalez v. Metropolitan Transportation Authority

The California case, *Gonzalez v. Metropolitan Transportation Authority*, was filed in April 1996 on behalf of a radio dispatcher and instructor employed by the Los Angeles County Metropolitan Transportation Authority (LACMTA). The district court dismissed the complaint, which challenged the grantee's policy, and the plaintiffs appealed. The

plaintiffs agreed that their positions were not safety-sensitive and consequently should not be subject to FTA drug or alcohol testing.

On April 14, 1999, a unanimous panel of the 9th Circuit reversed and sent the case back to the trial court to review the designation of dispatchers as safety-sensitive workers. The appeals court stated, "We do not know, from the record we have, whether the employees at issue would pose a substantial immediate threat to public safety if impaired by drugs or alcohol, or whether the procedure for testing them would be reasonably effective for finding out if they are impaired, or whether the tests as performed were an undue invasion of their privacy. Facts might be proved under the complaint that would entitle plaintiffs to relief." The employees challenging the testing have the burden of proving the case.

Until this matter is ultimately resolved, FTA grantees, subrecipients, (and their covered contractors) must continue to implement FTA's drug and alcohol testing regulations, including those affecting dispatchers.

5. Random Testing – Federal Law Supercedes State Law

O'Brien v. MBTA

On December 4, 1998, the United States Court of Appeals for the First Circuit upheld a federal District Court decision that permitted the Massachusetts Bay Transportation authority (MBTA) to conduct random drug and alcohol testing of transit police. In this case, *O'Brien v. MBTA*, two transit police officers contended that MBTA's drug testing program violated their rights under federal law and the Massachusetts Declaration of Rights. The Court of Appeals concluded that by accepting federal transit assistance, Massachusetts officials must abide by the conditions that Congress attached to them, one of which mandates random drug and alcohol tests for employees who perform safety-sensitive functions. The Court of Appeals stated that because the Act includes an express pre-emption provision, contrary state law could not stand as an obstacle to the testing protocol.

6. Employee Reinstatement – ADA Discrimination Claim

Wilson v. SEPTA and TWU Philadelphia Local 234

Wilson v. SEPTA and TWU Philadelphia Local 234 was filed in federal District Court in Philadelphia by a bus operator who was fired after twice testing positive for alcohol. He alleged that his firing was discrimination under the Americans with Disabilities Act (ADA). SEPTA (Southeastern Pennsylvania Transportation Authority) moved to dismiss the complaint, arguing that the plaintiff was not a qualified individual with a disability at the time SEPTA discharged him. In a ruling dated January 26, 1999, the court declined to dismiss the complaint. The court found that the employee met the definition of "disabled" for establishing a *prima facie* case of discrimination under the ADA in connection with his discharge from SEPTA. The ultimate issue of whether the firing was disability discrimination is yet to be determined by the court.

Because FTA has consistently held that the determination to retain or discharge an employee for having tested positive is a local decision, this opinion is not viewed as establishing a conflict between the ADA and FTA's drug and alcohol testing rule.

7. Unreasonable Searches and Seizures Claim

Dwan, et al. v. MBTA

Dwan, et al. v. MBTA, filed as a Memorandum of Decision (civil Action No. 95-12430-6AO) addressed the claim that the MBTA testing program violated the Fourth Amendment to the United States Constitution that prohibits unreasonable searches and seizures. The plaintiff asserted that he did not occupy a safety-sensitive position. The court held that maintenance functions performed by the plaintiff (i.e., repairing and installing body panels and welding and repairing vehicle understructure) were consistent with the regulatory definition of a safety-sensitive position and thus, including the plaintiff in the random testing program does not violate the Fourth Amendment.

Additionally, other requirements imposed by the MBTA that exceed the FTA requirements but do not conflict or interfere with the requirements of the rule, were challenged. The court concluded that the differences between the explicit requirements of the regulations and the MBTA program as adopted appear to be authorized in 49 CFR Part 653.11 and thus, the plaintiff's claim had no merit.

FTA and FMCSA Regulatory Comparison

TOPIC	FTA	FMCSA
Drug and Alcohol Testing Regulation	49 CFR Part 655, As Amended	49 CFR Part 382, As Amended
Testing Procedures	49 CFR Part 40, As Amended	Same
Applicability	Recipients of FTA 49 U.S.C. 5307, 5309, 5311, and 23 U.S.C. 103(e)(4)	♦ Employers who require employees to have CDLs ♦ CDL Holders
Drugs Prohibited marijuana, cocaine, amphetamines, opiates, phencyclidine	Same	Same
Alcohol Prohibited ≥0.04 BAC 0.02 to 0.039 BAC	 Remove from duty and refer to SAP for evaluation Remove from duty for 8 hours unless re-test < 0.02 BAC	 Same Remove from duty for 24 hours
Safety-sensitive Functions	♦ Operating a revenue service vehicle ♦ CDL holders ♦ Dispatch/controlling movement of vehicles ♦ Maintaining a revenue service vehicle or related equipment ♦ Security personnel carrying firearms	CDL holders when: ♦ driving/driver
Contractors	Applies to all safety-sensitive contractors that "stand in the shoes" of recipient	Each employer is responsible for their own CDL holders
Education and Training Display and Distribute Materials Employee Awareness Training on Drugs Reasonable Suspicion Training of Supervisor	 Info and Hotline Numbers Required 60 minutes on signs and symptoms of drug use; additional 60 minutes on alcohol	 Add effects and consequences of drug use to policy Not required Same
Policy Content Governing Board Approval Add information on Controlled Substances Certificate of Receipt from Employees	 Minimum requirements specified Required Not Required Recommended	 Same Not Required Required Required

FTA and FMCSA Regulatory Comparison (continued)

TOPIC	FTA	FMCSA
Testing Categories Pre-employment - drugs only	Result before assignment of safety-sensitive duty No waiver	Same Waived if certain conditions are met
Reasonable Suspicion	Trained supervisor makes specific, contemporaneous observations regarding appearance, speech, behavior, or odor	Same A written record must be prepared within 24 hours of the event Test delays >8 hours result in driver out of service for 24 hours
Post Accident - Fatality Test driver	Test driver required Test others that could have contributed	Same Not Required
Post Accident - No Fatality Immediate transport to a medical treatment facility or one or more vehicles receives disabling damage	Unless the employee can be completely discounted as a contributing factor	And the CDL holder receives a citation for a moving traffic violation
Random	Scientifically valid method Minimum drug test rate 50% Minimum alcohol test rate 10%	Same 50% 10%
Return-to-duty/Follow-up	Same	Same
Recordkeeping Retention MIS Access to record Previous employer records	5, 2, and 1 year records Selected reporting - employers randomly selected Controlled Obtain records for previous 2 years with employee consent	Same Same Same Same
Compliance Penalties	Suspension of funds	Employer/employee fines and penalties Possibility of issuing an out of service order
Compliance Certification	Required	Not Required

FTA and FMCSA Regulatory Comparison (continued)

TOPIC	FTA	FMCSA
Prohibited Behavior - Alcohol BAC ≥0.04; consumption on duty 4 hours before performance of safety-sensitive duties; 8 hours following an accident	Same No consumption on-call	Same No possession while on duty
Prohibited Behavior - Drugs at all times	Same	Same Prescription use when affects ability to perform. These are medical disqualifications.
SAP Referral Process	Same	Same

Chapter 3. PROGRAM FORMULATION AND REVISION

Following the initial publication of the regulation in 1994, most transit employers worked aggressively to develop comprehensive drug and alcohol testing programs to address the regulatory requirements. Originally, implementation of the program was phased in with the large systems required to implement first (1995), and the small operators required to follow a year later (1996). The implementation deadlines for all covered employers have long passed; all covered employers are now required to be in compliance.

New transit operations, contractors, or employers that are new to public transit are required to be in compliance with the regulations before they assume any safety-sensitive responsibilities. These employers must either formulate a program if none exists, or revamp an existing drug and alcohol testing program to meet FTA requirements.

Covered employers with existing FTA programs may also find that their programs require periodic fine-tuning, revision, or overhaul depending on the extent of changes in regulations, organizational structure, policy, collective bargaining agreements, and/or internal procedures.

For those employers who are establishing new FTA-compliant drug and alcohol testing programs or those who are revamping an existing program, the recommended first step is to identify and assemble key personnel who are responsible for developing and implementing the program.

The early involvement of transit management, employees, and labor organizations and their continued involvement throughout the implementation

process ensures that all critical concerns are addressed and improves the chances for acceptance and support of the new/revised program. The program should be presented in a positive, proactive manner as the product of a visible, agency-wide effort.

Section 1. TASK TEAM

Experience has shown that implementation of a new program or revision to an existing one is best achieved when a task team is formed and given responsibility for formulating or revising the policy and implementing the drug and alcohol program, with management guidance and approval. The composition of the team will depend on the size of the organization. In medium- to large-sized systems, representatives from each of the following disciplines should be included if possible: management, legal, medical personnel, operations, maintenance, and labor relations. The team in unionized systems should include one representative from each bargaining unit, and at least one employee representative from the general work population. You may also wish to include representatives from your consortium/third party administrator or service agents (e.g., MRO, SAP) if you have already obtained their services.

In small systems with limited staff, the team should include at least a driver and/or a maintenance employee. Small systems that are part of a city or county department may also wish to include legal counsel and someone from the personnel department.

Program Manager. The transit system's drug and alcohol program manager (DAPM) should lead the team. The DAPM should be knowledgeable about the transit system's operations, human resources, drug and alcohol program and regulatory requirements. The DAPM will be ultimately responsible for the formation, implementation, and day-to-day management of the program. The DAPM needs sufficient authority to direct the program and must have easy access to senior management, union representatives, and first-line workers.

Task Team Responsibilities. The primary responsibility of the task team is to develop an action plan for accomplishing the program's goals and objectives, thereby ensuring the successful implementation or revision of the program. The action plan should include: a list of necessary tasks, the assignment of individuals responsible for tasks, and a time schedule for completion.

Other duties of the task team may include:

- Helping resolve local policy issues;
- Providing input into the development or revision of the employer's drug and alcohol testing program policy;
- Establishing roles and responsibilities of individuals responsible for developing procedures for the transit system's drug and alcohol testing program;
- Identifying and evaluating potential service agents, testing pools, consortia, or other programs that may be beneficial to the employer;
- Providing input into procurement of equipment and contract services for specimen collection, laboratory testing, MRO services, BATs, and SAP and/or consortia;
- Assisting in employee awareness and supervisor training; and

- Assisting in the implementation and evaluation of the overall drug and alcohol testing program.

Recommendation

Positive Approach

Support for the drug and alcohol testing program should be embraced by top management and filtered down through the ranks of the transit system. The transit system management and board should recognize that the implementation of a comprehensive drug and alcohol program will be a great benefit to their employees. A good program will improve public safety, employee safety, and employee morale. In addition, the program will deter prohibited drug use and alcohol misuse, and will provide a mechanism to identify and help those employees with substance abuse problems. When presented in this positive manner, the program will have a greater likelihood of being accepted with little opposition from the employees or union.

Section 2. ACTION PLAN

The actual time that a system will need to formulate or revise its program will vary depending on the local circumstances and current status of its substance abuse management program. Additional time may be required if your current substance abuse management program is inconsistent with the FTA regulations or if labor/management issues are unresolved. Figure 3-1 shows a suggested schedule for critical program formulation activities. New transit systems or safety-sensitive contractors should initiate their action plan well in advance of system/contract start-up, as each must have their compliant programs in place prior to the performance of safety-sensitive functions. Figure 3-2 shows a suggested schedule for critical program review activities.

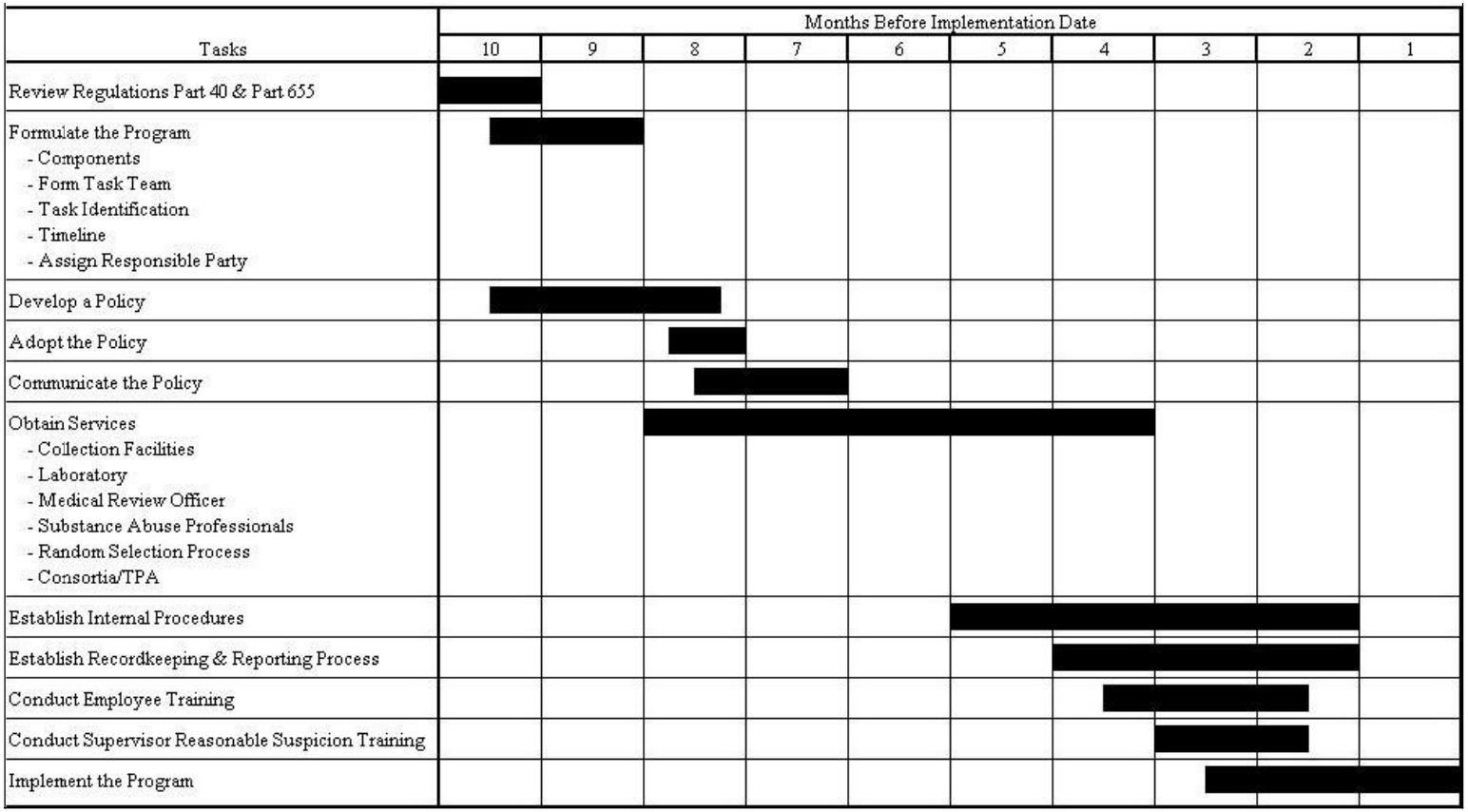


Figure 3-1. Suggested Schedule for Critical Program Formulation Activities

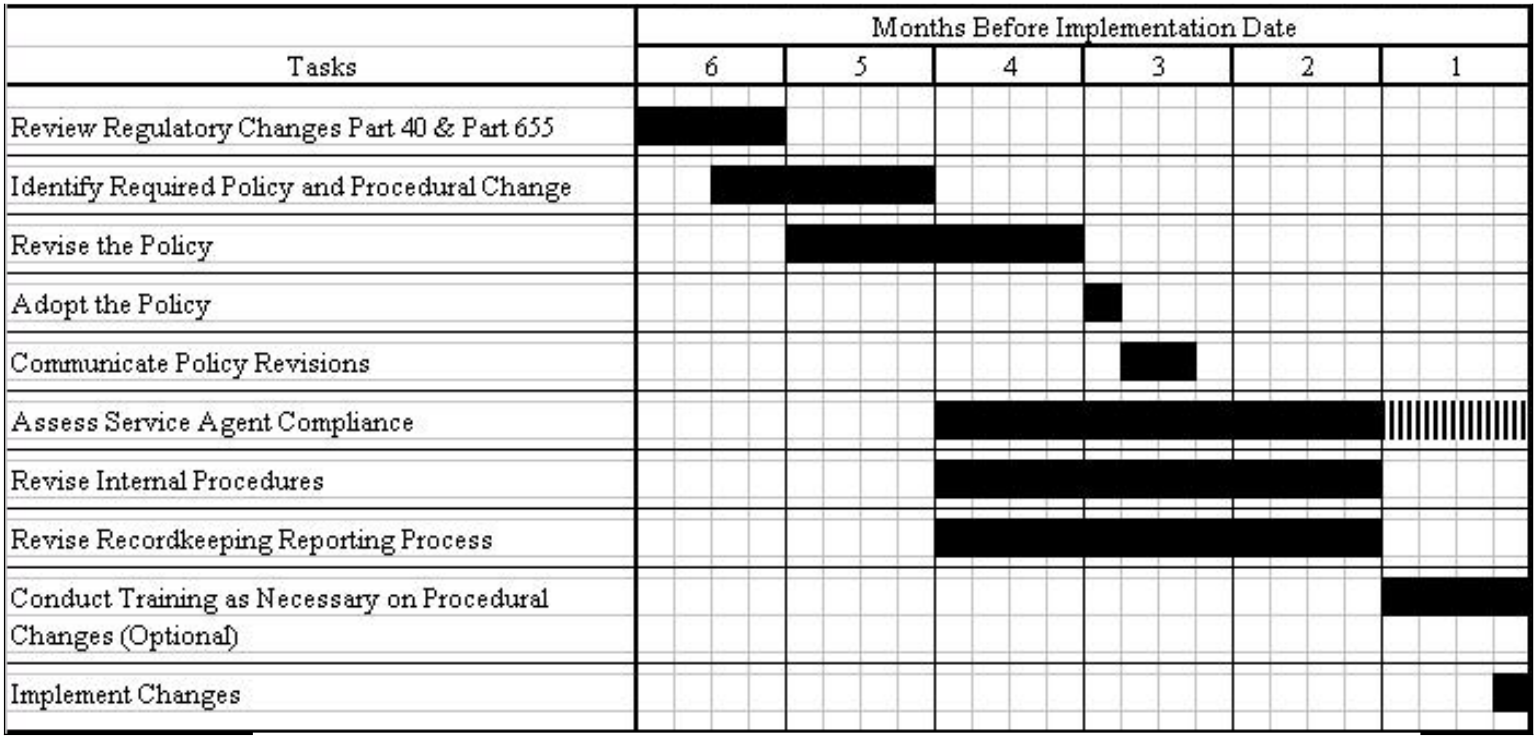


Figure 3-2. Suggested Schedule for Critical Program Review Activities

Chapter 4. POLICY DEVELOPMENT AND COMMUNICATION

The FTA regulation requires that every covered employer including direct recipients, sub-recipients, and safety-sensitive contractors that have safety-sensitive employees develop a compliant policy on prohibited drug use and alcohol misuse in the workplace. The rule also requires that the policy statement be written and made available to every safety-sensitive employee. You should use this chapter as a checklist of the items that should be included in your policy.

Only an employer can establish a policy for its employees. Therefore, contractor employees should not be placed under an agency's policy. The agency, however, can dictate through its contract, the minimum requirements of the contractor's policy and can require approval authority. Agencies that contract out their safety-sensitive functions and have no safety-sensitive employees are not required to have a policy statement.

Section 1. REQUIRED POLICY STATEMENT

The employer's Drug and Alcohol Program Manager (DAPM) should guide the development of the initial draft and any subsequent revisions. Depending on the structure of the agency, the DAPM may wish to solicit input from employees, labor organizations, other management personnel, and service agents as described on page 2-1 of the *Best Practices* manual.

FTA suggests that an employer's policy statement incorporate its position and information on all major aspects of its drug and alcohol program. Part 655 specifies the minimum requirements that must be included to be considered compliant.

FTA acknowledges that policy statements are written for many various target audiences, including employees, unions, the legal system, etc. Therefore,

employers may expand and improve upon the policy as appropriate to address these audiences. This is acceptable as long as FTA's requirements are met and the employer's provisions are noted accordingly. Thus, systems with detailed policies may continue to use them, but voluminous policies are not required by FTA.

The required elements of a policy are discussed in the following sections.

Identify Contact Persons

You must identify the person, office, branch, and/or position to answer employee questions about the drug and alcohol program, with the telephone number and office location clearly indicated. In most cases, the contact person will be the employer's DAPM.

Employee Categories Subject to Testing

Employees who perform safety-sensitive functions must be tested under the FTA regulation. Policies must identify the safety-sensitive functions that are covered and the employee's positions that are subject to testing. Most employers attach a list of functions and position titles to avoid policy revision every time they make personnel changes (see Chapter 2, " Regulatory Overview," for safety-sensitive definition).

Participation as a Requirement of Employment

The policy should state that participation in the agency's prohibited substance testing program is a requirement of each safety-sensitive employee and, therefore, it is a condition of employment.

Prohibited Behavior

Employers must specify the employee behaviors that the FTA rules prohibit. The policy must also identify the times when safety-sensitive employees must comply with the drug and alcohol rule.

- Use of illegal drugs is prohibited at all times.
- An employee must not consume alcohol while performing a safety-sensitive function (§655.32). Performing a safety-sensitive function is defined as any time the employee is actually performing, ready to perform, or immediately available to perform such functions.
- Employees are prohibited from consuming alcohol 4 hours prior to performing a safety-sensitive function (§655.33).
- Employees must not consume alcohol for 8 hours following an accident unless the employee has already undergone a post-accident test (§655.34).
- Employees are also prohibited from consuming alcohol during the hours the employee is on-call (§655.33(b)).
- Employees are prohibited from performing a safety-sensitive function while having an alcohol

concentration of 0.04 or greater (§655.31).

- Employees with an alcohol concentration of 0.02 or greater, but less than 0.04 may not be allowed to perform or continue to perform safety-sensitive functions until a subsequent test measures less than 0.02, or the employee has been removed from duty for at least 8 hours.

In addition, the policy may also incorporate policy language required by the Drug-Free Workplace Act (DFWA) of 1988 that requires direct recipients of $25,000 or more of federal funds to prohibit any employee from engaging in unlawfully manufacturing, distributing, dispensing, possessing, or using controlled substances in the workplace. Some employers have chosen to establish a single policy that meets the requirements of the FTA drug and alcohol testing regulations and the DFWA. Others have chosen to maintain two separate policy statements that address the requirements of the two rules.

Circumstances for Testing

The FTA requires drug and alcohol testing for safety-sensitive employees in specific circumstances: reasonable suspicion, post-accident, random, return to duty, and follow-up. Drug tests are required for pre-employment. Alcohol tests are permitted by Part 655, but are not required. If pre-employment alcohol tests are performed, the employer must comply with the requirements in Part 655.42. A detailed discussion of each testing procedure is provided in Chapter 6, "Types of Testing."

Your policy must define these circumstances in sufficient detail to inform the safety-sensitive employee about what triggers the tests.

Behavior That Constitutes a Test Refusal
(Random, Reasonable Suspicion, Post-Accident, Return-to-Duty, Follow-Up)

Behavior That Constitutes a Test Refusal	Drug Test	Alcohol Test
Failure to appear for a test in the time frame specified by the employer.	X	X
Failure to remain at the testing site until the testing process is completed.	X	X
Failure to provide a urine specimen, saliva, or breath specimen, as applicable.	X	X
Failure to provide a sufficient volume of urine or breath without a valid medical explanation for the failure.	X	X
Failure to undergo a medical examination to verify insufficient volume.	X	X
Failure to cooperate with any part of the testing process.	X	X
Failure to permit the observation or monitoring of specimen donation when so required (§40.67(l) and §40.69(g))	X	X
Failure to take a second test required by the employer or collector.	X	X
A drug test result that is verified by the MRO as adulterated or substituted.	X	
Failure to sign the certification on Step 2 of the Alcohol Test Form.		X

Behavior that Constitutes a Test Refusal

The policy must describe behavior that constitutes a refusal for both drug and alcohol tests [40.191,655.15(g)]. The chart above lists the behaviors that constitute a test refusal for all testing categories except for pre-employment.

Since applicants are not yet employees, the definition of a test refusal for a pre-employment test is limited by comparison since applicants may have legitimate reasons for failing to appear. For example, the individual may choose another job or decide they no longer want the position. In these situations, it would be unfair to qualify the failure to appear as a test refusal with the subsequent consequences. In addition, there may be legitimate circumstances where an applicant could leave a collection site before the test actually commences.

Consequently, an applicant refuses a pre-employment test only if he/she fails to complete the test once the collection process has begun (i.e., acceptance of the collection container). If the applicant leaves the collection site prior to the completion of the test, or takes another action listed above, the applicant has refused a test with corresponding DOT-mandated consequences. However, if the applicant leaves the site before the test begins or does not appear for the pre-employment test, the test is not refused and there are no DOT consequences. Additionally, with a pre-employment test that requires a medical examination for the Medical Review Officer (MRO) verification process or when required by the Designated Employer Representative (DER), the employee is deemed to have refused to test only if the medical examination was conducted following a contingent offer of employment.

Testing Procedures

The policy must describe the testing procedures and explain that the procedures protect the employee and the integrity of the drug and alcohol testing process, safeguard the validity of the test results, and ensure the test results are attributed to the correct employee.

To meet this requirement, the policy statement needs only to reference that the employer will abide by 49 CFR Part 40 as amended. It does not need to include detailed discussions of the testing procedures. By referencing this information, your policy will be shorter, less cumbersome, and easier to keep current. Employers must, however, ensure that the current version of Part 40 is available for review by employees when requested.

Employers have taken different approaches to this requirement. While some include Part 40 by reference only, others include greater detail in their policy statement, or develop procedure handbooks that supplement their policy (see the *Best Practices* manual). Any of these methods is acceptable as long as the minimum requirements are addressed.

Consequences of Drug Use and the Misuse of Alcohol

The policy must contain the consequences for a safety-sensitive employee who violates the rule. Violations occur when an employee:

- has a verified positive drug test result;
- has a confirmed alcohol concentration of 0.04 or greater; or
- refuses to submit to a test (see definition above).

This includes the mandatory requirement that such a safety-sensitive employee be removed immediately from his or her position, and be referred for evaluation by a substance abuse professional (SAP).

Additionally, the policy must specify the consequences for a covered employee who

has a confirmed alcohol concentration of 0.02 or greater, but less than 0.04. This includes the mandatory requirement that the individual be removed from safety-sensitive duties until the next regularly scheduled duty period, but not less than 8 hours following the test, unless a retest measures less than 0.02.

Any further action (e.g., suspension, termination) taken against the employee is left up to the discretion of the employer, consistent with law. Whatever the employer authorized consequences may be, these actions must be clearly described in detail in the policy. For every prohibited behavior covered in the policy, there should be a corresponding consequence. The policy should state that these additional actions are imposed under employer authority, and are not mandated by FTA.

Section 2. ADDITIONAL EMPLOYER PROVISIONS

The policy statement may provide additional detail or include additional requirements not mandated by FTA, as long as those provisions are identified as being included under the employer's own authority. The additional provisions must not contradict, discourage, or in any way confuse the minimum FTA requirements. Section 2.2 of the *Best Practices* manual addresses some of these additional provisions and provides examples of policies.

There are several major policy initiatives, however, that FTA and/or the DOT have identified for consideration when employers formulate their policy statements. These policy initiatives are discussed in the following section.

Inclusion of Policy on Prescription and Over-the-Counter Medications

Although not addressed in the FTA drug and alcohol testing rules, the FTA encouraged all grant recipients in a "Dear Colleague" letter to educate transit operators about the risks of using prescription and over-the-counter medications. Grantees were encouraged to include policy provisions regarding an employee's use of over-the counter and prescription medications that could jeopardize public safety.

Specifically, the policy should address medications that cause drowsiness, impair cognitive or mental abilities. FTA recommends that safety-sensitive employees enter into a dialogue with their physician or pharmacist regarding the side effects of medications and inquire about potential alternative treatments that will not jeopardize the individual's ability to perform job functions safely. The list is not definitive or all-inclusive, but it is provided for general awareness. The best source of additional information on these or other prescriptions and over-the-counter medications is your MRO.

Stand-Down Waivers

The term "stand-down" refers to an employer practice of temporarily removing an employee from the performance of safety-sensitive duties after learning that the individual had a confirmed laboratory positive drug test, but before the MRO has completed the verification process.

Historically, stand-downs have been prohibited under the DOT regulation, and they continue to be so under the new rule. MROs are not permitted to inform employers of a laboratory positive test until the MRO has determined if there is a legitimate medical explanation for the test result and has verified the test as either positive or negative. This prohibition is based on the premise that standing-down an employee before the MRO verification process is complete is premature, and could undercut the rationale for the MRO review. It could compromise confidentiality, and may unfairly stigmatize the employee as a drug user.

Recognizing, however, that some employers advocate stand-downs to enhance safety and reduce liability, the new DOT rule (§40.21) includes a mechanism for employers, on a case-by-case basis, to seek waivers if certain conditions are met. Specifically, the employer must have a well-founded stand-down plan that effectively protects the interests of the employees including confidentiality, and the facts must represent a genuine and plausible safety concern.

FTA anticipates that few transit employers will be able to meet the stringent requirements delineated in the waiver request process, and therefore, no policy or procedural change will result.

Under the DOT rule, the prohibition of stand-downs is narrowly defined and associated with the notification of the employer of a positive laboratory test result without MRO verification. This provision does not impede an employer's policies that require the removal of employees from safety-sensitive duties for any other reason not specifically addressed in the regulation.

Removal from Duty Following a Post-Accident or Reasonable Suspicion Test

Some transit employers have established a policy under their own authority that requires employees be removed from safety-sensitive service pending drug and alcohol test results following accidents and reasonable suspicion determinations. This practice is not considered a stand-down under the DOT rule, as the "event" was the reason for the person being removed from duty, not the laboratory test result. In this case, the employer has no knowledge of the drug test result, only that a drug test was required. This practice is not prohibited by FTA, but is encouraged due to liability considerations.

Removal of Employees From Duty While Awaiting Split Specimen Test Results

Employers have also been confused by how the stand-down prohibition relates to the practice of removing employees from duty following a non-negative test result (i.e., positive, adulterated, substituted), while awaiting the split specimen test result. Once the MRO has completed the review process and verified a test as non-negative, the employer is required to immediately remove the employee from safety-sensitive duties. The employee's removal cannot be delayed while awaiting the split specimen result. Thus, this is not a stand-down as defined in the DOT rule as the laboratory test result has already been verified by the

MRO before the employer is notified of the test result.

Second Chance versus Zero Tolerance

Once the FTA minimum consequences are met for a non-negative test result, FTA holds no position on the discipline that employers establish for test refusals, positive test results, adulterated or substituted specimens. Some employers practice zero-tolerance and discharge any employee who has a non-negative test result. Others operate under a second chance policy that allows employees who violated the rule to return to a safety-sensitive position after successfully completing the return-to-duty process. Still others establish some hybrid policies based on past practice, employer philosophy, and labor/management agreements.

Employers must reflect the employee consequences within the policy and clearly identify each as being provided under the employer's own authority. This decision has far reaching implications and must be well thought out. There is no best or recommended disciplinary policy.

Americans with Disabilities Act and Drug-Free Workplace Act Provisions

If you develop a policy that includes components of the Drug-Free Workplace Act and the Americans with Disabilities Act (ADA), you should review Chapter 13, "Drug-Free Workplace Act of 1988," and Appendix C, "Americans with Disabilities Act Discussion."

Section 3. POLICY ADOPTION

A final review of the draft policy and/or policy revisions should be conducted by your legal representative and by your labor relations or personnel officer. This legal review is to ensure that there are no conflicts between the policy provisions, the FTA requirements, and other state and local laws. (Note: The FTA rule preempts contrary state and/or local laws.)

The labor relations/personnel review should identify and resolve any conflicts between the policy and existing labor agreements or personnel policies. The requirements of the FTA regulations are not subject to bargaining. You should allocate sufficient time for this review and approval, and you should notify your governing board in the early stages of the policy development process that its approval will be required.

The local governing board of the employer must officially adopt the policy and any substantive revisions made thereto. The governing board of the employer may take many forms depending on the organizational structure and legal formation of the agency. A list of the most common governing boards is provided on the following page.

Organization/Agency	Governing Board
Municipality	City Council
County	County Commissioners
Regional Transit Authority	Board of Trustees
For-Profit Corporation	Board
Non-Profit Corporation	Board
Partnership	Partners
Sole Proprietor	Owner

In the event the employer has no governing board or the governing board does not have policy approval authority, the highest-ranking official with authority to approve the policy can do so.

Section 4. POLICY COMMUNICATION

Once you have developed or revised your agency's policy and it has been adopted, you must make sure that employees are aware of the policy and subsequent changes, and the effect it will have on them. You must provide materials (or notify employees of the availability of material) explaining the regulations, the policy, and the corresponding procedures to each safety-sensitive employee and representatives of employee organizations (§655.16). A sample Program Notification letter that satisfies this requirement is provided in the Sample Documentation section of this chapter.

Informing Current Employees of Policy Requirements and Revisions

How you communicate this information to your covered employees is your choice and is not dictated by the regulation. You can use any or all of the mechanisms available at your organization to educate your employees about the regulatory and employer policy requirements. The following methods have been used successfully:

- Orientation sessions
- Written materials
- Interactive forums
- Informational material displays
- Ongoing dialogue among safety-sensitive employees, labor representatives, first-line supervisors, and management.

FTA strongly encourages each employer to have each employee sign a "Confirmation of Receipt" form acknowledging receipt of the policy and the regulation summary. A sample form is provided at the end of this section. If you brief employees as a group, you should have each employee sign an attendance roster and maintain the list in your records.

Do not confuse the requirement to notify safety-sensitive employees about your

policy with the requirement to formally train certain employees and supervisors in selected aspects of your drug and alcohol program. See Chapter 5, "Training," for an explanation of your training obligations.

You can include other items in your policy orientation sessions. One suggestion is to provide an open forum where top management, union officials, laboratory representatives, and/or a substance abuse professional may answer questions regarding the policy, its implications, testing procedures, or available employee assistance. Be sure that persons answering questions about the policy and regulations are completely knowledgeable concerning the program. Avoid generalities, vague answers, opinions, and guesses. If a specific issue is not resolved or addressed by the policy, say so. If you do not know the answer to a question, assure the audience that you will get an answer as soon as possible, and be sure to follow-up.

Management Commitment

FTA suggests that top management should demonstrate its personal commitment and support of the program by communicating the policy to employees, which will set an example, and ensure fair and impartial implementation. Management assurances of strict confidentiality are key elements in promoting the program. Senior transit officials should understand the program thoroughly and should know about the effects of substance abuse, the requirements of the regulation, and the prescribed disciplinary actions. A positive attitude toward a drug- and alcohol-free work site should be communicated at every opportunity and will help to achieve a successful program.

Labor Involvement

Implementation of the FTA-mandated drug and alcohol program is not subject to bargaining, unless the transit agency chooses not to accept FTA operating or capital funding. Even then, the employer may fall under the regulatory authority of the Federal Motor Carrier Safety Administration (FMCSA). Only those policy provisions included under the employer's own authority are subject to collective bargaining.

Union or employee leadership must be notified of the employer's anti-drug and alcohol misuse policies and procedures and any subsequent changes made in the program. It can be advantageous to involve the union or employee leadership in the policy formulation/revision process. Your employee representatives may actively support the drug and alcohol program and may offer to assist in the administration of employee support programs (i.e., Alcoholics Anonymous, Employee Assistance Programs). For a more detailed discussion of labor involvement practices, see Section 3.1 of the *Best Practices* manual.

Applicants for Employment

You must make sure that all safety-sensitive applicants are fully aware of the transit system's commitment to a drug- and alcohol-free workplace. Add a statement similar to the one below to all notices of safety-sensitive positions:

> *The (Transit Agency) has established the goal of a 100 percent drug- and alcohol-free workplace. Applicants will be required to undergo drug testing prior to employment and will be subject to further drug and alcohol testing throughout their employment.*

In addition, the employee application form should contain a statement in which the prospective employee agrees to follow the transit system's drug and alcohol policy and submit to drug and alcohol testing if performing a safety-sensitive function. Current employees who are transferring to a safety-sensitive function must also be made aware of these policies. Further details on pre-employment testing are found in Chapter 6, "Types of Testing."

Contract Service Provider Notification

The FTA rules require that each recipient certify that it complies with the requirements of the regulations (§655.83). If a recipient uses a contract service provider or maintenance provider, these contractors must also be in compliance, unless they are maintenance contractors who work for Section 5311 subrecipients or Section 5307 or 5309 recipients that serve populations under 200,000.

Since the regulation covers contract personnel who are "standing in the shoes of" the transit system safety-sensitive employees, it is the recipient's responsibility to ensure that contract organizations comply with the regulations. The safety-sensitive functions covered for contract personnel are the same, except for the exclusions noted. These employees may be full- or part-time workers of the contractor.

Examples of Covered Safety-Sensitive Contractors

Contractor Function (Stands In the Shoes of FTA Section 5307, 5309, or 5311 Recipients)	Covered	Not Covered
Fixed Route Service	X	
Demand Response/Paratransit	X	
ADA Complementary Paratransit	X	
Turn-Key Service Providers	X	
Brokerage Services—Broker/Dispatcher Chooses Service Provider	X	
Passenger Chooses Service Provider		X
Intercity Service Provider	X	
Maintenance Service for Section 5307 and 5309 Recipients that Serve Population Greater than 200,000	X	
Maintenance Service for Section 5311 Subrecipients and Section 5307 and 5309 Recipients that Serve Populations Less Than 200,000		X
Warranty Work		X
Vehicle Manufacture/Remanufacture		X
Facility Construction Workers		X
Security Services (with Firearms) for Vehicles, Bus Stops, Terminals	X	
Security (with Firearms) for Vehicle Storage, Buildings, and Grounds		X
Engine and Component Rebuilding and Overhaul	X	

Do not assume that your contractors are knowledgeable about the regulatory requirements or that they have compliant policies or programs. It is the FTA recipient's responsibility to take the necessary actions to ensure the contractor's compliance.

You should notify all contract service and covered maintenance providers in writing of the regulatory requirements and the need for them to comply with the minimum requirements. Your procurement and contract documents should include specific language outlining the compliance regulations with the agency's regulatory compliance as a condition of contract award, and state that failure to remain compliant will result in contract termination. You may also wish to provide them with the necessary tools and technical assistance needed to develop and maintain a compliant program, such as the following:

- Provide each contractor with a copy of the regulatory requirements, these *Implementation Guidelines,* other FTA publications and resources as appropriate, and the transit system's policy statement, including a description of the program's intent and implications.

- Have each contractor sign a "Confirmation of Receipt" form acknowledging receipt of the policy and the regulations.

- Invite the contractor to participate in the transit system's testing and training program.

- Provide the contractor with a list of consortia/third party administrators (C/TPA) that can provide the necessary services to ensure that the contractor is in compliance.

- Inform contractors of the record keeping and reporting requirements and your intent to monitor compliance.

It is your responsibility to oversee and ensure that each contractor is compliant. You must certify that they are in compliance and ensure that they have completed their annual MIS Reports and submitted them to FTA as appropriate (see Chapter 10).

Section 5. POLICY UPDATES

Given the complexity of the regulation, diversity of the transit industry, regulatory emphasis on testing technology, and the illegal drug trade, all employers covered under the FTA regulation should anticipate that policy modifications will be required. Employers should stay up to date with the requirements, FTA letters of interpretation, and DOT/FTA guidance. Policy changes should be made as appropriate.

Anytime an employer makes substantive changes in the policy, it must be officially approved by the governing board and communicated to all employees. The date that the policy was last revised and approved should be clearly indicated in the policy. Employers should review their policy at least once per year to determine if modifications are necessary.

Sample Documentation

PRE-EMPLOYMENT DRUG TESTING NOTIFICATION AND ACKNOWLEDGEMENT

I hereby acknowledge and understand that, as part of my application for employment for a position which involves the performance of safety-sensitive functions as defined by 49 CFR Part 655, as amended, I must submit to a urine drug test under the authority of the U. S. Department of Transportation, Federal Transit Administration. I acknowledge and understand that any offer of employment is contingent on the passing of the aforementioned drug test and I will not be assigned to perform a safety-sensitive function unless my urine drug test has a verified negative result having no evidence of prohibited drug use.

_____ _____

Signature of Applicant Date

_____

Print Name

Witness: _____ _____

Signature Date

_____

Print Name

(Your application will not be considered for employment for a covered safety-sensitive position unless this acknowledgement is completed and signed.)

ACKNOWLEDGEMENT OF EMPLOYER'S DRUG AND ALCOHOL TESTING POLICY

I, _____, the undersigned, hereby acknowledge that I have received a copy of the anti-drug and alcohol misuse program policy mandated by the U. S. Department of Transportation, Federal Transit Administration for all covered employees who perform a safety-sensitive function. I understand this policy is required by 49 CFR Part 655, as amended, and has been duly adopted by the governing board of the employer. Any provisions contained herein which are not required by 49 CFR Part 655 or 49 CFR Part 40, as amended, that have been imposed solely on the authority of the employer are designated as such in the policy document.

I further understand that receipt of this policy constitutes a legal notification of the contents, and that it is my responsibility to become familiar with and adhere to all provisions contained therein. I will seek and get clarifications for any questions from the employer contact person listed in the policy. I also understand that compliance with all provisions contained in the policy is a condition of my employment.

I further understand that the information contained in the approved policy dated _____, is subject to change, and that any such changes, or addendum, shall be given to me in a manner consistent with the provision of 49 CFR Part 655, as amended.

_____ _____
Signature of Employee Date

Witness: _____ _____
Signature Date

Sample Program Notification Letter—New Policy/Program

Dear (Safety-Sensitive Employee) or Union Representative):

The Federal Transit Administration has recently revised and consolidated its drug and alcohol regulations into one new regulation entitled, *Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations* (49 CFR Part 655). (Transit Agency) is required to comply with this regulation, and we must issue a policy prohibiting illegal drug use at all times by our safety-sensitive employees. In addition, alcohol consumption by our safety-sensitive employees is prohibited while performing, and for 4 hours prior to performing safety-sensitive functions. Alcohol use after an accident is also prohibited. Tests must be conducted in six specific situations to determine whether an employee has used alcohol or drugs. The procedures and technology we will employ in this testing are specified in a Department of Transportation regulation, *Procedures for Transportation Workplace Drug and Alcohol Testing Programs* (49 CFR Part 40).

The regulations are very specific regarding what (Transit Agency) must do to comply. We have developed a policy and procedures list that will apply to you based upon the job functions you perform at (Transit Agency). To help you and your representatives better understand our policy and procedures, the following information will be available at all times in the (Drug and Alcohol Program Manager's/General Manager's/Legal/Labor Relations/Human Resources/Medical) Office:

1. Contact person
2. Safety-sensitive employee categories
3. When employees are required to be in compliance
4. Prohibited behavior
5. Circumstances when employee is tested
6. Testing procedures
7. Mandatory testing requirement for safety-sensitive functions
8. Consequences of refusing to submit to a test
9. Consequences of a verified positive drug test result
10. Consequences of an alcohol concentration of 0.04 or greater
11. Consequences of an alcohol concentration of 0.02 or greater, but less than 0.04
12. Information concerning the affects of alcohol misuse.

This program will begin on (Date of Implementation).

Thank you for your cooperation in implementing these important new safety regulations. If you have any questions regarding these regulations or (Transit Agency's) policy and procedures, please contact (Name of Contact Person) at (Telephone Number of Contact Person).

Sincerely,

General Manager

Enclosure(s)

Chapter 5. TRAINING

Training and educating your workforce and supervisors are major components of a successful drug and alcohol testing program. The benefits of the program are enhanced when your employees and supervisors understand your policies and procedures, why they are being implemented, and what their responsibilities are.

Well-trained employees and supervisors help you achieve your safety goals and maintain program integrity, which reduces your program costs and liabilities, and improves company morale. The FTA regulations require specific training for safety-sensitive employees and their supervisors.

The requirements with which you must comply are summarized in this chapter and corresponding sample course outlines are also provided in the Sample Documentation section.

The regulations do not require you to provide any education or training for non-safety-sensitive employees, nor do they require supervisory training for supervisors who will not be determining when to administer a reasonable suspicion test. Similarly, the regulations do not require refresher training for safety-sensitive employees. You are encouraged, however, to provide additional training beyond the requirements of the regulation under your own authority.

Section 1. TRAINING FOR SAFETY-SENSITIVE EMPLOYEES

The FTA drug and alcohol testing regulation (§655.14) requires each covered employer to establish an education and training program for all covered employees. The program must include a general education component, training for all safety-sensitive employees, and training for all supervisors and/or other company officers

authorized by the employer to make reasonable suspicion determinations.

Education

The general education component of the program (§655.14(a)) requires each employer to *display* and *distribute* informational material about the effects of drugs and alcohol to every covered employee. In addition, each employer must display and distribute a community service hot line telephone number (if available) to help employees who may be experiencing problems with prohibited drug use or alcohol misuse.

Appendix F of these guidelines includes information about drug and alcohol use that you may wish to incorporate into your educational program and informational materials. Suggested other sources of information are shown in Figure 5-1.

If you provide an Employee Assistance Program (EAP), the EAP should be able to provide you with information and educational materials. In fact, your contract may require the EAP to supply and distribute them. Also, your health insurance carrier or local government mental health agencies may have educational materials available to distribute to your workforce.

Community service hot line telephone numbers are available through a number of sources (see Figure 5-2). If you cannot locate a local number, there are several national hot line numbers that you can provide to your employees. Many of these numbers are toll free. In most cases, these national organizations can direct your employees to local services, including services for those without insurance coverage.

1. ***National Clearinghouse for Alcohol and Drug Information (NCADI)****, PO Box 2345, Rockville, MD 20852. (800) 729-6686 or (301) 468-2600. The Clearinghouse can provide fact sheets, films, posters, pamphlets, and brochures at no or low cost. Multilingual materials and a free quarterly catalog are also available.*

2. ***State substance abuse clearinghouse****. Each state has at least one federally funded clearinghouse which can provide you with nationally and locally produced information materials.*

3. ***Drug-free Workplace Help line, Center for Substance Abuse Prevention****. (800) 843-4971 operates from 9:00 a.m. to 8:00 p.m. EST, Monday – Friday. Provides information on policy, drug testing, employee assistance programs models, and related topics. Offers literature at no cost to employers. Referrals to other information sources and lists of consultants by geographic area are available.*

4. ***Partnership for a Drug Free America****, 405 Lexington Avenue, New York, NY 10174-0002. (212) 922-1560. Provides high quality, high impact messages in the form of posters, audiotapes, and videotapes. No charge, but a donation will be requested.*

Figure 5-1. Suggested Sources for Information Materials

1. *American Council on Alcoholism Help line – (800) 356-9996*
2. *National Cocaine Hot line – (800) COCAINE or (800) 662-HELP*
3. *National Council on Alcoholism and Drug Dependence Hope Line – (800) NCA-CALL*
4. *National Institute on Drug Abuse Hot line – (800) 662-HELP*
5. *Alcoholics Anonymous – (800) 870-3795*
6. *Narcotics Anonymous – see local directory*
7. *Local United Way*
8. *National Directory of Drug Abuse and Alcoholism Treatment and Prevention Programs. Directory published by the U.S. Public Health Service, Rockville, MD.*
9. *Your state alcohol and drug abuse clearinghouse*
10. *Your state alcohol and drug abuse agency (ies)*
11. *Yellow Pages directory under "Social Service Agencies"*
12. *Your municipal government Department of Social Services, or equivalent*

Figure 5-2. Sources of Community Service Hot Line Telephone Numbers

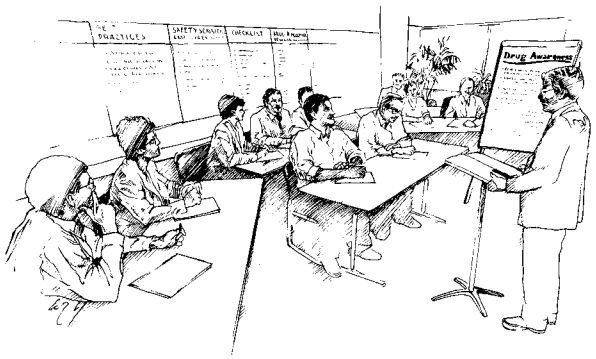
As mentioned in the previous chapter, each employer is required to provide every covered employee with written notice of the employer's drug and alcohol testing program polices and procedures.

Substance Abuse Awareness Training

The regulation (§655.14(b)) requires that you provide a minimum of 60 minutes of training to all safety-sensitive employees on the effects and consequences of prohibited drug use on personal health, safety, and the work environment. This training must also address the signs and symptoms that may indicate drug use (§655.14(b)).

Training safety-sensitive employees on the effects and consequences of alcohol misuse is not required by the FTA regulation. However, information concerning the effects of alcohol misuse on the individual's health, work, and personal life, as well as signs and symptoms of an alcohol problem, must be provided as part of the general education program as discussed previously (§654.14(a)).

Typically, training is provided in a classroom setting with an instructor present to answer questions and facilitate discussions. Some employers use interactive technologies that do not require a live instructor. Consult Section 3.2 of the *Best Practices* manual for additional information regarding training practices and instructional aides.



The 60 minutes of awareness training is required only once in the employee's tenure with the company. One hour of training should be considered a minimum. The time may be exceeded if necessary. Because of the volume of information that must be covered, some transit agencies have found 2 to 3 hours to be more appropriate.

Depending on the employee-management relationship and the unique needs of the employer's workforce, the employer may also choose to exceed the minimum requirement by providing refresher training. If an employer does so, the employer must specify that the additional requirements are set forth under the employer's authority and not the FTA.

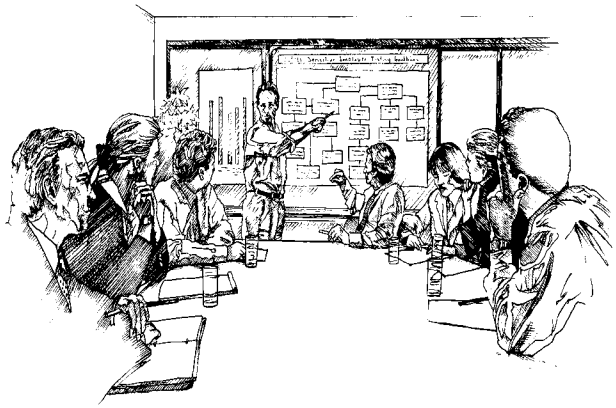
For systems establishing new drug and alcohol testing programs, the employee training should occur before the time of program inception. For systems that have programs established and have already conducted their initial employee training, no additional training is required, except for new hires or transfers into safety-sensitive positions. However, many systems have found it beneficial to provide employee briefings in response to major regulatory or policy changes.

New hires should receive copies of your drug and alcohol program notification, policy, and education materials. In most cases, the 60 minutes of training are incorporated into the employee orientation.

Section 2. TRAINING FOR SUPERVISORS

You must provide additional training for supervisors or other company officials who are authorized to determine when it is appropriate to administer reasonable suspicion drug and/or alcohol tests. Supervisors play a critical role in administering the program policies; and they are responsible for maintaining safety and productivity. Supervisors must determine when an employee's speech, behavior, body odor, or appearance provides "reasonable suspicion" that the employee has used or consumed prohibited drugs or alcohol in violation of the FTA regulation. A reasonable suspicion determination requires that a drug and/or alcohol test must be administered.

Only one supervisor's opinion is necessary to require a reasonable suspicion test, so it is important that you provide adequate training to determine when a test is needed. Employers who wish to have more than one supervisor involved in the decision-making process may do so as long as those involved have received the requisite training and have drawn their conclusion based on their own observations.



Supervisor training must include 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use, and at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse. Therefore, a total of 120 minutes is required. Before making any reasonable suspicion determinations, supervisors and other company officials are required to complete the necessary training. The training is only required once and there is no regulatory requirement for refresher training.

These requirements should be considered minimums. Under their own authority, employers are allowed to exceed these requirements, and they may require training that exceeds 2 hours in length and/or require periodic refresher training.

Training Agenda

See Exhibit 5-3 in the Sample Documentation section of this chapter for a proposed agenda on supervisory training. The agenda complies with the regulations and assumes that the alcohol and drug program training will be conducted concurrently. Training elements that are not specifically required by the regulations are marked as optional.

To improve effectiveness, your training program may be expanded to introduce the purpose of the regulation and to review the testing requirements and the disciplinary procedures adopted by your agency. In addition, you may include a discussion of confrontation and documentation procedures, and rehabilitation and treatment options, if they exist. Your supervisors should understand all of these topics to administer the program effectively.

To help you prepare your training sessions, Appendix F of these guidelines contains descriptions of the effects and behavioral indicators of alcohol and prohibited substances.

Record Keeping Requirements

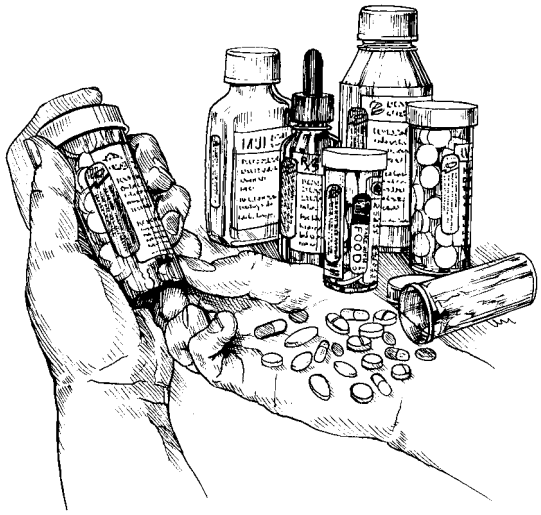
You must maintain detailed records of both your employee and supervisory drug and alcohol training for 2 years (§655.71). You must keep copies of all your training materials including attendance rosters, dates and times of training, and certifications of training compliance.

Your drug and alcohol training records should be stored either with your other training records or in the agency's drug and alcohol testing program files.

Section 3. PRESCRIPTION AND OVER-THE-COUNTER DRUGS

The FTA drug and alcohol testing regulations do not address the use of prescription and over-the-counter (OTC) medications. However, on May 22, 2000, the FTA issued a "Dear Colleague" letter to all grant recipients encouraging them to educate transit operators about the risks associated with their use. Specifically, grantees are encouraged to: 1) review current policies with regard to operator's use of over-the-counter and prescription

medications which could result in public safety being jeopardized; and 2) immediately institute educational programs that address the potential dangers of taking certain types of medications.



The educational programs should address medications that cause drowsiness or could impair the operator's cognitive or mental abilities. As part of the educational program, encourage safety-sensitive employees to enter into a dialogue with their physician or pharmacist regarding the side effects of medications and to inquire into potential alternative treatments that will not jeopardize safe job performance.

The best source of information on prescription and over-the-counter medications is your MRO.

Section 4. SOURCES OF TRAINING

Training is available from many sources**.** Some transit systems conduct substance abuse training in-house, while others contract with external trainers for the service. The approach you choose will depend upon the training resources available within your company, both in terms of staff time and expertise. Some of the external sources you may consider in selecting someone to develop or deliver your alcohol misuse and prohibited drug training are listed in Figure 5-3. You may choose to use company staff for some training and outside experts for other training.

1. Your EAP provider
2. Mental health professionals
3. Drug and alcohol treatment specialists
4. Pharmacists
5. Toxicologists
6. Nurses and physicians
7. Consultants specializing in the field of substance abuse in the workplace
8. Local law enforcement drug awareness specialists
9. Your state alcohol and drug clearinghouse which may maintain a speaker's bureau or list of consultants
10. Nonprofit organizations in your state
11. National organizations and their local affiliates such as the National Council on Alcoholism and Drug Dependence and the Employee Assistance Professionals Association and their state and/or local chapters
12. Larger transit systems near you that provide training to their employees and supervisors

Figure 5-3. External Sources of Trainers

Whomever you select to provide your training, you should ensure that the instructor will adhere to your outline and provide the training supportive of your policy and programs. Although a trainer may have an off-the-shelf curriculum, that curriculum will be of little use if it does not meet the requirements of the regulations or of your system. At a minimum, the curriculum will need to be tailored to reflect the provisions of your policy and procedures, your discipline policy, and your EAP, if any. For this reason, you may want to have someone from your human resources, medical, or labor relations department work with the outside expert in developing and presenting the training sessions.

Important criteria to consider in selecting a trainer are:

- Workplace experience with transit or similar industries;
- Concern with safety, cost reduction, productivity, liability, and public image, as well as employee welfare;
- Understanding of the applicable FTA and DOT regulations and how to handle employee attitudes and concerns regarding drug and alcohol testing;
- Training style, platform skills, techniques, tools, and methods appropriate to adult learning, including appropriate and high-quality audio/visual material, handouts, role playing, and case studies;
- Willingness to learn about your transit system, its operations, policy, programs, values, and culture; and
- Flexibility, professionalism, and tact in handling diverse opinions and needs of resistant employees, assertive managers, supervisors, executives, and union representatives.

FTA sponsored the production of a training aid for transit supervisors that describes the signs and symptoms of prohibited drug use. This training program, entitled "*Identification of Drug Abuse and/or Alcohol Misuse in the Workplace: An Interactive Training Program*," demonstrates the manifestation and behavioral cues of drug use and alcohol misuse, and the procedures supervisors should use to make fair and reliable reasonable suspicion testing referrals. A copy of this training program including video and leader's guide can be obtained by faxing a request to the FTA Office of Safety and Security at (202) 366-7951.

Section 5. DRUG-FREE WORKPLACE ACT TRAINING

Provisions of the FTA regulation affect only covered safety-sensitive employees. You are not required to test or to train any employees who are not safety-sensitive. However, the Drug-Free Workplace Act (DFWA) requires that all direct recipients of $25,000 or more in federal funds institute an ongoing substance abuse awareness program. The act requires that efforts be made to ensure that the drug-free message is ever present in the workplace, and it extends to all employees of a covered organization not just those who are deemed safety-sensitive.

For this reason, you may wish to train your entire workforce on the importance of maintaining a drug-free workplace, and on the resources that you have available to help

employees who have problems with prohibited drugs. Of course, you must make clear which parts of your policy and testing program apply to employees who are covered under the FTA drug and alcohol testing regulation and which parts apply to those who are not.

Given the DFWA requirement for the establishment of an "ongoing" substance abuse awareness program, you may also wish to retrain employees and supervisors on a regular basis. In addition, if your system has regular safety meetings, you may wish to include discussions of substance abuse to keep the issue in your employees' minds.

Section 6. SERVICE AGENT TRAINING REQUIREMENTS

You must ensure that the service agents who provide the testing services for your agency are appropriately educated and trained. This includes urine specimen collectors, breath alcohol technicians (BAT), screen test technicians (STT), Medical Review Officers (MRO), and Substance Abuse Professionals (SAP). These individuals must possess certain credentials, have a basic knowledge of the program, attend qualifications training, undergo periodic refresher training, and demonstrate knowledge either through an examination in the case of MROs and SAPs, or the demonstration of proficiency in the case of collectors, BATs, and STTs. Even though this training will be conducted by professional organizations, professionals within the area of expertise, or by equipment manufacturers, it is your responsibility as the regulated employer to assure that the training has occurred. You need not be concerned about the training of DHHS-certified laboratory personnel as DHHS is responsible for laboratory oversight.

Urine Collection Personnel

Individuals who conduct urine specimen collections under the DOT drug testing program must meet the following requirements:

Basic Knowledge. Urine collection personnel must be knowledgeable about Part 40 and its requirements, DOT agency regulations applicable to the employers for whom they perform collections (i.e., FTA, Part 655), and the current "DOT Urine Specimen Collection Procedures Guidelines." This publication is available from the DOT Office of Drug and Alcohol Policy Compliance (ODAPC) at http://www.dot.gov/ost/dapc. Collectors must also take action to remain current with regulatory changes.

Qualifications Training. Collectors must receive qualification training that addresses all of the steps necessary to complete a urine specimen collection correctly, including problem collections (e.g., shy bladder, attempts to adulterate, temperature out of range), fatal flaws, correctable flaws, and corrective actions. The training must cover the proper completion and transmission of the Custody

and Control Form (CCF) and must explain the collector's responsibility for maintaining the integrity of the collection process, ensuring the privacy of the employees being tested, and ensuring the security of the specimen. The collector must also be trained on how to avoid conduct or statements that could be viewed as offensive or inappropriate.

Proficiency Demonstration. Collectors must also demonstrate proficiency with the procedures by completing five consecutive error-free mock collections. Two of the mock collections must be uneventful, one will have insufficient volume, one collection will have a temperature out of range, and one collection deals with an employee's refusal to sign the CCF and initial the specimen bottle tamper-evident seal. The demonstration must be monitored and evaluated by a qualified monitor who must attest in writing that the mock collections were performed with no errors.

The monitor must be an individual who has demonstrated the necessary knowledge, skills, and abilities by successfully completing qualification training for collectors and by conducting DOT drug test collections on a regular basis for at least a year, or by conducting collector training under Part 40 for at least a year, or by successfully completing a "train the trainer" course.

Refresher Training. Refresher training is required at least every 5 years from the date on which the collector satisfactorily completed the initial qualification training and proficiency demonstration, and it must meet the same requirements for both.

Error Correction Training. Error correction training is required every time the collector makes a mistake in the collection process, causing a test to be cancelled, including both fatal and uncorrected flaws. The training must occur within 30 days of the date the collector is notified of the error and the resulting test cancellation. The training must cover the subject matter area(s) of the error that caused the cancellation.

The error correction training must be followed by a proficiency demonstration. The demonstration must include three error-free mock collections, (two on the subject matter of the error and one uneventful) that are monitored and attested to in writing by a qualified monitor.

Breath Alcohol Technicians/Screen Test Technicians

Breath alcohol technicians (BATs) and screen test technicians (STTs) are the only people authorized to conduct DOT alcohol tests. An STT can conduct only an alcohol screen test, while a BAT can conduct both a screen test and a confirmatory test. BATs and STTs must meet the following requirements:

Basic Information. BATs and STTs must be knowledgeable about the alcohol testing procedures set forth in 49 CFR Part 40, and the current DOT guidance. These publications are available from the ODAPC at http://www.dot.gov/ost/dapc.

Qualification Training. BATs and STTs must undergo training that is in accordance with the DOT Model BAT or STT course, or an equivalent. The DOT Model course is available for purchase from the ODAPC at the above referenced Web site. The qualifications training must address the alcohol testing procedures defined in Part 40 and the testing procedures associated with the operation of the

particular alcohol testing device that the BAT or STT will be using. The training must also emphasize the responsibility of the BAT and STT for maintaining the integrity of the testing process and ensuring the privacy of employees being tested. The training must instruct BATs and STTs on how to avoid conduct or statements that could be viewed as offensive or inappropriate.

The instructor must be an individual who has demonstrated the necessary knowledge, skills, and abilities by regularly conducting DOT alcohol tests as an STT or BAT for at least a year or who has conducted STT or BAT training on Part 40 requirements for at least a year, or who has successfully completed a "train the trainer" course.

Proficiency Demonstration. BATs must conduct seven error-free mock collections to demonstrate proficiency in alcohol testing and the use of the Evidential Breath Testing Device (EBT) that he/she will be using. STTs must complete five error-free mock collections to demonstrate proficiency in alcohol testing and the use of the Alcohol Screening Device (ASD) that he/she will use.

A qualified individual that evaluates the BAT/STT's performance must monitor the demonstrations and document in writing that the mock collections were error-free.

Refresher Training. BATs and STTs must undergo refresher training at least every 5 years from the date on which they satisfactorily completed their initial qualifications training and proficiency demonstration. The refresher training must meet the same requirements.

Error Correction Training. BATs and STTs must undergo error correction training if they make a mistake in the alcohol testing process that causes a test to be cancelled, including fatal and uncorrected flaws. The training must occur within 30 days of the date of the error and must cover the subject matter area(s) of the error. The BAT or STT must also demonstrate proficiency in the alcohol testing procedures by conducting three error-free mock tests of which two are related to the error and one is uneventful. The training and proficiency demonstration must be observed, evaluated, and documented in writing by a qualified instructor.

Medical Review Officers

The Medical Review Officer (MRO) is the gatekeeper of the drug testing program. As such, individuals must meet the following requirements to qualify as an MRO:

Credentials. An MRO must be a licensed physician (Doctor of Medicine or Osteopathy).

Basic Knowledge. An MRO must be knowledgeable about and have clinical experience in controlled substance abuse disorders including detailed knowledge of

alternative medical explanations for laboratory confirmed drug test results. The MRO must also be knowledgeable about issues relating to adulterated and substituted specimens, as well as the possible medical causes of specimens having an invalid result. MROs must have detailed knowledge of Part 40, the DOT MRO Guidelines, and the DOT agency regulations applicable to the employers they serve (i.e., FTA—Part 655). The DOT MRO Guidelines can be obtained from the ODAPC at the previously cited Web site. The MRO must also remain current with any changes to the regulations or DOT MRO Guidelines.

Qualification Training. The MRO qualifications training must include collection procedures for urine specimens, chain of custody, reporting and record keeping procedures, and the interpretation of drug and validity test results. The training must also define the role and responsibilities of the MRO in the DOT drug testing program and the interaction with other participants in the program such as the DER and the SAP. The training must also address the DOT agency rules (i.e., FTA) that apply to employers for whom the MRO provides services.

Following the completion of the qualification training, the MRO must satisfactorily complete an examination which must be administered by a nationally recognized MRO certification board or subspecialty board of medical practitioners who perform MRO functions.

Continuing Education. MROs are required to complete 12 professional development hours during each 3-year period, counting from the date of the successful completion of the initial examination. The professional development education hours must be relevant to performing MRO functions and must address new technologies, DOT and modal interpretations, new guidance, rule changes, and other information relevant to MRO practice. The continuing education activities must also include a method of assessing the MRO's understanding of the materials covered.

Substance Abuse Professionals

The Substance Abuse Professional (SAP) is the person responsible for the return-to-duty process. To be considered a SAP, an individual must have the following credentials and training:

Credentials. A SAP is a licensed physician, a licensed or certified social worker, a licensed or certified psychologist, a licensed or certified employee assistance professional, or a drug and alcohol counselor certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission (NAADAC), or the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse (ICRC).

Basic Knowledge. A SAP must be knowledgeable about and have clinical experience in the diagnosis and treatment of alcohol and controlled substance-related disorders. A SAP must be knowledgeable about the Part 40 requirements and the DOT agency (i.e., FTA) regulations applicable to the employers they serve, and the DOT SAP Guidelines. The SAP Guidelines can be obtained from the ODAPC. More important, however, the SAP must be knowledgeable about their function and how it relates to the employer's interests in safety-sensitive duties. The SAP must also

remain current with the regulations and any other information relevant to their duties.

Qualifications Training. SAP qualifications training must provide instruction on the background, rationale, and coverage of the DOT's drug and alcohol testing program, Part 40, and DOT agency (i.e., FTA) drug and alcohol testing rules. The training must address the drug testing procedures including collections, laboratory testing and MRO role, problems in drug testing, as well as the alcohol testing procedures including the testing process, the role of BATs and STTs, and problems in alcohol testing.

The training must include SAP qualifications and prohibitions, reporting and record keeping requirements, SAP communication with employers, MROs and treatment providers, and SAP issues. The SAP training must define the role of the SAP in the return-to-duty process, including the initial employee evaluation, referrals for treatment, the follow-up evaluation, continuing treatment recommendations, and the follow-up testing plan.

Upon completion of the training requirements, the SAP must satisfactorily complete an examination administered by a nationally recognized professional or training organization.

Continuing Education. During each 3-year period marked from the date of the initial examination, the SAP must satisfactorily complete 12 hours of professional development relevant to performing SAP functions. The continuing education must address new technologies, DOT and modal agency (i.e., FTA) interpretations, recent guidance, rule changes, and other issues relevant to SAP practice. The continuing education activities must also include a documentable assessment of knowledge gained.

Figure 5-4 below presents information on professional and technical training requirements.

Who Must Be Trained	Training or Background Required
Urine Collection Personnel (§40.33)	1. Credentials: None – Basic Information – Part 40 – "DOT Urine Specimen Collection Guidelines" – Applicable DOT Agency Regulations (i.e., FTA) – Keep Current 2. Qualifications Training – All Collection Steps and Completion of CCF – Problem Collections (shy bladder, adulterated specimen) – Fatal Flaws, Correctable Flaws, and Corrections – Collector's Professionalism 3. Proficiency Demonstration – Five Consecutive Error-Free Collections-Monitored 4. Refresher Training (Every 5 Years) – Qualifications Training – Proficiency Demonstration 5. Error Correction Training (Within 30 Days)

	– Training on Error – Proficiency Demonstration
Breath Alcohol Technician (BAT) and Screen Test Technician (STT) (§40.213)	1. Credentials: None 2. Basic Information – Part 40 – Current DOT Guidance 3. Qualifications Training – DOT Model BAT or STT Course – Part 40 Alcohol Testing Procedures – Operation of Alcohol Screen Device (ASD) for STT – Operation of Evidential Breath Testing (EBT) Device for BATs – BAT/STT Professionalism 4. Initial Proficiency Demonstration – BATs Conduct Seven (7) Error-Free Mock Collections Using Devices that Will Be Used – STTs Conduct Five (5) Error-Free Mock Collections Using Devices that Will Be Used – Monitored 5. Refresher Training (Minimum Every 5 Years) – Qualification Training – Proficiency Demonstration 6. Error Correction Training (within 30 Days of Error) – Training on Error – Proficiency Demonstration -- Three Consecutive Error-Free Mock Collections-Monitored
Medical Review Officer (MRO) (§40.121)	1. Credentials: A Licensed Physician (Medical Doctor or Doctor of Osteopathy) 2. Basic Knowledge – Knowledgeable of and Clinical Experience in Controlled Substance Abuse Disorders – Detailed Knowledge of Alternative Medical Explanations for Laboratory Drug Test Results – Knowledge of Adulterated and Substituted Specimens – Knowledge of Medical Causes for Invalid Test Results – Part 40 – DOT MRO Guidelines – DOT Agency Regulations (i.e., FTA) – Keep Current 3. Qualifications Training – Urine Specimen Collections – Chain of Custody, Reporting, Records – Interpretation of Drug and Validity Test Results – Role and Responsibility of MRO – Interaction with DERs, SAPs, etc. – Part 40 – DOT Agency Rules (i.e., FTA)

	– Changes in Rules, Guidance and Interpretations that Affect MRO Function – Examination 4. Continuing Education (Every 3 Years) – 12 Professional Development Hours Relevant to MRO Function – Update Materials and Information – Knowledge Assessment Tool
Substance Abuse Professional (SAP) (§655.281)	1. Credentials: A Licensed Physician (Medical Doctor or Doctor of Osteopathy), or a Licensed or Certified Psychologist, Social Worker, Employee Assistance Professional, or Drug and Alcohol Counselor (Certified by the NAADAC or by the ICRC 2. Basic Knowledge – Knowledge of, and Clinical Experience in the Diagnosis and Treatment of Drug and Alcohol Related Disorders – SAP Functions as they Relate to Employer Interests in Public Safety – Part 40 – DOT Agency Regulations Applicable to the Employers They Serve (i.e., FTA, Part 655) – DOT "Substance Abuse Professional Guidelines" – Keep Current 3. Qualifications Training – Background, Rationale, and Coverage of DOT's Program – Part 40 – DOT Agency Regulations (i.e., Part 655) – DOT Drug Testing – DOT Alcohol Testing Requirements – SAP Qualifications and Prohibitions – Role of the SAP in Return-to-Duty Process – SAP Consultation and Communication Requirements – Reporting and Record Keeping – SAP Issues – Examination 4. Continuing Education (Every 3 Years) – 12 Professional Development Hours Relevant to SAP Duties – Update Information – Knowledge Assessment Tool

Figure 5-4. Education and Training Requirements for Medical Professionals and Technicians

Sample Documentation

Exhibit 5-1
Summary of Education and Training Requirements

Program	Who Must Be Educated or Trained	What Must They Receive	Content
Drugs and Alcohol	All Safety-Sensitive Employees and Employee Organizations	Written Notice of Availability	1. Employer Policy & Procedures
	All Safety-Sensitive Employees	Display and Distribution of Information	1. Informational Material 2. Community Service Hot Line Telephone Number
Drugs Only	All Safety-Sensitive Employees	60 Minutes of Training	1. Effects of Drug Use on: Personal Health, Safety, and Work Environment 2. Manifestations and Behavioral Cues Indicating Drug Use
	Supervisors and Other Company Officials Designated to Make Reasonable Suspicion Determinations	60 Minutes of Training on Drugs 1. Marijuana 2. Cocaine 3. Amphetamines 4. Opiates 5. Phencyclidine	Indicators of Probable Drug Use: Physical Behavioral Performance Speech Other
Alcohol Only	Supervisors and Other Company Officials Designated to Make Reasonable Suspicion Determinations	60 Minutes of Training on Alcohol	Indicators of Probable Alcohol Misuse: Physical Behavioral Performance Speech Other

Exhibit 5-2
Typical Agenda For Safety-Sensitive Employee
Substance Abuse Awareness Training

I. Impact of Drug Abuse on Society and Industry

   A. National, Regional, and Local Statistics on Prohibited Drug Use
   B. How Drug Use Affects the Transit Industry

II. How Have the Federal Government and the Transit Industry Responded?

   A. Drug-Free Workplace Act
   B. Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations (49 CFR Part 655)
   C. Procedures for Transportation Workplace Drug and Alcohol Testing Programs (49 CFR Part 40)
   D. (Transit System) Policy on Prohibited Drugs and Alcohol

III. Safety, Personal Health, and Work Environment Effects of Prohibited Drugs

IV. Manifestations and Behavioral Cues That May Indicate Prohibited Drug Use

   A. Marijuana
   B. Cocaine
   C. Opiates
   D. Amphetamines
   E. Phencyclidine
   F. Alcohol (Optional)

V. Procedures and Protections of the (Transit System) Drug and Alcohol Testing Program

VI. Questions and Answers

Exhibit 5-3
Typical Agenda for Supervisory Training for Compliance with FTA Drug and Alcohol Regulation

I. Impact of Prohibited Drug Use and Alcohol Misuse on Safety, Personal Health, and Work Environment

- A. National and Local Statistics on Drug and Alcohol Abuse
- B. How Drug and Alcohol Use Affects the Transit System

II. How Have the Federal Government and the Transit System Responded?

- A. Drug-Free Workplace Act
- B. Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations (49 CFR Part 655)
- C. Procedures for Transportation Workplace Drug and Alcohol Testing Programs (49 CFR Part 40)
- D. (Transit System) Policy on Drugs and Alcohol

III. Responsibility of Supervisors (Optional)

- A. To Supervise
- B. To Deal with Problems in the Workplace
- C. To Document Unacceptable, Deteriorating, and Unsafe Performance
- D. To Evaluate Employee Fitness for Duty
- E. To Make Reasonable Suspicion Determinations When Warranted

IV. Indicators of Probable Alcohol Misuse or Prohibited Drug Misuse (Physical, Behavioral, Speech, Body Odor, and Performance Indicators)

- A. Alcohol
- C. Marijuana
- D. Cocaine
- E. Amphetamines
- E. Opiates
- F. Phencyclidine

V. Supervisory Job Duties in Relation to Reasonable Suspicion

- A. Observe Employees
- B. Determine Fitness for Duty
- C. Remove Employee from Safety-Sensitive Position
- D. Document Observations
- E. Ensure Confidentiality/Privacy of the Employee
- F. Review Findings
- G. Make Reasonable Suspicion Decision
- H. Escort to Collection Site (not required by FTA Regulations)
- I. Escort Home (not required by FTA Regulations)

VI. Conflict Management (Optional)

VII. Resources Available to the Employee (Optional)

- A. Employer Drug and Alcohol Program Manager

B. Medical Review Officer
C. Substance Abuse Professional
D. Employee Assistance Program, if available
E. Community Resources
F. Other

VIII. Questions and Answers

Exhibit 5-4
REASONABLE SUSPICION TRAINING
POINTS OF EMPHASIS

Remember that the Primary Issue is Safety. Employees who are believed to be under the influence of a prohibited substance are an immediate hazard to themselves and others. Management's inability to substantiate the objective facts associated with the reasonable suspicion determination or concern for a grievance or other employee action should be secondary to assuring safety.

Inquire and Observe. Ask the employee to explain the suspected behavior and to describe the events that took place from his or her perspective. A persuasive explanation should not deter or prevent you from requiring a test if you have a reasonable belief that prohibited drug use or alcohol misuse is a factor.

Denial should be an expected reaction. If an employee knows he/she will test positive, he/she may give several explanations and protests in an attempt to avoid testing. As a result, a reasonable suspicion decision must be based on objective observations. Remember, a request for a urine specimen or a breath test is not an accusation; it is merely a request for additional objective data.

To the employee, a request for a specimen may feel like an accusation; so it is important to stress that this is merely a request for additional data. Explain also that the incident and the test results will be handled with strict confidentiality. Sometimes, it may be necessary to calm the situation by telling the employee, "I'm glad to hear your explanation, and in light of the circumstances, I want to verify what you have just told me."

Isolate and Inform the Employee. Remove the employee from the vehicle or public locations. Explain that you believe he/she may not be fit for duty and you are requesting him or her to accompany you to the collection site. Inform the employee of the consequences of refusal and that he or she is being relieved from duty.

It is important to respect the dignity and confidentiality of the employee during the interview.

Review Findings. During the conversation, observe physical and mental symptoms. Be sure to document any characteristics that either support or contradict the initial information. The FTA regulation only requires that one supervisor make the reasonable suspicion referral. If possible, a second supervisor should be consulted. The confirmation by a second supervisor creates greater objectivity, provides additional observation, and generally strengthens the reliability of the reasonable suspicion determination.

Make the Reasonable Suspicion Decision. Anonymous tips must be taken seriously, but should not be the sole reason to initiate a request for a reasonable suspicion test. Hearsay is not an acceptable basis for a reasonable suspicion referral. If witnesses saw a specific event or behavior, the supervisor should ask them to describe what they saw. Questions a supervisor might ask an employee are: How far away were they? How long did they observe the person?

What, if anything, caused them to believe it was substance-abuse-related behavior? On what basis did they reach their conclusions?

The supervisor should observe the employee. What can the supervisor observe and objectively document as it relates to physical signs and symptoms, emotional state, physical evidence, and related facts? The reasonable suspicion determination must be made based on the trained supervisor's observations.

Transport the Employee. Although the FTA regulations do not specify that the employee must be transported, it is unwise to allow an employee suspected of being under the influence of alcohol or drugs to proceed alone to the collection site or to drive home. He or she could be a danger to self or others. In addition, the employer's exposure to liability is great if damage or injury occurs. Accompanying the employee to the collection site also assures that there is no opportunity en route for the employee to ingest or acquire anything that could affect the test result.

The direct or immediate supervisor of the employee must not serve as the collection site person for drug or alcohol tests (§655.53).

Document Events. Record the behavioral signs and symptoms that support the determination to conduct a reasonable suspicion test, and maintain those records for a minimum of 2 years. The signs and symptoms to look for are more fully described in Appendix F.

Chapter 6. TYPES OF TESTING

Six types of testing are required by Subpart E (49 CFR Part 655) of the FTA drug and alcohol rule. The six categories include:

- Pre-employment (drug test only)
- Reasonable suspicion
- Post-accident
- Random
- Return-to-duty
- Follow-up

In addition to these six types of testing, transit systems with over 2,000 covered safety-sensitive employees are also required to perform blind sample testing as a quality assurance measure for the testing laboratory (§40.103).

Section 1. PRE-EMPLOYMENT TESTING

The purpose of pre-employment testing is to identify applicants who have exhibited high risk behavior (i.e., consumed a prohibited drug) in the recent past. This behavior can impact the workplace and presents an unacceptable safety risk to the employee, coworkers, passengers, and the general public. Pre-employment testing identifies those employees who could bring a substance abuse problem into your transit agency.

Pre-employment Drug Testing

The FTA regulation (§655.41) requires that all applicants for employment in safety-sensitive positions or individuals being transferred into safety-sensitive positions from non-safety-sensitive positions must be given a pre-employment drug test. Applicants may not be assigned safety-sensitive functions unless the individual has a verified negative test result.

When an existing covered employee has not performed a safety-sensitive function for 90 consecutive calendar days and the employee has not been in the employer's random testing pool during that time, the employee is required to take a pre-employment drug test and obtain a negative test result prior to the reassignment of safety-sensitive duties. The reason for the

90-day absence is not a consideration. Thus, employees that are off duty for sickness, vacation, jury duty, leaves of absence, worker's compensation, Family Medical Leave, or any other purpose that extends 90 days or more will be subject to the pre-employment test if the employee has been removed from the testing pool. Employers should remove covered employees from the random testing pool for any testing period (i.e., quarter, month, week) for which the employer knows the employee will not perform any safety-sensitive duties.

For example:

If an employee is on extended worker's compensation leave for an anticipated period of 6 months, the employee may be removed from the employer's random pool for the duration of the six months (i.e., six monthly testing periods) to avoid dilution of the pool. Since the 6-month period is longer than 90 days, the employee would be required to take a pre-employment drug test prior to reassignment of safety-sensitive duties at the end of the 6-month period.

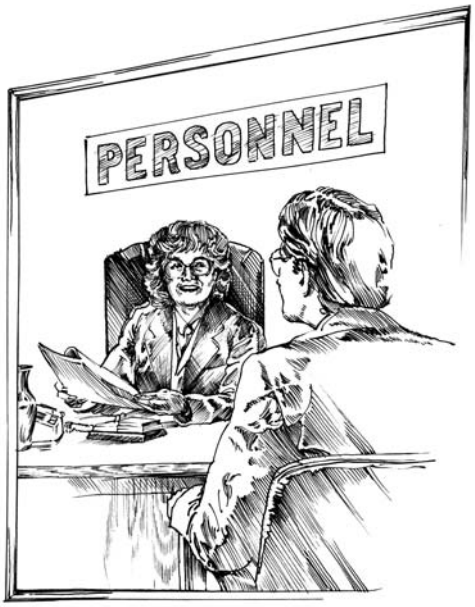
On the other hand, if an individual has called in sick and the duration of the illness is unknown, but it is likely that the individual will return to work within the quarterly testing period, the individual should not be removed from the testing pool. If the illness extends past 90 days, the employee would not receive a pre-employment test because they remained in the employer's testing pool.

Similarly, any applicant who undergoes a pre-employment test, but is not actually assigned safety-sensitive duties within 90 days from the date of the test, will have to be retested with negative test results prior to the applicant's first performance of safety-sensitive duties.

Prior to conducting a pre-employment test, the employer must inform the applicant or employee in writing of the testing requirement (§655.17). If a pre-employment drug test is cancelled, the employer shall require the employee or applicant to submit to and pass another test. Figure 6-2 illustrates the drug testing program for a pre-employment test.

Pre-employment Alcohol Testing

Pre-employment alcohol testing is not required, but an employer may choose under FTA authority to conduct pre-employment alcohol testing following the procedures set forth in Part 655.42 and Part 40 (Subparts J through N). If the employer chooses to conduct pre-employment alcohol testing, the applicant must have a negative alcohol test (<0.02 BAC) before the individual is assigned safety-sensitive duties. The employer can conduct a pre-employment alcohol test only after making a contingent offer of employment (or transfer) requiring a negative alcohol test result. The decision to conduct pre-employment alcohol tests must be consistent and reflect equal treatment for all covered employees.



Previous DOT Employer Record Check

Section 40.25 of the revised DOT drug and alcohol testing rule states that all DOT covered employers must make a good faith effort to obtain drug and alcohol testing records for the previous two years for all applicants seeking safety-sensitive positions. All DOT covered employers include those employers who fall under the regulatory authority of FTA, Federal Motor Carrier Safety Administration (FMCSA), Federal Aviation Administration (FAA), Federal Railroad Administration (FRA), U. S. Coast Guard (USCG), and pipeline safety (RSPA).

Employers that fall under the FTA authority must adhere to the following requirements:

- Require each applicant or employee transfers for safety-sensitive positions to complete a written consent that allows their previous employers to release drug and alcohol testing information to you. A sample form is provided in the Sample Documentation section of this chapter. If the applicant/transferee refuses to provide this written consent, you must not permit him/her to perform safety-sensitive functions.

- Submit the applicant/transferee's written consent along with a request for information to each of the DOT-regulated employers who have employed the applicant/transferee for any period during the 2 years before the date of the individual's application or transfer. The following information must be obtained:

  1. Alcohol test results of 0.04 alcohol concentration or greater;
  2. Verified positive drug tests;
  3. Refusals to test;
  4. Other violations of FTA/DOT rules; and
  5. As appropriate, documentation of the successful completion of DOT return-to-duty requirements including follow-up tests. If the previous employer does not have this information, this documentation must be obtained from the employee.

- If possible, obtain and review this information before the employee performs safety-sensitive functions. If this is not possible, you must make and document a good faith effort to obtain the information. If you have not made a good faith effort, you must not allow the employee to perform safety-sensitive functions after 30 days from the date on which the employee first performed safety-sensitive job duties.

- You must also ask all applicants/transferees whether he/she has tested positive, or refused to test within the past 2 years on any DOT pre-employment drug or alcohol test administered by a DOT-covered employer for which they did not get the job.

- If information obtained from a previous employer includes any drug or alcohol test information that indicates a non-negative test result or violation of the DOT/FTA regulations, you must not allow the employee to perform safety-sensitive duties unless you have obtained documentation that the employee has complied with the return-to-duty requirements including SAP assessment, successful treatment, negative return-to-duty test, and follow-up tests.

- All information received and documentation of good faith efforts must be kept as a confidential record and maintained for a minimum of 3 years.

Likewise, if you are requested to provide information regarding a previous employee and the employee has provided written consent, you are required to provide the requested information. The information must be released in a confidential manner and you must maintain a written record of the information released.

Hiring Following a DOT Rule Violation

The FTA regulations prohibit you from assigning an individual to a safety-sensitive position who has previously violated any DOT drug and alcohol regulations, unless that person has successfully completed the DOT return-to-duty process and has a negative pre-employment test. You may become aware of a violation by an applicant or existing employee through a self-confession, previous employer record check, previous pre-employment test, or other means. The return-to-duty process includes the referral to a SAP for evaluation and completion of the recommended treatment program. Before assigning the individual to safety-sensitive duties, you must accept responsibility for the completion of the recommended follow-up testing plan, if applicable. Also, you may require the applicant to adhere to any aftercare treatment recommendations.

SAP Referrals for Pre-employment Non-Negative Test Results

The DOT regulations require that all covered employees as well as applicants who violate a DOT drug and alcohol regulation (i.e., positive test result or refusal) must be provided a list of Substance Abuse Professionals that are readily available to the employee/applicant. See Chapter 9 of these Guidelines for more information regarding the roles and responsibilities of the SAP.

Pre-employment Tests With Insufficient Volume

If an applicant is unable to provide a sufficient amount of urine to permit a drug test (i.e., 45 mL) the collector must follow

the "insufficient volume" procedures defined in §40.193, and later described in Chapter 7. If, when following these procedures, the applicant is still unable to provide a sufficient specimen, the employer must direct the applicant to obtain an evaluation from a licensed physician within 5 days. The physician must be acceptable to the MRO and have expertise in the relevant medical field. The physician must ascertain if there is a medical condition that with a high degree of probability, precluded the applicant from providing a sufficient amount of urine. Additionally, the physician must determine if the applicant's medical condition is the result of a serious, permanent, or long-term disability. If so, the MRO or evaluating physician must determine if there is clinical evidence of illicit drug use. The MRO/physician may conduct an alternative test (e.g., blood test) as part of the medical evaluation. If there is no evidence of illegal drug use, the MRO must report the test result as negative, thereby allowing the applicant to be assigned safety-sensitive duties. The employer must make the applicant a conditional offer of employment before the medical evaluation, consistent with provisions of the Americans with Disabilities Act.

Pre-employment Test Refusals

An applicant is considered to have refused a test only if the donor has committed to the process and the collection has commenced (i.e., the applicant accepts the collection cup), and then fails to cooperate with or complete the collection process as defined in §40.191 and further described in Chapter 7. If the applicant does not appear at all for the pre-employment test, leaves the collection site, or fails to cooperate before the test commences, he/she has not refused a test because the test has not yet commenced.

Section 2. REASONABLE SUSPICION TESTING

The FTA regulations (§655.43) require a safety-sensitive employee to submit to a test when the employer has reasonable suspicion that the employee has used a prohibited drug or has misused alcohol. The request to undergo a reasonable suspicion test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the safety-sensitive employee.

Reasonable suspicion testing provides management with a tool to identify affected employees who may pose a danger to themselves and others in their performance of safety-sensitive functions. Employees may be at work in a condition that raises concern regarding their safety or productivity. A supervisor or other company official must determine if reasonable suspicion exists to conclude that substance abuse or alcohol misuse may be causing the behavior.

Any supervisors or other company official who may be called upon to make this determination, must be trained in the facts, circumstances, physical evidence, physical signs and symptoms, or patterns of performance and/or behavior that are associated with use. Supervisors must also know the proper procedures for confronting and referring the employee for testing. If supervisors or other company officials are not trained, or are not fair and objective in requesting reasonable suspicion tests, employee complaints of harassment may result. Be careful not to expect that training alone will make your supervisors experts in detecting substance abuse. Even with training, the overt signs and symptoms of substance abuse can often be masked and may be subtle enough to avoid direct detection. Training is described in more detail in Chapter 5, "Training."

If one supervisor or other company official, trained to identify the signs and symptoms of drug and alcohol use, reasonably concludes that objective facts may indicate drug use or alcohol misuse, this is sufficient justification for testing. A final practical check is whether the supervisor would have been less responsible in not taking action than in asking the employee to submit to testing. Remember, safety is the first priority.

The supervisor's decision should pass the "reasonable prudent individual" test, which simply means a similarly trained and experienced supervisor, being reasonable and prudent and having observed and noted the same facts, signs, and circumstances could have reached the same conclusion. Hunches and "gut feelings" are not valid in making a reasonable suspicion determination. A reasonable suspicion referral must be based on a trained supervisor's specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the covered employee.

Reasonable suspicion referrals may be triggered by incidents and complaints by other employees or passengers during the workday. In this situation, the supervisor must investigate the claims and make the reasonable suspicion decision based on his/her own observations, not hearsay. It is imperative that reasonable suspicion decisions be made quickly and correctly based on the objective facts that are present at the time of the observation.

Only one trained supervisor or company official is required to make a reasonable suspicion determination. However, the preamble to the regulation clarifies that employers are permitted to require two or more supervisors to make referrals as long as each is trained and each makes the direct observation leading to the reasonable suspicion determination.

A reasonable suspicion test for drugs can be conducted anytime a covered employee is on duty. Employers should clearly define

for employees what is meant by on-duty (e.g., report time, clock time, etc.). However, a reasonable suspicion test for alcohol can only be conducted when the observations are made during, just preceding, or just after the performance of safety-sensitive functions. If a reasonable suspicion alcohol test is not conducted within 2 hours following the observations that led to the determination, the employer must document the reason for the delay. If an alcohol test is not administered within 8 hours following the determination, the employer must cease attempts to administer the test and document the reasons for the delay that resulted in the cessation of the test.

Figures 6-3 and 6-5 at the end of this chapter, illustrate the reasonable suspicion testing processes for alcohol and drugs.

Section 3. POST-ACCIDENT TESTING

The FTA regulations (§655.44) require testing for prohibited drugs and alcohol in the case of certain transit accidents or incidents that meet the FTA definition.

There is a significant difference between reasonable suspicion testing and post-accident testing. Reasonable suspicion requires some indication of probable linkage between behavior or events and substance abuse before a test can be requested. Post-accident testing is mandatory for accidents where there is loss of life associated with the operation of a revenue service vehicle. Post-accident tests are required for other nonfatal accidents unless employee performance can be discounted completely as a contributing factor.

An accident (§655.4) is defined as an occurrence associated with the operation of a vehicle in which:

- An individual dies;
- An individual suffers a bodily injury and immediately receives medical treatment away from the scene of an accident;
- The mass transit vehicle involved is a bus, electric bus, van, or automobile in which one or more vehicles incurs disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle; or
- The mass transit vehicle involved is a railcar, trolley car, trolley bus (on a fixed guideway or overhead wire), or vessel, and is removed from operation. This definition does not include rubber-tire look-alike historical trolley buses that operate on surface roads without a fixed guideway. These vehicles are considered buses under the previous definition.

Damage that precludes the departure of any vehicle from the scene of the occurrence in its usual manner in daylight hours after simple repairs is known as “disabling damage.” Disabling damage includes damage to vehicles that could have been operated, but would have caused further damaged if so operated.

Disabling damage does not include damage that could be remedied temporarily at the scene of the occurrence without special tools or parts, tire disablement without other damage even if no spare tire is available, or damage to headlights, taillights,

turn signals, horn, or windshield wipers that makes them inoperative.

Vehicles covered include a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel that is used for mass transportation or for ancillary services. Ancillary service includes non-revenue service commercial motor vehicles and vehicles used by armed security personnel. Thus, accidents involving supervisor or general manager vehicles that are not used to transport passengers do not meet this definition and do not justify a post-accident test under this regulation.

An "occurrence associated with the operation of a vehicle" means that the accident or incident must be directly related to the manner in which the driver applies the brake, accelerates, or steers the vehicle. Operation of a vehicle does not include operation of the lift. An accident could be the result of a collision with another vehicle or pedestrian, or it could be associated with an incident that occurs on the vehicle without any contact with another vehicle (e.g., a passenger on the bus falls due to the manner in which the vehicle was operated).

Fatal Accident

Whenever there is a loss of human life, each surviving safety-sensitive employee operating the mass transit vehicle at the time of the accident must be tested. Safety-sensitive employees not on the vehicle (e.g., maintenance personnel), whose performance could have contributed to the accident (as determined by the transit agency using the best information available at the time of the accident), must also be tested.

Post-accident drug and alcohol testing of the operator is not required under the FTA regulations if the covered employee is tested under the fatal accident testing requirements of the Federal Motor Carrier Safety Administration rule (49 CFR Part 389.303(a)(1) or (b)(1)) by a law enforcement officer.

Nonfatal Accident

Following nonfatal accidents, employers shall test each safety-sensitive employee operating the mass transit vehicle at the time of the accident unless the employer determines that the covered employee's performance can be completely discounted as a contributing factor to the accident (§655.44(a)(2)). A decision must be made using the best information available at the time of the decision. The term "completely discounted" does not address preventability, chargeability, or accident fault, but rather assesses if the employee in any way contributed to the accident.

For non-fatal accidents, the employer shall test any other safety-sensitive employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the incident.

Nonfatal accidents involving a bus, electric bus, van, or automobile must meet the definition of an accident for these types of vehicles (injury or disabling damage) to be considered an accident. For these vehicles, "removal from operation" is not a criteria for a post-accident test. Thus, employers that take a road surface vehicle (i.e., non-fixed guideway) out of service without meeting the other criteria (i.e., disabling damage or bodily injury that requires immediate medical treatment away from the scene) may not conduct a post-accident test under FTA authority. The portion of the definition that addresses "removal from operation" is the portion that deals only with vehicles on fixed guideways (i.e., rail car, trolley car, trolley bus) or vessels. The definition for these vehicles does not include disabling damage.

Other Accidents (Non-DOT)

Other accidents that do not meet these criteria may be conducted under the employer's own authority, but not under the authority of the FTA regulation. Thus, employers that choose to test for accidents that meet a property damage threshold, backing accidents, etc., must do so under their own authority using non-DOT forms.

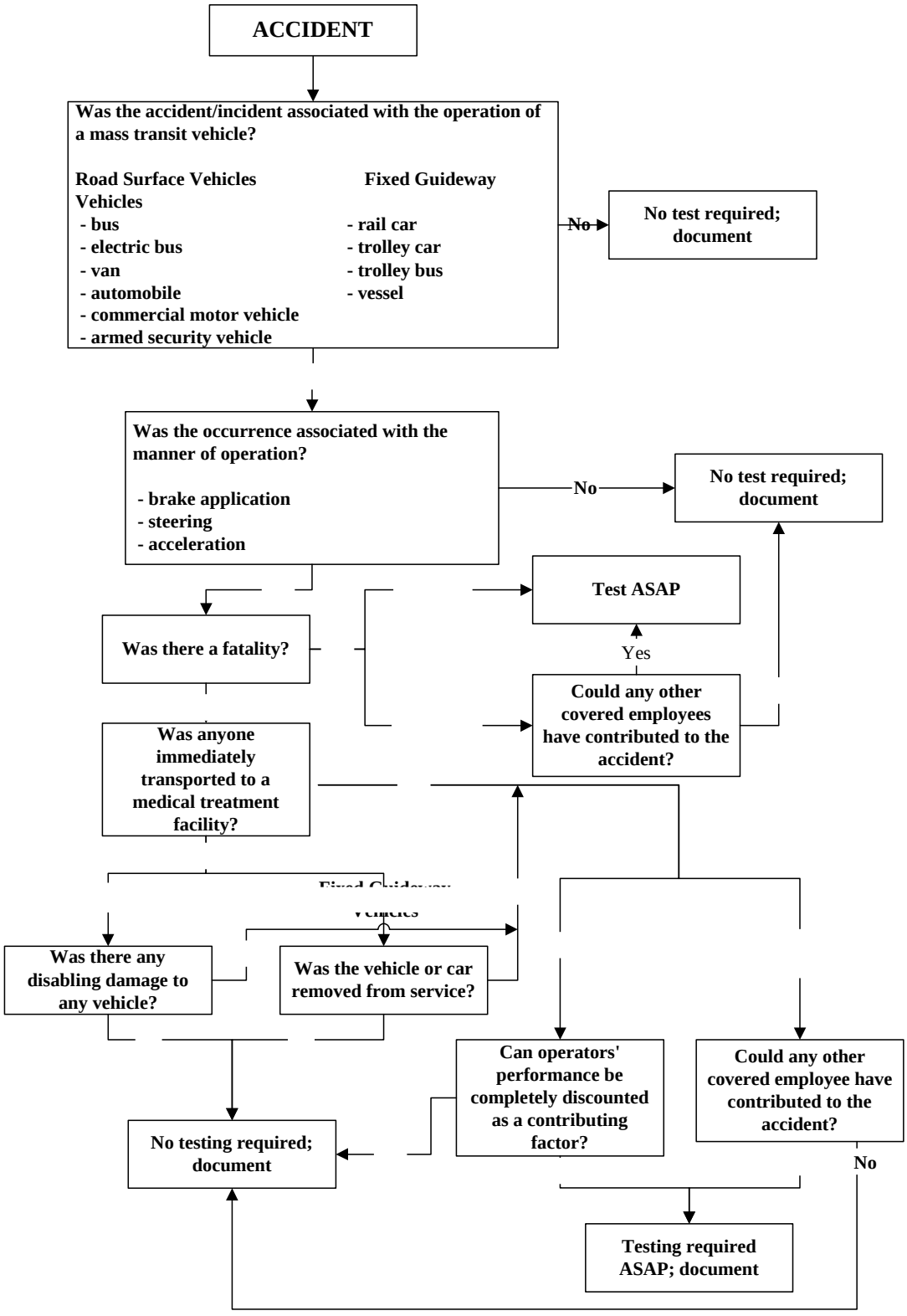
All Accidents

Post-accident drug and alcohol tests must be performed as soon as possible following the accident. If an alcohol test is not administered within 2 hours following the accident, the employer must still attempt to administer the test, and must also prepare and maintain on file a record stating the reason(s) the test was not promptly administered. This documentation requirement should not be misconstrued to mean that employers have 2 hours to get an alcohol test conducted. To the contrary, the 2-hour provision only triggers when documentation of the delay is required. The alcohol test must be conducted as soon as possible following the accident. If an alcohol test is still not administered within 8 hours following the accident, the employer shall cease attempts to administer an alcohol test and shall maintain records on why the test was not performed. Likewise, if a drug test has not been performed within 32 hours, the employer must cease attempts to conduct the drug test and document why the test was not administered.

Employers must ensure that testing services are available at all times and in all locations where safety-sensitive functions are performed. Unavailability of testing sites is an unacceptable explanation for not conducting a test. Employers should review their operations to determine if there are locations or time periods that cannot be served by the primary collection site. If gaps in testing coverage exist, the employer must establish alternative procedures in anticipation of accidents during these times. If procedures are not established in advance, the employer may be unable to administer required tests.

The circumstances that require a post-accident test for drugs are the same circumstances that require a post-accident test for alcohol. Therefore, every accident that meets the FTA accident definition must result in both a drug and alcohol test. The only circumstance where a drug test would be conducted, but not an alcohol test, is in the rare event the employee is unavailable (e.g., unconscious, incarcerated) for an alcohol test during the 8-hour window, but is available within the 32-hour window for drugs. The chart on the following page illustrates the post-accident decision process.

Post-Accident Decision Chart



Testing for drugs and alcohol following an accident must be performed as soon as possible following the accident, but should in no way delay necessary medical attention for injured people or prohibit a safety-sensitive employee from leaving the scene of an accident to obtain assistance or necessary emergency medical care. However, the safety-sensitive employee must remain readily available, which means the transit agency knows the location of the safety-sensitive employee. Employees that leave the scene of the accident prior to submitting to the test without notifying the employer of his/her location may be deemed to have refused the test.

If a collision/incident does not meet the FTA accident definition (§655.4) or if the definition is met, but the employer completely discounts the employee's performance as a contributing factor in a non-fatal accident, the decision not to administer a drug and/or alcohol test must be documented in detail, including the decision-making process used to reach the decision not to test.

In the rare event that an employee is unable to perform a post-accident test within the required time period (i.e., 8 hours for alcohol and 32 hours for drugs) due to circumstances beyond the employer's control, the results of a blood, urine, or breath alcohol test conducted by a federal, state, or local official having independent authority for the test, will be considered to meet the requirements for a post-accident test. The test must conform to the applicable federal, state, or local testing requirements and must be obtained by the employer. Circumstances beyond the employer's control might include instances where the employee is incarcerated, unconscious, or requires medical treatment that precludes the FTA testing.

Results from tests administered by law enforcement personnel may not be used if the employer could have, but did not perform its own test. This provision does not permit employers to ignore their obligation to test, nor does it prohibit duplicated post-accident testing. In such cases, it is expected that the employer will conduct FTA drug and alcohol tests, while law enforcement officials conduct tests under their own authority. In instances where law enforcement test results are accepted in lieu of FTA test results, the employer must document the circumstances which prevented the FTA drug and alcohol tests from being conducted.

This provision imposes no requirement on federal, state, or local officials to perform post-accident testing for FTA covered employers. Employers should not assume that law enforcement personnel routinely perform post-accident testing or that law enforcement officials will make test results readily available to them. Most law enforcement agencies will require a

subpoena or official request to release test results to employers.

Procedures Following an Accident

The steps to follow in a post-accident situation are summarized as follows:

1. **Treat any injury first.** The accident victims' physical health is always a higher priority than conducting a substance abuse test.

2. **Cooperate with law enforcement officials.** Allow local law enforcement to conduct their investigation. For purposes of their investigation, the police may require a test for a legal determination of the presence of drugs or alcohol. Remember that you cannot use the results of a test given for law enforcement purposes unless the employee is unavailable for FTA testing during the designated time period following the accident. You must use due diligence to administer post-accident tests in accordance with FTA's regulations.

3. **Determine if the incident meets the FTA definition of an accident**. Based on the information available at the time of the incident, determine if it meets the FTA criteria for an accident. For a nonfatal accident, determine if the operator can be completely discounted as a contributing factor. Determine if any other covered employee besides the driver could have contributed to the accident. Determine whom to test.

4. **Explain the need for testing.** Tell the employee(s) that a test is required by FTA regulations to be conducted. Point out to the employee that a negative finding will objectively put to rest any suspicion of drugs and alcohol as a cause of the accident.

5. **Conduct tests promptly.** The FTA regulations require that specimen collection be performed as soon as possible, but no later than 8 hours for alcohol and 32 hours following the accident for drugs.

6. **Document the test decision promptly.** As soon as practical following the accident, document the reason why a test was conducted or why one was not.

Figures 6-3 and 6-5 at the end of this chapter, illustrate the post-accident testing processes for alcohol and drugs.

Section 4. RANDOM TESTING

The FTA regulation (§655.45) requires random testing of drugs and alcohol for all safety-sensitive employees. Random testing can identify employees who are using drugs or misusing alcohol, but are able to use the predictability of other testing methods to escape detection. More importantly, it is widely believed that random testing serves as a strong deterrent against employees beginning or continuing prohibited drug use and misuse of alcohol.

Transit agencies must use a scientifically valid random-number selection method to select safety-sensitive employees. Valid methods include the use of a random-number table or a computer-based random-number generator that is matched with safety-sensitive employees' identification numbers (i.e., social security number, payroll number, or other employer identification number). Picking numbers from a hat or other manual techniques are not acceptable due to inherent or perceived

biases in the process. To be considered scientifically valid, each covered employee must have an equal chance of being picked each time selections are made.

Testing Rates

The number of random drug tests to be conducted each year must equal at least 50 percent of the total number of safety-sensitive employees subject to drug testing, included in the testing pool. A slightly higher percentage (+5%) should be tested to provide for cancelled tests. The number of random alcohol tests conducted each year must equal at least 10 percent of the covered employees included in the pool. If the transit system joins a consortium for random-number selection, the annual rate may be calculated for each individual consortium organizational member or for the total number of safety-sensitive employees within the consortium (see Chapter 11, "Consortia and Third Party Administrators").

The FTA's random alcohol and drug testing rates may be adjusted based on analysis of positive drug and alcohol violations rates for the entire transit industry (§655.45(d)) as reported in the annual industry-wide Management Information System report. If the transit industry as a whole generates a random positive drug test result of less than 1 percent for two consecutive calendar years, FTA may reduce the drug testing rate to 25 percent. FTA may not lower the drug testing rate below 25 percent. If, subsequently, the random positive drug test rate ever exceeds 1 percent during any single calendar year, the drug test rate will be increased back up to the 50 percent level. A summary of the rates is presented in the following chart.

Even though the alcohol testing rate was originally established at 25 percent, the alcohol testing rate was lowered to 10 percent in 1998 based on industry-wide violation rates below 0.5 percent for the two consecutive preceding years. The alcohol testing rate will be increased back to 25 percent if the violation rate is greater than 0.5 percent but less than 1 percent for any single year. The alcohol rate can increase to 50 percent if the violation rate exceeds 1 percent in any given year. The alcohol violation rate is calculated each year by adding the number of positive random tests to the number of refusals of random tests and dividing the sum by the total number of random tests attempted (completed plus refused).

Industry-wide Positive Random Test Results	Alcohol Random Testing Rate	Drug Random Testing Rate
Less than 0.5%	10%	25%
Greater than 0.5 % but less than 1%	25%	25%
Greater than 1%	50%	50%

Note: To reduce the testing rate the industry-wide positive rates must be at the designated level for 2 consecutive years, while the rate will increase if the positive test rate raises one level during any single year.

The minimum annual percentage rates will be published in the *Federal Register* each year for the following calendar year and noted in the FTA Drug and Alcohol Regulation *Updates*. The rates will be applicable for the calendar year beginning on January 1 of the calendar year following publication of the random testing rates. The rates are considered minimums. Employers who choose to test at higher rates may do so

as long as the testing rate is addressed in their policy statement.

Calculation of the Number of Random Tests

The method used to figure the actual number of random tests needed has confused many in the industry, often resulting in under-testing by many and some unnecessary over-testing by others. Transit system employee bases often fluctuate over the course of a year due to terminations, new hires, or seasonal variations due to weather, school/university sessions, or tourist seasons. Consequently, the size of the random testing pool also fluctuates.

Some transit systems have established the size of their pool by estimating the number of safety-sensitive employees employed as of January 1 (or any other arbitrary date) of each year. This method is incorrect. To clarify this issue, a step-by-step method of calculation is provided in Figure 6-1.

Only completed tests can be used to meet the random test rate. Thus, if any of the individuals selected during the current test period were not tested or the test was cancelled, an adjustment must be made when calculating the number of tests to be performed during the next testing period to ensure that the required rates are achieved within the year. Progress toward rate achievement should be monitored throughout the year to avoid the need to make one major adjustment at the end of the year.

Also, consortia use the same method of calculation. The employer and consortium must have procedures in place to ensure that the pool is up-to-date before each draw, and to inform the random selector of cancelled or incomplete tests that will require an adjustment in the number of draws made for the next testing period.

A reporting requirement in the MIS Drug and Alcohol Data Collection forms has also caused confusion in determining the number of random tests needed. These forms require each employer to report the number of covered employees that were employed in each safety-sensitive function. The MIS form requires that the number of covered employees reported be a cumulative total of all employees performing safety-sensitive functions over the course of the reporting year. Given employee turnover, cumulative totals usually exceed the number of safety-sensitive positions since they count all individuals that fell under the FTA regulatory authority sometime during the year. Many people have assumed that the random test rate should be based on this cumulative total. This is not the case, and would result in too many tests for systems with larger staff turnover. Rather, you should use the method described in Figure 6-1, which reflects the fluctuation in staffing levels.

Random Testing Pool Management

All safety-sensitive employees in the random pool must have an equal chance of being selected for testing and shall remain in the pool, even after being tested. It is possible for some employees to be tested several times in one year, and other employees not to be tested for several years. Depending on the size of the safety-sensitive employee pool, numbers may be selected on a periodic basis, usually daily, weekly, monthly, or quarterly. Selections should be made as frequently as possible, but not less often than quarterly (see chart on page 6-16).

1. Determine how frequently random draws are made (daily, weekly, monthly, quarterly, etc.). This is the testing period.

2. For each testing period, determine the number of safety-sensitive employees that are in the pool. Be sure to update the file prior to the random draw to ensure that all new hires and individuals placed into active status have been added to the pool, and those who have been discharged or put on inactive status have been removed.

3. Calculate the number of tests to be performed during the testing period as follows:

   a. Multiply the number of safety-sensitive employees in the pool at the beginning of the testing period by the required testing rate (50 percent for drugs and 10 percent for alcohol).
   b. Divide the total by the number of testing periods in the year (quarterly = 4; monthly = 12; weekly = 52; and daily = 365).

   The result is the number of tests to be performed for that testing period. This method is demonstrated in the table provided below.

Testing Period	Safety-Sensitive Employees in Period (A)	Test Periods Per Year (B)	Random Rate Drug (C)	Random Rate Alcohol (D)	# of Drug Tests Required (A*C)/B	# of Alcohol Tests Required (A*D)/B
Quarter 1	160	4	50%	10%	20	4
Quarter 2	126	4	50%	10%	16	4
Quarter 3	62	4	50%	10%	8	2
Quarter 4	168	4	50%	10%	21	5
Total Year					65	15

4. Once the number of tests per testing period has been calculated, the total should be adjusted for cancelled tests.

Figure 6-1. Method for Calculating the Number of Random Tests

Suggested Frequencies of Random-number Selections	
Random Tests Per Year	Frequency of Random-number Selections
1-11*	Quarterly
12-51	Monthly
52-364	Weekly
>364	Daily
* Small systems that conduct few tests per year may need to conduct more tests to ensure the testing is spread throughout the year.	

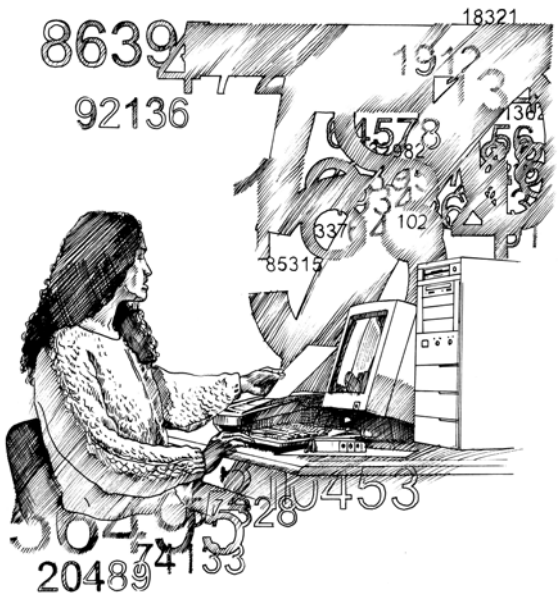
Once an employee is selected, the employer should schedule the collection within the testing period (i.e., week, month, quarter) and make sure the employee is not inadvertently notified of the test until it is time to proceed to the collection site. Tests should be performed evenly throughout the testing period to eliminate predictability.

If the employee is off-duty or otherwise unavailable at the time the employer desires to conduct the test, the test should be postponed until the employee is on-duty, if the test can be performed during the testing period for which the number was selected. The only explanation for selecting another number and substituting a replacement for the original individual is in the rare event the originally selected employee will not work (or perform safety-sensitive duties in the case of an alcohol test) during the entire testing period. Logistical difficulties, operational requirements, or complicated personnel issues that make the testing process more difficult are not acceptable reasons for choosing a replacement. Likewise, convenience of the employer, collection facility, or mobile testing unit should not influence whom to test. Anytime the originally selected employee is not tested, the employer should document the reason for not testing and address the individual's unavailability during the whole testing period.

All safety-sensitive employees must be included in the random pool. Thus, the random pool should be purged prior to each testing period to ensure that the random process will not be compromised. All new hires and transfers into a safety-sensitive position since the last draw must be added to the pool. Similarly, all covered employees that have retired, quit, are on leave or been fired, or otherwise expected to be unavailable throughout the testing period must be removed from the pool.

If the transit agency decides to randomly test non-safety-sensitive employees, those employees must be placed in a separate pool and tested under the transit agency's authority, and not under the authority of the DOT and FTA.

Once the list of employee identification numbers has been developed, use it for random selection. One way to do this is to contract out the random-number selection process. Preferably, the contractor organization would only have the numbers and would not be able to correlate them with any employee name. If an outside service agent is used for this purpose, care must be taken to ensure that the random-number draw is communicated to the Designated Employer Representative in a confidential manner.



In many small transit systems, every employee is considered safety-sensitive and is included in the random pool. If, as a result, the employer's DAPM is in the random pool, someone outside of the pool must be responsible for performing the random-number selection.

The transit system's DAPM is also usually the contact person to whom the random selections are reported and who schedules the tests for all employees. However, when the DAPM's number is randomly selected, another system employee or responsible individual (e.g., the county personnel director) should be designated as the contact. This person should schedule and notify the DAPM of the need for the test, and ensure that the test is performed immediately upon notification. The DAPM should be subject to the same level of disclosure as others that are selected for testing.

Scheduling Random Tests

The test dates must be spread reasonably throughout the year so as not to establish a predictable pattern (e.g., the first Tuesday of each month) (§655.45(g)). The number of tests conducted weekly, monthly, or quarterly should remain relatively constant to the extent possible reflecting seasonal variations in the employee base. Conducting all of your tests in one month, for example, does not achieve the goal of unpredictable testing. Likewise, the testing should be performed on different days of the week.

Most importantly, however, random testing must be conducted at all times of the day when safety-sensitive functions are performed. This prevents employees from coordinating their drug and alcohol use to the random testing schedule. To be effective, employees should be on-notice at all times that they could be tested anytime they are on duty, day or night. If employees can predict when tests will not be performed due to employer policy, operational logistics, unavailability of collection sites, etc., the random program will be compromised.

Random drug tests can be conducted at any time the employee is on duty. An employee who may be called on to perform a safety-sensitive function at any time and who is receiving pay for such time, is on duty for the purpose of random drug testing. Random alcohol tests, however, can only be conducted just before, during, or after the employee is performing safety-sensitive duties. When employees are scheduled to perform a safety-sensitive function periodically or as needed, the employee must be subject to random testing even if the occurrence is rare or sporadic.

The process must be unannounced as well as unpredictable. Once the employee has been notified that he/she has been selected for testing, he/she should report immediately to the collection site.

Employees are not to be given any advance notice.

When developing a random testing program, you should establish a standard procedure and practice for notifying employees who have been selected. In scheduling tests, be careful not to provide any indication of when the testing will occur.

Every effort should be made to provide the maximum privacy possible. Employees should be individually and discretely notified to report to the collection site. Assure those employees selected for testing that this is a routine random test. They should not feel that they have been singled out for testing for reasonable suspicion or for some other unstated reason. Flowcharts detailing the random testing process may be found at the end of this chapter.

The FTA *Random Drug Testing Manual*, published in September 1991, describes the random selection process in detail. Consult this publication when choosing an approach to random testing, deciding when to test, and developing the selection and notification procedures.

Section 5. RETURN-TO-DUTY TESTING

Before any employee is allowed to return-to-duty to perform a safety-sensitive function following a verified positive drug test result, an alcohol result of 0.04 or greater, a refusal to submit to a test, or any other activity that violates the regulations, that employee must first be evaluated by a SAP and pass a return-to-duty test (§655.46, §40.285).

This test and the SAP's evaluation of an individual's return-to-duty status provides some degree of assurance to the employer that the individual is presently free of alcohol and/or any prohibited drugs and is able to return to work without undue concern about continued substance abuse and public safety.

Recommendation

Random Testing

One of the most sensitive types of testing is random testing. Indeed, if your system is challenged on a random test, you may be required to demonstrate that you are properly applying a valid random selection methodology.

Small transit systems may be best served by contracting out the random selection process. Part of the responsibility that can be contracted out involves maintaining the random test pool by using unique identification numbers from each member system to update the pool membership. Because employees of all systems are pooled together, the pool is large enough that the predictability of the test is lessened. Likewise, since no manager at any of the transit systems is involved in the selection process (all selections are done in a controlled access area of the consortium management company), no employee need fear that he or she has been unfairly singled out for testing.

Many alcohol or drug users are "polyusers;" that is, they use both alcohol and drugs. Therefore, the DOT regulations allow the employer to administer return-to-duty tests for both drugs and alcohol, even though the original infraction was due to alcohol or drugs only.

Before a return-to-duty test is performed, the employee must be evaluated by a SAP to determine if the employee has successfully followed all the recommendations for action by the SAP, including participation in any rehabilitation program. The SAP must recommend an education or treatment program in response to every referral.

Before making the return-to-duty recommendation, the SAP must obtain documentation from the recommended treatment program and confer with treatment professionals regarding the employee's progress. The SAP must also conduct a face-to-face clinical interview with the employee to determine if the employee has complied with the recommendations.

Based on input from the SAP, the return-to-duty decision must ultimately be made by the employer. If the SAP does not believe the individual has successfully complied with the recommended treatment program, the employer must not allow the employee to return to his/her safety-sensitive duties. See Chapter 9 for a more detailed discussion on the role of the SAP.

Once the SAP has determined that the employee has successfully complied with the treatment recommendations and the employer has decided the individual can return to work, a return-to-duty test must be performed. The employee must have a verified negative drug test result and/or an alcohol test result of less than 0.02 to return to a safety-sensitive function. If a drug test result is cancelled, the employer shall require the employee to submit to and pass another drug test.

If an employee is unable to provide a sufficient amount of urine to permit a return-to-duty drug test (i.e., 45 mL), the collector must follow the "insufficient volume" procedures defined in §40.193 and later described in Chapter 7. If when following these procedures, the employee is still unable to provide a sufficient specimen, the employer must direct the employee to obtain an evaluation from a licensed physician within 5 days. The physician must be acceptable to the MRO and have expertise in the field. The physician must ascertain whether there is a medical condition that with a high degree of probability precluded the employee from providing a sufficient amount of urine. Additionally, the physician must determine if the employee's medical condition is the result of a serious and permanent or long-term disability. If so, the MRO or evaluating physician must determine if there is clinical evidence of illicit drug use. The MRO/physician may conduct an alternative test (e.g., blood test) as part of the medical evaluation. If there is no evidence of illegal drug use, the MRO must report the test result as negative, thereby allowing the employee to be assigned safety-sensitive duties.

Figures 6-4 and 6-6 at the end of this chapter, illustrate the return-to-duty testing processes for alcohol and drugs.

Section 6. FOLLOW-UP TESTING

Required Testing

Once allowed to return-to-duty, an employee shall be subject to unannounced follow-up testing for at least 12 but not more than 60 months. The frequency and duration

of the follow-up testing will be recommended by the SAP as long as a minimum of six tests are performed during the first 12 months after the employee has returned to duty (§655.47, §40.301). Six tests the first year should be considered a minimum and should be the exception, not the rule. Every case should be decided on its own merits based on the unique circumstances of the individual.

The SAP may recommend follow-up testing of employees beyond the 12-month requirement (§40.307). Follow-up testing must not exceed 60 months from the time the employee returns to duty, but can be terminated anytime after the first 12 months if the SAP determines testing is no longer required.

To be effective, follow-up testing should be conducted frequently. Depending upon the SAP's evaluation and recommendation, testing may be conducted with varying frequency (weekly, biweekly, or monthly) at the outset, and may be reduced to monthly or quarterly testing as the first complete year of recovery is approached.

If the employee is subject to drug follow-up tests, the SAP may also recommend the employee take one or more follow-up alcohol tests with a required result less than 0.04. Conversely, the employee is subject to alcohol follow-up tests, the SAP may recommend that the employee take one or more follow-up drug tests with a verified negative result (§40.307(c)).

The SAP will document his/her recommendations in a written follow-up testing plan that the employer is required to follow. The plan will not provide actual test dates, but instead will give direction on frequency and duration of the required testing. The employer may not impose additional testing requirements beyond the SAP's follow-up testing plan. The SAP recommendations are non-negotiable. Only the SAP may modify his/her evaluation and recommendations based on new or additional information.

Follow-up tests must be unannounced with no predictable pattern. No one can substitute any other test (e.g., treatment tests, random tests) for a follow-up test, and you cannot count a cancelled test as a completed follow-up test. Cancelled follow-up tests must be recollected.

Follow-up testing is separate from and in addition to the regular random testing program. Employees who are subject to follow-up testing must also remain in the standard random pool and must be tested whenever they are selected, even if this means being tested twice in the same day, week, or month.

Follow-up testing both motivates the employee to remain free of any prohibited substances and provides you with assurance that the person has not resumed drug use or alcohol misuse. However, depending on the individual, the substance of abuse, and the effectiveness of treatment, the relapse rate might be high.

Employers and employees should also be aware that the follow-up testing plan follows the employee to subsequent DOT covered employers and/or through breaks in service.

The SAP may conclude that the employee has successfully demonstrated compliance even though the employee has yet to complete the entirety of the education or treatment program. The SAP then may recommend that the employee continue in an aftercare program in addition to the follow-

up testing program. The SAP must document the recommendations. Upon receiving a recommendation for aftercare from the SAP, the employer is encouraged to create a return-to-duty contract with the employee that requires the employee to comply with the aftercare recommendations. Such a contract spells out desired employee performance goals and obligations (e.g., remaining free of prohibited substances, complying with aftercare recommendations) and clearly states the consequences if the employee fails to adhere to the provisions of the contract. If a return-to-duty agreement is created, the employee is obligated to comply with the SAP's recommendation for these services [40.303(c)].

Figures 6-4 and 6-6 at the end of this chapter, illustrate the follow-up testing processes for alcohol and drugs.

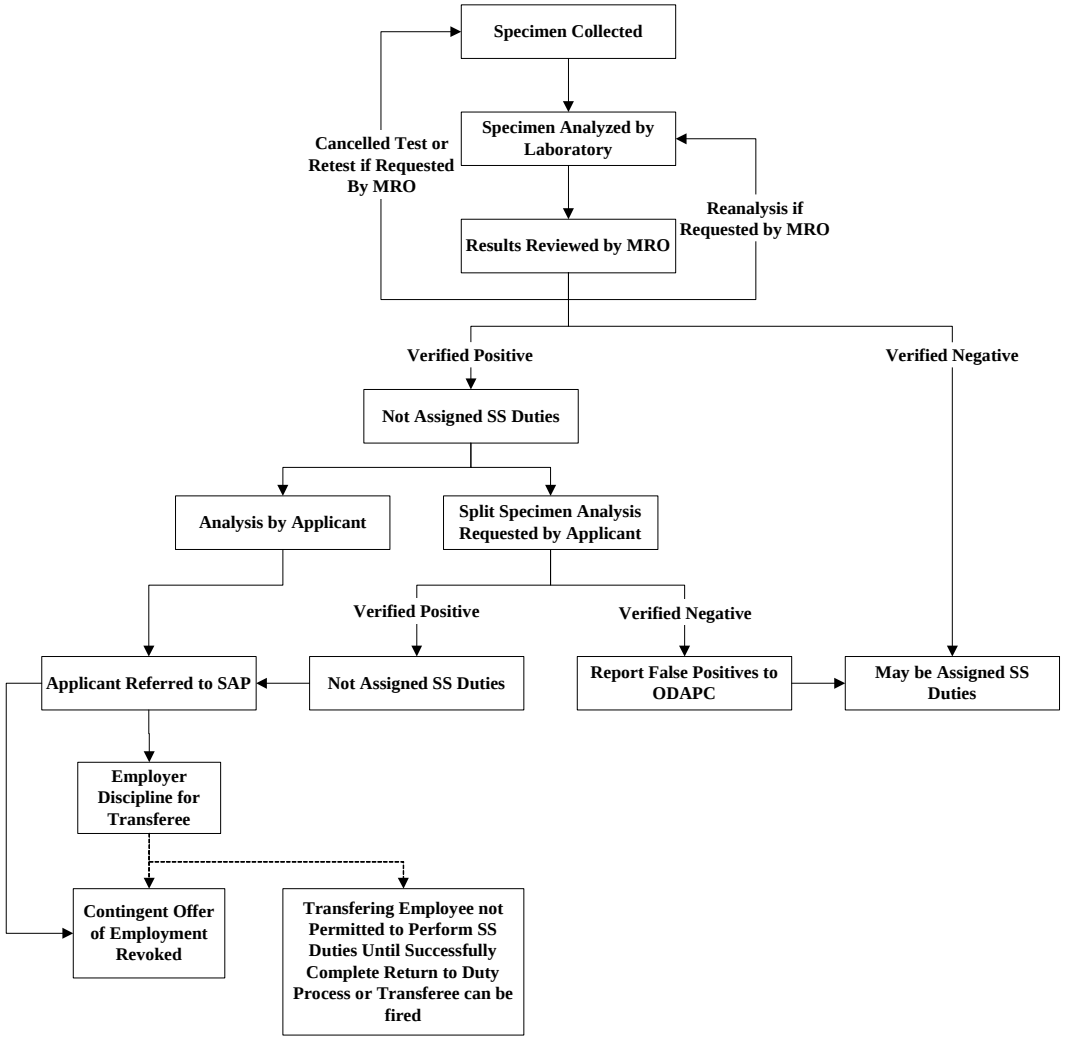
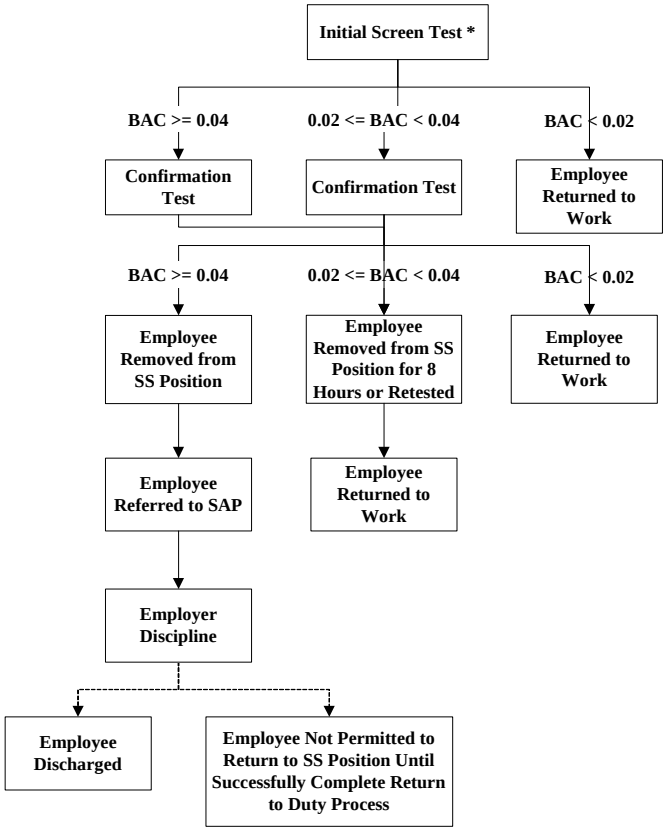


Figure 6-2. Drug Testing Program for Pre-Employment Test



*** The term "Initial Screen Test" will be fully explained in Chapter 8**

BAC = Breath Alcohol Concentration
SS = Safety-Sensitive
SAP = Substance Abuse Professional

Employer Discretion
Regulatory Requirements

Figure 6-3. Alcohol Testing Process for Random, Reasonable Suspicion, Post-Accident

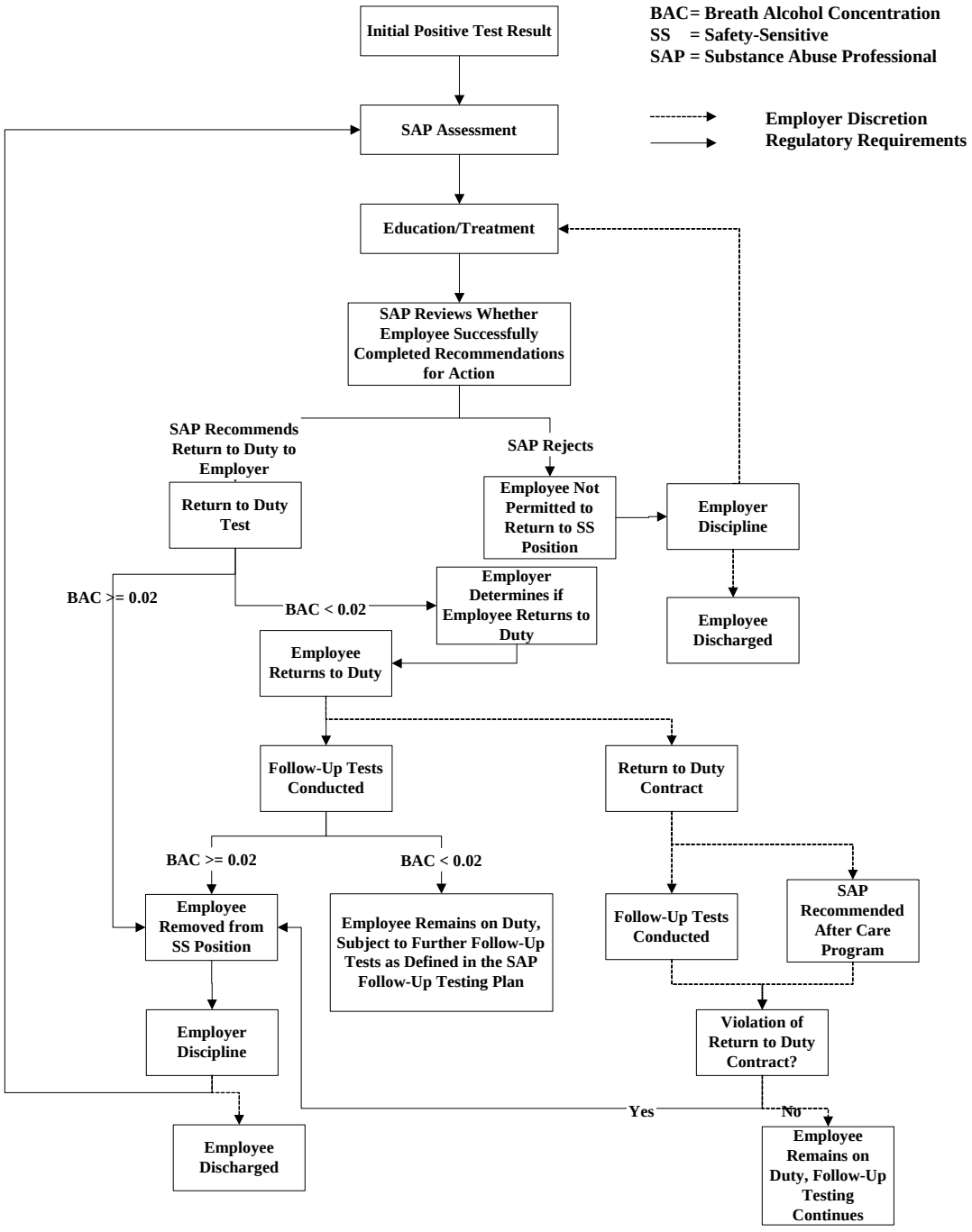


Figure 6-4. Alcohol Testing Process for Return-to-Duty, Follow-up

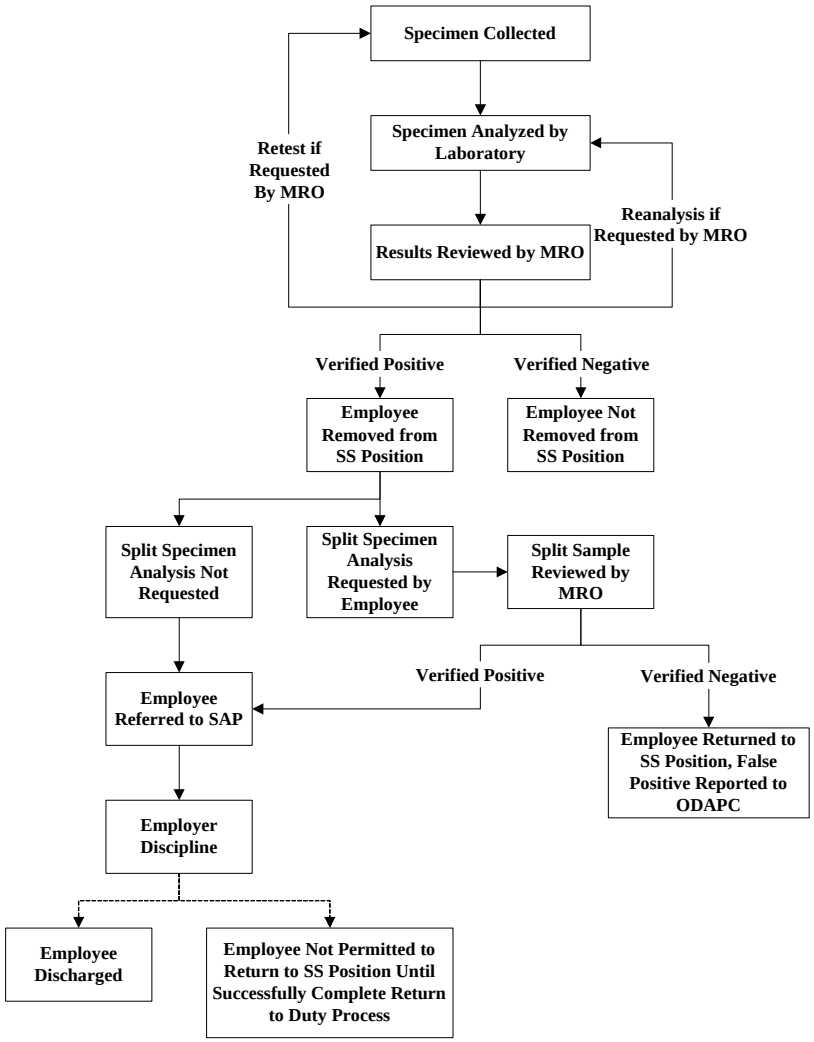


Figure 6-5. Drug Testing Process for Random, Reasonable Suspicion, Post-Accident

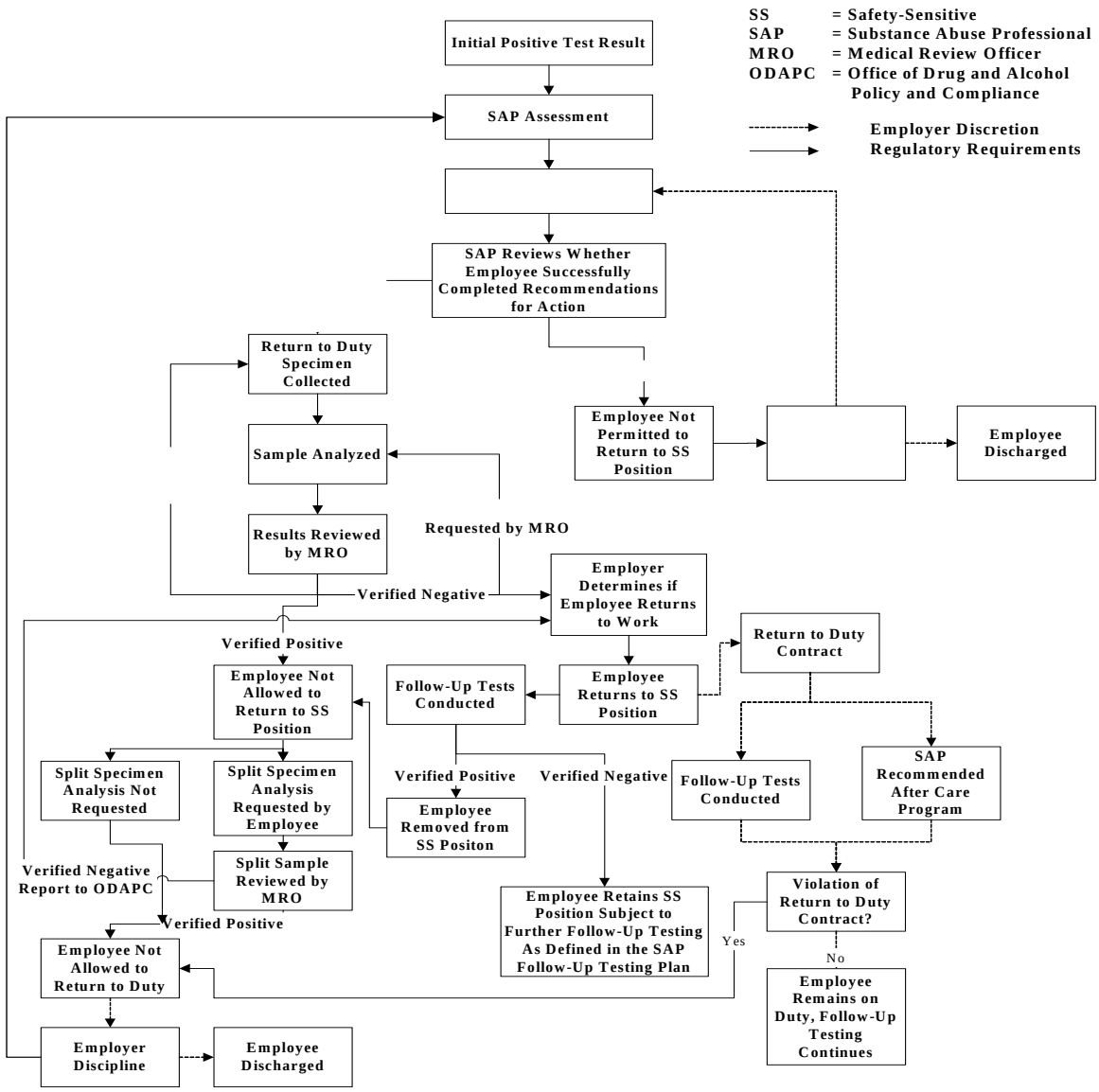


Figure 6-6. Drug Testing Process for Return-to-Duty, Follow-up

Sample Documentation

Suggested Format: "Release of Information Form -- 49 CFR Part 40 Drug and Alcohol Testing"

<u>Section I</u>. To be completed by the new employer, signed by the employee, and transmitted to the previous employer:

Employee Printed or Typed Name: _____
Employee SS or ID Number: _____
I hereby authorize release of information from my Department of Transportation regulated drug and alcohol testing records by my previous employer, listed in *Section I-B*, to the employer listed in *Section I-A*. This release is in accordance with DOT Regulation 49 CFR Part 40, Section 40.25. I understand that information to be released in *Section II-A* by my previous employer, is limited to the following DOT-regulated testing items:

1. Alcohol tests with a result of 0.04 or higher;
2. Verified positive drug tests;
3. Refusals to be tested;
4. Other violations of DOT agency drug and alcohol testing regulations;
5. Information obtained from previous employers of a drug and alcohol rule violation;
6. Documentation, if any, of completion of the return-to-duty process following a rule violation.

Employee Signature: _____ Date: _____

I-A.
New Employer Name: _____
Address: _____
_____
Phone #: _____ Fax #: _____
Designated Employer Representative: _____

I-B.
Previous Employer Name: _____
Address: _____
_____
Phone #: _____
Designated Employer Representative (if known): _____

<u>Section II</u>. To be completed by the previous employer and transmitted by mail or fax to the new employer:

II-A. In the two years prior to the date of the employee's signature (in Section I), for DOT-regulated testing ~

1. Did the employee have alcohol tests with a result of 0.04 or higher?	**YES ____ NO ____**
2. Did the employee have verified positive drug tests?	**YES ____ NO ____**
3. Did the employee refuse to be tested?	**YES ____ NO ____**
4. Did the employee have other violations of DOT agency drug and alcohol testing regulations?	**YES ____ NO ____**
5. Did a previous employer report a drug and alcohol rule violation to you?	**YES ____ NO ____**
6. If you answered "yes" to any of the above items, did the employee complete the return-to-duty process?	**N/A ____ YES ____ NO ____**

NOTE: If you answered "yes" to item 5, you must provide the previous employer's report. If you answered "yes" to item 6, you must also transmit the appropriate return-to-duty documentation (e.g., SAP report(s), follow-up testing record).

II-B.
Name of person providing information in *Section II-A*: _____
Title: _____
Phone #: _____
Date: _____

Example
Post-Accident Drug and Alcohol Test
Decision Documentation Form

1) Accident Report Number: _____

2) Location of Accident: _____
_____
_____

3) Accident Date: _____ **Time:** _____

4) Report Date: _____ **Time:** _____

5) Name of Employee: _____

6) Identification Number: _____

7) Position: _____

8) Result of Accident: (Check all that apply)

_____ **Fatality**
_____ **Disabling Damage* to One or More Vehicles (Bus, Van, Paratransit)**
_____ **Remove from revenue service (Fixed guideway vehicles only)**
_____ **Injury Requiring Immediate Transport to Medical Facility**
_____ **Employee** _____ **Other Vehicle**
_____ **Passenger** _____ **Other, Specify:** _____
_____

9) Was the employee sent for a post-accident test? _____ **Yes** _____ **No**

10) If No, Explain: _____
_____
_____

11) Decision to Test:
FTA Authority _____ **Yes** _____ **No**
Company Authority _____ **Yes** _____ **No**

12) Type of Test: _____ **Drug** _____ **Alcohol**

13) Supervisor Making Determination: _____

14) Notification of Test: **Date:** _____ **Time:** _____

15) Test Conducted:
Drug: **Date:** _____ **Time:** _____
Alcohol: **Date:** _____ **Time:** _____

16) Did the alcohol test occur more than 2 hours from the time of the accident? _____ **Yes** ____ **No**
Explain: _____
_____

17) If no alcohol test occurred because of more than 8 hours elapsed from the time of the accident, please explain: _____

_____

18) Did the employee leave the scene of the accident without just cause? _____ **Yes** _____ **No**
If yes, explain: _____

_____

_____

19) If no drug test was performed because more than 32 hours had passed since the time of the accident, explain why:

_____

_____

_____

20) If the employee indicated recent use of prescription or over-the-counter medications, please complete a confidential medical report.

21) Other comments: _____

_____

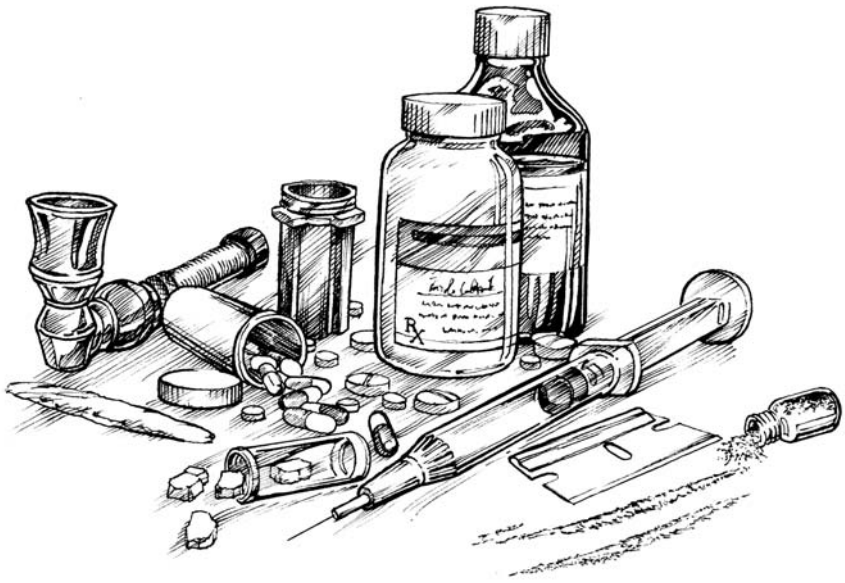
_____

_____

22) Supervisor Signature: _____ **Date:** _____

Attachment:
Order to Test
Chain of Custody
Test Result Summary
Alcohol Testing Form

* *Disabling damage* means damage, which precludes departure of any vehicle from the scene of the occurrence in its usual manner in daylight after simple repairs. Disabling damage includes damage to vehicles that could have been operated but would have been further damaged if so operated, but does not include damage which can be remedied temporarily at the scene of the occurrence without special tools or parts, tire disablement, without damage even if no spare tire is available, or damage to headlights, taillights, turn signals, horn, mirrors, or windshield wipers that makes them inoperative.



Chapter 7. DRUG TESTING PROCEDURES

Under the FTA drug testing regulation for safety-sensitive employees, you are required to conduct laboratory testing of urine specimens for five types of drugs (§655.21). Identification of either a drug or its metabolite in the urine indicates recent use of the drug. A metabolite is a modified form of a drug that has been chemically altered by the body's metabolic system. Depending upon the drug and the person's usage habits, the detection period ranges from less than one day to a month or more.

The FTA regulation requires testing for the following drugs (or their metabolites):

- Marijuana
- Cocaine
- Opiates (e.g., heroin, morphine, codeine)
- Phencyclidine (PCP)
- Amphetamines (e.g., racemic amphetamine, dextroamphetamine, and methamphetamine).

The Department of Health and Human Services (DHHS) establishes the minimum threshold levels for each of the five drugs tested under USDOT testing programs including the FTA. Minimum levels are established for both the initial screening test and for the confirmatory test.

The minimum thresholds are established at levels high enough to prevent a positive reading for secondhand smoke or incidental contact with one of the substances. To obtain a positive test result, the individual would need to actually consume a quantity of the substance (i.e., smoke, inject, ingest) that is consistent with illegal drug use.

A common method of marijuana consumption is the ingestion of food products, such as brownies, that have had marijuana added to the ingredients. Also, some manufacturers have begun to market food products containing hemp seeds or extracts. These products may have THC

(Delta 9-tetrahydrocannabinol-9 carboxylic acid, the active ingredient in marijuana) levels high enough to result in a positive test result for marijuana. Since these products do not constitute a "legitimate medical explanation" for the presence of THC in an individual's specimen, test results will be confirmed as positive if they exceed the minimum thresholds established with corresponding FTA and employer consequences. Part 40.151(f) states that the Medical Review Officers (MRO) "must not accept an assertion of consumption or other use of a hemp or other non-prescription marijuana-related product as a basis of verifying a marijuana test negative." This also includes the medicinal use of marijuana that may be permitted by some states, but is not recognized by federal law.

If you choose to test for other drugs, such as barbiturates, benzodiazepines (e.g., Valium, Librium, Xanax), nonbarbiturate sedatives (e.g., Quaalude), and nonamphetamine stimulants, you may do so as long as the tests for those additional drugs are performed separately from the FTA test. Such testing is outside the scope of the FTA regulation and is entirely at the discretion of the transit system. Performing tests separately means that you must obtain a separate urine specimen from the employee and process that specimen with its own non-federal custody and control form. Employees must be notified whether they are being tested under the FTA required program or the employer's program.

Section 1. OBTAINING PROGRAM SERVICES

In establishing an effective drug testing program, you will need to utilize certain specialized service agents to perform various functions. These include the following:

- Specimen collection
- Laboratory testing
- Medical Review Officer (MRO)
- Substance Abuse Professional (SAP)

If you do not have qualified individuals on staff, you will need to identify qualified service agents to provide each of these services. You may purchase the services of each agent individually, or you may wish to purchase services from a consortium or third party administrator (C/TPA) that package two or more services together for one price. Chapter 11 provides a detailed discussion of the use of C/TPAs, the services they provide, and their limitations. Each of the above services is discussed individually in this section.

Section 2. SPECIMEN COLLECTION

Collection Sites. All urine specimens must be collected at an appropriate collection site. A collection site is defined (§40.3) as "a place selected by the employer where employees present themselves for the purpose of providing a urine specimen for a drug test." You are required to designate one or more sites, depending on your needs. Collection site services must be available while safety-sensitive functions are performed. Subsequently, many employers have found it necessary to contract with more than one collection site or obtain supplemental on-call collection services to ensure that all time periods are covered.

Typically, collection sites are located at physician's offices, commercial collection sites, mobile vans, or a local hospital or clinic; however, there is no requirement that a collection site be located at a medical facility. Any location that meets the minimum requirements specified in Subpart D of Part 40 may be used.

Recommendation

Multiple Collection Sites

Many transit systems have found that one collection site is not enough to meet the total testing requirements for their agency. Employers have often found that collection sites have limited hours of operation and therefore cannot conduct tests during all days and times that safety-sensitive functions are being performed. In response, agencies have contracted with secondary collection sites to supplement the primary collection site. Sometimes, the supplemental sites are hospitals or clinics that have extended work hours or are willing to provide services on an on-call basis. Other systems have contracted with off-duty nurses or other medical personnel to conduct after-hour collections on transit system premises.

Some transit systems may wish to establish collection sites on their own premises. On-premise collection sites may also be used during times when commercial or third party sites are unavailable (e.g., nights, weekends, holidays).

Regardless of where the collection site is located, it must meet Department of Transportation guidelines established in "Procedures for Transportation Workplace Drug and Alcohol Testing Programs" (49 CFR Part 40, Subpart D). The regulation (§40.41) requires, in part, that the collection site provide all necessary personnel, materials, equipment, facilities, and storage space necessary to conduct the test consistent with the regulations. At a minimum, the site must provide a privacy enclosure for urination (preferably a single-toilet room having a full-length privacy door), a suitable clean writing surface, and a water source for hand washing, which if practicable, should be outside the privacy enclosure. If a water source is present inside the privacy enclosure, that water source as well as other substances that could be used for adulteration and substitution (e.g., water faucets, soap dispensers) must be secured, and moist towelettes must be provided for hand washing outside the privacy enclosure. No one but the donor may be present in the privacy enclosure during the collection, except for the observer in the event of a directly observed collection.

If a multi-stall restroom facility is used, the site must provide substantial visual privacy such as a partial-length door, all water sources in the restroom must be secured, and bluing agent must be added to the other toilets, or they must be secured to prevent access. Additionally, a multi-stall facility requires that a person of the same gender or a medical professional monitor the collection. The monitor enters the room with the donor, but remains outside the stall and does not watch the employee urinate into the collection cup (§40.69). A multi-stall collection is the only time a monitor is permitted. A monitored collection is significantly different from an observed collection, which is discussed later in this chapter.

Collection site operators must take necessary steps to prevent unauthorized access to the collection facility that could compromise a collection's integrity. Access to the site must be restricted during specimen collection to ensure privacy and prevent the collector from becoming distracted. Limited access signs must be posted. Additionally, access to collection materials and specimens must be restricted.

Only specimen donors, collectors, other collection site workers, DERs, employee and employer representatives, and DOT agency representatives are authorized to enter any part of the site in which urine specimens are collected or stored. The collection site must have a policy and procedures in place to prevent anyone else from entering the collection area. All

authorized individuals are under the supervision of the collector at all times when in the collection area. The collector may remove any person who obstructs, interferes with, or causes a delay in the collection process.

Collection Site Personnel. A collector is a trained person who instructs and assists employees at a collection site, receives and makes an initial inspection of the urine specimen provided by those employees, and initiates and completes the Federal Drug Testing Custody and Control Form (CCF). Only individuals that meet the minimum requirements for collectors defined in Subpart C of 49 CFR Part 40 are authorized to collect urine specimens for DOT drug testing.

The minimum requirements that a collector must have in order to perform their duties include basic information, qualification training, initial proficiency demonstration, refresher training, and error-correction training. These requirements are discussed in Chapter 5, Section 6 of this document. The DOT does not require or provide collector certification, but instead requires that collectors have documentation that they have met the appropriate training requirements.

If an individual becomes a collector after August 1, 2001, he/she must meet the training and proficiency demonstration requirements prior to performing any DOT collections. Individuals who served as collectors prior to August 1, 2001, but have not met the minimum training requirement have until January 31, 2003 to be trained. All collectors must have refresher training within 5 years from the date they completed their initial qualifications training and every 5 years thereafter.

Recommendation
Mobile Collectors Have Limitations

Many transit systems and state consortia use mobile collectors to collect urine and breath specimens for the FTA drug and alcohol testing program. Mobile collectors are often associated with or under contract to third party administrators who provide all the testing services as part of a turnkey package. The mobile collectors are often considered an economical method for obtaining collection services in areas, times, or situations that have limited collection site alternatives. In most cases, mobile collectors notify the transit system when they will be on-site for random test collections. Many transit systems and statewide consortia find this arrangement convenient as the mobile collector takes over many of the administrative responsibilities associated with the program.

In most cases, mobile collectors provide a collection services that are compliant with the FTA drug and alcohol testing regulations. However, FTA-regulated employers must carefully monitor the policies and practices of mobile collectors. A primary concern is the predictability and pattern of testing that is often characteristic of mobile collectors. To economically provide testing services, mobile collectors typically attempt to schedule collections in the most cost-efficient manner possible. Subsequently, collectors often ride a circuit from transit system to transit system, and so patterns develop. Additionally, mobile collectors that are not close to the transit system cannot respond in a timely manner for post-accident or reasonable suspicion tests. Since an incident triggers the need for a test, and the transit system must respond immediately, prior arrangements for a collector within close proximity is necessary.

The immediate or direct supervisor of an employee may not serve as a collector for that employee (§655.53). Additionally, the employee may not be the collector of his or her own urine specimen. The *Urine Specimen Collection Guidelines* also recommends that a collector should not be related to the employee (e.g., spouse, ex-

spouse, relative) or a close personal friend. The guidelines go on to suggest that to avoid any potential appearance of collusion or impropriety, a safety-sensitive employee subject to the DOT drug testing rules should not be a collector, an observer, or a monitor for co-workers who are in the same testing pool or who work together with that employee on a daily basis.

Each collector must maintain documentation of their initial qualifications training, proficiency demonstration, refresher training, and error-correction training and provide this documentation upon request to DOT agency representatives (i.e., auditors, triennial reviewers), and to employers and/or C/TPAs using their services.

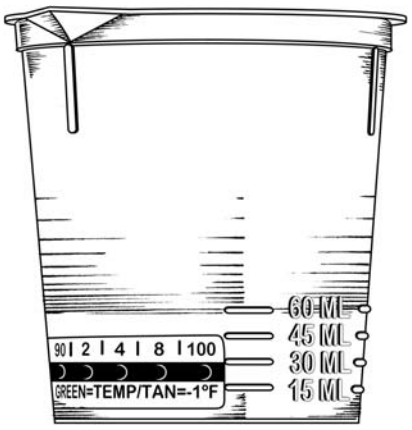
The collection site personnel are responsible for maintaining the integrity of the specimen collection and transfer process, ensuring the security of the specimen, and ensuring the dignity and privacy of the donor. Collectors should conduct their duties with professionalism and avoid any remarks that may be construed as accusatory or otherwise offensive or inappropriate.

To deter donors from tampering with their specimens, the specimen collector must perform the following tasks prior to each and every collection:

1. Secure water sources by turning off water or taping handles to prevent opening faucets.
2. Put bluing agent in the toilet bowl and swish to ensure dispersion throughout the bowl.
3. Remove all soap, disinfectants, cleaning agents, or other possible adulterants.
4. Inspect the site to ensure that no foreign or unauthorized substances are present.
5. Secure toilet tank top or put bluing agent in the tank water.
6. Ensure that undetected access is not possible.
7. Secure areas and items that can be used to conceal contaminants (i.e., vanities, trashcans, paper towel holders).
8. Recheck each collection facility following each collection.

Collectors may only conduct one test at a time (unless the donor is in an extended wait time associated with the insufficient volume procedure described later in this chapter). The collector must, to the greatest extent possible, keep the donor's specimen within full view of the donor and the collector until the specimen is sealed. Only the collector and the donor are allowed to handle the specimen before it is sealed. The collector must remain at the collection site and be in personal control of the specimen throughout the collection process.

As the employer, you are ultimately responsible for the collection process and as such you should monitor collection sites closely and require documentation that collectors have met the minimum requirements. Contracting for this service removes your staff from direct involvement in the collection and testing process and turns these functions over to impartial, outside technical persons who have no direct relationship with your employees. Contracting for collection services, however, does not relieve you from responsibility for ensuring that the complete collection process meets all applicable regulatory requirements established by FTA and DOT (§40.15(c)).



Supplies. The following supplies and documents will be needed at each collection site you use. The laboratory with which you contract usually provides these supplies. The collection kit has been standardized and the specifications are defined in Appendix A of Part 40.

- Single-Use Collection Cups – The cups must be plastic and large enough to easily catch and hold at least 55 mL of urine. The cups must have graduated volume markings clearly noting levels of 45 mL and above. The cups must have a temperature strip attached that can provide temperature readings between 90°F and 100°F. The cups must be individually wrapped or have a peelable, sealed lid (much like an orange juice container) or other visible tamper-evident system.

- Plastic Specimen Bottles – The plastic specimen bottles must be large enough to hold at least 35 mL of urine and must have a screw-on or snap-on cap that prevents seepage during shipment. The bottles must have clear markings indicating the 30 mL level for the primary specimen, and the 15 mL level for the split specimen. The bottles must be designed so that the required tamper-evident tape bottle seals fit with no damage to the seal when applied or initialed. The bottles must be wrapped in a sealed plastic bag, shrink wrapped, have a sealed lid, or be packaged by some other easily visible tamper-evident system. The plastic material must be leak resistant.

- Leak-Resistant Plastic Bag – The plastic bag must have two sealable compartments or pouches that are leak resistant. One pouch must be large enough to hold two specimen bottles and the other large enough to hold the CCF paper work. Once closed, the bag must be tamper-evident.

- Absorbent Material – Each kit must contain enough absorbent material to absorb the contents of both specimen bottles, and the material must be provided in the plastic bag pouch that holds the specimen bottles.

- Shipping Container – The shipping container must be designed to adequately protect the specimen bottles from damage during shipping.

- Federal Drug Testing Custody and Control Form (CCF)– This form must be used to document every urine collection required under the DOT testing program. The five-part form must include the names, addresses, telephone numbers, and fax numbers of the employer and the MRO. The CCF documents the chain of custody and is legal evidence that the reported test results apply to the donor. The Federal CCFs cannot be used for non-DOT urine collections. Furthermore, non-federal CCFs cannot be used for DOT urine collections. The CCF form was revised on June 23, 2000.

The DOT requires the new version of the CCF to be used for all DOT covered tests collected after July 31, 2001. Use of a non-federal form or an old version of the form for a DOT collection by mistake is not a fatal flaw that will result in a cancelled test if the prescribed corrective actions (§40.205(b)) are taken.

- Tamperproof Sealing System – Pre-printed seals/labels are provided as part of the CCF. Once applied to the specimen bottles, the seal ensures that the specimen bottle has not been opened or tampered with. The label also identifies the bottle with a unique identifying number identical to that appearing on the CCF.

- Writing Instruments – An indelible pen or other instrument suitable for making permanent markings on labels and seals and for legibly completing the urine custody and control form should be provided.

Recommendation
Written Instructions/Checklist

Written instructions should be provided for collection site personnel. The instructions should describe in detail the procedures for collecting and transporting specimens, and completing the custody and control form. These instructions should be available at all times for reference and may be provided in a checklist format to allow the technician to indicate when each step in the collection process has been accomplished.

Written instructions setting forth the employee responsibilities for the drug test are provided on the back of the CCF. Examples of employee and collection site personnel written instructions are provided in the Sample Documentation section of this chapter.

Collection Process. Specimen collection is the most critical aspect of the drug testing program. There is a greater opportunity for human error or compromising an employee's privacy and dignity in the collection process than anywhere else in the drug testing process. However, the strict maintenance of the specimen chain of custody and personnel training can minimize the problems and number of test cancellations resulting from flawed specimen collections. Employee confidence in, and acceptance of, the testing process is enhanced when the collection is conducted with efficiency and professionalism. You should, therefore, ensure that the collection site personnel rigorously follow DOT guidelines for specimen collection.

An overview of the key steps and criteria for the collection process follows. Trained collectors who perform DOT collections must precisely follow these steps. For specific requirements, refer to §40.61, §40.63, §40.65, §40.71 and §40.73.

1. The arrival time of the employee should be noted and compared to the employer-designated arrival time to determine if the employee arrived within the specified time allowed. If the employee arrived late, the collector must immediately notify the DER. The time noted should be the time the employee arrives at the collection site, not the time the collection begins as there may be delays at the collection site that are out of the control of the employee.
2. Following the employee's arrival at the collection site, the collector must begin the collection process without undue delay. If there is a waiting line for services, employees awaiting a test should be moved to the front of the line, only to be displaced by

individuals with emergency or life-threatening conditions. Testing should not be delayed because the employee indicates that they don't believe they can provide a specimen. If this is the case, the collector should follow the "insufficient volume" procedures. Likewise the test should not be delayed to await union representation.

3. In the event both drug and alcohol tests are required, the alcohol test should be conducted first, if possible.

4. The collector must inspect the collection room before and after each specimen collection. Any unauthorized persons and materials that could be used to adulterate the specimen must be removed. Access to the room must be restricted while the collection is taking place. The collector must make sure all collection supplies are available, the area is properly secured, water sources are secured, and bluing agent is placed in all toilets as described previously.

5. The collector must verify the identity of the employee through the use of an official photo identification card issued by the employer or a federal, state or local government (e.g., driver's license). Faxes or photocopies of identification are not acceptable. If photo identification is not available, verification by a transit agency representative is acceptable, but cannot be made by a coworker or other employee being tested. If the identity of the employee cannot be verified, the collector must contact the DER immediately to verify the employee's identity.

6. The collector must explain the basic collection procedures to the employee and show the employee the written instructions provided on the back of the Federal Drug Testing Custody and Control form.

7. Only Federal Drug Testing Custody and Control forms can be used. If non-Federal forms are used for a federal DOT test, the test will be cancelled unless corrective procedures are followed. The preprinted specimen ID number must be checked to be sure it matches the specimen ID number on the preprinted specimen bottle seals. The collector should make sure that the laboratory's, employer's, and MRO's name and address are correctly printed on the form. Some collection sites do testing for a number of clients, and problems with billing and reporting can occur if the wrong forms are used.

   The collector must complete Step 1 of the form by entering the employee's identification number, reason for the test, drug test to be performed, and the collection site information. Refusal to provide a social security number is not a test refusal, but the collector must make note of such in the remarks section of the form.

8. The collector must direct the employee to remove outer clothing (coveralls, sweaters, jackets, vests, hats, etc.) and to leave these garments along with other personal belongings (purses, briefcases, backpacks) outside the privacy enclosure. If requested, the employee should be provided a receipt for items left. Employees are allowed to keep their wallets.

9. The collector must direct the employee to empty his or her pockets and display the items. If the collector sees nothing that could be used to adulterate the specimen, the employee will be allowed to place the items back into their pockets and proceed with the collection. If any items are identified that could be used to tamper with a specimen, the collector will secure the item until the test is complete. If the collector determines that the items were apparently brought to the collection site to adulterate the specimen, the collector will perform an observed collection.
10. The collector will have the employee rinse his or her hands with water and dry them.
11. Either the employee or the collector will select and unwrap the collection cup in front of the employee. The collector will direct the employee to the privacy enclosure taking only the collection cup. The collector will instruct the employee to provide at least 45 mL (about 1½ ounces) of urine and not to flush the toilet. The collector should explain that the temperature of the specimen must be taken as soon as possible following the void and the specimen should be returned to the collector as soon as the specimen has been obtained. The collector may establish a reasonable amount of time for the employee to be in the privacy enclosure as long as the employee is told in advance of the time limit.
12. After the employee gives the specimen to the collector, the collector will check the temperature of the specimen, check the specimen volume, and inspect the specimen for adulteration or substitution. Both the collector and the employee should maintain visual contact with the specimen to the greatest extent possible until the labels/seals are placed over the specimen bottle caps. If practical, the collector may permit the employee to wash his or her hands right after the employee gives the collection container to the collector as long as the employee and the collector can still maintain visual control of the specimen. If not, a moist towelette may be provided.
13. The temperature of the specimen must be taken within 4 minutes of receiving the specimen. The temperature must be between 90.0° and 100.0°F. If the specimen is outside the acceptable temperature range, the collector will immediately begin

a new collection under direct observation as described later in this chapter.

14. If the employee is unable to provide at least 45 mL, the collector will discard the specimen and follow the insufficient volume procedures described later in this chapter.

15. If during the collection process, the collector notices any conduct that clearly indicates an attempt to substitute or adulterate a specimen, the collection process must be completed and then the collector must immediately begin a new collection under direct observation as described later in this chapter. In addition, the collection site technician must visually examine the specimen for any unusual color, sediment, or other signs of tampering, and note the results on the custody and control form. If it is apparent that the employee has tampered with the specimen, the collector must immediately begin a new collection under direct observation.

16. If the employee refuses to cooperate with the collection process including conducting a new test under direct observation, the collector will immediately inform the DER and document the noncooperation on the Federal Drug Testing Custody and Control form.

17. In the presence of the donor, the collector will pour the urine into two specimen bottles. Thirty (30) mL will be poured into the primary specimen or "A" bottle and the cap will be placed and secured on the bottle. Then the collector will pour at least 15 mL into the split specimen or "B" bottle and the cap will be placed and secured on the bottle.

18. The collector will seal and label the specimen bottles in the presence of the donor. The preprinted label(s) with the same specimen identification number as the custody and control form will be removed from the forms and attached to the specimen bottles. The collector will ensure that the "A" label is placed on the primary specimen and the "B" label is placed on the split specimen. The collector will then write the date on the seals and then request the employee to initial the labels verifying that the specimen is his/hers. The employee must be present to observe the sealing of the bottles. The employee must initial the labels after they have been attached to the bottle, not before.

19. The remaining steps of the Federal Drug Testing Custody and Control form (CCF) must be completed. The collector will direct the employee to read, sign, and date the certification statement, and provide date of birth, printed name, and day and

evening contact telephone numbers in Step 5 of Copy 2 of the CCF. The signature attests to the authenticity of the specimen and information provided and the integrity of the collection process. Refusal to sign the form does not constitute a refusal to test, but should be noted by the collector in the remarks section of the form.

The employee is not to put any additional personal information on the CCF. The collector must instruct the employee not to list any medications that he or she is currently taking on the CCF. The employee may make notes of medications on the back of the employee copy (Copy 5) of the CCF for his or her own personal use, but they must not be conveyed to anyone else in the drug testing process.

20. The collector completes the collector's portion of the CCF by printing his/her name, date and time of the collection, entering the name of the courier/delivery service and signing the certification statement. The CCF is checked to make sure it is complete and legible and the employee is provided Copy 5 of the form.

21. Both the primary specimen and the split specimen must be sealed along with Copy 1 of the CCF in the appropriate pouches of the plastic bag. The employee will be notified that he/she can leave and the plastic bag will be readied for shipping to the laboratory (e.g., using shipping containers and following procedures defined by the courier service). The specimen should be placed in secure storage until picked up by the courier/delivery service.

22. Copy 2 of the CCF will be sent to the MRO and Copy 4 of the CCF will be sent to the DER within 24 hours, or the next business day. The specimen must be shipped to the laboratory as soon as possible, but no later than the 24 hours or the next business day.

Any urine specimen remaining after the specimen bottles have been filled and sealed should be discarded. If the agency tests for drugs other than those specified by the FTA regulation, a completely separate urine collection with its own non-federal custody and control form is required.

Split Sample. As described, the DOT drug testing process requires that the urine specimen be split and poured into two specimen bottles. The split specimen process provides the employee with the option of having an analysis of the split sample performed at a separate DHHS laboratory should the primary specimen test result come into question. The employee has 72 hours after being informed by the MRO of a non-negative test result (i.e., positive, adulterated, substitute) to request a test of the split sample.

Insufficient Volume (§40.193, §40.195). If an employee is unable to provide 45 mL of urine, the collector will discard the specimen and instruct the employee that he/she has up to 3 hours to provide another specimen with sufficient volume. The 3-hour time period begins when the insufficient quantity or empty cup is presented to the collector. During the 3-hour period, the employee may consume up to 40 ounces of fluid distributed reasonably throughout the period. The employee's

refusal to drink is not considered a test refusal. However, if the 3 hours have expired and the employee refused to make the attempt to provide a new urine specimen, this is considered a test refusal, the process must be discontinued, and the collector must notify the DER.

If reattempts are made that also result in insufficient urine volumes, the specimens must be discarded. Under no circumstances can a collector combine urine collected from separate voids to create one specimen of sufficient volume.

The only time a specimen with insufficient volume would be maintained is if a temperature reading could be obtained and the reading was out of range or there were visible signs of tampering or adulteration. The collector will complete the process with the insufficient specimen, initiate a new collection under direct observation and send both specimens to the laboratory for analysis.

If the 3 hours have passed and the employee is still unable to provide an adequate specimen, the insufficient specimen shall be discarded, testing discontinued, and the DER notified. After consulting with the MRO, the employer must direct the employee to obtain a medical evaluation from a licensed physician who is acceptable to the MRO, and has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. The evaluation must be made within 5 business days of the initial collection effort. The medical evaluation must determine if the employee has, or with a high degree of probability could have, a medical condition that could have precluded the employee from providing a sufficient amount of urine. A medical condition includes an ascertainable physiological condition (e.g., urinary dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or dehydration. If no medical explanation is found, the MRO will determine that the employee refused the test. If a medical explanation is found, the MRO will deem the test cancelled for all test categories except for pre-employment, return-to-duty, and follow-up tests.

For pre-employment, return-to-duty, and follow-up tests, the licensed physician making the medical evaluation must also determine under the direction of the MRO, if the medical condition is a serious and permanent, or long-term disability that is highly likely to prevent the employee from providing a sufficient urine specimen in the future. If so, the MRO must determine via a medical evaluation and consultation with the individual's physician if there is clinical evidence that the individual is an illicit drug user. The medical evaluation may include conducting an alternative test (e.g., blood) as part of the medical process used to determine clinical evidence of drug use. If no evidence of illicit drug use is found, the MRO must report the test as negative. If evidence is found, the MRO must report the test as cancelled.

Observed Collections. As of August 31, 2009, USDOT requires mandatory direct observation for all return-to-duty and follow-up testing. This drug testing rule applies to return-to-duty safety sensitive employees who have already failed or refused to take a prior drug test.

In the following circumstances, the collectors are <u>required</u> to complete the first collection and immediately require a second collection made under direct observation:

- The employee has presented a urine sample that falls outside the normal

temperature range (90.0° to 100.0° F). The collector does not take the employee's body temperature, but immediately requires another collection under direct observation.
- The collector observes conduct or materials that clearly indicates an attempt to substitute or adulterate the sample (e.g., substitutes urine in plain view, blue dye in specimen presented, etc.).

In the following circumstances the MRO will direct the employer to have the employee immediately retested under direct observation. The employer is required to comply with the MRO's request.

- The laboratory reported to the MRO that a specimen was invalid, and the MRO determined that there was not an adequate medical explanation for the result; or
- The MRO had to cancel a test when the primary specimen was verified as positive, adulterated, or substituted because the split specimen was unavailable for testing (i.e., the split specimen leaked, was lost, or inadvertently discarded).

In the following circumstance, the employer must authorize an observed collection:

- The employee has previously been determined to have used a controlled substance without medical authorization and the particular test is being conducted under the FTA regulation as a return-to-duty or follow-up test.

Previously, employers were allowed to conduct observed collections for tests following a previous dilute specimen. As of August 1, 2001, this practice was prohibited.

Observed collections must be performed with no advance notice to the employee. The direct observation must be conducted by a person of the same gender as the employee being tested. The same gender requirement also applies to medical professionals who are observers. The observer can be a different person from the collector and is not required to have any special training or certifications. The observer must follow the verbal instructions of the collector. The reason for the direct observation must be explained to the employee. The observer must directly watch the urine stream go from the employee's body to the collection container.

Dilute Specimens. A dilute specimen is a specimen with creatinine and specific gravity values that are lower than expected for human urine. If the test is reported as a dilute positive, the test should be treated as a verified positive test result. If the test is reported as a negative dilute, the employer may, but is not required to direct the employee to take another test. The retest must not be conducted under direct observation. Whatever the employer's policy in this regard, all employees must be treated the same for this purpose and must be informed in advance of the retest policy. If the employer requires a retest following a negative dilute test result, the retest must be conducted with no advance notice. The result of the second test becomes the test of record and there is no opportunity for a third test, even if the second is also dilute.

Section 3. LABORATORY TESTING

The scientific techniques used in drug testing are virtually error-free when properly applied. The combination of immunoassay screening with confirmation by gas chromatography/mass spectrometry (GC/MS) makes the possibility of error

extremely remote. In the past, most errors in test results were the result of human error in specimen handling, documentation, or validity testing, all of which have been reduced in recent years by using detailed test protocols, scrutiny of testing regimes, and stringent quality control checks.

All drug testing under the FTA regulations must be completed in a laboratory certified by the DHHS under the National Laboratory Certification Program (NLCP). These laboratories have been rigorously inspected and tested and meet the highest standards for analytical competence. A list of DHHS-certified laboratories (current as of the date of publication of these guidelines) is provided in Appendix D. This list is updated on a monthly basis and is printed in the *Federal Register* the first week of each month by the Substance Abuse and Mental Health Services Administration (SAMHSA). The list should be checked monthly as new laboratories are added and others are removed. To verify the certification status of a laboratory, DHHS has also established a telephone HELPLINE at (800) 843-4971. The list is also maintained on the following Web site: http://www.workplace.samhsa.gov/ResourceCenter/lablist.htm.

All laboratories that conduct drug tests under the DOT-covered program must comply with both the DOT requirements set forth in Subpart F of Part 40, and the DHHS requirements.

Each transit system should enter into a contract for primary laboratory services that specifically states the activities to be performed and the cost for such services. Transit systems should also enter into a contract with at least one additional laboratory for split sample analysis and to serve as a backup in case problems arise with the primary lab. The regulation does not specify whether the employer or the employee decides which DHHS-certified lab is used for the split specimen so it remains a local decision. However, it helps to identify the possible labs in advance to make establishing customer accounts and billing practices easier, whereas failure to do so in advance may result in testing delays and billing mistakes. Prior to finalizing the contract with the laboratory, the DAPM and employee representative may want to personally inspect the laboratory.

Specimen Inspection. The DOT regulation requires the lab to first inspect each specimen and the CCF for fatal and correctable flaws. If no fatal flaw exists, but correctable flaws are found (see Section 5 of this chapter), the lab must document the flaw and take corrective action as defined in §40.205.

Validity Testing. Specimen validity testing is the evaluation of the specimen to determine if it is consistent with normal human urine or if certain adulterants or foreign substances were added to the urine, the urine was diluted, or the specimen was substituted. At the time these *Guidelines* were published, laboratories were permitted to conduct validity testing as part of the DOT testing process. As soon as the DHHS

publishes its final rule establishing the standards for determining the validity of urine specimens under the Mandatory Guidelines for Federal Workplace Drug Testing Programs, it is anticipated that the DOT will make the validity testing of every specimen a mandatory portion of the drug testing process.

Each primary specimen will be tested for creatinine, pH, and adulterants. If the creatinine level is less than 20 mg/mL, the specific gravity of the specimen will also be measured. If the creatinine concentration is less than 20 mg/mL and the specific gravity is less than 1.003, the specimen is considered dilute. If the specimen is super dilute with a creatinine concentration of less than or equal to 5 mg/mL and the specific gravity is less than or equal to 1.001 or greater than or equal to 1.020, the specimen is considered substitute, as the human body is incapable of providing a specimen with those quantifications.

The rule does not specifically list the adulterants that will be tested for, but instead requires (§40.91) that the laboratories test for substances identified and published by the DHHS. A specimen is considered to be adulterated when the specimen's physical characteristics are outside the normal expected range for human urine, a substance is present that is not expected in human urine, or a substance is present at concentrations so high that it is not consistent with human urine.

Drug and Drug Metabolite Testing. The laboratory must test for the following five drugs or their metabolites using the testing protocols and minimum cutoff thresholds defined in §40.87: marijuana, cocaine, opiates (e.g., heroin, morphine, codeine), phencyclidine (PCP), and amphetamines (e.g., racemic amphetamine, dextroamphetamine, and methamphetamine). The initial test is an immunoassay test. If any prohibited drug or its metabolite registers above the cutoff level on the immunoassay screen, an aliquot of the same urine specimen must be confirmed by using a technique called gas chromatography/mass spectrometry (GC/MS).

The initial test result is based on the ability of antibodies to recognize drugs in biological fluids. Immunoassay tests, called screens, are simple to run and are often automated, and are relatively inexpensive. The confirmatory tests are more accurate, more time consuming, require sophisticated laboratory equipment, and thus are more expensive than immunoassay screens. The only confirmatory test permitted by 49 CFR Part 40 is GC/MS.

Test Results. The laboratory may only report the test results to the designated Medical Review Officer (MRO). The test results will be reported to the MRO as negative, negative—dilute, positive, positive-dilute, adulterated, substituted, or invalid. An invalid test is one where the urine specimen contains an unidentified adulterant or an unidentified interfering substance, has abnormal physical characteristics, or has an endogenous substance at an abnormal concentration that prevents the laboratory from completing or obtaining a valid drug test result.

The laboratory must confidentially transmit the test results to the MRO in a timely manner (i.e., the same day that the test result is reviewed by the lab's certifying scientist). Except for opiate positives with morphine or codeine levels at 15,000 ng/mL or above, test results will not be provided with quantitative values unless a specific request is made by an MRO.

Type of Drug or Metabolite	Initial Test Cutoff Levels	Confirmation Test Cutoff Levels
(1) Marijuana Metabolites (i) Delta-9-tetrahydrocanna-binal-9-carboxylic acid (THC)	50	15
(2) Cocaine Metabolites (Benzoylecgonine)	300	150
(3) Phencyclidine (PCP)	25	25
(4) Amphetamines (i) Amphetamine (ii) Methamphetamine	1000	500 500[a]
(5) Opiate Metabolites (i) Codeine (ii) Morphine (iii) 6acetylmorphine (6 AM)	2000	2000 2000 10[b]

Opiate levels above 15,000 ng/mL will be automatically reported because the responsibilities of the MRO and employee change with opiate levels this high. In this case the burden of proof shifts to the employee to provide a verifiable medical explanation for such high levels.

Split Specimen Testing. The primary laboratory must provide secure storage for the split sample for 1 year if the primary specimen is positive, adulterated, or substituted. If directed by the MRO, the primary laboratory shall forward the split specimen bottle, with seal intact, a copy of the MRO request, and a copy of the custody and control form to a different DHHS-approved laboratory. If the split specimen is unavailable for testing, the lab must provide as much information as possible to the MRO regarding the cause of the unavailability.

In the case of a positive test result, the second lab must test the specimen for the presence of the drug(s)or drug metabolite independent of the cutoff levels. If the presence of the substance(s) is found, the primary test will be confirmed positive. If the test fails to reconfirm the presence of the drug/metabolites that were reported positive by the primary lab, the second lab must conduct validity testing on the split to determine if the specimen was adulterated or substituted. If the split does not reconfirm the presence of the drug/metabolite and there is no evidence of adulteration or substitution, the result will be reported to the MRO, the test will be cancelled, and the failure to reconfirm will be reported to the DOT Office of Drug and Alcohol Policy and Compliance (ODAPC).

Where a primary test result shows the specimen was adulterated or substituted, the second lab must test the split specimen in the same manner as the primary to determine if the specimen was adulterated or substituted. If the adulteration or substitution is found, the primary test result will be confirmed. If not, the result will be reported to the MRO, the test cancelled, and the failure to reconfirm will be reported to the ODAPC.

If the split is unavailable for testing and, therefore, cannot be used to reconfirm the primary test result, the primary test will be cancelled and the MRO will direct the employer to have the employee retested under direct observation. Split specimen test results can only be reported to the MRO.

Specimen Storage and Record Keeping. All confirmed non-negative specimens must be retained by the laboratory in long-term frozen storage for a minimum of 1 year. The laboratory must provide semi-annual summation reports consistent with 49 CFR Part 40, Appendix B reporting requirements to each covered employer for whom they conduct testing. The summaries must be sent by January 20

[a] Specimen must also contain amphetamine at a concentration of greater than or equal to 200 ng/mL.
[b] Test for 6-AM in the specimen. Conduct this test only when specimen contains morphine at a concentration greater than or equal to 2000 ng/mL.

for the preceding 6 months ending on December 31 and July 20 for the preceding 6 months ending on June 30.

Employers or C/TPAs that have fewer than 2000 DOT-covered employees are not required to perform blind specimen testing.

Section 4. MEDICAL REVIEW OFFICER

The FTA regulation requires that all drug testing laboratory results must be reviewed by a qualified MRO. The purpose of this review is to verify and validate test results.

An MRO is defined in the regulation as a licensed physician responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results. The MRO must be knowledgeable about and have clinical experience in controlled substance abuse disorders. The MRO must have the appropriate medical training to interpret and evaluate laboratory confirmed positive test results and be knowledgeable about alternative medical explanations for laboratory confirmed test results. The MRO must be aware of issues relating to adulterated and substituted specimens and possible medical causes for invalid test results.

As discussed in Chapter 5, MROs must know the DOT MRO Guidelines, Part 40 and applicable DOT agency rules (i.e., FTA Part 655). MROs must receive qualification training and complete at least 12 hours of professional development hours of continuing education that is relevant to MRO functions during each subsequent 3-year period.

The MRO is to serve as an independent, impartial gatekeeper responsible for the accuracy and integrity of the drug testing process. As such, the MRO is required to perform the following functions (§40.123):

- Receive the results of drug tests from the laboratory.
- Conduct administrative review of the CCF to ensure it is legible, accurate, and signed by the laboratory's certifying scientist. Check for fatal and correctable flaws. Take action to immediately correct correctable flaws. If appropriate, the MRO may request the laboratory to analyze the original specimen again to verify the accuracy of the reported test result.
- Provide feedback as appropriate to the DER and service agents regarding performance issues. Report major problems to the ODAPC and FTA as appropriate.
- The MRO or his/her staff must make at least three attempts to contact the employee spaced reasonably over a 24-hour period, including the day and evening using the telephone numbers listed on the CCF. All

attempts to contact the employee must be documented.

- If, after making a reasonable effort, the MRO is unable to reach the individual directly, the MRO shall contact the DER/DAPM. The DER should make at least three attempts to contact the employee within a 24-hour period. If contact is made, the DER must instruct the employee to contact the MRO immediately (no longer than 72 hours) and explain the consequences of failing to do so. If the employee fails to contact the MRO within 72 hours, the test will be verified as a no-contact positive. If, after making reasonable efforts for a 24-hour period, the DER is unable to contact the employee, the employer may leave a message for the employee instructing him/her to contact the MRO and place the employee on temporary unqualified status or medical leave. If 10 days pass with no employee contact, the MRO will verify the test result as a no-contact positive. All attempts to contact the employee must be documented.

- If contact is made, the MRO must provide the employee with the opportunity to discuss the test result on a confidential basis. If the employee declines to discuss the test result with the MRO, the test will be verified as a no-contact positive test result. If the employee wishes to talk to the MRO, the MRO staff may schedule the interview, but must not gather any medical information or information concerning possible explanations for the test result. The staff may advise an employee to have medical information ready to present to the MRO.

- The MRO verification interview with the employee must be made by telephone or in person. The MRO must tell the employee that the test result was positive, adulterated, substituted, or invalid and the basis for the test result (i.e., presence of drug or adulterant, or validity test results). The MRO must explain the verification process and the potential need for further medical evaluation. The MRO must warn the employee before any medical information is discussed that the MRO must disclose to third parties (i.e., employer, SAP, NTSB, DOT, FTA) without the employee's consent for drug test result information and medical information affecting the performance of safety-sensitive duties that the employee provides.

- The MRO will review and interpret an individual's confirmed non-negative (i.e., positive, adulterated, substituted, invalid) test by (1) reviewing the individual's medical history, including any medical records and biomedical information provided; (2) affording the individual an opportunity to discuss the test result; and (3) verifying the authenticity of all medical records (i.e., prescriptions, medical procedures) the employee provides. The MRO may contact the employee's physician or other relevant medical personnel for further information. Based on the information that was provided and verified, the MRO must decide whether there is a legitimate medical explanation for the result, including legally prescribed medication.

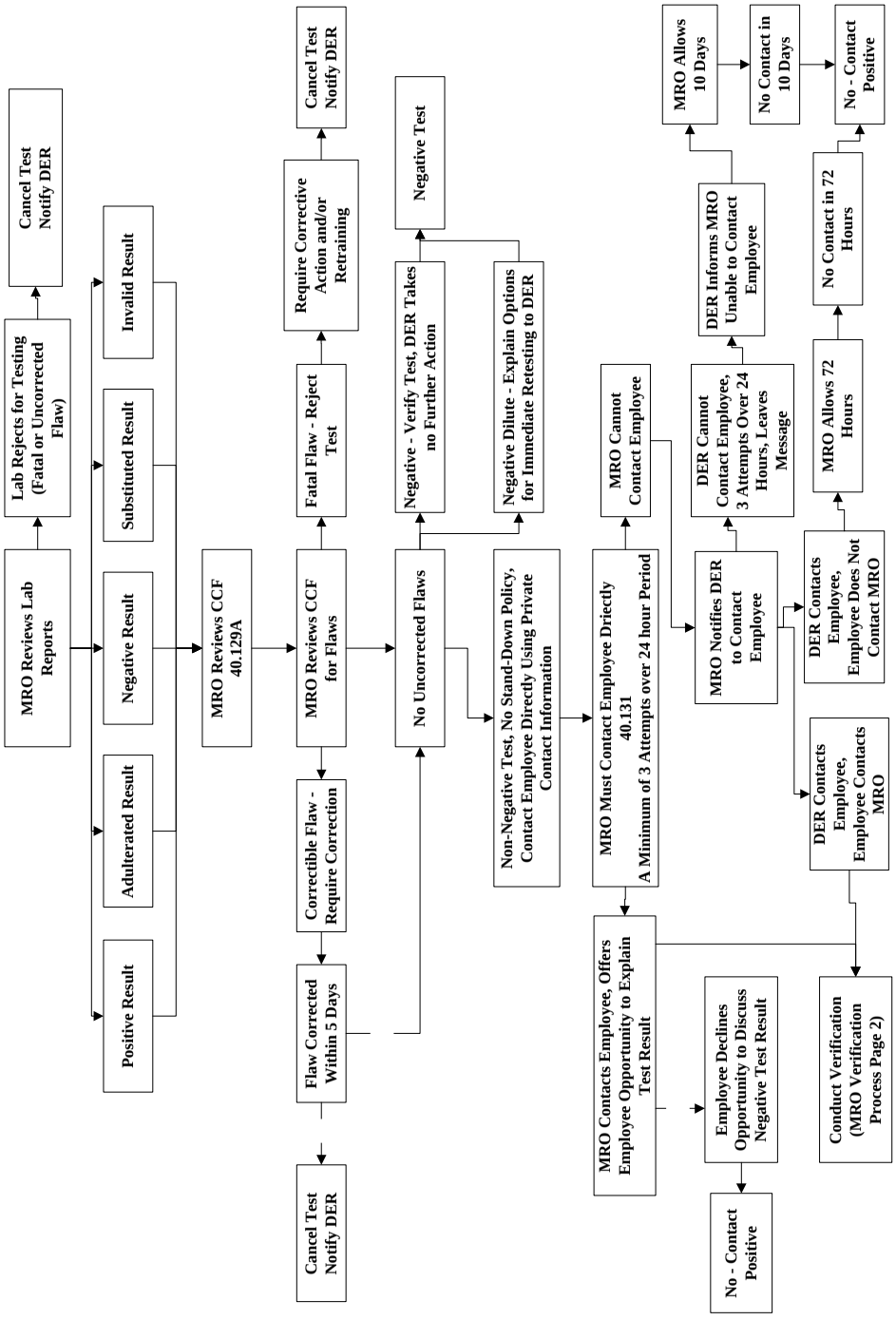


Figure 7-1. MRO Verification Flowchart: Employee Contact

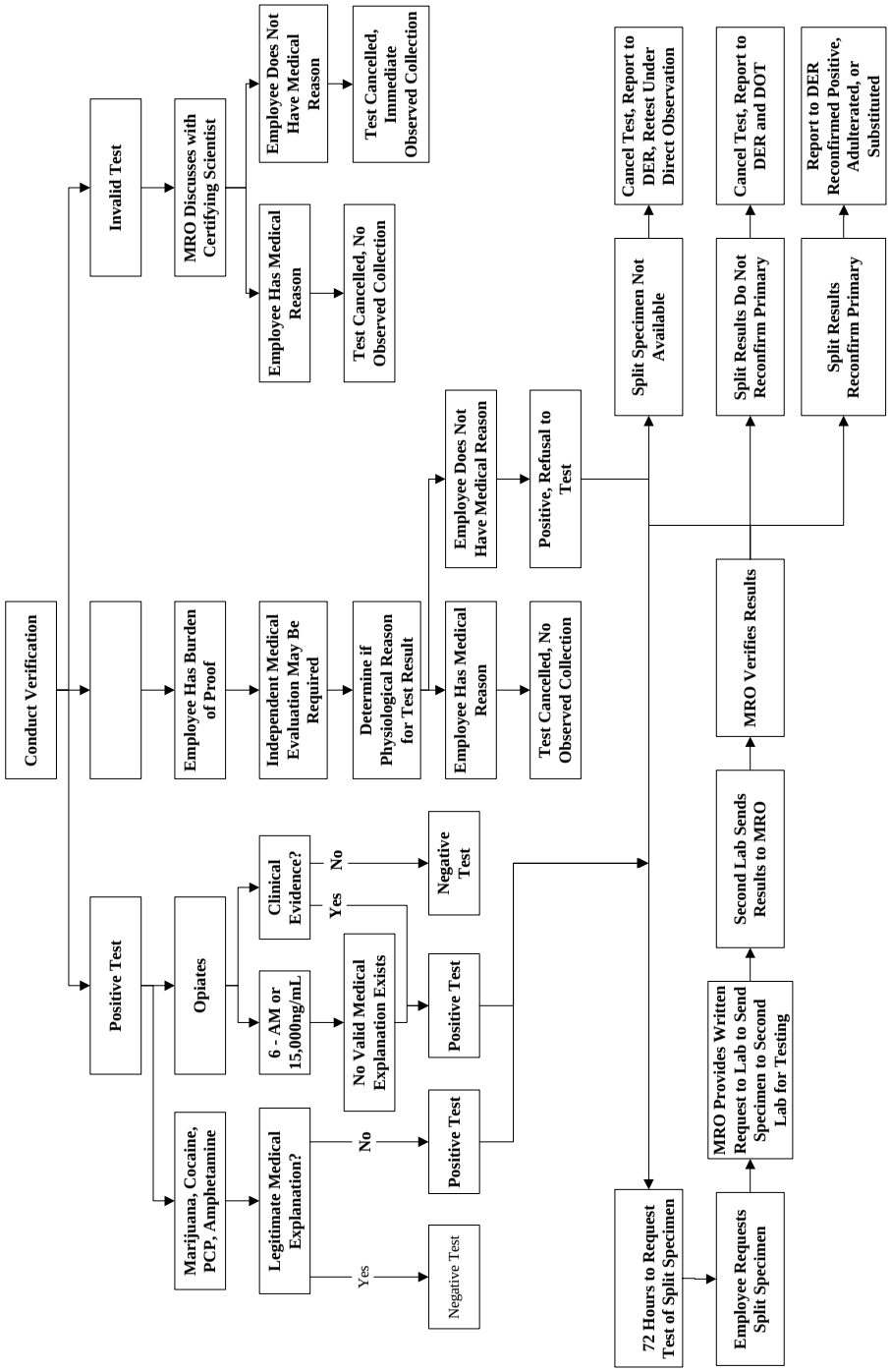


Figure 7-2. MRO Verification Flowchart: Verification Process

- The MRO will verify the test result as either negative, positive, test cancelled, or test refused. Cancelled tests include invalid tests and tests with fatal flaws or uncorrected correctable flaws. Test refusals include adulterated and substituted tests.

- The MRO must report each verified test result and other relevant information to the DER in a timely and confidential manner. The employer must be notified of a verified positive, adulterated, or substituted test result immediately by telephone or other electronic means, so the employee can be removed from safety-sensitive duties immediately. The hard copy documentation of the test result provided by the MRO should follow later. The employer must not delay the removal of the employee from safety-sensitive duty while awaiting receipt of the hard-copy documentation of the test result. Likewise, removal of the employee from safety-sensitive duties must <u>not be</u> delayed pending the split specimen analysis.

- The MRO must notify each employee who has a verified non-negative test result that the employee has 72 hours in which to contact the MRO to request a test of the split specimen. The MRO must tell the employee how they can be contacted during the 72-hour period. The request may be verbal or in writing. If the employee requests an analysis of the split specimen within 72 hours of having been informed of a verified non-negative test, the MRO shall direct the laboratory, in writing, to ship the split specimen to another DHHS-certified laboratory for analysis. The split specimen test must be performed as soon as possible. The employee is not required to pay for the test before the test takes place. However, consistent with employer policy, the employer may seek reimbursement for the cost of the test once the test has been performed.

- If the analysis of the split specimen fails to confirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, or if the split specimen is unavailable or inadequate for testing, the MRO shall cancel the test and report the cancellation and the reasons for it to the DOT, the employer, and employee. If the split is unavailable for testing the MRO will direct the DER to send the employee for a retest under direct observation.

- If the employee has not contacted the MRO to request the split test within 72 hours of being notified of a verified positive drug test, the employee may present to the MRO information documenting that serious illness, injury, inability to contact the MRO, lack of actual notice of the verified positive test, or other circumstances that unavoidably prevented the employee from contacting the MRO in time. If the MRO concludes that there is a legitimate explanation for the employee's failure to contact the MRO within 72 hours, the MRO shall direct that the analysis of the split specimen be performed. If the MRO concludes that there is <u>no</u> legitimate explanation for the employee's failure to contact the MRO within 72 hours, then the

MRO is not required to direct the analysis of the split specimen to be performed.

- The MRO must maintain all necessary records and protect the employee's privacy and testing program confidentiality.

The MRO must confirm a positive test result for marijuana, cocaine, amphetamines, and/or phencyclidine unless the employee presents a legitimate medical explanation for the presence of the drug/metabolite in his/her system. The burden of proof is on the employee to provide necessary documentation of the medical explanation. This information must be presented at the time of the verification interview with the MRO. If a valid medical explanation is provided, the MRO must verify and report the test as negative. If not, the MRO must verify and report the test result as positive.

If the laboratory reports a positive test result for opiates, the MRO must review the laboratory results to determine if 6-acetylmorphine (6-AM) was present in the specimen: if so, the test must be verified positive. If 6-AM is not present, but the codeine or morphine levels are above 15,000 ng/mL, the burden of proof is on the employee to provide documentation of a legitimate medical explanation. If the concentrations are less than 15,000 ng/mL, the burden of proof is on the MRO to determine if there is clinical evidence of illegal drug use. To accomplish this task, the MRO must conduct or require another physician to conduct a face-to-face examination of the employee. If no clinical evidence is found, the MRO must verify the test result as negative.

If a specimen is determined by the laboratory to be adulterated or substituted, the MRO will provide the employee with the same opportunity to explain the test result as if it were positive. Thus, the MRO should explain the test results to the employee and offer the employee the opportunity to present a legitimate medical explanation for the laboratory validity, or adulterant test result. In the case of an adulterated specimen, the employee has the burden of proof to demonstrate that the adulterant entered the specimen through physiological means. In the case of a substituted specimen, the employee must demonstrate that he/she can produce a urine specimen through physiological means that has creatinine and specific gravity levels that fall within the criteria of a substitute specimen.

If the explanation appears reasonable, the employee will have up to 5 days to undergo a medical examination by a qualified medical physician, acceptable to the MRO, to evaluate and consider any evidence that the employee presents. The evidence must be gathered using appropriate methodology and controls to ensure its accuracy and reliability. The employee must demonstrate that the cited medical condition actually results in the physiological production of urine meeting the creatinine and specific gravity criteria.

The MRO may change a verified test result (§40.149) only if additional information is obtained from the employee, laboratory, or other source (e.g., prescribing physician) that impacts the MRO's determination. The MRO has the sole authority under the regulation to make medical determinations, and as such is the only one that may change a verified test result. An arbitrator or employer is not permitted to overturn the medical judgment of the MRO regarding whether there is a legitimate medical explanation for a non-negative test result.

The MRO may only consider test results in the verification process that were obtained in accordance with Part 40. Thus, results of tests conducted by other entities or tests using hair or blood specimens cannot be used by the MRO. Likewise, DNA test results must be ignored. The MRO must not play a role in any disputes with the employer regarding the circumstances leading up to the test, nor should he/she be sympathetic to employee assertions of inadvertent contact, unknowing use, or other explanations that do not constitute a legitimate medical use. The MRO cannot accept any explanations for the presence of phencyclidine or 6-AM in a specimen. Nor is it possible to have a urine specimen with bleach, soap, or glutaraldehyde or one without creatinine. MROs cannot take into consideration the use of marijuana under "medicinal marijuana" state laws that are not recognized by the DOT or the use of hemp products.

Not all physicians have the specific clinical experience or knowledge necessary to become MROs. The basic knowledge requirements, qualifications training, and continuing education requirements will further limit the availability of MROs. However, there are a number of MRO trade associations that offer the required training and certification programs to interested physicians. Each of these organizations offer listings of qualified MROs that could serve as a starting point when an agency tries to identify a new or replacement MRO. These organizations are listed in the following chart.

Organization	**Contact Information**
American Association of Medical Review Officers	www.aamro.com (800) 489-1839
American Society of Addiction Medicine	www.asam.org (301) 656-3920
American College of Occupational and Environmental Medicine	www.acoem.org (847) 818-1800
Medical Review Officer Certification Council	www.mrocc.org (847) 303-7210

When selecting a qualified MRO, you should:

1. Review qualifications, medical license, memberships, dates of qualification training and subsequent continuing education training, and other relevant training and experience to ensure minimum standards are met;

2. Have the MRO describe his or her methods for remaining informed of MRO policies and practices (e.g., attending conferences, additional training, memberships, newsletters, etc.);

3. Check references for similar work performed;

4. Assess ability to work with collection sites, testing laboratories,

substance abuse professionals, and individual employees; assess the proposed method of notifying employees of verified positive test results and the method used to afford employees the opportunity to discuss test results;

5. Assess the availability and cost for expert testimony for associated court cases; and

6. If not based locally, have the MRO indicate how face-to-face medical evaluations with employees will be conducted (i.e., an opiate positive, insufficient volume) and how the MRO will coordinate with the DER/DAPM and local substance abuse professionals.

When the services of an MRO have been retained, the employer should be sure to:

- Define procedures for disclosure of verified non-negative test results to the employer, and the confidentiality that is required for medical information not specifically related to the use of drugs;
- Notify the MRO of the specimen collection sites, laboratories, and SAPs used by the employer;
- Provide the MRO with copies of the employer's policy and procedures manual;
- Make sure the MRO has a copy of the regulations (49 CFR Parts 40 and 655) and the DOT MRO Guidelines; and
- Specify reporting procedures and record keeping requirements.

If the employer has an FTA-approved stand down policy (see discussion in Chapter 4 of these guidelines), the MRO must work closely with the employer and the laboratory to work out reporting procedures, timelines, and verification logistics.

Section 5. CORRECTABLE AND FATAL FLAWS

Fatal Flaws and Test Cancellations. Any time a service agent, employer, or other entity involved in the testing process becomes aware of an error in the testing process, it must be documented. Most problems that arise in the collection process are correctable following procedures established in §40.205. However, there are four errors that cannot be corrected if they occur, and are not followed by a retest. DOT has identified the following errors and omissions as "fatal flaws" that must result in a specimen being rejected by the laboratory (§40.199).

1. Specimen identification number on the specimen bottle does not match the specimen identification number on the custody and control form.
2. Collector's printed name and signature are both missing from the custody and control form.
3. Primary specimen volume is less than 30 mL and the split specimen cannot be re-designated as the primary specimen.
4. Specimen bottle seal is broken or shows evidence of tampering and the split specimen cannot be re-designated as the primary specimen.

In addition, the MRO must cancel a test when the following situations exist. In some cases, as designated below, the MRO may

direct the DER to have the employee sent for a retest.

1. The test is reported as "Invalid." The test must be cancelled and the employee must be retested under direct observation.

2. The test is reported "Rejected for Testing" because of an uncorrected correctable flaw. A retest is not required.

3. The Primary is positive, but the split fails to reconfirm. A retest is not required.

4. The primary specimen is adulterated or substituted and the split fails to reconfirm. A retest is not required.

5. The primary specimen is positive, adulterated, or substituted and the split specimen is unavailable. A retest is required under direct observation.

6. The examining physician indicates that there is a legitimate medical explanation for insufficient volume. A retest is not required.

Correctable Flaws. Other errors may occur in the testing process that do not impact the accuracy of the test; therefore, they can be corrected. When the laboratory identifies a correctable flaw, the laboratory must make every attempt to correct the problem following the procedures outlined in §40.205. A correctable flaw that is not corrected will result in a cancelled test. Correctable flaws include:

1. The collector's signature is omitted on the certification statement on the CCF.
2. The employee's signature is omitted from the certification statement and the "employee refused to sign" is not stated in the remarks section.
3. The certifying scientist's signature is omitted on a non-negative test result from the laboratory.
4. A non-DOT or an expired DOT custody and control form is used for a DOT collection when otherwise the testing process followed is in accordance with the DOT procedures.

Cancelled Tests. A cancelled test is neither positive nor negative. The cancelled test is to be treated as if the test never occurred. In situations where a negative test result is required (i.e., pre-employment, return-to-duty, or follow-up), another test must be performed. A cancelled test does not count toward the employer's minimum random test requirement. Additionally, a cancelled test does not provide a valid basis for an employer to conduct a non-DOT test under company authority.

If the specimen temperature on the CCF was not checked and there is no entry regarding the temperature being out of range in the Remarks section of the form, corrective action must be taken, but the error is not sufficient to cancel a drug test.

No person may declare a test cancelled based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test. Mistakes that do not result in a cancelled test and do not require corrective action include the following:

1. Minor administrative mistakes such as omitting an employee's middle initial;

2. An error that does not affect employee protections, such as the failure to add bluing agent to the toilet bowel;
3. Collection of the specimen by a collector that has not met the training requirements;
4. A delay in the collection process;
5. Verification of a test result by an otherwise qualified MRO who has not met the training requirements;
6. Failure to perform an observed or monitored collection when one is required, or performing an unauthorized collection;
7. Use of a facility that does not meet the minimum requirements;
8. Omission of courier name on the CCF;
9. Inadvertent inclusion of personal information on the CCF; or
10. Claims that the employee was improperly selected for testing.

Section 6. EMPLOYER RESPONSIBILITIES

Employers are responsible for ensuring that all aspects of the drug testing program comply with 49 CFR Part 40. Even though employers may hire one or more service agents to perform the testing functions, the employer cannot delegate the responsibility for compliance. An FTA recipient or subrecipient whose service agents do not meet or who violate applicable requirements and procedures of Part 40, may be deemed out of compliance and subject to losing their FTA funding.

All written or unwritten contracts, agreements, or arrangements with service agents concerning the provision of DOT drug and alcohol testing services are deemed, as a matter of law, to require compliance with all applicable DOT and FTA drug and alcohol testing regulations (§40.11).

Employer Actions. With the publication of the new DOT rule on the Procedures for Transportation Workplace Drug and Alcohol Testing Programs (49 CFR Part 40), the wide range of test results and corresponding employer actions have been clearly defined and standardized. Figure 7-3 is provided on page 7-28 as a quick reference of test results and subsequent employer actions. For further explanation, the regulatory text should be consulted.

Once an employer is notified by the MRO of a verified positive, adulterated, or substituted test result, the employer must immediately remove the employee from safety-sensitive job duties. The employer must not wait for the written report from the MRO or the test result from the split specimen. The employee cannot be returned to safety-sensitive duty until the employee has successfully completed the return-to-duty process as defined further in Chapter 9 of these guidelines.

If an employee's test result is negative dilute, the employer must determine if a retest is required as defined in the employer's policy statement. If the MRO reports the test result as invalid, the employer must immediately send the

employee for a retest under direct observation without any advance notice. The employer cannot add any additional consequences to an invalid test. If a test is cancelled when a negative test is required (i.e., pre-employment, return-to-duty, follow-up), the employer must send the employee back for another test, not under direct observation. The employer is not allowed to alter a drug test result once the result has been verified by the MRO.

Test Result	Verified Result	Employer Action
Negative	Negative	No Action
Negative—Dilute [§40.197]	Negative	No Action; or Employer May Retest
Temperature Out of Range [§40.67]	Inconclusive	Retest Under Direct Observation
Evidence at Collection of Specimen Tampering/Substitution/Adulteration [§40.67]	Inconclusive	Retest Under Direct Observation
Positive [40.23]	Positive—Rule Violation	Removal From Duty, Refer to SAP, Employer Consequence
Positive—Dilute [40.197]	Positive—Rule Violation	Removal From Duty, Refer to SAP, Employer Consequence
Test Refusal/Adulteration/Substitution [§40.23; §40.191]	Test Refusal—Rule Violation	Removal From Duty, Refer to SAP, Employer Consequence
Insufficient Volume With Medical Explanation (Random, Reasonable Suspicion, Post Accident) [§40.193]	Cancelled	No Action
Insufficient Volume With Disability—No Evidence of Illegal Drug Use (Pre-employment, Return to Duty, Follow Up) [§40.195]	Negative	No Action
Insufficient Volume with Evidence of Illegal Drug Use (Pre-Employment, Return to Duty, Follow Up)	Cancelled	Assignment of Safety-Sensitive Duties Prohibited, Employer Consequences
Insufficient Volume With No Medical Explanation [§40.193]	Test Refusal—Rule Violation	Removal From Duty, Refer to SAP, Employer Consequences
Fatal Flaw/Rejected for Testing [§40.199]	Cancelled	No Action
Invalid Result With Medical Explanation [§40.159]	Cancelled	No Action
Invalid Result With No Medical Explanation [§40.159]	Cancelled	Retest Under Direct Observation
Primary Positive—Split Fails to Reconfirm Drug [§40.187]	Cancelled	Employer/MRO Notifies ODAPC
Primary Adulterated/Substituted—Split Fails to Reconfirm [§40.187]	Cancelled	Employer/MRO Notifies ODAPC
Primary Invalid—Split Fails to Reconfirm [§40.187]	Cancelled	Retest Under Direct Observation
Primary Non-negative—Split Unavailable for Testing [§40.187]	Cancelled	Retest Under Direct Observation

Figure 7-3. Summary of Test Results and Subsequent Employer Actions

Sample Documentation

Collection Site Checklist
(To be used by Specimen Collection Personnel)

1. Record the employee's arrival time at the collection site. Notify the transit agency if the employee fails to report or arrives late.

2. Prepare the collection site. Ensure that all collection supplies are available, the area is properly secured, water sources are secured, and bluing agent has been placed in the toilets.

3. Begin the test without undue delay. If an alcohol breath test is to be performed, conduct it prior to collecting the urine specimen.

4. Verify the identity of the employee through the use of an official picture identification or verification by a transit official. Provide a copy of your identification if the employee requests you to do so.

5. Explain the collection process to the employee and review the instructions on the back of the CCF with the employee.

6. Check to see if the information provided in Step 1 of the CCF is accurate: specimen ID number, laboratory name and address, employer's name, address, telephone and fax number, MRO name, address, telephone and fax number; employee ID number; reason for the test; test to be performed; and collection site information.

7. Request that the employee check his/her belongings, including unnecessary outer garments, purses, and briefcases. The employee may retain his/her wallet. If the employee requests it, provide a receipt for his/her personal belongings.

8. Direct the employee to empty his or her pockets and display the items. Assess the items to ensure that no items are present that could be used to adulterate the specimen. If nothing is present, the employee should be allowed to return the items to his/her pockets. Refusal to empty one's pockets constitutes a test refusal. If an item is identified as a potential adulterant, but appears to be inadvertently brought to the site, secure the item and continue with the test. If the item appears to be brought to the site with the intent to adulterate the specimen, a direct observation collection should be conducted.

9. Request the employee to rinse his/her hands with water and dry them.

10. Provide the employee with a specimen bottle or allow him/her to choose one and direct him/her to the privacy enclosure. Instruct the employee to provide a specimen of at least 45 mL. Also, advise the employee not to flush, and to return the specimen to the collector as soon as possible so that the temperature of the specimen can be checked. Do not enter the enclosure. You should not observe the specimen collection unless special circumstances exist. You may set a reasonable time limit for the employee to be inside the privacy enclosure. Notify the employee of the time limit.

11. If the employee refuses to provide a specimen, or otherwise fails to cooperate with the process, inform the employer and document the refusal on the custody and control form.

Collection Site Checklist (cont.)
(To be used by Specimen Collection Personnel)

12. After you receive the specimen, check the specimen temperature as soon as possible, but no more than 4 minutes after the employee hands you the specimen. Check the specimen volume, and inspect the specimen for evidence of adulteration or substitution. If the temperature of the specimen is outside the acceptable range (90.0 °to 100.0°F), require the employee to provide another specimen under direct observation. If the temperature is within range and everything else appears satisfactory, check the appropriate boxes on Step 2 of the CCF regarding temperature and the type of collection.

13. If there is any reason to suspect adulteration or substitution, require the employee to provide another specimen under direct observation.

14. Break the seals on the specimen bottles and pour the first 30 mL of urine from the collection container into the primary specimen bottle. Pour the remainder (at least 15 mL) into the split specimen bottle.

15. Remove the tamper-evident seals from the CCF and place them on each bottle. The "A" label should be placed on the primary specimen and "B" label should be placed on the split specimen. The seal should be centered over the lid/cap and down the sides of the bottle to ensure the lid/cap cannot be removed without destroying the seal. Write the date on the seals. Request the employee to initial the seals attached to the bottle.

16. To the greatest extent possible, keep the specimens in your and the employee's view prior to sealing and labeling the specimen.

17. Direct the employee to read, sign, and date the certification statement and provide the date of birth, printed name, and day and evening contact telephone numbers in Step 5 of Copy 2 of the CCF.

18. Complete the collector's portion of the CCF, ensure that all copies of the CCF are legible and complete, and package the specimen along with Copy 1 of the CCF in the plastic bag, and prepare the specimen for shipment. Provide Copy 5 of the CCF to the employee and then excuse him/her.

19. Send Copy 2 of the CCF to the MRO, Copy 4 to the DER, and maintain Copy 3 at the collection site for at least 30 days.. The specimens and CCF must be shipped within 24 hours or the next business day.

Employee Specimen Collection Checklist
(For Employees Required to Provide Urine Specimens for Drug Testing)

1. Report to the specimen collection site as soon as possible after receiving notification. Refusal to report for collection within the timeframe defined by your employer or refusal to cooperate with the collection process will be considered a test refusal.

2. Show the collection site personnel an official photo identification card.

3. Check your outer garments with the collection site personnel for safekeeping. You have the right to retain your wallet and to ask for a receipt for your belongings. Display your pocket contents to the collector. Allow the collector to secure any unacceptable items with your other belongings.

4. Rinse and dry your hands.

5. Obtain or observe the collector obtaining a wrapped specimen container and break or watch the collector break the seal on the collection container.

6. Proceed to the privacy enclosure and provide a specimen in the collection container. At least 45 mL of urine are required for analysis. Do not flush the toilet. Return the specimen to the collector as soon as possible after completing the void. If an insufficient amount of urine is provided, the original specimen will be discarded and you will be given up to 3 hours and allowed to consume not more than 40 ounces of fluids to provide another specimen. Do not tamper with the specimen or make substitutions. The specimen will be visually inspected for unusual color and sediment.

7. The temperature of the specimen will be measured and must fall within an acceptable range. If the temperature falls outside the acceptable range, you will be required to provide another specimen under direct observation. If the collector notices any signs of adulteration, substitution, or tampering with the specimen, the collector will require you to provide another specimen under direct observation. Refusal to cooperate with the request for a new collection under direct observation will be deemed a test refusal.

8. Give the specimen to the specimen collection personnel and watch the collector break the seal on the specimen bottles, pour the specimen into the primary and split specimen bottles, seal and label them. Initial the labels verifying that the specimen is yours.

9. Read, sign, and date the certification statement, and provide your date of birth, printed name, and day and evening contact telephone numbers in Step 5 of Copy 2 of the CCF.

10. You may wish to indicate on the back of your copy (Copy 5) of the custody and control form any medications you are currently using. This list may serve as a memory jogger in the event a Medical Review Officer calls you to discuss the results of your test, but this is not required. Do not put any personal information on any other copy of the CCF.

11. Watch the collector complete the collector's portion of the CCF and place the specimen bottles and Copy 1 of the CCF inside the leak-resistant plastic pouch.

12. You may now wash your hands and the collector will instruct you that the collection process is over and you may leave. The results of the laboratory analysis will be forwarded to your employer's MRO. If the results are negative (no drugs detected), the MRO will notify your employer. If the laboratory confirms a positive result (drugs detected), or as adulterated or substituted specimen, the MRO will contact you at the telephone number you provided to give you the opportunity to discuss the test results and to submit information demonstrating a medical explanation for the test results.

Instructions for Completing the Federal Drug Testing Custody and Control Form

A. Collector ensures that the name and address of the drug testing laboratory appear on the top of the CCF and the Specimen I.D. number on top of the CCF matches the Specimen I.D. number on the labels/seals.

B. Collector provides the required information in STEP 1 on the CCF. The collector provides a remark in STEP 2 if the donor refuses to provide his/her SSN or Employee I.D. number.

C. Collector gives a collection container to the donor for providing a specimen.

D. After the donor gives the specimen to the collector, the collector checks the temperature of specimen within 4 minutes and marks the appropriate temperature box in STEP 2 on the CCF. The collector provides a remark if the temperature is outside the acceptable range.

E. Collector checks the split or single specimen collection box. If no specimen is collected, that box is checked and a remark is provided. If it is an observed collection, that box is checked and a remark is provided. If no specimen is collected, Copy 1 is discarded and the remaining copies are distributed as required.

F. Donor watches the collector pouring the specimen from the collection container into the specimen bottle(s), placing the cap(s) on the specimen bottle(s), and affixing the label(s)/seal(s) on the specimen bottle(s).

G. Collector dates the specimen bottle label(s) after they are placed on the specimen bottle(s).

H. Donor initials the specimen bottle label(s) after the label(s) have been placed on the specimen bottle(s).

I. Collector turns to Copy 2 (MRO Copy) and instructs the donor to read the certification statement in STEP 5, and to sign, print name, date, provide phone numbers, and date of birth after reading the certification statement. If the donor refuses to sign the certification statement, the collector provides a remark in STEP 2 on Copy 1.

J. Collector completes STEP 4 (i.e., provides signature, printed name, date, time of collection, and name of delivery service), immediately places the sealed specimen bottle(s) and Copy 1 of the CCF in a leak-proof plastic bag, releases specimen package to the delivery service, and distributes the other copies as required.

FEDERAL DRUG TESTING CUSTODY AND CONTROL FORM

SPECIMEN ID NO. 1234567 LAB ACCESSION NO.

1A

OMB No. 0930-0158

STEP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

A. Employer Name, Address, I.D. No.

B. MRO Name, Address, Phone and Fax No.

C. Donor SSN or Employee I.D. No. _____

D. Reason for Test: ☐ Pre-employment ☐ Random ☐ Reasonable Suspicion/Cause ☐ Post Accident ☐ Return to Duty ☐ Follow-up ☐ Other (specify) _____

E. Drug Tests to be Performed: ☐ THC, COC, PCP, OPI, AMP ☐ THC & COC Only ☐ Other (specify) _____

F. Collection Site Address:

Collector Phone No. _____

Collector Fax No. _____

STEP 2: COMPLETED BY COLLECTOR

Read specimen temperature within 4 minutes. Is temperature between 90° and 100° F? ☐ Yes ☐ No, Enter Remark	Specimen Collection: ☐ Split ☐ Single ☐ None Provided (Enter Remark)	☐ Observed (Enter Remark)

REMARKS

STEP 3: Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor initials seal(s). Donor completes STEP 5 on Copy 2 (MRO Copy)

STEP 4: CHAIN OF CUSTODY - INITIATED BY COLLECTOR AND COMPLETED BY LABORATORY

I certify that the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in accordance with applicable Federal requirements.

X _____ Signature of Collector

Time of Collection AM PM ▶

(PRINT) Collector's Name (First, MI, Last)

Date (Mo./Day/Yr.) ▶

SPECIMEN BOTTLE(S) RELEASED TO:

Name of Delivery Service Transferring Specimen to Lab

RECEIVED AT LAB:

X _____ Signature of Accessioner ▶

(PRINT) Accessioner's Name (First, MI, Last)

Date (Mo./Day/Yr.) ▶

Primary Specimen Bottle Seal Intact

☐ Yes

☐ No, Enter Remark Below

SPECIMEN BOTTLE(S) RELEASED TO:

STEP 5a: PRIMARY SPECIMEN TEST RESULTS - COMPLETED BY PRIMARY LABORATORY

☐ NEGATIVE ☐ DILUTE ☐ REJECTED FOR TESTING

☐ POSITIVE for: ☐ MARIJUANA METABOLITE ☐ COCAINE METABOLITE ☐ PCP ☐ CODEINE ☐ MORPHINE ☐ 6-ACETYLMORPHINE ☐ AMPHETAMINE ☐ METHAMPHETAMINE

☐ ADULTERATED ☐ SUBSTITUTED ☐ INVALID RESULT

REMARKS _____

TEST LAB (if different from above) _____

I certify that the specimen identified on this form was examined upon receipt, handled using chain of custody procedures, analyzed, and reported in accordance with applicable Federal requirements.

X _____ Signature of Certifying Scientist

(PRINT) Certifying Scientist's Name (First, MI, Last)

Date (Mo./Day/Yr.)

STEP 5b: SPLIT SPECIMEN TEST RESULTS - (IF TESTED) COMPLETED BY SECONDARY LABORATORY

Laboratory Name

Laboratory Address

☐ RECONFIRMED ☐ FAILED TO RECONFIRM - REASON _____

I certify that the split specimen identified on this form was examined upon receipt, handled using chain of custody procedures, analyzed, and reported in accordance with applicable Federal requirements.

X _____ Signature of Certifying Scientist

(PRINT) Certifying Scientist's Name (First, MI, Last)

Date (Mo./Day/Yr.)

PEEL

1234567 A

SPECIMEN ID NO.

PLACE OVER CAP

1234567

SPECIMEN BOTTLE SEAL

Date (Mo. Day Yr.)

Donor's Initials

PEEL

1234567 B (SPLIT)

SPECIMEN ID NO.

PLACE OVER CAP

1234567

SPECIMEN BOTTLE SEAL

Date (Mo. Day Yr.)

Donor's Initials

COPY 1 - LABORATORY

PRESS HARD - YOU ARE MAKING MULTIPLE COPIES

0000-0000-0225

Drug Form Part 1
Face Inks: 000 BLK / 000 RED
Date: 05/09/00
Not To Use For Colormatch
Follow PMS Guide For Colors

FEDERAL DRUG TESTING CUSTODY AND CONTROL FORM

SPECIMEN ID NO. 1234567 LAB ACCESSION NO.

2A

OMB No. 0930-0158

STEP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

A. Employer Name, Address, I.D. No.

B. MRO Name, Address, Phone and Fax No.

C. Donor SSN or Employee I.D. No. _____

D. Reason for Test: ☐ Pre-employment ☐ Random ☐ Reasonable Suspicion/Cause ☐ Post Accident ☐ Return to Duty ☐ Follow-up ☐ Other (specify) _____

E. Drug Tests to be Performed: ☐ THC, COC, PCP, OPI, AMP ☐ THC & COC Only ☐ Other (specify) _____

F. Collection Site Address:

Collector Phone No. _____

Collector Fax No. _____

STEP 2: COMPLETED BY COLLECTOR

Read specimen temperature within 4 minutes. Is temperature between 90° and 100° F? ☐ Yes ☐ No, Enter Remark

Specimen Collection: ☐ Split ☐ Single ☐ None Provided (Enter Remark)

☐ Observed (Enter Remark)

REMARKS

STEP 3: Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor initials seal(s). Donor completes STEP 5 on Copy 2 (MRO Copy)

STEP 4: CHAIN OF CUSTODY - INITIATED BY COLLECTOR AND COMPLETED BY LABORATORY

I certify that the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in accordance with applicable Federal requirements.

X _____ Signature of Collector

_____ Time of Collection ▶ AM PM

_____ (PRINT) Collector's Name (First, MI, Last)

_____ Date (Mo./Day/Yr.) ▶

SPECIMEN BOTTLE(S) RELEASED TO:

_____ Name of Delivery Service Transferring Specimen to Lab

RECEIVED AT LAB:

X _____ Signature of Accessioner ▶

_____ (PRINT) Accessioner's Name (First, MI, Last)

_____ Date (Mo./Day/Yr.) ▶

Primary Specimen Bottle Seal Intact

☐ Yes

☐ No, Enter Remark Below

SPECIMEN BOTTLE(S) RELEASED TO:

STEP 5: COMPLETED BY DONOR

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct.

X _____ Signature of Donor

_____ (PRINT) Donor's Name (First, MI, Last)

_____ Date (Mo. / Day / Yr.)

Daytime Phone No. (___) _____ Evening Phone No. (___) _____ Date of Birth _____ Mo. Day Yr.

Should the results of the laboratory tests for the specimen identified by this form be confirmed positive, the Medical Review Officer will contact you to ask about prescriptions and over-the-counter medications you may have taken. Therefore, you may want to make a list of those medications for your own records. THIS LIST IS NOT NECESSARY. If you choose to make a list, do so either on a separate piece of paper or on the back of your copy (Copy 5). —DO NOT PROVIDE THIS INFORMATION ON THE BACK OF ANY OTHER COPY OF THE FORM. TAKE COPY 5 WITH YOU.

STEP 6: COMPLETED BY MEDICAL REVIEW OFFICER - PRIMARY SPECIMEN

In accordance with applicable Federal requirements, my determination/verification is:

☐ NEGATIVE ☐ POSITIVE ☐ TEST CANCELLED ☐ REFUSAL TO TEST BECAUSE: ☐ ADULTERATED ☐ SUBSTITUTED ☐ DILUTE

REMARKS _____

X _____ Signature of Medical Review Officer

_____ (PRINT) Medical Review Officer's Name (First, MI, Last)

_____ Date (Mo./Day/Yr.)

STEP 7: COMPLETED BY MEDICAL REVIEW OFFICER - SPLIT SPECIMEN

In accordance with applicable Federal requirements, my determination/verification for the split specimen (if tested) is:

☐ RECONFIRMED ☐ FAILED TO RECONFIRM - REASON _____

X _____ Signature of Medical Review Officer

_____ (PRINT) Medical Review Officer's Name (First, MI, Last)

_____ Date (Mo./Day/Yr.)

0000-0000-0225

COPY 2 - MEDICAL REVIEW OFFICER COPY

Drug Form Part 2
Face Inks: 000 BLK / 000 RED
Date: 05/09/00
Not To Use For Colormatch
Follow PMS Guide For Colors

FEDERAL DRUG TESTING CUSTODY AND CONTROL FORM

SPECIMEN ID NO. 1234567 LAB ACCESSION NO.

OMB No. 0930-0158

STEP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

A. Employer Name, Address, I.D. No.

B. MRO Name, Address, Phone and Fax No.

C. Donor SSN or Employee I.D. No. _____

D. Reason for Test: ☐ Pre-employment ☐ Random ☐ Reasonable Suspicion/Cause ☐ Post Accident ☐ Return to Duty ☐ Follow-up ☐ Other (specify) _____

E. Drug Tests to be Performed: ☐ THC, COC, PCP, OPI, AMP ☐ THC & COC Only ☐ Other (specify) _____

F. Collection Site Address:

Collector Phone No. _____

Collector Fax No. _____

STEP 2: COMPLETED BY COLLECTOR

Read specimen temperature within 4 minutes. Is temperature between 90° and 100° F? ☐ Yes ☐ No, Enter Remark	Specimen Collection: ☐ Split ☐ Single ☐ None Provided (Enter Remark)	☐ Observed (Enter Remark)

REMARKS

STEP 3: Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor initials seal(s). Donor completes STEP 5 on Copy 2 (MRO Copy)

STEP 4: CHAIN OF CUSTODY - INITIATED BY COLLECTOR AND COMPLETED BY LABORATORY

I certify that the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in accordance with applicable Federal requirements.

X _____ Signature of Collector

Time of Collection AM PM ▶

_____ (PRINT) Collector's Name (First, MI, Last)

Date (Mo./Day/Yr.) ▶

SPECIMEN BOTTLE(S) RELEASED TO:

_____ Name of Delivery Service Transferring Specimen to Lab

RECEIVED AT LAB:

X _____ Signature of Accessioner ▶

_____ (PRINT) Accessioner's Name (First, MI, Last)

Date (Mo./Day/Yr.) ▶

Primary Specimen Bottle Seal Intact

☐ Yes

☐ No, Enter Remark Below

SPECIMEN BOTTLE(S) RELEASED TO:

STEP 5: COMPLETED BY DONOR

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct.

X _____ Signature of Donor

_____ (PRINT) Donor's Name (First, MI, Last)

Date (Mo. / Day / Yr.)

Daytime Phone No. ( ) _____ Evening Phone No. ( ) _____ Date of Birth ___ / ___ / ___ Mo. Day Yr.

Should the results of the laboratory tests for the specimen identified by this form be confirmed positive, the Medical Review Officer will contact you to ask about prescriptions and over-the-counter medications you may have taken. Therefore, you may want to make a list of those medications for your own records. THIS LIST IS NOT NECESSARY. If you choose to make a list, do so either on a separate piece of paper or on the back of your copy (Copy 5). —DO NOT PROVIDE THIS INFORMATION ON THE BACK OF ANY OTHER COPY OF THE FORM. TAKE COPY 5 WITH YOU.

STEP 6: COMPLETED BY MEDICAL REVIEW OFFICER - PRIMARY SPECIMEN

In accordance with applicable Federal requirements, my determination/verification is:

☐ NEGATIVE ☐ POSITIVE ☐ TEST CANCELLED ☐ REFUSAL TO TEST BECAUSE:
☐ DILUTE ☐ ADULTERATED ☐ SUBSTITUTED

REMARKS _____

X _____ Signature of Medical Review Officer

_____ (PRINT) Medical Review Officer's Name (First, MI, Last)

Date (Mo./Day/Yr.)

STEP 7: COMPLETED BY MEDICAL REVIEW OFFICER - SPLIT SPECIMEN

In accordance with applicable Federal requirements, my determination/verification for the split specimen (if tested) is:

☐ RECONFIRMED ☐ FAILED TO RECONFIRM - REASON _____

X _____ Signature of Medical Review Officer

_____ (PRINT) Medical Review Officer's Name (First, MI, Last)

Date (Mo./Day/Yr.)

COPY 3- COLLECTOR COPY

Drug Form Part 3
Face Inks: 000 BLK / 000 RED
Date: 05/09/00
Not To Use For Colormatch
Follow PMS Guide For Colors

FEDERAL DRUG TESTING CUSTODY AND CONTROL FORM

SPECIMEN ID NO. 1234567 LAB ACCESSION NO.

OMB No. 0930-0158

STEP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

A. Employer Name, Address, I.D. No.

B. MRO Name, Address, Phone and Fax No.

C. Donor SSN or Employee I.D. No. _____

D. Reason for Test: ☐ Pre-employment ☐ Random ☐ Reasonable Suspicion/Cause ☐ Post Accident ☐ Return to Duty ☐ Follow-up ☐ Other (specify) _____

E. Drug Tests to be Performed: ☐ THC, COC, PCP, OPI, AMP ☐ THC & COC Only ☐ Other (specify) _____

F. Collection Site Address:

Collector Phone No. _____

Collector Fax No. _____

STEP 2: COMPLETED BY COLLECTOR

Read specimen temperature within 4 minutes. Is temperature between 90° and 100° F? ☐ Yes ☐ No, Enter Remark	Specimen Collection: ☐ Split ☐ Single ☐ None Provided (Enter Remark)	☐ Observed (Enter Remark)

REMARKS

STEP 3: Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor initials seal(s). Donor completes STEP 5 on Copy 2 (MRO Copy)

STEP 4: CHAIN OF CUSTODY - INITIATED BY COLLECTOR AND COMPLETED BY LABORATORY

I certify that the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in accordance with applicable Federal requirements.

X _____ Signature of Collector

_____ Time of Collection AM PM ▶

_____ (PRINT) Collector's Name (First, MI, Last)

_____ Date (Mo./Day/Yr.) ▶

SPECIMEN BOTTLE(S) RELEASED TO:

_____ Name of Delivery Service Transferring Specimen to Lab

RECEIVED AT LAB:

X _____ Signature of Accessioner ▶

_____ (PRINT) Accessioner's Name (First, MI, Last)

_____ Date (Mo./Day/Yr.) ▶

Primary Specimen Bottle Seal Intact

☐ Yes

☐ No, Enter Remark Below

SPECIMEN BOTTLE(S) RELEASED TO:

STEP 5: COMPLETED BY DONOR

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct.

X _____ Signature of Donor

_____ (PRINT) Donor's Name (First, MI, Last)

_____ Date (Mo. / Day / Yr.)

Daytime Phone No. (____) _____ Evening Phone No. (____) _____ Date of Birth _____ Mo. Day Yr.

Should the results of the laboratory tests for the specimen identified by this form be confirmed positive, the Medical Review Officer will contact you to ask about prescriptions and over-the-counter medications you may have taken. Therefore, you may want to make a list of those medications for your own records. THIS LIST IS NOT NECESSARY. If you choose to make a list, do so either on a separate piece of paper or on the back of your copy (Copy 5). —DO NOT PROVIDE THIS INFORMATION ON THE BACK OF ANY OTHER COPY OF THE FORM. TAKE COPY 5 WITH YOU.

STEP 6: COMPLETED BY MEDICAL REVIEW OFFICER - PRIMARY SPECIMEN

In accordance with applicable Federal requirements, my determination/verification is:

☐ NEGATIVE ☐ POSITIVE ☐ TEST CANCELLED ☐ REFUSAL TO TEST BECAUSE: ☐ DILUTE ☐ ADULTERATED ☐ SUBSTITUTED

REMARKS _____

X _____ Signature of Medical Review Officer

_____ (PRINT) Medical Review Officer's Name (First, MI, Last)

_____ Date (Mo./Day/Yr.)

STEP 7: COMPLETED BY MEDICAL REVIEW OFFICER - SPLIT SPECIMEN

In accordance with applicable Federal requirements, my determination/verification for the split specimen (if tested) is:

☐ RECONFIRMED ☐ FAILED TO RECONFIRM - REASON _____

X _____ Signature of Medical Review Officer

_____ (PRINT) Medical Review Officer's Name (First, MI, Last)

_____ Date (Mo./Day/Yr.)

COPY 4- EMPLOYER COPY

0000-0000-0225

Drug Form Part 4
Face Inks: 000 BLK / 000 RED
Date: 05/09/00
Not To Use For Colormatch
Follow PMS Guide For Colors

FEDERAL DRUG TESTING CUSTODY AND CONTROL FORM

SPECIMEN ID NO. 1234567 LAB ACCESSION NO.

OMB No 0930-0158

STEP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

A. Employer Name, Address, I.D. No.

B. MRO Name, Address, Phone and Fax No.

C. Donor SSN or Employee I.D. No. _____

D. Reason for Test: ☐ Pre-employment ☐ Random ☐ Reasonable Suspicion/Cause ☐ Post Accident ☐ Return to Duty ☐ Follow-up ☐ Other (specify) _____

E. Drug Tests to be Performed: ☐ THC, COC, PCP, OPI, AMP ☐ THC & COC Only ☐ Other (specify) _____

F. Collection Site Address:

Collector Phone No. _____

Collector Fax No. _____

STEP 2: COMPLETED BY COLLECTOR

Read specimen temperature within 4 minutes. Is temperature between 90° and 100° F? ☐ Yes ☐ No, Enter Remark	Specimen Collection: ☐ Split ☐ Single ☐ None Provided (Enter Remark)	☐ Observed (Enter Remark)

REMARKS

STEP 3: Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor initials seal(s). Donor completes STEP 5 on Copy 2 (MRO Copy)

STEP 4: CHAIN OF CUSTODY - INITIATED BY COLLECTOR AND COMPLETED BY LABORATORY

I certify that the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in accordance with applicable Federal requirements.

X _____ Signature of Collector — Time of Collection AM PM ▶

_____ (PRINT) Collector's Name (First, MI, Last) — Date (Mo./Day/Yr.) ▶

SPECIMEN BOTTLE(S) RELEASED TO:

_____ Name of Delivery Service Transferring Specimen to Lab

RECEIVED AT LAB:

X _____ Signature of Accessioner ▶

_____ (PRINT) Accessioner's Name (First, MI, Last) — Date (Mo./Day/Yr.) ▶

Primary Specimen Bottle Seal Intact

☐ Yes

☐ No, Enter Remark Below

SPECIMEN BOTTLE(S) RELEASED TO:

STEP 5: COMPLETED BY DONOR

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct.

X _____ Signature of Donor — _____ (PRINT) Donor's Name (First, MI, Last) — Date (Mo. / Day / Yr.)

Daytime Phone No. (___) _____ Evening Phone No. (___) _____ Date of Birth Mo. / Day / Yr.

Should the results of the laboratory tests for the specimen identified by this form be confirmed positive, the Medical Review Officer will contact you to ask about prescriptions and over-the-counter medications you may have taken. Therefore, you may want to make a list of those medications for your own records. THIS LIST IS NOT NECESSARY. If you choose to make a list, do so either on a separate piece of paper or on the back of your copy (Copy 5). —DO NOT PROVIDE THIS INFORMATION ON THE BACK OF ANY OTHER COPY OF THE FORM. TAKE COPY 5 WITH YOU.

STEP 6: COMPLETED BY MEDICAL REVIEW OFFICER - PRIMARY SPECIMEN

In accordance with applicable Federal requirements, my determination/verification is:

☐ NEGATIVE ☐ POSITIVE ☐ TEST CANCELLED ☐ REFUSAL TO TEST BECAUSE: ☐ DILUTE ☐ ADULTERATED ☐ SUBSTITUTED

REMARKS _____

X _____ Signature of Medical Review Officer — _____ (PRINT) Medical Review Officer's Name (First, MI, Last) — Date (Mo./Day/Yr.)

STEP 7: COMPLETED BY MEDICAL REVIEW OFFICER - SPLIT SPECIMEN

In accordance with applicable Federal requirements, my determination/verification for the split specimen (if tested) is:

☐ RECONFIRMED ☐ FAILED TO RECONFIRM - REASON _____

X _____ Signature of Medical Review Officer — _____ (PRINT) Medical Review Officer's Name (First, MI, Last) — Date (Mo./Day/Yr.)

COPY 5- DONOR COPY

5A

0000-0000-0225

Drug Form Part 5
Face Inks: 000 BLK / 000 RED
Date: 05/09/00
Not To Use For Colormatch
Follow PMS Guide For Colors

Privacy Act Statement: (For Federal Employees Only)

Submission of the information on the attached form is voluntary. However, incomplete submission of the information, refusal to provide a urine specimen, or substitution, or adulteration of a specimen may result in a delay or denial of your application for employment/appointment or may result in removal from the Federal service or other disciplinary action.

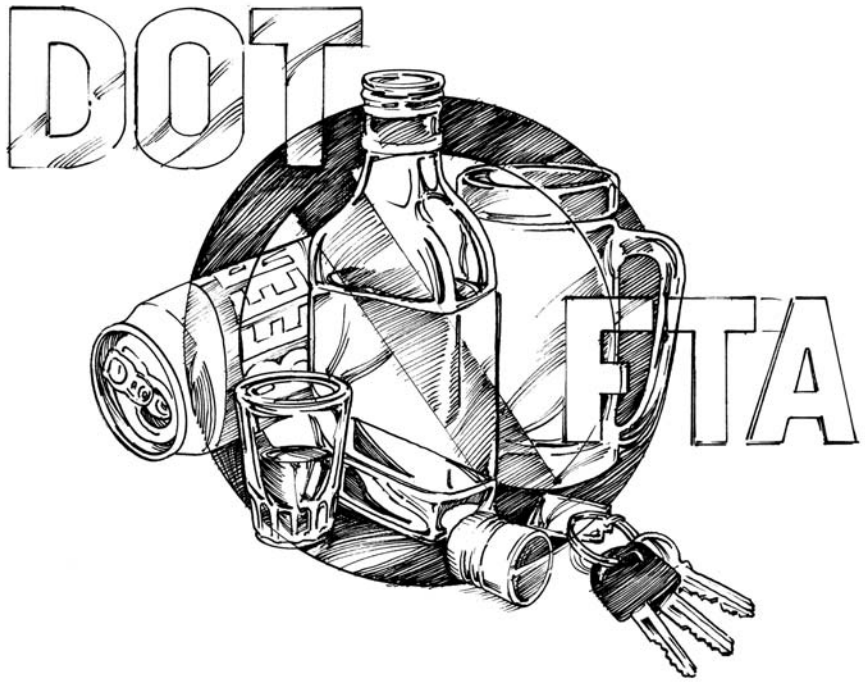
The authority for obtaining the urine specimen and identifying information contained herein is Executive Order 12564 ("Drug-Free Federal Workplace"), 5 U.S.C § 3301 (2) 5 U.S.C § 7301, and Section 503 of Public Law 100-71, 5 U.S.C § 7301 note. Under provisions of Executive Order 12564 and 5 U.S.C. 7301, test results may only be disclosed to agency officials on a need-to-know basis. This may include the agency Medical Review Officer, the administrator of the Employee Assistance Program, and a supervisor with authority to take adverse personnel action. This information may also be disclosed to a court where necessary to defend against a challenge to an adverse personnel action.

Submission of your SSN is not required by law and is voluntary. Your refusal to furnish your number will not result in the denial of any right, benefit, or privilege provided by law. Your SSN is solicited, pursuant to Executive Order 9397, for urinalysis testing for illegal drugs. If you refuse to indicate your SSN, a substitute number or other identifier will be assigned as required, to process the specimen.

In the event laboratory analysis determines the presence of one or more illegal drugs in the specimen you provide, you will be contacted by an agency Medical Review Officer (MRO). The MRO will determine whether there is a legitimate medical explanation for the drug(s) identified by urinalysis.

Paperwork Reduction Act Notice (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information, including the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information is estimated for each respondent to average: 5 minutes/donor; 4 minutes/collector; 3 minutes/laboratory; and 3 minutes/Medical Review Officer. Federal Employees may send comments regarding these burden estimates, or any other aspect of this collection of information including suggestion for reducing the burden to the SAMHSA Reports Clearance Officer, Paperwork Reduction Project (0930-0158), Room 16-105, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this project is 0930-0158.



Chapter 8. ALCOHOL TESTING PROCEDURES

The FTA regulation (49 CFR Part 655) requires that you conduct breath alcohol testing on safety-sensitive employees consistent with 49 CFR Part 40, Subparts J through N. The alcohol test consists of an initial screen test, that if not negative, is followed by a confirmatory test. A breath alcohol test measures the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath. Alcohol is the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols. The test measures the concentration of alcohol regardless of its source. Thus, it will detect alcohol consumed as a beverage, candy, food, medicine, or other product where the quantity of alcohol results in a breath alcohol concentration above the minimum cut-off levels.

Only saliva and breath tests using approved devices are authorized by the DOT for alcohol screen tests, and only breath tests are authorized for confirmatory alcohol tests. **Urine and blood tests are not allowed for DOT covered alcohol tests.**

The FTA regulation (§40.23) prohibits any employer from allowing an employee with an alcohol concentration of 0.04 or greater to perform any safety-sensitive duties until he/she has been evaluated by an SAP and has passed a return-to-duty test. An employee with an alcohol concentration of 0.02 or greater, but less than 0.04, must be removed from duty for 8 hours or until a retest shows an alcohol concentration of less than 0.02.

Section 1. ALCOHOL TESTING DEVICES

The initial screen test may be conducted using an evidential breath testing device (EBT) or a non-evidential alcohol screen device (ASD) using breath or saliva. The confirmatory test can only be conducted using an EBT.

Alcohol Screen Devices (ASD) (§40.3). An ASD is a breath or saliva device, other

than an EBT, that is approved by the National Highway Traffic Safety Administration (NHTSA) and placed on a conforming products list (CPL) for such devices. At the time of publication, the CPL had 16 testing devices that had been approved as ASDs. Two of these were saliva tests and 14 were non-evidential breath tests.

ASDs may only be operated by trained and qualified Screen Test Technicians (STT). Only ASDs on the NHTSA conforming products lists that have instructions for them included in Part 40 may be used to conduct DOT alcohol screening tests (§40.229). An ASD can only be used for a screen test and may not be used for a confirmatory test.

Evidential Breath Testing Device (EBT) (§40.231). An EBT is a device that measures an employee's alcohol concentration. It must be able to distinguish alcohol from acetone at the 0.02 alcohol concentration level. EBTs must be capable of conducting air blank tests and external calibration checks, and they must be approved by NHTSA and operated by qualified and trained Breath Alcohol Technicians.

The Conforming Products List (CPL) of EBT devices that was current as of the date of this document's publication is provided in the Sample Documentation section of this chapter. When viewing the CPL, special note should be made that only those devices listed without an asterisk (*) are authorized for use in confirmatory alcohol testing under the DOT alcohol testing program. NHTSA will occasionally print updates to their CPL of EBTs in the *Federal Register.* This list can be found at: http://www.nhtsa.dot.gov /people/injury/alcohol/ebtcpl021003FR.pdf.

For confirmation tests, EBTs must be able to:

- Print each test result in triplicate or three consecutive identical copies;
- Assign a unique number to each completed test, allow the BAT and the employee to read the number before each test, and print the number on each copy of the result;
- Print on each copy of the result the manufacturer's name for the device, the device's serial number, and the time of the test;
- Distinguish alcohol from acetone at the 0.02 alcohol concentration level;
- Test air blanks; and
- Perform external calibration checks.

Each EBT device must have a manufacturer-developed quality assurance plan approved by NHTSA (§40.233). The plan must include the following:

- A designated method or methods to perform external calibration checks of the device;

- Specified minimum intervals for performing external calibration checks that account for different frequencies of use, environmental conditions (e.g., temperature, altitude, humidity), and contexts of operation (e.g., stationary or mobile use);

- Specified tolerances on an external calibration check within which the EBT is regarded to be in proper calibration; and

- Specified inspection, maintenance, and calibration requirements and intervals for the device.

The regulation specifically requires that the employer comply with the NHTSA-approved quality assurance plan by ensuring that the external calibration checks of each EBT are performed as described in the manufacturer's plan and that the EBT will be taken out of service if any external calibration check results in a reading outside the tolerances for the device. The EBT cannot be placed back into service until it has been repaired and has had an acceptable external calibration check. The employer must also ensure that the inspection, maintenance, and calibration of each EBT is performed by the manufacturer or a maintenance representative certified by the device's manufacturer or an appropriate state agency. The employer must also maintain records of the external calibration checks of the EBT and store the EBT in a secure place when not being used. If the employer delegates these duties to a service agent, the employer remains responsible for ensuring that these requirements are met.

Provisions should be made for a backup EBT for times when the primary EBT is unavailable, out of calibration, or being serviced. You could acquire a second instrument, arrange for a "loaner," or arrange to use another transit agency or DOT employer's EBT when necessary. Other DOT employers might include school bus agencies, trucking companies, airlines, railroads, city/county public works departments, etc.

Section 2. ALCOHOL TESTING PERSONNEL

Screen Test Technicians (STT) and Breath Alcohol Technicians (BAT) are the only people authorized to conduct DOT alcohol tests. STTs may conduct screen tests only, whereas a BAT can conduct both screen tests and confirmatory tests.

Screen Test Technician (40.213). To serve as an STT, an individual must have basic knowledge about the alcohol testing process as specified in 49 CFR Part 40 and current DOT alcohol testing program guidance materials. The STT must have qualifications training that follows the DOT Model STT course, or an equivalent. The STT must demonstrate proficiency in following the alcohol testing procedures and in the operation of the alcohol screen device that he/she will be using. Proficiency will be demonstrated by completing five consecutive error-free mock tests under the direct observation and scrutiny of a qualified monitor. If the alcohol screen device that the STT will be using indicates readings by changes, contrasts, or other readings in color, the STT must demonstrate as part of the proficiency demonstration that he/she is able to discern the changes, contrasts, or readings correctly. STTs are required to undergo refresher training every 5 years and error correction training anytime a mistake results in a cancelled test. See Chapter 5 for a more detailed discussion of the STT training requirements.

Breath Alcohol Technician (§40.213). Breath alcohol technicians must know the alcohol testing rule and the alcohol testing program guidance materials published by the DOT Office of Drug and Alcohol Policy and Compliance (ODAPC). These materials can be obtained at www.dot.gov/ost/dapc. BATs must receive qualifications training that is in accordance with the DOT Model BAT course, and be "trained to proficiency" in the operation of the EBT he/she will be using as well as the alcohol testing procedures specified in the regulation. The DOT Model course or equivalent must provide training in the principles of EBT methodology, operation, and calibration checks. In addition, the BAT must complete training on the fundamentals of breath analysis for alcohol content, the procedures required for obtaining a breath specimen, and interpreting and recording EBT results.

The BAT must demonstrate competence in the operation of the specific EBT he/she will use. Proficiency demonstrations must include seven consecutive error-free mock collections performed before a qualified monitor. The BAT will also be required to receive refresher training every 5 years and error-correction training anytime a mistake results in a cancelled test. See Chapter 5 for a more detailed discussion of the BAT training requirements.

If one BAT is selected as the primary EBT operator, provisions should be made for backup services. Each BAT/STT is required to maintain documentation showing that he/she has successfully met all the requirements. This documentation must be made available to employers and DOT representatives upon request. Employers should periodically check their service agent's records to ensure that the minimum training and proficiency demonstration requirements are being met.

The immediate or direct supervisor of an employee cannot serve as the BAT or STT for that employee's test. Law enforcement officers who have been certified by state or local governments to conduct breath alcohol tests on the EBT or ASD that was used for the test are deemed to be qualified as BATs and are not required to complete the DOT training requirements. If local law enforcement agencies will be used to conduct alcohol testing services under the DOT regulations, the alcohol testing devices utilized should be checked against the NHTSA conforming products list to determine if they qualify as EBTs.

Section 3. ALCOHOL TESTING SITES

Alcohol Testing Site (§40.221). Alcohol test sites should provide visual and aural privacy. The alcohol test can be performed in a medical facility, employer's facility, a mobile collection facility (e.g., a van equipped for alcohol testing) or any other facility meeting the privacy requirements.

EBTs and ASDs can be purchased and operated directly by the transit system or any service agent willing to perform breath testing services. If possible, alcohol tests should be performed at the same location used to collect urine for drug tests. By conducting the alcohol and drug tests in the same location, the time and logistical

problems associated with the collection process will be minimized when an employee will be taking both an alcohol and a drug test. Remember, in instances where a drug and alcohol test will both be conducted, the alcohol test is to be performed first and without undue delay.

In unusual circumstances (e.g., accident, reasonable suspicion) when an alcohol testing site meeting these requirements is not available, the alcohol test can be conducted in a manner that provides the employee with privacy to the greatest extent practicable (i.e., back of a supervisor's car at an accident scene).

Testing sites must have the necessary personnel, materials, equipment, and facilities to conduct the test. The testing site must prevent unauthorized individuals from entering the testing area. The only people who should be authorized to enter the testing site are the employees being tested, BATs, STTs, and other alcohol testing site workers, DERs, and DOT agency representatives. Employee representatives should be allowed to enter only if authorized by the employer's policy or labor management agreement. Anyone entering the site must be supervised by the BAT/STT, and he/she may be removed from the site anytime the BAT/STT believes the individual is obstructing, interfering with, or causing unnecessary delays in the testing process. No one other than the BAT/STT, employee, and/or DOT agency representative may actually witness the testing process.

The EBT and ASDs must be stored in a secure place when not in use. The site must be secured with no unauthorized access at any time the EBT is unsecured or when testing is occurring. The BAT must conduct only one test at a time and must not leave the testing site while the preparations for testing or the test itself are in progress.

Recommendation
Locating Rural Alcohol Testing Sites

The number, location, and availability of alcohol breath testing services may be limited, especially in very rural areas. Employers who are experiencing difficulty finding alcohol testing sites may wish to join forces with other transportation employers in your region to purchase EBT and BAT services as a group (see Chapter 11,"Joining a Consortium)." Transportation employers may include transit systems, trucking firms, school bus operations, or other agencies that have drivers holding CDLs.

In very rural areas, some transit agencies conduct their own initial screens using inexpensive saliva ASDs, and then using local law enforcement agencies to conduct confirmatory tests using their EBTs. This arrangement is less expensive for the transit system because they need not purchase or maintain an EBT. Yet, it is not a burden on the local law enforcement agency since they will be called upon on only in the rare event that the initial screen indicates a breath alcohol concentration of 0.02 or greater. This approach will only work if the local law enforcement agency agrees and the confirmatory test can be performed within 30 minutes of the screen test.

This method should be implemented with caution to avoid any perception of testing as a "police" action. However, where there are no alternatives, use of local law enforcement agencies may be the only workable option.

Any employer, new or existing, that needs to establish alcohol testing services within its service area should consider the following procedures for identifying potential vendors:

1. Develop specifications for EBT/ASD and BAT/STT services consistent with 49 CFR Part 40. Estimate the number and types of tests to be performed throughout the year. Specify the hours of required

availability and the need for backup equipment and trained personnel.

2. Confer with other employers in your region who must purchase alcohol testing services to satisfy DOT regulations. Determine how these employers are meeting the requirement for testing. Identify potential contractors and consortia (private and public) for testing services.

3. Investigate the current and potential availability of EBT/ASD and BAT/STT services in the local community and evaluate the level of interest in the provision of testing services.

4. Select an alcohol collection site. If possible, the alcohol specimen collection site should be the same as the drug specimen collection site.

5. Develop a contract that specifies the obligation of the collection site to maintain equipment quality standards and BAT/STT qualifications, refresher, and error-correction training consistent with 49 CFR Part 40 throughout the duration of the contract. Require that sufficient records of the quality control measures, equipment calibration, and training be provided for documentation.

Section 4. ALCOHOL BREATH TESTING PROCESS

The following procedures must be used to conduct the alcohol breath test:

Preparation (§40.241). Upon arrival at the alcohol collection site, the employee must check in to have his/her arrival time noted. If the employee arrived late as determined by the employer, the BAT/STT must notify the DER immediately and follow the DER's instructions. A late arrival may be considered a test refusal.

As soon as the employee arrives at the testing site, the testing process should begin without undue delay. If both a drug and alcohol test are to be performed, the alcohol test is to be conducted first unless practical considerations warrant otherwise. The process is not to be delayed to await an employer or employee representative.

The employee must provide positive identification to the BAT/STT. The identification can be a company photo identification card or a photo identification card issue by a federal, state, or local government (e.g., driver's license). Faxes and photocopies of identification will not be accepted. Positive identification by an official employer representative (e.g., supervisor) is acceptable. If the employee does not produce the proper identification, the BAT/STT must contact the DER to verify the identity of the employee.

The BAT/STT will explain the testing procedure to the employee and show him/her the instructions on the back of the alcohol testing form. The new Alcohol Testing Form, (ATF) printed as Appendix G of Part 40, must be used for all DOT covered alcohol tests performed since February 1, 2002. Only the DOT ATF can be used for a DOT alcohol test. The DOT ATF cannot be used for non-DOT alcohol tests. A copy of the ATF is provided in the Sample Documentation section of this chapter.

The BAT/STT completes Step 1 of the ATF by filling in the information regarding the employee, employer, DER and reason for the test. The employee is directed to complete Step 2 of the ATF and sign the certification. If the employee refuses to sign the certification in Step 2 of the process, it will be considered a test refusal, the test will be halted, and the DER will be notified immediately.

Screen Tests. The screen test will be given with an EBT or ASD. If an EBT or non-evidential breath testing device is used (§40.243), an individually wrapped mouth piece will be selected by the BAT/STT or the employee. The mouthpiece will be attached to the device, and the employee will be instructed to blow forcefully into the mouthpiece for 6 seconds, or until the device indicates that a sufficient amount of breath has been obtained. The displayed result will be shown to the employee. The test results will be recorded on the ATF.

If a saliva ASD is used for the screen test (§40.245), the STT will check the expiration date on the device and show it to the employee. The package will be opened in the presence of the employee, and the STT will offer the device to the employee, instructing him/her to insert it into his/her mouth until it becomes saturated with saliva. If the test does not activate, or the employee chooses not to use the device, the STT will insert the device into the employee's mouth and gather the saliva. Upon removal of the device from the mouth, the STT will check to see if the device was activated. If so, the STT will await the appropriate time defined by the manufacturer and then read the result displayed. In all cases, the result must be read within 15 minutes of the test. The STT will show the result to the employee and enter the result on the ATF. If the test cannot be completed, one reattempt is allowed. If the reattempt is not successful, the employee must be directed to take a new test immediately using an EBT.

Confirmation Test (§40.251). If the result of the screen test is an alcohol concentration of less than 0.02, no further testing is required, and the BAT/STT will report the result to the DER as a negative test. The employee may then return to his/her safety-sensitive position. If the result of the screen test is an alcohol concentration of 0.02 or greater, a confirmation test must be performed.

The confirmation test must be conducted at least 15 minutes, but not more than 30 minutes, after the completion of the screen test. This delay prevents any accumulation of alcohol in the mouth from leading to an artificially high reading, as any residual amount of alcohol left in the mouth will dissipate prior to the confirmation test.

At the conclusion of the screen test, the BAT/STT will inform the employee of the need to conduct a confirmation test and instruct the employee not to eat, drink, or put any object or substance in his or her mouth. The BAT/STT will also instruct the employee not to belch to the extent possible while awaiting the confirmation test. The BAT/STT must inform the employee why the waiting period is needed and that while it is in the employee's best interest to follow the instructions, the test will be conducted at the end of the waiting period, even if they are disregarded.

If more than 30 minutes have elapsed since the time of the screen test, the cause for the delay must be documented, but the test remains valid.

Before the confirmation test is administered, the BAT shall conduct an air blank on the EBT in the presence of the employee. If the reading is greater than 0.00, the BAT shall conduct one more air blank. If the second air blank reading is greater than 0.00, the EBT must not be used to conduct the test.

The confirmation test is conducted using the same procedures as the screening test. A new mouthpiece will be used and inserted into the EBT. The employee will be instructed to blow forcefully into the mouthpiece for at least 6 seconds, or until the device indicates it has an adequate breath sample. The result on the display must be shown to the employee. The result and unique test number that the EBT prints out must also be shown to the employee.

The BAT will sign and date the form. If the test result is less than 0.02, the test is over, the employer will be given his/her copy of the ATF, and the employee will be dismissed. If the test result is 0.02 or above, the BAT will instruct the employee to sign and date the certification statement on Step 4 of the ATF (It is not a test refusal if the employee refuses to sign Step 4 of the ATF). The BAT will immediately transmit the results directly to the DER so the employee can be immediately removed from safety-sensitive duties. The BAT will attach the alcohol test result printout directly onto the ATF with tamper evident tape (unless the results are printed directly on the form).

If the initial and confirmatory test results are different, the confirmation test result is deemed to be the final result. An employer cannot take action against an employee under these regulations for a positive screen test (i.e., 0.040 or greater) when the confirmatory test result is negative (i.e., 0.039 or less). If the alcohol test is positive, the employer should make arrangements to drive the employee from the collection site to avoid liability.

Reporting. The BAT will transmit all results to the DER confidentially (in writing, in person, by telephone, or other electronic means). In the event an individual must be removed from safety-sensitive duties (0.02 or above or test refusal), the BAT will notify

the employer's representative immediately. The DER must have a mechanism to establish the identity of the BAT when test results or other confidential information is provided over the phone or electronically (e.g., password). The EBT will produce a printout of the test results in triplicate or print three consecutive identical copies of the results. The three copies of the printout will be attached to each of the three copies of the ATF. Copy 1 must be retained by the BAT, Copy 2 must be provided to the employee, and Copy 3 must be transmitted to the employer.

Test Refusal (§40.261). Similar to drug testing, there are a number of behaviors defined in the regulation that constitute an alcohol test refusal. These are listed below.

- Failure to appear for the test within the timeframe defined by the employer.
- Failure to remain at the testing site until the testing process is complete.
- Failure to attempt to provide a specimen.
- Failure to provide sufficient breath with no valid medical explanation for the inability to provide the required specimen.
- Failure to undergo a medical examination associated with insufficient volume procedures.
- Failure to sign the certification on Step 2 of the ATF.
- Failure to cooperate with the collection process.

Anytime an employee exhibits any of these behaviors, the BAT/STT must immediately terminate the test, notify the DER directly, and note the test refusal on the form.

The DOT and the FTA do not require pre-employment alcohol testing. However, if a DOT covered agency chooses to perform pre-employment alcohol testing, it may do so as long as the DOT testing procedures are followed. (§655.41). Applicants who do not appear for a pre-employment alcohol test or leave the collection site prior to commencement of the alcohol testing process are not deemed to have refused a pre-employment alcohol test.

Insufficient Volume (§40.263; §40.265). If an employee attempts and fails to provide enough breath, the BAT must instruct the employee to make another attempt to provide a sufficient breath specimen. The BAT should provide additional instruction on the technique that should be followed and coach the employee through the process. If the second attempt is unsuccessful, the BAT may provide another opportunity to the employee to provide a specimen if the BAT believes it is likely that the next attempt would be successful.

If the individual is still unable to provide a sufficient breath specimen, the BAT may attempt to operate the EBT in manual mode, or they may use a saliva ASD, if available. If attempts are still unsuccessful, the BAT/STT will contact the DER and note the insufficient volume on the ATF. The employer must then inform the employee that he/she has 5 days to obtain a medical evaluation from a licensed physician to determine if the insufficient volume had a valid medical explanation.

The physician has to be acceptable to the employer and must have expertise in the medical issues related to the insufficient volume. The physician shall determine if a medical condition is present, and if so determine if the condition has, or with a high degree of probability could have, precluded the employee from providing a

sufficient amount of breath. A medical condition includes any ascertainable physiological condition or a medically documented pre-existing psychological disorder. This does not include unsupported assertions of "situational anxiety" or hyperventilation.

If no valid medical explanation is found, the insufficient volume is considered a test refusal. If a valid medical explanation is provided, the test will be cancelled.

Incomplete or Cancelled Tests (§40.267). To protect the integrity of the test and to ensure accurate results, the procedures for conducting an alcohol breath test are rigorous. Alcohol confirmation tests are considered invalid when the following occurs:

- A saliva test is used for a screen test after its expiration date, the waiting time specified by the manufacturer is not adhered to, or the device is not activated;
- The BAT does not wait 15 minutes between the screening and confirmatory tests;
- A valid air blank test is not performed before each confirmation test;
- The air blank conducted before the confirmation test has a reading other than 0.00;
- The EBT fails to print the confirmation results;
- The sequential test number on the EBT is not the same as the number on the printout, or the alcohol concentration displayed on the EBT is different from what was printed out; or
- The external calibration check of the EBT produces a result outside the allowed tolerance levels. In this case, every test result of 0.02 or above obtained on the EBT since the last valid external calibration check will be cancelled (§40.267).

These results are considered "fatal flaws" and cannot be corrected. The test is cancelled and considered neither positive nor negative. Cancelled tests must be reported to the DER within 48 hours of the cancellation. The employee must be treated as if the test never occurred. If the employee needs a negative test result for a return-to-duty or follow-up test, a retest must be performed. Otherwise, a retest following a cancelled test is prohibited. A cancelled test does not count toward the minimum random testing rate requirements.

Other problems that occur are considered correctable. If the BAT/STT becomes aware of a problem during the testing process, the BAT/STT must try to correct the problem immediately and, if necessary, repeat the test. If a test is repeated, the BAT/STT is not limited to the number of attempts that can be made to complete the test as long as the employee is making a good faith effort to provide the breath specimen. If a testing device is inoperable, efforts must be made to locate another testing device to complete the test.

If the BAT/STT or employer becomes aware of a "correctable flaw" that has not already been corrected, the individual must take all practicable actions to correct the problem so that the test is not cancelled. If these problems are not corrected, the test must be cancelled.

Examples of errors that require corrective action include the following:

- The BAT/STT does not sign the ATF;
- If the employee fails to sign Step 4 of the ATF, and the BAT/STT neglects to note such in the Remarks section of the ATF; and
- The BAT/STT uses a non-DOT alcohol testing form for a DOT test.

All "fatal" and "correctable" flaws must be documented. No person concerned with the testing process including the employer, employee representative, arbitrator, etc., may declare a test cancelled based on a mistake in the process that does not have a significant adverse effect on the right of the employee to a fair and accurate test. Thus, minor administrative mistakes or an error that does not affect employee protections cannot be used as grounds to cancel DOT test results.

Section 5. EMPLOYER RESPONSIBILITIES

Employers are responsible for ensuring that all aspects of the alcohol testing program are in compliance with 49 CFR Part 40. Even though employers may hire service agents to perform the testing functions, the employer cannot delegate the responsibility for compliance. An FTA recipient or subrecipient whose service agents do not meet, or who violate, applicable requirements and procedures of Part 40 will be deemed to be out of compliance and subject to losing their FTA funding.

All written or unwritten contracts, agreements, or arrangements with service agents concerning the provision of DOT drug and alcohol testing services are deemed, as a matter of law, to require compliance with all applicable DOT and FTA drug and alcohol testing regulations (§40.11).

Employer Actions. Once an employer is notified by the BAT/STT of a confirmed positive alcohol test result (≥ 0.04) or a test refusal, the employer must immediately remove the employee from safety-sensitive job duties. The employer must not wait for the written report from the BAT. The employee cannot be returned to safety-sensitive duty until the employee has successfully completed the return-to-duty process as defined further in Chapter 9 of these Guidelines.

A test result that is 0.02 or greater, but less than 0.04 is not a positive test under the regulations and, therefore, does not have the same consequences. Since the test result is also non-negative, the employee must be removed from safety-sensitive duties and cannot be allowed to return until the next regularly scheduled duty period, but not less than 8 hours. The employee may perform safety-sensitive functions earlier if a retest indicates an alcohol concentration of less than 0.02. Because an alcohol test result in this range is not positive, employers may not impose any additional consequences under FTA authority. However, employers may establish consequences for a non-negative test result under their independent authority that is otherwise consistent with law. For example, some employers discipline employees that have been removed from duty because of a non-negative test result as an unexcused absence and not as a violation of the FTA drug and alcohol testing rule.

In addition to stipulating the consequences of a positive alcohol test result, employers should clearly specify in their company plan other employee actions that are prohibited by the FTA regulation. Prohibited employee conduct includes the following:

- Using alcohol while performing safety-sensitive functions;
- Using alcohol within 4 hours prior to performing safety-sensitive functions;
- Performing a safety-sensitive function with an alcohol concentration of 0.04 or greater;
- Consuming alcohol while on-call; and
- Using alcohol within 8 hours following a covered accident unless the employee has already taken a post-accident alcohol test.

Employers must not permit a safety-sensitive employee to perform a safety-sensitive function if that employee has violated any of these provisions. Employers should also establish consequences for each of the prohibited behaviors.

The summary on the following page provides a quick reference of test results and subsequent employer actions. For more explanation, the regulatory text should be consulted.

If a test is cancelled when a negative test is required (i.e., return-to-duty, follow-up), the employer must send the employee back for another test. The employer cannot add any consequences to a cancelled test. The employer is not allowed to alter an alcohol test result once confirmed by the BAT.

Summary of Test Results and Subsequent Employer Actions

Test Result	Verified Result	Employer Action
Negative	**Negative**	**No Action**
Confirmation Test ≥ 0.02, but < 0.04 [§40.23; §655.48; §655.61]	**Not Negative—Not a Rule Violation**	**Remove From Safety-Sensitive Duty For 8 Hours Unless a Retest Results in < 0.02; Employer Consequence Under Company's Independent Authority**
Confirmation Test ≥ 0.04 [§40.23; §655.61]	**Positive**	**Remove From Safety-Sensitive Duties; Refer to SAP; Employer Consequence**
Test Refusal [§40.261; §655.49]	**Test Refusal—Rule Violation**	**Removal From Duty; Refer to SAP; Employer Consequence**
Insufficient Volume With Medical Explanation [§40.265]	**Cancelled**	**No Action**
Insufficient Volume With No Medical Explanation [§40.265]	**Test Refusal—Rule Violation**	**Removal From Duty; Refer to SAP; Employer Consequences**
Fatal Flaw (Random, Post-Accident, Reasonable Suspicion) [§40.267]	**Cancelled**	**No Action**
Fatal Flaw (Return-to-Duty, Follow-up)[§40.273]	**Cancelled**	**Retest**
Consumption of Alcohol While Performing Safety-Sensitive Duties [§655.32]	**Rule Violation**	**Remove From Safety-Sensitive Duties; Employer Consequence**
Consumption of Alcohol Within 4 Hours of Performing Safety-Sensitive Duties [§655.33(a)]	**Rule Violation**	**Remove From Safety-Sensitive Duties; Employer Consequences**
Consumption of Alcohol While On-Call—Employee Refuses Work [§655.33(b)]	**No Rule Violation**	**Employer Consequences for Missed Assignment**
Consumption of Alcohol While On-Call—Employee Reports for Work [§655.33(b)]	**Rule Violation if Alcohol Level ≥ 0.02**	**Remove from Safety-Sensitive Duties; Employer Consequences**
Consumption of Alcohol Within 8 Hours Following An Accident Without Previously Undergoing an Alcohol Test [§655.34]	**Rule Violation if Alcohol Level ≥ 0.02**	**Removal From Safety-Sensitive Duties; Employer Consequences**

Sample Documentation

Highway Safety Programs; Conforming Products List of Screening Devices to Measure Alcohol in Bodily Fluids

[Federal Register: May 4, 2001 (Volume 66, Number 87)]
[Notices]
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From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr04my01-164]

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2001-9324]

Highway Safety Programs; Conforming Products List of Screening Devices To Measure Alcohol in Bodily Fluids

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice amends the Conforming Products List (CPL) of devices that conform to the Model Specifications for Screening Devices that Measure Alcohol in Bodily Fluids (59 FR 39382).

EFFECTIVE DATE: May 4, 2001.

FOR FURTHER INFORMATION CONTACT: Dr. James F. Frank, Office of Research and Traffic Records, Research and Evaluation Division (NTS-31), National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590; Telephone: (202) 366-5593.

SUPPLEMENTARY INFORMATION: On August 2, 1994, Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids were published in the Federal Register (59 FR 39382). In these model specifications, NHTSA recognized industry efforts to develop new technologies. These specifications established performance criteria and methods for testing alcohol screening devices using either breath or other bodily fluids to measure alcohol content. NHTSA established these specifications to support State laws that target youthful offenders (i.e., ``zero tolerance'' laws) and the Department of Transportation's workplace alcohol testing program. NHTSA published its first CPL for screening devices on December 2, 1994 (59 FR 61923; with a correction in 59 FR 65128). Five devices were on that first list.

On August 15, 1995, NHTSA amended its CPL of screening devices to measure alcohol in bodily fluids in the Federal Register (60 FR 42214) by adding two additional devices to the list, thereby bringing the list to seven devices.

Since the publication of that list, five additional devices have been evaluated at the Volpe National Transportation Systems Center in Cambridge, MA and found to conform to the model specifications. Accordingly, these five devices, listed in alphabetical order, are being added to the CPL.

The first new listing is the ``Alcohol ^{TM}'' disposable breath alcohol tubes manufactured by Akers Laboratories, Inc., of Thorofare, NJ. These are disposable tubes that use a potassium dichromate color change to indicate whether the BAC of a breath sample is above the 0.02 threshold. These devices passed all requirements of the model specifications except when read under sodium vapor lighting conditions. Hence, they are approved for use except under sodium vapor lighting conditions, and the manufacturer's package insert specifies this limitation.

The second new listing is the Alco Check 9000 manufactured by Alco Check International of Hudsonville, MI. This device differs from the Alco Check 3000 D.O.T. and the Alco Screen 3000 (the same device sold under two different names) in that it allows for the storage and retrieval of test data by use of an added memory chip. As the Alco Check 3000 D.O.T. and the Alco Screen 3000 already conform to these model specifications, and the added memory chip does not change the alcohol-measuring capability of the device, NHTSA did not require the new Alco Check 9000 to be retested before listing it on this CPL for screening devices.

The third new device on the CPL is the ABI (Alcohol Breath Indicator) manufactured by HAN International Co. Ltd. of Seoul, Korea. This is an electronic device with a two-digit numerical display that uses a semi-conductor sensor.

The last two devices are the ``PAS IIIa'' and the ``PAS Vr'' manufactured by PAS Systems International, Inc. of Fredericksburg, VA. These are both electronic devices that use a fuel cell sensor with a two-digit numerical display. The PAS IIIa and PAS Vr are modifications of two different passive alcohol sensors made by the same company, but with a disposable mouthpiece added so that an appropriate deep-lung air sample can be obtained for breath measurements.

Two housekeeping items are also addressed in this notice. First, the company previously listed as STC Diagnostics, Inc. has changed its name to OraSure Technologies, Inc. and the new CPL reflects the inclusion of the new company name in addition to the old one. The name of its product, the Q.E.D. A150 Saliva Alcohol Test, remains the same. Second, there are a number of handheld breath test devices on the NHTSA CPL for Evidential Breath Testers that frequently are used as screening devices. It should be noted that any device on the most recent NHTSA CPL for EBTs which was published on July 21, 2000 (65 FR 45419) that was tested against the 1993 Model Specifications for Evidential Breath Testers (58 FR 48705) also fully meets the requirements of the Model Specifications for Screening Devices that Measure Alcohol in Bodily Fluids. Both procedures evaluate the performance of instruments at the 0.020 BAC level.

The Conforming Products List is therefore amended as follows:

Conforming Products List of Alcohol Screening Devices

Manufacturer	Device(s)
Akers Laboratories, Inc., Thorofare, NJ	Alcohol ™ \2\
Alco Check International\1\, Hudsonville, MI	Alco Check 3000 D.O.T.
	Alco Screen 3000
	Alco Check 9000
Chematics, Inc., North Webster, IN	ALCO-SCREEN 02™ \3\
Guth Laboratories, Inc., Harrisburg, PA	Alco Tector Mark X
	Mark X Alcohol Checker
Han International Co., Ltd., Seoul, Korea	A.B.I. (Alcohol Breath Indicator)
OraSure Technologies, Inc., Bethlehem, PA (Formerly STC Technologies, Inc.).	Q.E.D. A150 Saliva Alcohol Test
PAS Systems International, Inc.,	PAS IIIa
Fredericksburg, VA	PAS Vr
Repco Marketing, Inc., Raleigh, NC	Alco Tec III
Roche Diagnostic Systems, Branchburg, NJ	On-Site Alcohol \4\
STC Technologies, Inc	Q.E.D. A150 Saliva Alcohol Test
Sound Off, Inc.\1\, Hudsonville, MI	Digitox D.O.T.
	Alco Screen 1000

\1\ The devices listed by these manufacturers are the same devices sold under different names.
\2\ It should be noted that the Alcohol disposable breath alcohol screening device manufactured by Akers Laboratories, Inc. passed the model specifications under all lighting conditions except one, namely sodium vapor lighting. The device is being listed on this CPL with the understanding that the manufacturer will specify in written instructions accompanying the product that the device should not be used under sodium vapor lighting conditions. It passed the testing under all other conditions.
\3\ While the ALCO-SCREEN 02™ saliva-alcohol screening device manufactured by Chematics, Inc. passed the requirements of the model specifications when tested at 40 deg.C (104 deg.F), the manufacturer has indicated that the device cannot exceed storage temperatures of 27 deg.C (80 deg.F). Instructions to this effect are stated on all packaging accompanying the device. Accordingly, the device should not be stored at temperatures above 27 deg.C (80 deg.F) and, if the device is stored at or below 27 deg.C (80 deg.F) and used at higher temperatures (i.e., within a minute), the devices met the model specifications and the results persisted for 10-15 minutes. When these devices were stored at or below 27 deg.C (80 deg.F) and were equilibrated at 40 deg.C (104 deg.F) for an hour prior to sample application, the devices failed to meet the model specifications. Storage at temperatures above 27 deg.C (80 deg.F), for even brief periods of time, may result in false negative readings.
\4\ While this device passed all of the requirements of the model specifications, readings should be taken only after the time specified by the manufacturer. For valid readings, the user should follow the manufacturer's instructions. Readings should be taken one (1) minute after a sample is introduced at or above 30 deg.C (86 deg.F); readings should be taken after two (2) minutes at 18 deg.C-29 deg.C (64.4 deg.-84.2 deg.F); and readings should be taken after five (5) minutes when testing at temperatures at or below 17 deg.C (62.6 deg.F). If the reading is taken before five (5) minutes has elapsed under the cold conditions, the user is likely to obtain a reading that underestimates the actual saliva-alcohol level.

Note that the device made by Akers Laboratories, Inc. is a single-use, disposable breath test device. The devices manufactured by Chematics, Inc., OraSure Technologies, Inc., Roche Diagnostic Systems, Inc., and STC Technologies, Inc. are all single-use, disposable saliva alcohol test devices. The other devices listed are electronic breath testers. Those manufactured by PAS Systems International, Inc. use a fuel-cell sensor, whereas those manufactured by Alco Check International, Guth Laboratories, Han International Co., Ltd., Repco marketing, Inc., and Sound Off, Inc. use semi-conductor sensors.

Issued on: May 1, 2001.
Rose A. McMurray,
Associate Administrator for Traffic Safety Programs.
[FR Doc. **01-11318 Filed** 5-3-**01**; 8:45 am]
BILLING CODE 4910-59-P

Highway Safety Programs; Model Specifications for Devices to Measure Breath Alcohol

SUMMARY: The FHWA is issuing this notice to advise the public that a supplement to an Environmental Impact Statement (EIS) will be prepared for a proposed highway project in Lincoln County, Oregon. The Oregon Department of Transportation (ODOT) initially started the project development process for the proposed Pioneer Mountain-Eddyville project with the intent to use their own funds to construct the project. They published a Draft Environmental Impact Statement (DEIS) in September 1993 and held a Public Hearing in October 1993. ODOT did not complete the final EIS for the proposed project. ODOT is now proposing to request federal aid participation for the project. As a result, FHWA is reviewing the DEIS, public hearing testimony, and comments received on the DEIS to determine if all federal regulations and processing requirements have been met.

FOR FURTHER INFORMATION CONTACT: Anthony Boesen, Region 2 Liaison Engineer, Federal Highway Administration, Equitable Center, Suite 100, 530 Center Street NE, Salem, Oregon 97301, Telephone (503) 399–5749.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with ODOT and after evaluation of the DEIS, public hearing testimony and written comments, will prepare a Supplemental Environmental Impact Statement for the project, and hold additional public hearing as necessary.

The proposed project will realign a 10 mile, 2-lane roadway section from mile point 14.5 to 24.75 of the Corvallis-Newport Highway (US 20). Two Build Alternatives and a No-Build Alternative were considered in the DEIS. Build Alternative number one generally followed the existing roadway and the Yaquina River. Build Alternative number two is on new alignment and overall reduces the highway length by 2.5 miles. An option common to both Build Alternatives was considered for a short segment on the west end of the project; this design option was a channel change of Simpson Creek. Based on public input, agency comments and coordination, and overall environmental impacts, Build Alternative number two without the channel change of Simpson Creek is the preferred alternative determined by ODOT. Lincoln County has strongly supported Alternative 2 and has now included the proposed project in their county comprehensive land use plans.

The project is considered necessary to improve the highway to current safety standards, eliminate numerous sharp curves, reduce a higher than average accident rate that occurs on this segment of highway, and is part of an overall upgrade of this highway between the Willamette Valley and the Oregon Coast.

There have been no significant changes in development/conditions in the area since the DEIS was prepared, as the proposed route is predominately through underdeveloped large timber company holdings that have been logged within recent years. The project has been developed with consideration for the proposed listings of the salmon by the National Marine Fisheries Service (NMFS). Since then the salmon has been formally listed by NMFS. There appears to be no Section 4(f) eligible properties that would be impacted by this proposed project.

The DEIS describing the proposed action and solicitation of comments was sent to all appropriate federal, state, and local agencies by ODOT. Public meetings and a public hearing were held for the project. ODOT published a Hearing Study Report/Decision Document in March 1994 that summarized and responded to all comments received at the public hearing and on the DEIS. As a result of comments received, minor changes are being considered for inclusion in the proposed project and subsequent environmental documents. Since ODOT formally circulated the DEIS, we propose to develop a supplemental EIS and circulate it with a copy of the summary of the DEIS as part of our normal distribution. Copies of the entire DEIS will be made available upon request. Additional public meetings/public hearing will be held as needed.

To ensure that the full range of issues related to this proposed action are addressed and significant issues identified, comments, and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: July 12, 2000.

Elton Chang,

Environmental Engineer, Oregon Division.

[FR Doc. 00–18454 Filed 7–20–00; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–00–7570]

Highway Safety Programs; Model Specifications for Devices To Measure Breath Alcohol

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice amends the Conforming Products List for instruments that conform to the Model Specifications for Evidential Breath Testing Devices (58 FR 48705).

EFFECTIVE DATE: July 21, 2000.

FOR FURTHER INFORMATION CONTACT: Dr. James F. Frank, Office of Traffic Injury Control Programs, Impaired Driving Division (NTS–11), National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington, D.C. 20590; Telephone: (202) 366–5593.

SUPPLEMENTARY INFORMATION: On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol (38 FR 30459). A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974 (39 FR 41399).

On December 14, 1984 (49 FR 48854), NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices, and published a conforming Products List (CPL) of instruments that were found to conform to the Model Specifications as Appendix D to that notice (49 FR 48864).

On September 17, 1993, NHTSA published a notice (58 FR 48705) to amend the Model Specifications. The notice changed the alcohol concentration levels at which instruments are evaluated, from 0.000, 0.050, 0.101, and 0.151 BAC, to 0.000, 0.020, 0.040, 0.080, and 0.160 BAC; added a test for the presence of acetone; and expanded the definition of alcohol to include other low molecular weight alcohols including methyl or isopropyl. On June 4, 1999, the most recent amendment to the Conforming Products List (CPL) was published (64 FR 30097), identifying those instruments found to conform with the Model Specifications.

Since the last publication of the CPL, two (2) instruments have been evaluated and found to meet the model specifications, as amended on September 17, 1993, for mobile and

non-mobile use. They are: (1) Intoxilyzer 400PA manufactured by CMI, Inc. of Owensboro, KY. This device is a hand-held breath tester with a fuel cell alcohol sensor. (2) Alco Sensor IV–XL manufactured by Intoximeters, Inc. of St. Louis, MO. This device is a hand-held breath tester with a fuel cell alcohol sensor that is microprocessor controlled. It is designed to minimize operator involvement in performing the test and processing the test data.

The CPL has been amended to add these two instruments to the list.

In accordance with the foregoing, the CPL is therefore amended, as set forth below.

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES

Manufacturer and model	Mobile	Nonmobile
Alcohol Countermeasure Systems Corp., Mississauga, Ontario, Canada:		
Alert J3AD*	X	X
PBA3000C	X	X
BAC Systems, Inc., Ontario, Canada: Breath Analysis Computer*	X	X
CAMEC Ltd., North Shields, Tyne and Ware, England: IR Breath Analyzer*	X	X
CMI, Inc., Owensboro, KY:		
Intoxilyzer Model:		
200	X	X
200D	X	X
300	X	X
400	X	X
400PA	X	X
1400	X	X
4011*	X	X
4011A*	X	X
4011AS*	X	X
4011AS–A*	X	X
4011AS–AQ*	X	X
4011 AW*	X	X
4011A27–10100*	X	X
4011A27–10100 with filter*	X	X
5000	X	X
5000 (w/Cal. Vapor Re-Circ.)	X	X
5000 (w3/8″ ID Hose option)	X	X
5000CD	X	X
5000CD/FG5	X	X
5000EN	X	X
5000 (CAL DOJ)	X	X
5000VA	X	X
PAC 1200*	X	X
S–D2	X	X
Decator Electronics, Decator, IL: Alco-Tector model 500*		X
Draeger Safety, Inc., Durango, CO:		
Alcotest Model:		
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII–C	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
900*	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410–II	X	X
Gall's Inc., Lexington, KY: Alcohol Detection System-A.D.S. 500	X	X
Intoximeters, Inc., St. Louis, MO:		
Photo Electric Intoximeter*	X	
GC Intoximeter MK II*	X	X
GC Intoximeter MK IV*	X	X
Auto Intoximeter*	X	X
Intoximeter Model:		
3000*	X	X
3000 (rev B1)*	X	X
3000 (rev B2)*	X	X
3000 (rev B2A)*	X	X
3000 (rev B2A) w/FM option*	X	X
3000 (Fuel Cell)*	X	X
3000 D*	X	X
3000 DFC*	X	X
Alcomonitor		X
Alcomonitor CC	X	
Alco-Sensor III	X	X
Alco-Sensor IV	X	X
Alco-Sensor IV–XL	XL	X
Alco-Sensor AZ	X	X
RBT–AZ	X	X
RBT III	X	X
RBT III–A	X	X
RBT IV	X	X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
RBT IV with CEM (cell enhancement module)	X	X
Intox EC/IR	X	X
Portable Intox EC/IR	X	X
Komyo Kitagawa, Kogyo, K.K.:		
Alcolyzer DPA–2*	X	X
Breath Alcohol Meter PAM 101B*	X	X
Lifeloc Technologies, Inc., (formerly Lifeloc, Inc.), Wheat Ridge, CO:		
PBA 3000B	X	X
PBA 3000–P*	X	X
PBA 3000C	X	X
Alcohol Data Sensor	X	X
Phoenix	X	X
Lion Laboratories, Ltd., Cardiff, Wales, UK:		
Alcolmeter Model:		
300	X	X
400	X	X
AE–D1*	X	X
SD–2*	X	X
EBA*	X	X
Auto-Alcolmeter*	X	
Intoxilyzer Model:		
200	X	X
200D	X	X
1400	X	X
5000 CD/FG5	X	X
5000 EN	X	X
Luckey Laboratories, San Bernadino, CA:		
Alco-Analyzer Model:		
1000*		X
2000*	X	
National Draeger, Inc., Durango, CO:		
Alcotest Model:		
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII–C	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
900*	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410–II	X	X
National Patent Analytical Systems, Inc., Mansfield, OH:		
BAC DataMaster (with or without the Delta-1 accessory)	X	X
BAC Verifier Datamaster (with or without the Delta-1 accessory)	X	X
DataMaster cdm (with or without the Delta-1 accessory)	X	X
Omicron Systems, Palo Alto, CA:		
Intoxilyzer Model:		
4011*	X	X
4011AW*	X	X
Plus 4 Engineering, Minturn, CO: 5000 Plus4*	X	X
Seres, Paris, France:		
Alco Master	X	X
Alcopro	X	X
Siemans-Allis, Cherry Hill, NJ:		
Alcomat*	X	X
Alcomat F*	X	X
Smith and Wesson Electronics, Springfield, MA:		
Breathalyzer Model:		
900*	X	X
900A*	X	X
1000*	X	X
2000*	X	X
2000 (non-Humidity Sensor)*	X	X
Sound-Off, Inc., Hudsonville, MI:		
AlcoData	X	X
Seres Alco Master	X	X
Seres Alcopro	X	X
Stephenson Corp.: Breathalyzer 900*	X	X
U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, CA:		
Alco-Analyzer 1000		X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
Alco-Analyzer 2000		X
Alco-Analyzer 2100	X	X
Verax Systems, Inc., Fairport, NY:		
BAC Verifier*	X	X
BAC Verifier Datamaster	X	X
BAC Verifier Datamaster II*	X	X

*Instruments marked with an asterisk (*) meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (*i.e.,* instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC.) Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids.

(23 U.S.C. 402; delegations of authority at 49 CFR 1.50 and 501.1)

Issued on: July 17, 2000.

Rose A. McMurray,

Associate Administrator for Traffic Safety Programs.

[FR Doc. 00–18455 Filed 7–20–00; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–99–6187; Notice 2]

Athey Products Corporation, Grant of Application for Decision That Noncompliance Is Inconsequential to Motor Vehicle Safety

Athey Products Corporation (Athey) determined that certain Mobil model Street Sweepers it produced are not in full compliance with 49 CFR 571.105, Federal Motor Vehicle Safety Standard (FMVSS) No. 105, ''Hydraulic and Electric Brake Systems,'' and filed an appropriate report pursuant to 49 CFR Part 573, ''Defect and Noncompliance Reports.'' Athey also applied to be exempted from the notification and remedy requirements of 49 U.S.C. Chapter 301—''Motor Vehicle Safety'' on the basis that the noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of an application was published, with a 30-day comment period, on October 21, 1999 in the **Federal Register** (64 FR 56835). NHTSA received no comments on this application during the comment period.

Paragraph S5.5 of FMVSS No. 105 requires each vehicle with a gross vehicle weight rating greater than 10,000 pounds, except for a vehicle with a speed attainable in 2 miles of not more than 33 mph, to be equipped with an antilock brake system (ABS) that directly controls the wheels of at least one front axle and the wheels of at least one rear axle of the vehicle. Vehicles that do not comply with the requirements of a FMVSS are subject to the notification and remedy requirements of Chapter 301, unless exempted pursuant to 49 U.S.C. 30118(d) and 30120(h) on the basis that the noncompliance is inconsequential to motor vehicle safety. The effective date of the requirement for ABS on medium and heavy duty hydraulically-braked trucks was March 1, 1999.

Between March 1, 1999 and July 31, 1999 Athey manufactured, sold and/or distributed 21 Athey Mobil M8A model street sweepers and 56 Mobil M9D model street sweepers which were not equipped with ABS as required by FMVSS No. 105. To the best of Athey's knowledge, there were no other vehicles manufactured by the company that are noncompliant with the ABS requirements.

Athey supported its application by stating that the agency recognized that vehicle stopping distances and stability would not be substantially improved with ABS during maximum braking at speeds below 33 mph. According to Athey, the noncompliant vehicles are capable of speeds in excess of 33 mph, but spend the majority of their operating time at speeds below 33 mph. A review of information from its customers indicated that these street sweepers spend 80% to 90% of their operation time at speeds that are most effective at removal of road debris, speeds in the 3 to 7 mph range. In Athey's opinion, due to the low speed operation of these vehicles and the type of road use of street sweepers, maximum brake application does not normally cause lockup and the subsequent loss of vehicle control or jack knifing. Athey also stated that these street sweeper models are seldom operated in inclement weather thereby reducing the need for ABS.

Athey further stated that the hydraulic service brake system with which the noncompliant street sweepers are equipped is capable of providing substantially more brake torque than necessary to meet the 30 mph and 60 mph stopping performance requirements in FMVSS No. 105.

In addition to information supporting its arguments that the noncompliance with FMVSS No. 105 is inconsequential, Athey cited several other developments and circumstances that it considered relevant to its application. Athey stated that it attempted to secure the necessary ABS equipment from suppliers in order to meet the March 1, 1999 effective date for ABS installation, but experienced delays in receiving ABS equipment from suppliers due to a backlog of orders for ABS components. Further, immediately upon becoming aware of the consequences of the noncompliance, Athey halted all further sales and/or distribution of the Mobil model M8A and M9D street sweepers until compliance with the ABS requirements was achieved.

According to Athey, the importance of the service provided by street sweepers on public and private roadways should not be overlooked. The removal of waste material such as broken glass and other sharp, potentially dangerous objects from the roadway is a health and safety benefit.

Athey also noted that the agency granted a temporary exemption to the Johnson Sweeper Company (JSC) under 49 CFR part 555 from the ABS requirements of FMVSS No. 105. The agency cited the low speed operation of the JSC street sweepers and a reduction in the number of sweepers to fill the need of municipalities if JSC sweepers were not available, as important factors in its decision.

Upon its review of this petition, the agency believes that the true measure of inconsequentiality to motor vehicle safety is the effect of the noncompliance on the operation of the vehicles. Athey has described the effect of the absence of ABS on the operational characteristics, the braking capacity, and the braking stability of these specialized vehicles. The street sweepers spend the majority of their operating time at speeds in the 3 to 7 mph range for maximum debris removal effectiveness, speeds well below the vehicle speed capability for which ABS

U.S. Department of Transportation (DOT)
Alcohol Testing Form

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street
City, ST ZIP _____

_____

DER Name and Telephone No. _____ (___) _____
DER Name **DER Phone Number**

D: Reason for Test: ☐Random ☐Reasonable Susp ☐Post-Accident ☐Return to Duty ☐Follow-up ☐Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ ___/___/___
Signature of Employee **Date Month Day Year**

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐BAT ☐STT **DEVICE:** ☐SALIVA ☐BREATH* **15-Minute Wait:** ☐Yes ☐No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

_____

_____

_____

_____ _____
Alcohol Technician's Company **Company Street Address**

_____ _____ (___) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) **Company City, State, Zip** **Phone Number**

_____ ___/___/___
Signature of Alcohol Technician **Date Month Day Year**

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ ___/___/___
Signature of Employee **Date Month Day Year**

COPY 1 – ORIGINAL – FORWARD TO THE EMPLOYER

Affix Or Print Screening Results *Here*

Affix With Tamper Evident Tap

Affix Or Print Confirmation Result *Here*

Affix With Tamper Evident Tape

Affix Or Print Additional Results Here

Affix With Tamper Evident Tape

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street
City, ST ZIP _____

_____

DER Name and Telephone No. _____ (___) _____
DER Name DER Phone Number

D: Reason for Test: ☐Random ☐Reasonable Susp ☐Post-Accident ☐Return to Duty ☐Follow-up ☐Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

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Signature of Employee Date Month Day Year

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TECHNICIAN: ☐BAT ☐STT DEVICE: ☐SALIVA ☐BREATH* 15-Minute Wait: ☐Yes ☐No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

_____

_____

_____

_____ _____
Alcohol Technician's Company Company Street Address

_____ _____ (___) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip Phone Number

_____ ___/___/___
Signature of Alcohol Technician Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ ___/___/___
Signature of Employee Date Month Day Year

COPY 2 – EMPLOYEE RETAINS

Affix Or Print Screening Results *Here*

Affix With Tamper Evident Tap

Affix Or Print Confirmation Result *Here*

Affix With Tamper Evident Tape

Affix Or Print Additional Results Here

Affix With Tamper Evident Tape

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street
City, ST ZIP _____

_____

DER Name and Telephone No. _____ ( ) _____
DER Name DER Phone Number

D: Reason for Test: ☐Random ☐Reasonable Susp ☐Post-Accident ☐Return to Duty ☐Follow-up ☐Pre-employment

Affix Or Print Screening Results *Here*

Affix With Tamper Evident Tap

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ ___/___/___
Signature of Employee Date Month Day Year

Affix Or Print Confirmation Results *Here*

Affix With Tamper Evident Tape

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐BAT ☐STT DEVICE: ☐SALIVA ☐BREATH* 15-Minute Wait: ☐Yes ☐No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

_____

_____

_____

_____ _____
Alcohol Technician's Company Company Street Address

_____ _____ ( ) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip Phone Number

_____ ___/___/___
Signature of Alcohol Technician Date Month Day Year

Affix Or Print Additional Results Here

Affix With Tamper Evident Tape

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ ___/___/___
Signature of Employee Date Month Day Year

COPY 3 – ALCOHOL TECHNICIAN RETAINS

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug and alcohol Policy and Compliance, Room 10403, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

BACK OF PAGES 1 and 2

INSTRUCTIONS FOR COMPLETING THE U.S. DEPARTMENT OF TRANSPORTATION ALCOHOL TESTING FORM

NOTE: Use a ballpoint pen, press hard, and check all copies for legibility.

STEP 1 The Breath Alcohol Technician (BAT) or Screening Test Technician (STT) completes the information required in this step. Be sure to print the employee's name and check the box identifying the reason for the test.

NOTE: If the employee refuses to provide SSN or I.D. number, be sure to indicate this in the remarks section in STEP 3. Proceed with STEP 2.

STEP 2 Instruct the employee to read, sign, and date the employee certification statement in STEP 2.

NOTE: If the employee refuses to sign the certification statement, do not proceed with the alcohol test. Contact the designated employer representative.

STEP 3 The BAT or STT completes the information required in this step and checks the type of device (saliva or breath) being used. After conducting the alcohol screening test, do the following (as appropriate):

Enter the information for the screening test (test number, testing device name, testing device serial number or lot number and expiration date, time of test with any device-dependent activation times, and the results), on the front of the AFT. For a breath testing device capable of printing, the information may be part of the printed record.

NOTE: Be sure to enter the result of the test exactly as it is indicated on the breath testing device, e.g., 0.00, 0.02, 0.04, etc.

Affix the printed information in the space provided, in a tamper-evident manner (e.g., tape), or the device may print the results directly on the ATF. If the results of the screening test are less than 0.02, print, sign your name, and enter today's date in the space provided. The test process is complete.

If the results of the screening test are 0.02 or greater, a confirmation test must be administered in accordance with DOT regulations. An EVIDENTIAL BREATH TESTING device that is capable of printing confirmation test information must be used in conducting this test.

After conducting the alcohol confirmation test, affix the printed information in the space provided, in a tamper-evident manner (e.g., tape), or the device may print the results directly on the ATF. Print, sign your name, and enter the date in the space provided. Go to STEP 4.

STEP 4 If the employee has a breath alcohol confirmation test result of 0.02 or higher, instruct the employee to read, sign, and date the employee certification statement in STEP 4.

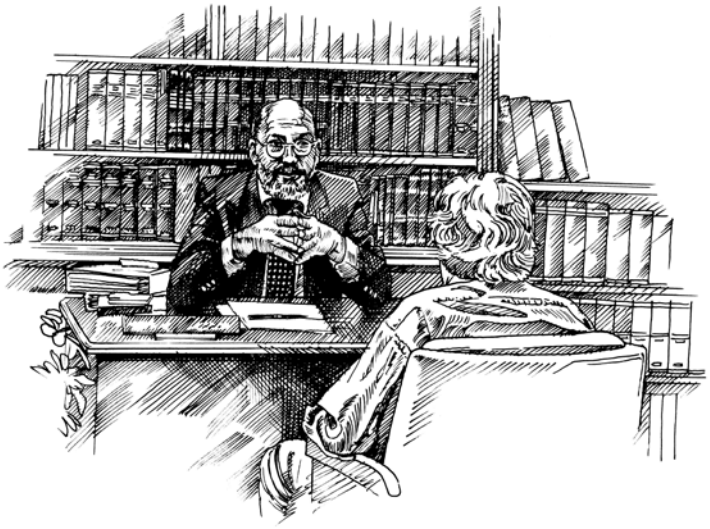
NOTE: If the employee refuses to sign the certification statement in STEP 4, be sure to indicate this in the remarks line in STEP 3.

Immediately notify the DER if the employee has a breath alcohol confirmation test result of 0.02 or higher.

Forward **Copy 1** to the employer. Give **Copy 2** to the employee. Retain **Copy 3** for BAT/STT records.

BACK OF PAGE 3

[FR Doc. 00–31251 Filed 12–14–00; 2:49 pm]
BILLING CODE 4910–62–C



Chapter 9. SUBSTANCE ABUSE PROFESSIONALS, REHABILITATION, AND TREATMENT

The FTA regulations require that any individual who has a positive drug test, a breath alcohol concentration of 0.04 or greater, or refused a test, must immediately be removed from his/her safety-sensitive position [§655.61]. In addition, he/she must be advised of the resources available to evaluate and resolve problems associated with drug abuse or alcohol misuse, including the names, addresses, and telephone numbers of substance abuse professionals (SAP) and counseling and treatment programs. Employers must provide these services to their employees even if their policy is to terminate employees who violate the drug and alcohol regulations.

If you allow employees to return to duty following a positive test result or test refusal, the individual cannot be allowed to return to a safety-sensitive position until he/she has completed the SAP evaluation, referral, education/treatment, and return-to-duty process. The SAP is the "gatekeeper" of the return-to-duty process and is responsible for protecting public safety to the greatest extent possible by professionally evaluating the employee and recommending appropriate education/treatment, follow-up tests, and aftercare in the event the employee returns to performing safety-sensitive functions.

Previously, the regulations that covered the SAP functions were defined in the various modal administration (e.g., FTA) drug and alcohol testing regulations. However, with the publication of the revised DOT regulations on drug and alcohol testing procedures (49 CFR Part 40), the SAP qualifications, roles, responsibilities, and procedures were relocated in Subpart O of Part 40.

Section 1. SAP QUALIFICATIONS

A substance abuse professional (SAP) must have the following credentials [§40.281]:

(1) An SAP must be a licensed physician (Doctor of Medicine or Doctor of Osteopathy); or a licensed or certified psychologist; a licensed or certified social worker; or a licensed or certified employee assistance professional; or an alcohol and drug abuse counselor certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission (NAADAC), or by the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse (ICRC).

(2) The SAP must have knowledge of and clinical experience in the diagnosis and treatment of substance abuse-related disorders, and must have knowledge of the SAP's role in the protection of public safety. The SAP must be well informed about Part 40 and the pertinent DOT agency (i.e., FTA) regulations. Every SAP must have his/her own copy of *The Substance Abuse Professional Guidelines* published by the DOT Office of Drug and Alcohol Policy and Compliance (ODAPC) in August 2001, and must be aware of any significant changes to the regulations and/or *Guidelines.*

(3) In addition, SAPs must complete qualifications training. SAPs currently practicing have until December 31, 2003 to obtain the training, whereas individuals wishing to begin SAP practice after December 31, 2003 must meet the training requirement before performing SAP functions. Please refer to Chapter 5 for information on qualification training.

(4) Following the qualifications training, the individual must satisfactorily complete an examination that is given by a nationally recognized professional or training organization. The examination must cover all elements discussed in the qualifications training, and the test must be validated by a test evaluation organization.

(5) SAPs must also successfully complete 12 hours of professional development training or Continuing Education Units (CEU) every 3 years following the completion of the initial qualifications training. The CEUs must be relevant to the performance of SAP duties and include materials concerning new technologies, interpretations, recent guidance, rule changes, and other SAP issues.

A primary SAP should be selected who will be responsible for providing services to your employees. This professional should be encouraged to learn about your operations and the safety-sensitive functions that your employees perform. Such

knowledge will be a major asset when assessing the needs of your employees and their ability to perform safety-sensitive duties. Backup SAPs should also be selected to provide assessments when the primary SAP is not available. MROs, other physicians, community mental health centers, Employee Assistance Programs (EAP), universities, private practitioners, and trade associations may provide you with a list of possible SAPs in your area.

Section 2. SAP ROLES AND RESPONSIBILITIES

Any time an employee or applicant tests positive for drugs or alcohol, or refuses a test, the employer is required to immediately remove the individual from safety-sensitive duties and make an SAP referral. Additional consequences are left to the discretion of the individual employer. Some employers provide a second chance, while others adhere to a zero-tolerance policy and discharge the employee. The role of the SAP varies depending on if the employee is terminated or allowed to return to duty.

Employers that have zero-tolerance policies (i.e., first positive results in termination) must provide the employees a list of SAPs that are readily available with names, addresses, and telephone numbers [§40.287]. Applicants who test positive or refuse a test must also be provided a SAP list. Employers with zero-tolerance policies are not required to provide a SAP evaluation or any subsequent recommended education or treatment. The employer is only required to make a referral to a qualified SAP. If the individual chooses to make an appointment and follow through with the assessment and subsequent treatment, he/she does so on their own at their own expense, and without any participation by the employer.

Employers with second chance policies, however, must provide a SAP list and ensure that employees have completed the SAP evaluation, referral, education/treatment, and return-to-duty process before the individual can be allowed to perform safety-sensitive job duties [§40.291].

Who pays for SAP evaluations and services is up to employer discretion, and is not dictated by the regulation. In some cases, SAP assessments are covered under health care benefits. The decision of who pays is also open to collective bargaining.

When an employee is referred to a SAP, the SAP must carry out the responsibilities defined in Subpart O of Part 40.

Initial SAP Evaluation [§40.293]. Make a comprehensive face-to-face assessment and clinical evaluation to determine what level of assistance the employee needs in resolving problems associated with alcohol use or prohibited drug use. The evaluation should be comprised of a standard psychosocial history, an in-depth drug and alcohol use history, and current mental status. The evaluation should provide a diagnosis, treatment recommendations, and a treatment plan that must be followed by the employee.

Education/Treatment Program Referral [§40.29(c)(d)]. Refer the employee to an appropriate education and/or treatment program that meets the unique needs of the individual and to the greatest extent possible will allow the individual to return to a safety-sensitive position without undue concern for public safety. An education/treatment program must be recommended for every individual that is assessed. The SAP may not determine that education/treatment is not required. The recommendation must be provided to the employer in a written report.

Follow-up Evaluation [§40.301]. Conduct a face-to-face follow-up evaluation to determine if the employee has actively participated in and successfully complied with the recommended education/treatment program. This evaluation must be completed before an employer can return an employee back to work. The evaluation should ascertain if the employee has successfully completed the education/treatment program, has a prognosis for success, and has demonstrated subsequent behavioral changes. The evaluation must be based upon written reports from, and personal communication with, the education/treatment provider and the employee clinical interview. This evaluation should not be viewed as a cursory administrative review, but should determine if the employee can reasonably be expected to return to safety-sensitive duties without undue concern for public safety.

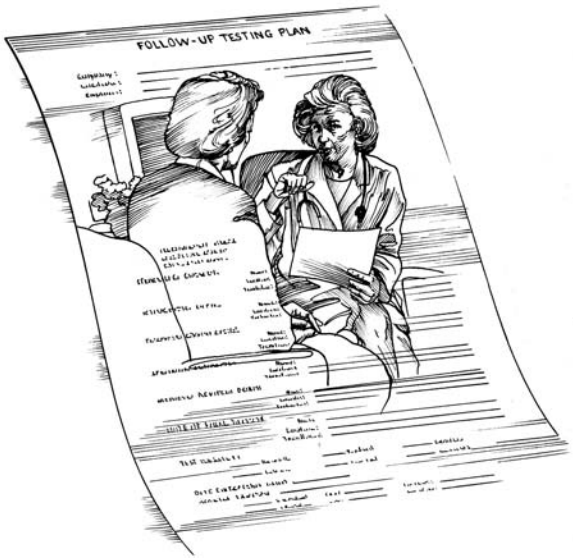
If the SAP determines that the employee has not demonstrated successful compliance and remains a risk to public safety, the SAP must recommend that the employee not return to duty at that time and the employer is prohibited from returning the employee to safety-sensitive job duties. How the employer responds is the employer's decision and should be defined in the employer's policy and/or labor management agreements. Thus, some employers may instruct the SAP to conduct additional follow-up evaluations while other employers may take personnel action against the employee.

If the SAP has determined that the employee has made sufficient progress, the SAP may recommend that the employee be allowed to return to safety-sensitive duties. In either case, the SAP must provide a written report to the employer highlighting the clinical evaluation results, subsequent recommendation, and if appropriate, aftercare recommendations.

Return-to-Duty Process [40.305]. Once the SAP has determined that the employee has successfully complied with the prescribed education/treatment program, the employer must make the final decision about whether the employee will be permitted to return to the performance of safety-sensitive functions subject to company policy and collective bargaining agreements, as appropriate. If the employee will be allowed to return to work, the employer must ensure that the employee takes a return-to-duty test for drugs, alcohol, or both. If the employee's initial test was positive for drugs, at a minimum the return-to-duty test must be negative for drugs. If the employee's initial test was positive for alcohol, at a minimum the return-to-duty test must be an alcohol test with an alcohol concentration of less than 0.02.

Follow-up Testing Plan [§40.307]. If a recommendation is made to let the employee return to duty and the return-to-duty test is negative, the SAP must develop a follow-up testing plan for the employee returning to work. The SAP must determine the number and frequency of follow-up tests and whether the tests should be conducted for

drugs, alcohol, or both. The plan should be developed based on the unique circumstances of the individual.



At a minimum, the follow-up testing plan must consist of at least six tests in the first 12 months following the employee's return to safety-sensitive duties. A follow-up testing plan that meets only these minimums should be considered a rarity rather than a rule as the follow-up program should be unique to the individual and should be aggressive enough to deter and detect use of alcohol and prohibited drugs by the employee. The follow-up testing process should serve as an essential component of the employee's rehabilitation process. Follow-up testing can last up to 60 months, but can be terminated by the SAP anytime following the initial 12 months.

The SAP should not establish the actual test dates, as the SAP will not necessarily be knowledgeable about the employee's work schedule. Therefore, the responsibility to schedule and carry out the follow-up tests is the employer's. Follow-up testing should be spread throughout the year, and be unpredictable and unannounced. Follow-up testing is in addition to random testing.

The requirements of the SAP's follow-up testing plan follow the employee to subsequent employers or through breaks in service [§40.305].

Aftercare [§40.303]. Individuals enrolled in outpatient programs, self-help groups, etc., may be allowed to conduct the follow-up evaluation and the return-to-duty test prior to completion of the full range of recommended education and/or treatment. This would only occur if the SAP believes that the employee has reached a critical point in their treatment program and made significant progress in their rehabilitation where they no longer pose a risk to public safety. For example, an employee enrolled in an 8-week out-patient program who reaches a critical turning point in his/her life in week six may be evaluated by the SAP and allowed to return to duty prior to completion of the 8-week program.

However, employees who are actively enrolled in an in-patient or a partial in-patient program should not be considered eligible to return to duty prior to program completion.

In the event individuals are allowed to return to duty prior to completion of their education/treatment program, the SAP is required to recommend an aftercare program that, among other things, will require the employee to complete the treatment program after returning to duty. Similarly, the SAP is required to recommend an aftercare program for those individuals who have completed an education/treatment program, but are believed by the SAP to be in need of additional treatment or support to assist him/her in maintaining sobriety or abstinence from drug use following their return to duty. The SAP recommendations for aftercare must be included in the written report provided to the employer following the follow-up evaluation.

Employers are not required to follow the aftercare recommendations, but they are strongly encouraged to include them as part of a return-to-duty agreement or contract with the employee [§40.303]. If the employee fails to follow the aftercare recommendations, he/she may be subject to disciplinary action by the employer for failing to follow the conditions outlined in the return-to-duty agreement.

SAP Limitations [§40.29(f)]. When making recommendations for education/treatment, SAPs are prohibited from considering employee claims that the testing process was unjust or inaccurate. As professionals, SAPs must not be swayed by statements from employees that attempt to lessen the seriousness of a DOT rule violation or the SAPs own personal opinions about the justification or rationale for the test. The SAP must assume that a verified positive test result has conclusively established that the employee violated the DOT drug and/or alcohol rules.

Once an SAP has made his/her evaluation and informed the employer in writing of their recommendation, the employer (and employee) is prohibited from seeking a second opinion. Only the SAP who made the initial evaluation may modify the evaluation and recommendations based on new or additional information.

Confidentiality [§40.311]. SAPs adhere to various federal and state laws and rules, codes of ethical standards, and certification and licensing board requirements for confidentiality. However, this privileged client-counselor relationship is waived if the employee poses a clear and imminent danger to self or others, if there is known or suspected child or elder abuse or neglect, when medical records are court-ordered by a judge compelling disclosure, or when the counselor seeks medical or legal advice.

The DOT regulation [§ 40.293] also states that when an employee has tested positive or refused a drug test, the SAP may consult with the MRO who verified the test to obtain information pertinent to the evaluation. The MRO and SAP are free to discuss the test result, quantification levels (if already obtained by the MRO), and any other medical information relevant to the case. Release of this information does not require the employee's consent. The SAP may also communicate with education and/or treatment providers without employee consent regarding confidential information that is relevant to the follow-up evaluation process.

The SAP clinical records for each employee must be maintained in accordance with federal, state, and local laws regarding record maintenance, confidentiality, and release of information. In addition, these records must be made available to DOT agency representatives and representatives of the National Transportation Safety Board in an accident investigation, upon request.

The SAP may also provide written reports directly to the employer without a signed release from the employee. Upon the employee's request, the SAP must make a copy of all SAP reports available to the employee except for information regarding the follow-up testing plan. Records will also be released to other third parties (e.g., subsequent employers) with a written release from the employee.

Education/Treatment Options [§40.293(c)(d)]. Appropriate education options may include, but are not limited to, self-help groups (e.g., Alcoholics Anonymous), community lectures where attendance can be independently verified, and bona fide drug and alcohol education courses. Treatment options may include, but

are not limited to, in-patient hospitalization, partial in-patient treatment, outpatient counseling programs, and aftercare. SAPs should be careful to assess the effectiveness of the program in terms of effecting actual rehabilitation of the individual rather than enrolling an individual in a detoxification program. A detox program works to remove the drugs/alcohol from a person's system, but does little to impact future usage. An effective rehabilitation program, on the other hand, alters an individual's behavior, changes their outlook on life, and impacts their future life choices. A person that successfully completes an effective rehabilitation program has a much greater chance of remaining drug and alcohol free.

SAPs may not provide treatment to employees whom they have assessed, nor may SAPs have any financial or other ties to treatment providers who are treating employees the SAP referred. The rules, however, do not prohibit the SAP from referring an employee for assistance to 1) a public agency operated by a state, county, or municipality; 2) the employer's contracted treatment provider; 3) the single substance abuse inpatient treatment program made available by the employee's insurance coverage plan; and 4) the only education program reasonably located within the general commuting area. If the only treatment program available to the employee through the employee's insurance coverage is not considered by the SAP to be an effective or suitable program, the SAP should not recommend the covered program, but should identify other more appropriate programs even if not covered by the employee's insurance.

SAPs should have a working knowledge of quality programs and qualified counselors, as well as insurance, benefit plans, employee's ability to pay, employer treatment contracts, and payment requirements. The SAP should know the employer's policies regarding payment for treatment and use of leave (e.g., sick leave, vacation, leave without pay) for treatment.

Section 3. EMPLOYEE ASSISTANCE PROGRAMS

Programs that address substance abuse problems in the workplace are often referred to as Employee Assistance Programs, or EAPs. EAPs help employees and family members with personal and behavioral problems, including, but not limited to, health, marital, financial, alcohol, drug, legal, and emotional stress that may adversely affect job performance, productivity, and most importantly, safety. All sizes and types of employers have instituted EAPs because they can help save money through decreased absenteeism, fewer accidents, reduced use of insurance benefits, savings in worker's compensation claims, fewer grievances arbitrations, and reduced employee replacement costs.

EAPs as SAPs. Because EAPs typically perform SAP-like functions (i.e., assessment, confidential record keeping, determination of suitability to return to work, and recommendation for follow-up testing), and the additional cost to expand an existing EAP to include SAP services are lower than the initial costs to establish a new

SAP, many employers have looked to their EAPs for SAP services. On the surface, this appears to be a wise decision. However, many transit systems have found that an EAP may not be the best environment to find SAPs who are philosophically aligned with DOT programs, and they may not be the best location to house SAP services.

FTA audits frequently found that SAPs in general misunderstand their role as the gatekeeper of the return-to-duty process, and therefore, compromise the integrity of the process and public safety. This misunderstanding is associated with the philosophical misalignment of EAP counselors and SAPs. EAP counselors are often viewed as advocates for the employee and as such, attempt to return employees who have tested positive back to duty as soon as possible. This approach is consistent with the training that counselors often receive that emphasizes getting the person back into a stable work environment as soon as possible, where they must be accountable.

This philosophy, however, is contrary to the basic premise upon which the SAP's function was established. Due to the safety-sensitive nature of the positions the employees fill, the SAP should be very conservative in his/her assessment of the employee and the progress made in education/treatment programs. "Putting in the time" is simply not enough for an individual returning to a safety-sensitive position. Similarly, if the SAP rushes the return-to-duty test, the employee may be putting the public at risk. The SAP must not release the individual to come back to work until the SAP has a reasonable level of assurance that the individual will stay drug and alcohol free based on the individual's attitude, support structure, participation in the treatment program, motivation, and demonstrated behavior changes. The SAP is the advocate for the public interest, not the employee.

Given this difference of philosophical viewpoints, some transit systems have chosen to separate the SAP function from the EAP function. In the traditional role, the EAP remains available to employees to help them deal with issues in confidence and, if needed, self refer to a treatment program for drug or alcohol problems. The SAP does not become involved unless there is a positive test result or a test refusal on a DOT test. However, if an FTA rule violation occurs, the individual falls under the purview of the SAP and must be subject to the consequences and return-to-duty process defined in the regulations that were summarized previously in this chapter.

By separating the functions, the credibility and effectiveness of the EAP program as an employee benefit is not compromised, and the seriousness and rigor of the SAP process is not diluted. Employees can better understand the roles of the two entities rather than being confused by one counselor that presents two different approaches, standards of confidentiality, and advocacy depending on whether they act as the EAP counselor or the SAP gatekeeper.

If separation of the functions is not possible, the SAP should be cautioned about the difference of approach, philosophy, and confidentiality that defines the two roles. Employees should also be made aware of the differences.

Self Referrals. One of the positive outcomes of the FTA drug and alcohol testing program is that it makes employees aware of the effects and consequences of prohibited drug use and alcohol misuse on personal health, safety, and the work

environment. Employees are also aware of the consequences should they test positive or refuse a test under the employer's policy. As a result, individuals with drug or alcohol problems may seek help to address their problems prior to being detected through the employer's FTA drug and alcohol testing program. Employees are more likely to seek help if they can do so in a confidential manner, where the programs are easy to access. Thus, transit employers have found that EAP programs serve an important role in terms of self-referrals.

If the employer encourages self-referrals, the process must be clearly defined, with the elimination of as many barriers as possible. The employee should be made aware of the confidentiality protections, nature of management reports, treatment requirements, testing requirements, leave policy, and interrelationship with the FTA testing program. Employees should know that self-referral does not in any way shield them from FTA tests or the consequences for a positive result. The employee should be made aware if they will be removed from duty, assigned non-safety-sensitive tasks, or be allowed to continue with their regular job duties during their self-referred treatment period. The employee must be informed if they will be required to participate in an after care program and if they will be required to sign a return-to-duty agreement.

Section 4. DRUG AND ALOCHOL REHABILITATION AND TREATMENT

As noted earlier, the FTA regulations do not require you to provide or pay for rehabilitation and treatment programs. However, rehabilitation and treatment programs are often an integral part of successful substance abuse programs. Additionally, research and experience have demonstrated that such programs can be highly cost-effective. The decision to provide rehabilitation to affected employees should be made with both the employer and employee's needs in mind.

Two basic types of treatment are available that include various inpatient and outpatient services. Inpatient treatments often involve a 1- to 4-week stay in the hospital or residential treatment center and may be recommended for the more severely addicted person. Outpatient treatment is appropriate for persons who are employed and can benefit from education and behavior modification to remain drug- and/or alcohol-free. Outpatient services predominate in the transit industry; 75 percent of persons receiving treatment for drug addiction and/or alcoholism are treated as outpatients.

Intensive Inpatient Services. Inpatient centers treat dependent people with physical and/or psychological complications. Patients in intensive treatment may need supervised detoxification and may suffer physical withdrawal symptoms. As part of treatment, patients will attend education and awareness lectures and group therapy sessions. Frequently, family members are involved in treatment since dependency affects the entire family. Residential intensive inpatient treatment may last from 1 to 4 weeks.

Intensive Outpatient Services. These services treat dependent patients who have fewer physical or psychological complications. They offer effective and less expensive alternatives to residential care for individuals with relatively stable home environments and supportive employers. The patient receives education, group therapy, and individual counseling for up to

10 weeks, with most sessions scheduled in the evenings (generally three sessions per week). These programs often require some family involvement. Costs are generally one-third to one-half of intensive inpatient treatment.

Outpatient Follow-Up Services. Patients discharged from intensive treatment may need further help. This may be an outpatient follow-up program lasting several months to a year or more. One visit per week is typical. Many inpatient and intensive outpatient treatment plans include weekly follow-up sessions at no additional cost.

Your SAP will develop a treatment program that best meets the needs of the employee in a cost-effective manner. The SAP should take the following issues into consideration when evaluating a treatment program's effectiveness and making a treatment referral.

- **Cost**. High cost does not guarantee effectiveness. Conduct a cost comparison of programs. Cost disparities may result due to the number of professionals per bed, hours of one-on-one counseling and group therapy, days of treatment, amount of aftercare counseling, or extent of other medical resources utilized.
- **Reputation**. Ask other substance abuse professionals and former program participants for their candid opinions.
- **Staff qualifications**. A quality program should have a balance of professionals. Nurses, physicians, psychologists, social workers, and formerly dependent counselors should staff intensive inpatient programs. There should be medical management of detoxification. All professional staff should be state-certified treatment specialists or counselors interning for certification.
- **"Whole person" approach**. Chemical dependency is caused by many factors – childhood development, psychological instability, heredity, social environment, and lifestyle behaviors. A quality program should meet all needs – physical (diet and exercise), social (communication skills), psychological (individual and group counseling), intellectual (education and awareness sessions), and spiritual.

Although treatment and rehabilitation is not required under the FTA regulations, a policy, which tries to reclaim human resources, should be carefully considered. At first glance, it may seem inappropriate to allow anyone to work again who has demonstrated a high-risk behavior such as drug or alcohol abuse. However, trained, skilled labor is a valuable resource, which demographic studies indicate may become increasingly difficult to obtain and retain. You should consider employee replacement costs, as well as the impacts on work productivity and morale as you evaluate the cost-effectiveness of rehabilitation services.

Sample Documentation

SUBSTANCE ABUSE PROFESSIONAL REFERRAL

I acknowledge that I have received a referral to a Substance Abuse Professional as required by FTA regulations and as adopted by this agency in _____
(Name of System)

_____ Substance Abuse Policy dated_____

The cost of this service will be paid by:_____

Substance Abuse Professional referral:

Name _____

Address _____

City/State _____

Phone _____

Alternate Substance Abuse Professional referral:

Name _____

Address _____

City/State _____

Phone _____

I have received a copy of this referral:

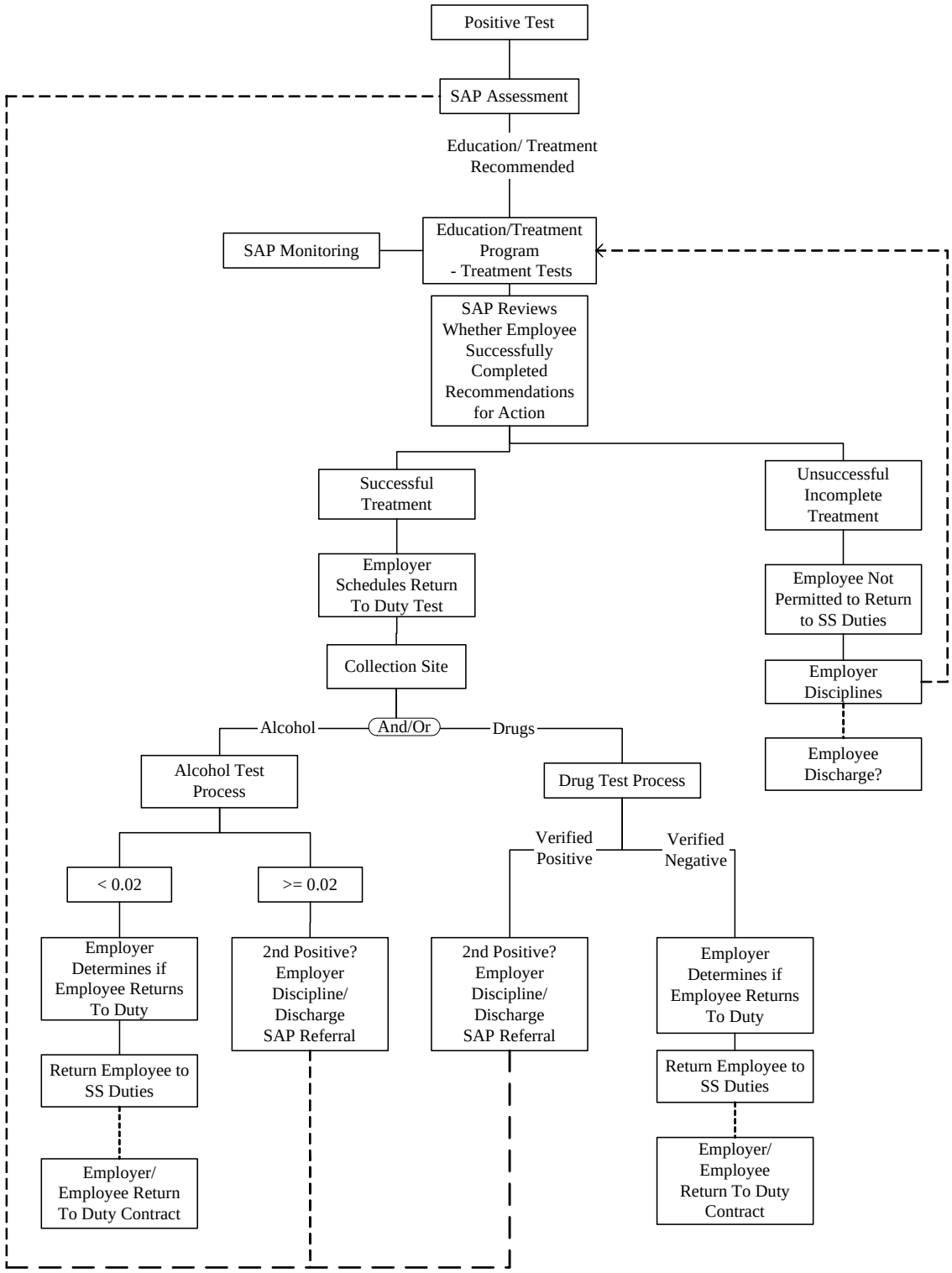
_____ _____
Employee Signature Date

_____
Print Name

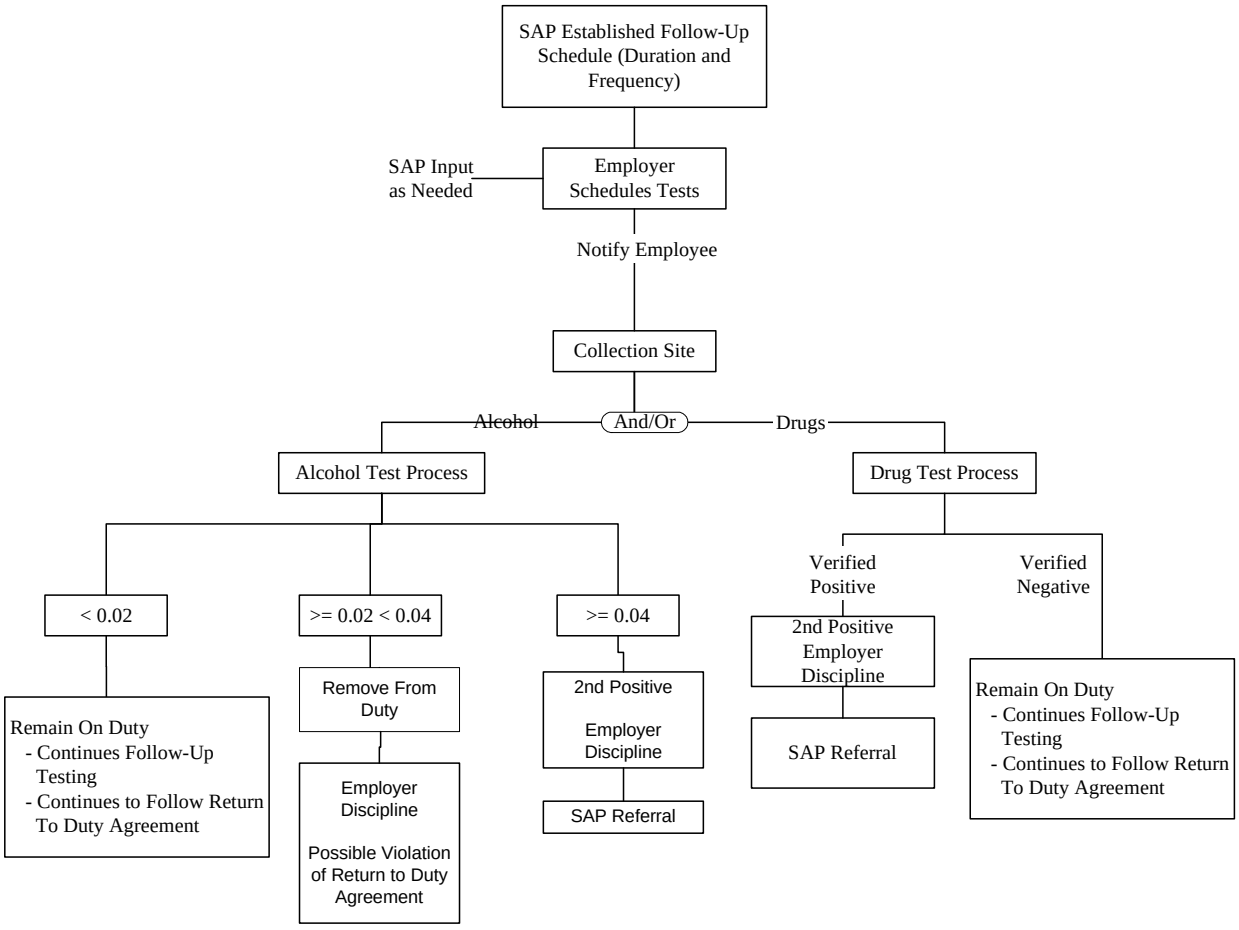
_____ _____
Agency Representative Signature Date

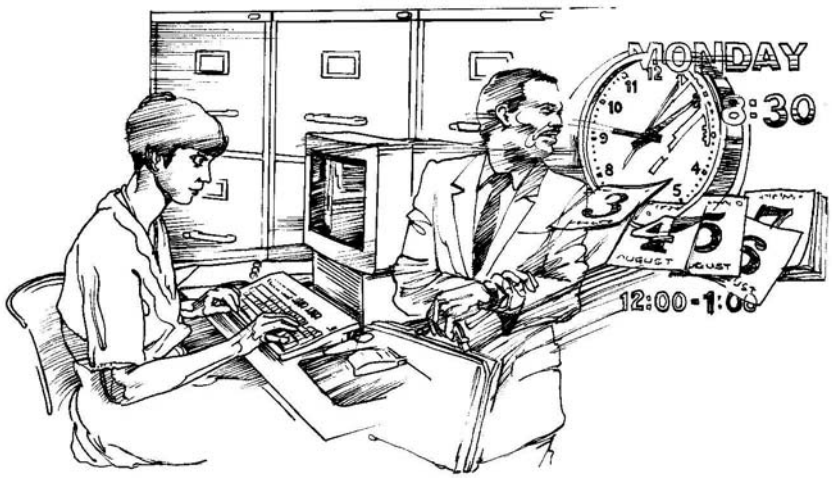
_____
Print Name

RETURN TO DUTY TESTING PROCESS



FOLLOW-UP TESTING PROCESS





Chapter 10. ADMINISTRATIVE REQUIREMENTS

FTA-covered employers must maintain certain records documenting their testing program consistent with the requirements set forth in Subpart P of Part 40 and §655.71. These DOT and FTA requirements specify the type of records that must be kept and the corresponding length of time they should be maintained. These requirements should be considered minimums. Sometimes, additional records are needed to complete a paper trail and thoroughly document the decision-making process. Similarly, employers may extend the record retention period to coincide with timelines for other data uses. For example, the statute of limitations for accidents in some states may exceed the minimum retention requirements for post-accident records set forth in the FTA regulations. Therefore, it may be prudent for the employer to establish a record retention policy that addresses both the FTA minimum requirements, and other potential needs for the information.

The regulation [§655.71] clearly specifies that records must be maintained on test results, the testing process, return-to-duty process, and employee training. In addition, you must submit annual reports to FTA regarding testing program activities and results. The regulations specify record keeping requirements for both employers [§655.71 and §40.333] and service agents [Part 40 Subpart P].

Section 1. RECORD KEEPING

Employer Record Keeping Requirements. Employers must maintain records documenting their program administration and the test results. Figure 10-1 on the following page summarizes the employer record retention requirements [§655.71]. The retention period begins on the record creation date.

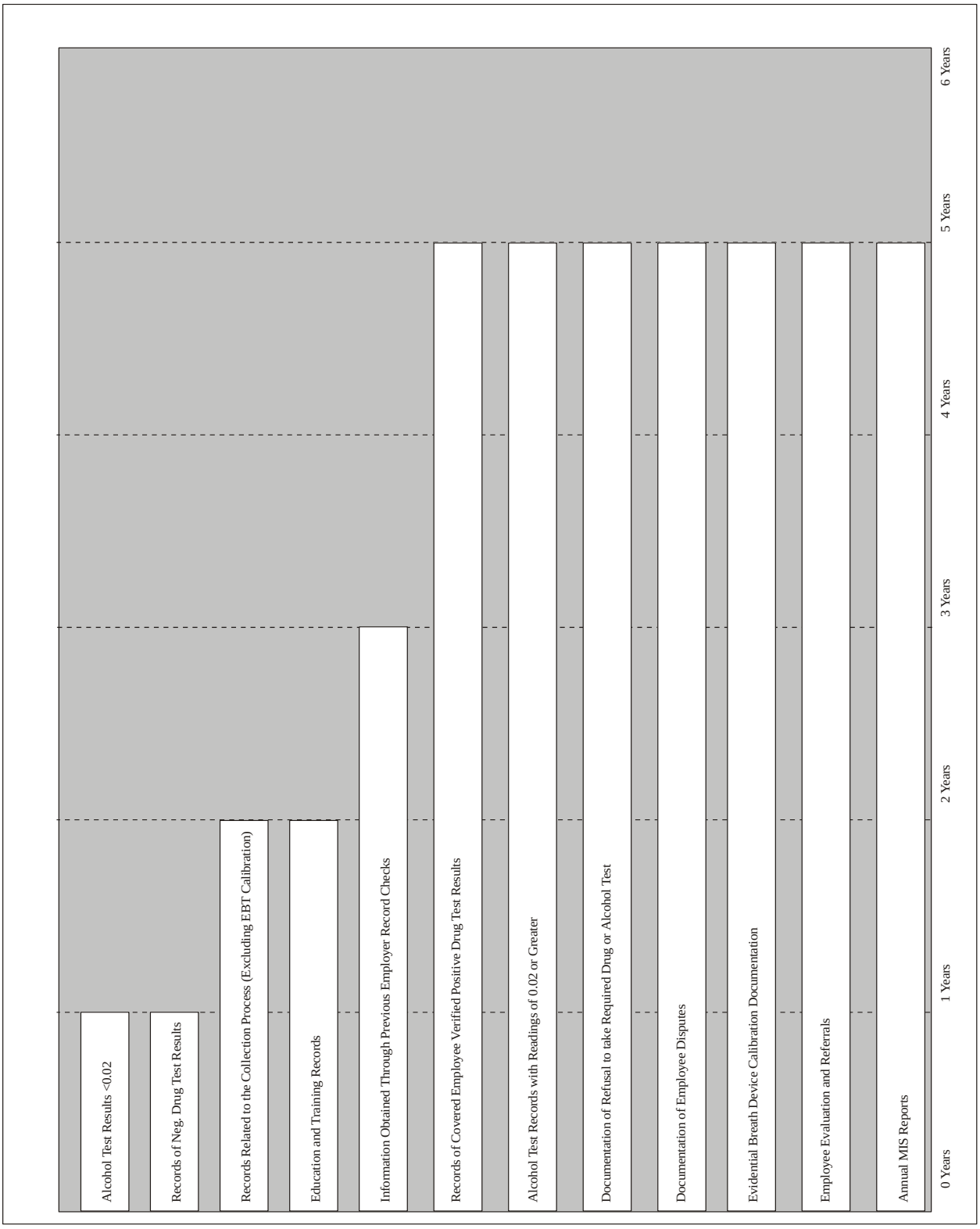


Figure 10-1. Employer Record Keeping Requirements

All employers must maintain records that document their FTA testing program's policies and procedures. These general records include the following:

- Current policy statement listing effective date and the governing board's approval (e.g., resolution/minutes); employee and new hire policy receipt acknowledgements.

- Previous policy statements listing effective dates and the corresponding governing board approvals; employee and new hire policy receipt acknowledgments.

- Training records documenting employee training and supervisor reasonable suspicion training. Documentation should include training agendas with major topics, corresponding time allotments, instructor, and roster of attendees by date. If possible, employers should keep copies of training materials used. The employer should also document that employees were notified of hotline numbers and keep copies of informational displays and handout materials with dates of distribution or display [§655.71(c)(4)].

- Credentials documenting that each service agent meets the minimum requirements for basic knowledge, qualifications training, certification/examination, error-correction training, and refresher training. If the service agents maintain these records, the employer should perform and keep documents of periodic spot checks to ensure that the minimum requirements are met.

- Log of Evidential Breath Testing Device external calibration checks [§40.333].

- Management Information System annual reports [§655.71(c)(5)].

- Safety-sensitive contractor oversight documents, including proof of policy adoption, training, use of qualified service agents, random selection process, record keeping, and test results. A compliance checklist (see Sample Documentation section at end of this chapter), and/or periodic inspection records are useful.

- Random selection process with documentation of scientific validity of methodology used. The employer should also keep documentation of all random numbers drawn with explanation for any test not conducted [§655.71(c)(1)].

Employers may also wish to maintain documentation explaining why jobs were designated safety-sensitive positions. This explanation may also be incorporated into individual job descriptions.

In addition to the general records, the employer must keep individual test records specific to each covered employee. These records may be kept in alphabetical order by employee, or by test category. Flow charts showing document flow for each category of test are shown in the Sample Documentation section at the end of this chapter.

- Pre-employment test records should include documentation that written notice of the drug test requirement was given to each applicant, the DOT Chain of Custody and Control (CCF) form, and the test result. If possible, the employer should note

when the applicant was assigned safety-sensitive duties.

Also, the employer must keep copies of the employee consent forms required to obtain test results from previous DOT-covered employers, documentation of the employers good faith effort to obtain the information from the previous employers, and previous employer responses with corresponding documentation [§40.25; §40.333].

- Random test records should include the CCF for all drug tests, the MRO test result report, and the ATF for all alcohol tests [§655.71(c)(1)].

- Post-accident test records should include a reference to the accident (i.e., accident number, location, date) to ensure that the test records are attributed to the corresponding accident. The record must state the decision-making process of why a test was or was not conducted [§655.44(d)]. The record must document the reason for any delay that caused an alcohol test to occur more than 2 hours from the time of the accident, or that caused test attempts to cease because the alcohol test was delayed more than 8 hours from the time of the accident [§655.44(a)(2)(ii)]. The record should also include documentation of the reason for any delay that caused test attempts to cease because the drug test was delayed more than 32 hours from the time of the accident. The documentation should also include the CCF with corresponding drug test result, and the ATF [§655.71(c)(1)].

- Reasonable suspicion test records should include the supervisor's documentation of the observation or event, which triggered the reasonable suspicion determination, the name of the employee involved, the date and time of the observation, the safety-sensitive function being performed at the time of the observation, circumstances of the observation, and the objective facts that led to the determination. The record should also include the CCF, documentation of the drug test result, and the ATF [§655.71(c)(1)]. The record must state the reason for any delay that caused an alcohol test to occur more than 2 hours from the time of the observation, or that caused test attempts to cease because the alcohol test was delayed more than 8 hours from the time of the observation. The record should also include documentation of the reason for any delay that caused test attempts to cease because the drug test was delayed more than 32 hours from the time of the observation.

Positive test result records should be maintained in individual employee files for at least 5 years. Positive drug test records must include the CCF, documentation from the MRO indicating the test result, split specimen test results, if any, and SAP referral [§655.71]. If possible, service agent credentials or pertinent information should accompany the positive test result. Positive alcohol test records (≥ 0.04) must include the ATF and the SAP referral. If possible, EBT calibration documentation and BAT certification should also accompany the ATF. Test records indicating an alcohol concentration of 0.02 or greater, but less than 0.04, must also be maintained for 5 years.

Employee **test refusals** should also be maintained in individual employee files for at least 5 years. Test refusal documentation should include the DAPM, supervisor, collector, and/or BAT statements of facts and circumstances related to the refusal [§655.71(c)(2)]. Documentation associated with a substitute or adulterated specimen should include the CCF, MRO's report of results (including the assessment of the referral physician, if appropriate), split specimen results, if any, and SAP referral.

In instances of **insufficient volume**, the employer should maintain the CCF and document the selection and evaluation of the referral physician, and the MRO's final determination of whether an existing medical condition caused the insufficient volume [§655.71(c)(1)].

If the employer has a second chance policy, the employee file must include the SAP's initial assessment, recommendation for treatment, reassessment, and the release to work documentation. The file must include the CCF, drug test result, and ATF for the **return-to-duty test,** as well as the SAP's recommended follow-up testing plan and subsequent CCFs, test results, and ATFs for the corresponding **follow-up tests** [§655.71 (c)(3)].

Records regarding positive test results, test refusals, and employee disputes that are associated with individual employees must be maintained for at least 5 years.

File management methods are discussed in Section 4.5 of the Best Practices manual under "Record Keeping Methods." Appendix B of the Best Practices manual contains examples of forms and master logs used to document the various types of tests conducted. These forms and logs are discussed in Section 4.1 of the manual under the different types of testing. If properly maintained, these records provide a comprehensive paper trail that documents and supports all testing decisions and makes program oversight, administration, and production of annual reports easier.

All FTA drug or alcohol test records must be kept in a secure location with controlled access [§655.71(a)]. Most employers have found that keeping their FTA drug and alcohol testing records in a separate locked file cabinet is the easiest way to meet this requirement. These records should also be maintained separate from personnel records and medical records to ensure that no unauthorized persons have access to test results. The employer must clearly define who will have access to the files and for what purpose. In most cases, access to test results is limited to one or two people within an organization, most commonly the DAPM and his/her assistant.

Otherwise, access to information should be restricted to all agency employees. This bar to information includes all system employees, union representatives, management, supervisory personnel, and board members. Individuals within the organization should only be privy to the information on a "need to know" basis. Thus, in the case of a pending dismissal or disciplinary action due to a positive test, the employee's supervisor who normally handles dismissals would need to know the reason for the dismissal and therefore, it would be appropriate to inform the supervisor of the positive test result. Care should be taken, however, to ensure the test results do not become "common knowledge" due to any action or comment by management personnel. See discussion on confidentiality and information disclosure later in this chapter.

If a consortium is used to administer the employer's testing program, the employer

may arrange to have the consortium maintain some or all of its records. It is not necessary, under these circumstances, for the employer to maintain a duplicate set of records, however, it may be in the employer's best interest to keep copies. See Chapter 11 of these *Guidelines* for a more detailed discussion of possible roles and responsibilities of consortiums. Regardless of who maintains the employer's records, it is the employer's responsibility to exercise and document oversight/compliance activities to ensure accurate and current records are kept that comply with FTA regulations.

Checklists of how long you should retain each of your records can be found in the Sample Documentation section of this chapter.

Service Agent Record Keeping Requirements. The various service agents participating in the DOT drug and alcohol testing process also have specific record keeping requirements.

Collection sites must keep copies of Copy 3 of the CCF for at least 30 days [§40.73(a)(9)]. Specimen collectors must maintain records documenting their credentials including qualifications training, proficiency demonstration, refresher training, and error correction training. These records must be made available to employers and DOT agency representatives upon request [§40.33(g)]. Similarly, BAT/STTs must also maintain documentation of their credentials and make them available to employers or DOT agency representatives upon request [§40.213(g)].

Laboratories must maintain non-negative specimens in secure, long-term frozen storage for a minimum of 1 year [§40.99]. If the primary specimen is non-negative, the split specimen must be stored for at least 1 year or for the same period of time that the primary specimen is retained. The laboratory must retain all records pertaining to each specimen for a minimum of 2 years [§40.109]. The records and specimens must be maintained for a longer period if requested by the employer, employee, MRO, or DOT agency.

Laboratories must produce and retain an aggregate statistical summary of drug test results for each employer on a semi-annual basis [§40.111]. The information required for the summary is presented in the Sample Documentation section of this chapter. The summary for the period beginning on January 1 through June 30 of each year must be reported to employers by July 20 of the same calendar year. Summaries covering the period from July 1 through December 31 must be reported by January 20 of the next calendar year. The laboratory must also maintain these summary reports for at least 2 years.

The lab summary reports must not include any employee specific information or information upon which an employee's identity can be inferred. Thus, laboratory reports will not be sent to employers that have fewer than 5 aggregate test results.

Medical review officers must maintain documentation of their credentials including medical licenses, qualifications training, and continuing education credits [§40.121(e)]. These records must be made available to employers and DOT agency representatives upon request. Substance abuse professionals must also maintain and make their credentials and training documentation available upon request [§40.281(e)]. In addition, SAPs must maintain copies of all reports provided to employers for a period of 5 years. Additional clinical records must be maintained in accordance with federal, state, and local laws that govern

confidentiality and information disclosure [§40.311(g)].

Section 2. CONFIDENTIALITY AND ACCESS TO RECORDS

The FTA regulation [§655.73] states that test results may be released only when required by regulation or when the employee provides specific written consent, which means that the employee must indicate in his/her written statement the specific information that is to be released, the identity of the person to which the information is to be released, and the specified time period. Vague, ill-defined, open-ended, or blanket statements of release are prohibited. The following circumstances require specific written consent:

- Employers and service agents shall release information or copies of records regarding an employee's test results to a third party only as directed by specific written consent of the employee.

- Upon written request, employers must promptly provide any employee with any and all records pertaining to his/her use of drugs or misuse of alcohol including test results. The only record that must be withheld from the employee is the SAP recommended follow-up testing plan [§40.329]. The release of information to the employee cannot be delayed pending payment for reproduction.

- Records must be released to subsequent employers upon receipt of a request that is accompanied by a written consent from the employee. The employer should release only the specific information for the specific time period that is delineated in the request and should only be released to the person expressly authorized to receive the information identified on the request.

Specific written consent is <u>not</u> required in the following circumstances:

- Employers and service agents may disclose information related to a test result to the employee or the decision-maker in a lawsuit (e.g., wrongful discharge), grievance (e.g., arbitration), or other proceeding initiated by, or on behalf of, the employee tested. This includes worker's compensation, unemployment compensation, or other proceeding related to a benefit sought by the employee when the drug or alcohol test results are pertinent to the proceeding [§40.323(a)(1)]. The information may only be released to parties to the proceeding.

- Employers and service agents may release test information in a criminal or civil action when a court of competent jurisdiction determines that it applies to the case and issues an order directing the employer to produce the information. The employer may release the information only with a binding stipulation that the decision-maker to whom it is released will make it available only to parties to the proceeding [§40.323(a)(2)].

- Employers and their service agents must release information to the National Transportation Safety Board (NTSB) on any post-accident test performed for an accident under NTSB investigation.

- Employers and service agents shall make available copies of DOT-covered drug and alcohol testing program records when requested by DOT, any DOT agency with regulatory authority over the employer or any of its employees, or to the state oversight agency authorized to oversee rail fixed guideway systems.

- Employers and service agents must also disclose any and all drug and alcohol testing information required under Part 655 to the state oversight agency or grantee required to certify compliance to FTA on their behalf. Thus, state departments of transportation that administer rural public transit programs under Section 5311 may have access to its subrecipient's drug and alcohol testing records to ensure compliance. Similarly, grantees that contract out safety-sensitive functions to contractors can review the contractor's drug and alcohol testing program records to monitor compliance.

Employers shall maintain records in a secure manner, so that disclosure of information to unauthorized persons does not occur. Release of information under any other circumstance is prohibited by the regulations [§655.73(a); §40.231].

Besides the employer, the collection site, laboratory, Medical Review Officer, and Substance Abuse Professional must also adhere to strict confidentiality requirements. The testing laboratory is prohibited from releasing individual test results to anyone except the designated MRO. The MRO and the BAT should only report individual employee's test results to designated employer representatives and to the individual who was tested.

MROs are also required to release drug test results and medical information to the employer, health care provider, SAP, DOT agency, or NTSB without the employee's consent, if the MRO determines the person is medically unqualified to perform safety-sensitive duties or poses a significant safety risk [§40.327]. MROs, laboratories, and SAPs are required to provide employees with copies of any records pertaining to their drug and alcohol testing records within 10 days of receiving a written request from the employee. These records should be provided free of charge except for reproduction costs. The laboratory information must be provided to the employee via the MRO. All records including notes and checklists must be released except for those covered by other laws pertaining to confidentiality and the release of clinical records. SAP recommended follow-up testing plans must not be released to employees.

Employers and service agents must provide access to all facilities used to conduct DOT drug and alcohol testing functions by DOT or FTA agency representatives (e.g., auditors). The FTA representative must be given access to all written, printed, and computer-based records, reports, files, materials, data, documentation, agreements, contracts, policies, and procedures. Laboratories must not, however, release or provide a specimen or a part of a specimen to a third party without first obtaining written consent from ODAPC. If a lab receives a court order to release a specimen, the laboratory must take necessary legal steps to contest the issuance of the order.

To ensure confidentiality is not violated, it is the employer's responsibility to clearly

define who will receive test results and for what purposes. Anytime an employer or service agent releases information to a third party without the employee's specific written consent, the employer or service agent must immediately notify the employee in writing of the release.

The release of test results is only one concern. You must also be sensitive to employee expectations of confidentiality in other aspects of a drug and alcohol program. For example, if it becomes widely known that an employee has taken a reasonable suspicion test (even if the test result is negative), that employee may feel that his/her privacy has been violated. Likewise, if referrals to a treatment program for rehabilitation become a topic of gossip, employees may lose faith in your program and become distrustful of management. Therefore, confidentiality should be applied to all aspects of your substance abuse management program, particularly with respect to identifying specific individuals. The general guideline is to apply the same high regard for privacy and confidentiality that you would want and expect for yourself.

Section 3. REPORTING

FTA requires that transit agencies prepare annual reports summarizing test results [§655.72] for each calendar year. The information is used to monitor the success of the FTA drug and alcohol testing program and to determine the annual random drug and alcohol testing rates for future years. The standard Management Information System (MIS) reports that must be used are contained in 49 CFR Part 655, Appendix A. The forms can also be downloaded from FTA's homepage at http://transit-safety.volpe.dot.gov/DAMIS.

Previously, all grantees, subrecipients, and safety-sensitive contractors covered under the FTA regulations were required to submit their reports to FTA each year. However, with the publication of 49 CFR Part 655, FTA changed the way systems are to report. Under the new rule, all covered employers are still required to complete an annual MIS report, but only those employers who are randomly selected are required to submit their reports to FTA.

The sampling procedure used stratifies the transit agencies into four groupings: top 40 urban, other large urban, small urban, and rural transit agencies. Safety-sensitive contractors are included in the grouping for the transit agency they serve. All of the top 40 transit agencies and their safety-sensitive contractors are required to report every year and are not included in the sampling process. For the remaining agencies, a sampling method used renders a 95 percent confidence interval at the +/- 0.5 percent precision level. As a result, in 2001, 70 large urban, 55 small urban, and 188 rural agencies were randomly selected. Including the 40 largest systems, a total of 353 transit agencies were selected for reporting. When safety-sensitive contractors were added, a total of 802 employers were required to submit MIS reports for calendar year 2001.

The list of randomly selected transit agencies is created at the end of each calendar year. Each of the selected employers is sent a notification and reporting package directly. Section 5311 subrecipients are contacted directly with a separate notification to their respective state. The selected employers are required to submit their reports using the MIS forms in their package, or submit their responses electronically.

Many employers have found that the use of master logs that are used to track drug and alcohol tests throughout the year can ease the task of completing the MIS reports. Instead of wading through individual test records, the master logs can simply be consulted for the necessary information. Master logs can also be used to assist the DAPM in overseeing and managing the program.

The accuracy of the data reported and the statistical validity of the sample selection method is critical as the information obtained is the basis for establishing future minimum random drug and alcohol testing rates. Once the MIS reports are received from the selected employers, an average random positive test rate is calculated for each of the four transit size groupings. The test rates are weighted based on the estimated number of individual drug tests for each group. The overall weighted average is the value used to determine the minimum random rate.

If the weighted average random rate for drugs is 1.0 percent or more, the minimum drug random test rate will remain at 50 percent. If the weighted average rate is less than 1.0 percent for 2 consecutive years, the minimum random rate will be lowered to 25 percent. If it subsequently, rises above 1.0 percent for any single year, the minimum drug random test rate will rise again to 50 percent.

If the weighted average rate for alcohol remains below 0.5 percent, the minimum alcohol random test rate will remain at 10 percent. If the weighted average rate exceeds 0.5 percent, but is below 1.0 percent for 1 year, the minimum alcohol random rate will be increased to 25 percent. If the weighted average rate for alcohol exceeds 1.0 percent for a single year, the minimum alcohol random rate will be established at 50 percent.

Each of the selected employers must submit their annual reports to FTA's Drug and Alcohol Management Information System office by March 15 following each calendar year. States must review the reports of their Section 5311 subrecipients for accuracy prior to their submittal to FTA. Employers have the option to submit their responses in hard copy or CD-ROM. Internet reporting will be an option in the future.

If an employer is a member of a testing consortium, that consortium must provide the required information to the employer. The employer may either compile its annual report from reports provided by the consortium, or the employer may require the consortium to prepare the annual report. In either case, the employer must reserve adequate time to review the data provided by the consortium and submit its report by March 15. Even if the consortium maintains the employers' records and prepares the employers' reports, the employer is still responsible for the report's accuracy and timely submission.

Section 4. CERTIFICATIONS

Urban systems that receive funding directly through Section 5307 or 5309 from

FTA must certify annually that they are in compliance with the alcohol and drug testing regulations as part of their Annual List of Certifications and Assurances for FTA Grants and Cooperative Agreements. Rural systems that receive FTA Section 5311, 5307, or 5309 funding through a state department of transportation do not certify directly to FTA; rather the state must certify annually on their behalf. Most states require their subrecipients to certify compliance as part of the state annual grant submission. In instances where a rural system does not submit a grant application annually, the state should require annual letters from each, certifying compliance with the drug and alcohol testing regulations.

Sample letters of certification can be found in the Sample Documentation section of Chapter 2, "Regulatory Overview."

Your certification must be authorized by your governing board (if you have one), or by another authorized official. You should review your program and ensure its compliance prior to signing. Figure 10-2 shows examples of individuals who might be authorized to certify compliance at various types of organizations and the records needed to show proper granting of authority and review.

States must certify the compliance of transit agencies they oversee. Simply requiring transit agencies to certify that they are in compliance may not be adequate. Examples of oversight activities include the following:

- Technical assistance and training to establish and operate programs
- On-site monitoring and inspection
- Regular reporting and follow-up

If you receive more than $25,000 in funding directly from FTA, you must also certify compliance with the Drug-Free Workplace Act of 1988. A copy of the required Drug-Free Workplace Act certification is included in Chapter 13. The certification is normally submitted to your regional FTA office at the same time as, and as part of, your grant application. See Chapter 13 for a detailed discussion of the Drug-Free Workplace Act of 1988.

Section 5. SANCTIONS

If you do not institute a program including all of the elements required by the applicable regulations, your agency can lose its FTA funding.

You should be very careful in preparing both your reports and your certifications. Neither should be prepared or signed casually. It is especially important to ensure that your governing board or senior officials who will sign (or authorize you to sign) annual reports and certifications are fully informed on a regular basis about the status and activities of the program.

Your signature on the annual reports and certifications indicates that their contents are true and accurate to the best of your knowledge. If you knowingly and willingly make, or cause others to make, false statements or misrepresentations in either the annual reports or the certifications, you are committing a federal crime and are subject to criminal penalties including a fine of up to $10,000, imprisonment of up to 5 years, or both (§1001 of Title 18 of the U.S. Code).

A. At a Nonprofit Agency or Independent Transit Authority

Individual Authorized to Certify Compliance	Typically Authorized By	Records That Should Be Maintained to Demonstrate Proper Granting of Authority and Review
Program Manager	General Manager Executive Director Board of Directors	Board Minutes Authorizing Memorandum
General Manager Executive Director	Board of Directors	Board Minutes
Board President Board Chairman	Board of Directors	Board Minutes

B. At a Municipal Agency

Individual Authorized to Certify Compliance	Typically Authorized By	Records That Should Be Maintained to Demonstrate Proper Granting of Authority and Review
Program Manager	Department Head; Municipal CEO; Municipal Council, Board; or Equivalent	Authorizing Memorandum Minutes
Department Head	Mayor; Agency Head; Municipal Council	Authorizing Memorandum Minutes
City Manager; Head of Municipal Council; or Equivalent	Mayor; Municipal Council	Minutes

C. At a State Agency

Individual Authorized to Certify Compliance	Typically Authorized By	Records That Should Be Maintained to Demonstrate Proper Granting of Authority and Review
DOT Employee with Responsibility for Alcohol Misuse and Drug Use Programs	Head of Public Transportation Division	Authorizing Memorandum, Initialed Copy of Report
Head of Public Transportation Division	Secretary or Commissioner of Transportation	Authorizing Memorandum
Secretary or Commissioner of Transportation	Follow State Rules	Follow State Rules

Figure 10-2. Examples of Individuals Given Authority to Certify Compliance

Sample Documentation

Semiannual Laboratory Report Requirements

Reporting Period:
Laboratory Name and Address:
Employer Identification:
C/TPA Identification:

1. Number of specimen results reported:
    - Total
    - Pre-employment
    - Post-accident
    - Random Testing
    - Reasonable suspicion/cause testing
    - Return-to-duty testing
    - Follow-up testing
    - Type not noted on CCF

2. Number of specimen results reported:
    - Negative
    - Negative-dilute

3. Number of specimens reported as Rejected for Testing:
    - Fatal flaw
    - Uncorrected flaw

4. Number of specimens reported as positive:
    - Marijuana Metabolite
    - Cocaine Metabolite
    - Opiates
        - Codeine
        - Morphine
        - 6-AM
    - Phencyclidine
    - Amphetamines
        - Amphetamine
        - Methamphetamine

5. Adulterated

6. Substituted

7. Invalid Results

Record Retention Checklists (page 1)

Drug and Alcohol Program Records You Must Maintain for 1 Year

1. Records of Test Results less than 0.02

   _____ Employer's copy of the Alcohol test forms, including results of the test.

2. Records of Verified Negative Drug Test Results

   _____ Employer's copy of custody and control form

   _____ Test result

Drug and Alcohol Program Records You Must Maintain for 2 Years

1. Records Related to the Collection Process
   (Except Calibration of Evidentiary Breath Testing Devices)

   _____ Collection logbooks, if used.

   _____ Documents relating to the random selection process.

   _____ Verification of Breath Alcohol Technician Training.

   _____ Documents generated in connection with decisions to administer reasonable suspicion alcohol and/or drug tests.

   _____ Documents generated in connection with decisions on post-accident tests.

   _____ Documents showing existence of medical explanation of inability of safety-sensitive employee to provide enough urine or breath for test.

2. Education and Training Records

   _____ Training materials on drug use awareness, including a copy of the employer's policy on prohibited drug use.

   _____ Names of safety-sensitive employees attending training on prohibited drug use and the dates and times of such training.

   _____ Documentation of training provided to supervisors to qualify them to make reasonable suspicion determinations.

   _____ Certification that training complies with the regulatory requirements.

Record Retention Checklists (page 2)

_____ Procedures to assess those with verified positive tests, providing available services, referral, suspension, and dismissal.

_____ Materials distributed to employees on alcohol misuse awareness.

_____ Documentation of compliance with requirements of §655.82.

_____ Educational materials that explain the regulatory requirements.

_____ The employer's policy and procedures with respect to implementing the regulatory requirements.

____ Written notice to every safety-sensitive employee of the availability of the above materials.

_____ Written notice to all safety-sensitive employee organizations (i.e., collective bargaining units) of availability of the above materials.

Drug and Alcohol Program Records You Must Maintain for 3 Years

1. Information obtained from the previous employer record check.

____ Records of previous positive drug tests, alcohol tests ≥ 0.02, test refusals, and/or any other rule violation.

_____ Records documenting the individual's completion of the return-to-duty process.

_____ Records documenting the employer's good faith effort to obtain records from an applicant's previous DOT-covered employers including applicant consent forms.

Drug and Alcohol Program Records You Must Maintain for 5 Years

1. Records of Covered Employee Verified Positive Drug Test Results.

_____ Employer's copy of the chain-of-custody form and corresponding test result.

_____ Documents related to the refusal of any safety-sensitive employee to submit to a required drug test.

_____ Documents presented by a safety-sensitive employee to dispute the result of a drug test administered under 49 CFR Part 655.

Record Retention Checklists (page 3)

2. Alcohol Test Records with Alcohol Readings ≥ 0.02.

   _____ The employer's copy of the alcohol test form, including the results of the test.

   _____ Documents related to the refusal of any safety-sensitive employee to submit to an alcohol test required by 49 CFR Part 655.

   _____ Documents presented by a covered employee to dispute the result of an alcohol test administered under 49 CFR Part 655.

3. Documentation of refusal to take a required drug and/or alcohol test.

   _____ Includes adulterated or substituted drug test results.

4. Evidential Breath Testing Device Calibration Documentation

   _____ Documents specifying the machine calibration (e.g., by serial number), the date of calibration, the certified technician calibrating the equipment, and the results of the calibration. Signed by the calibrating technician.

   _____ Manufacturer's calibration schedule for the model of equipment used.

   _____ Certification record for the calibration technician.

5. Employee Evaluation and Referrals

   _____ Records pertaining to the SAP's initial assessment of the individual.

   _____ Records concerning a safety-sensitive employee's entry into and completion of the program of rehabilitation/education recommended by the substance abuse professional.

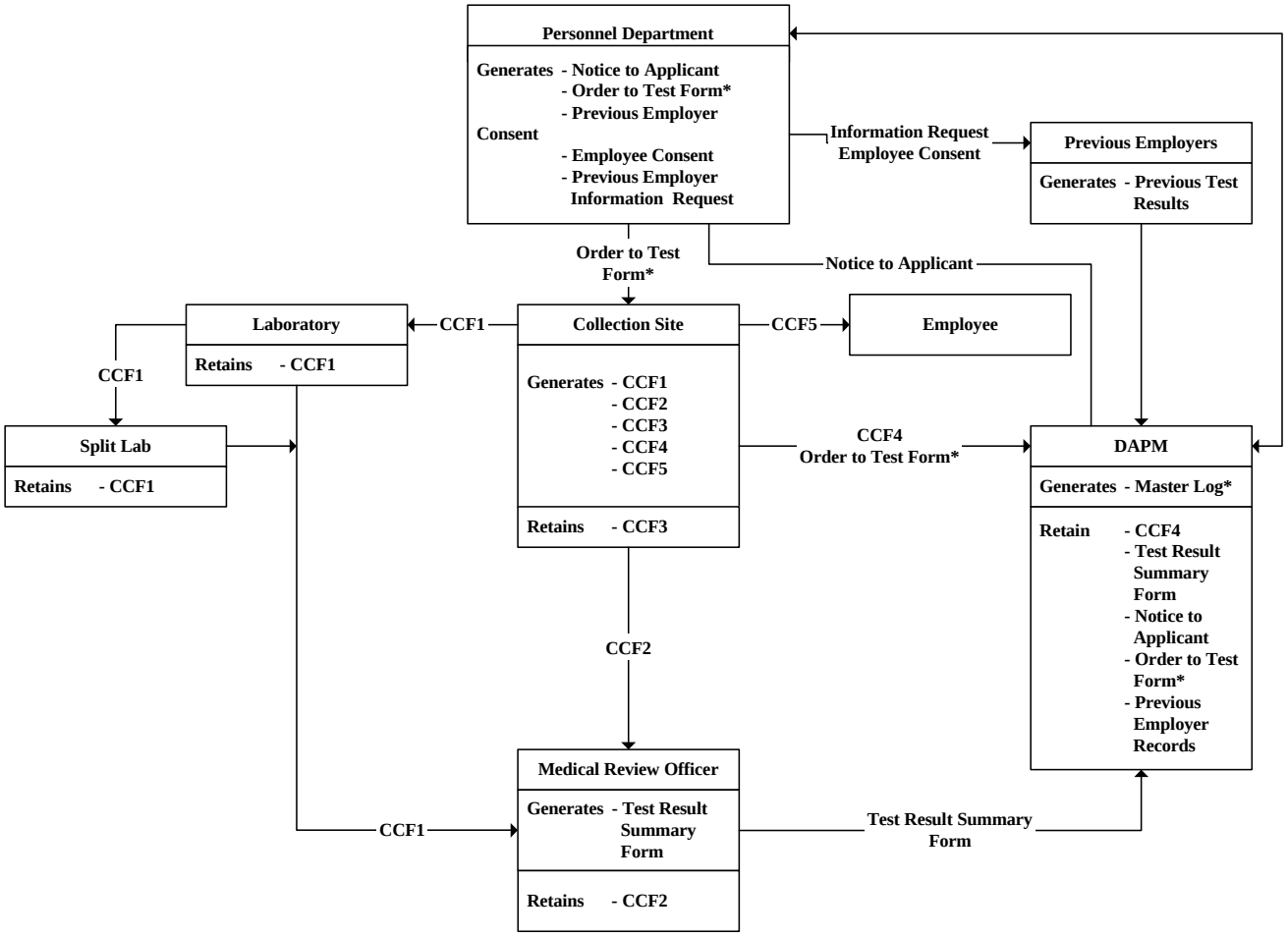
   _____ Records pertaining to the SAP's reassessment of the individual following education/treatment.

   _____ Records pertaining to a determination by a substance abuse professional concerning a safety-sensitive employee's suitability to return to work as a safety-sensitive employee.

   _____ Records of follow-up tests and schedules for follow-up tests.

6. Annual MIS Reports

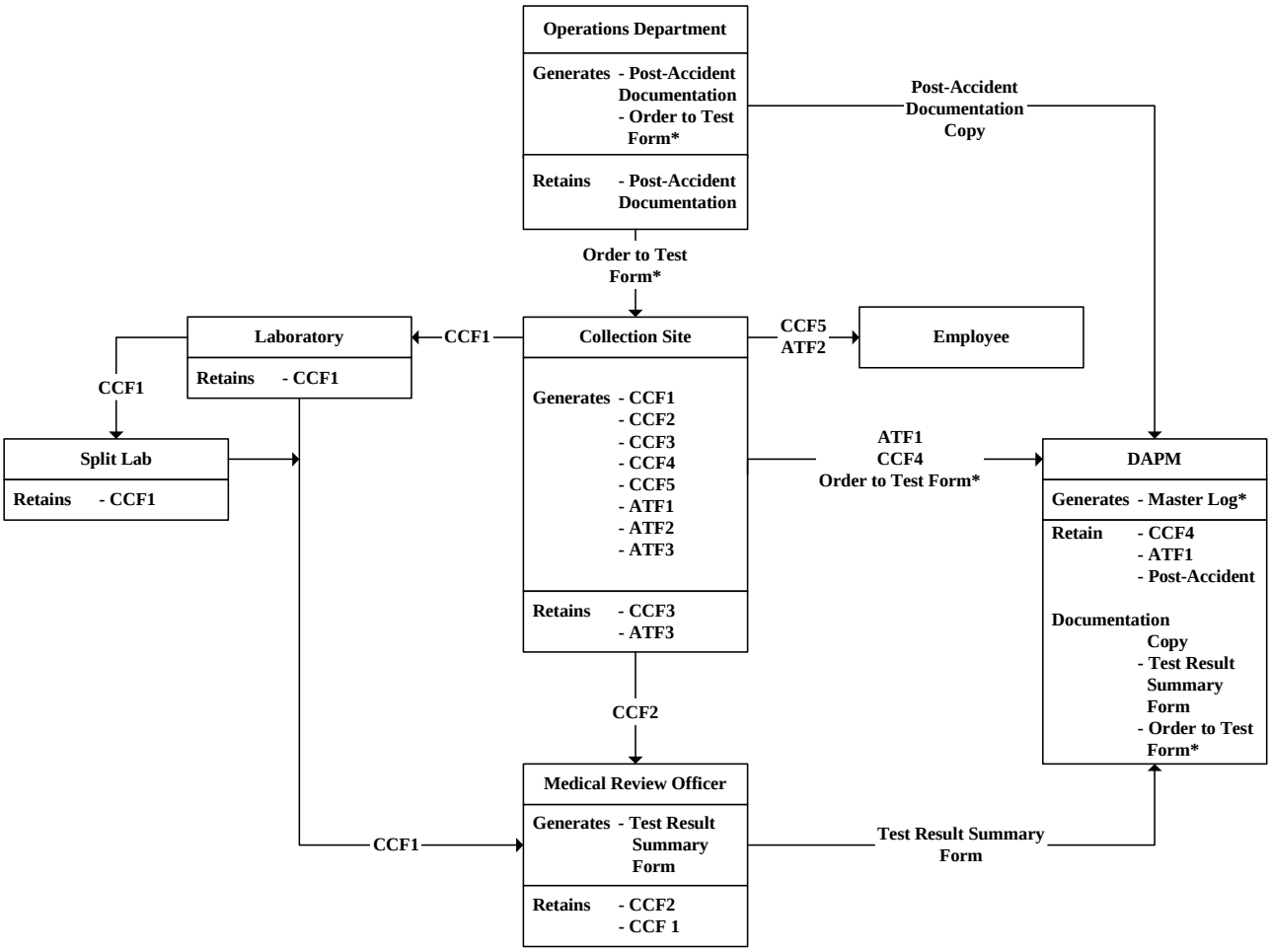
PRE-EMPLOYMENT FORM FLOW



CCF Chain of Custody & Control Form
ATF Alcohol Testing Form

* Optional

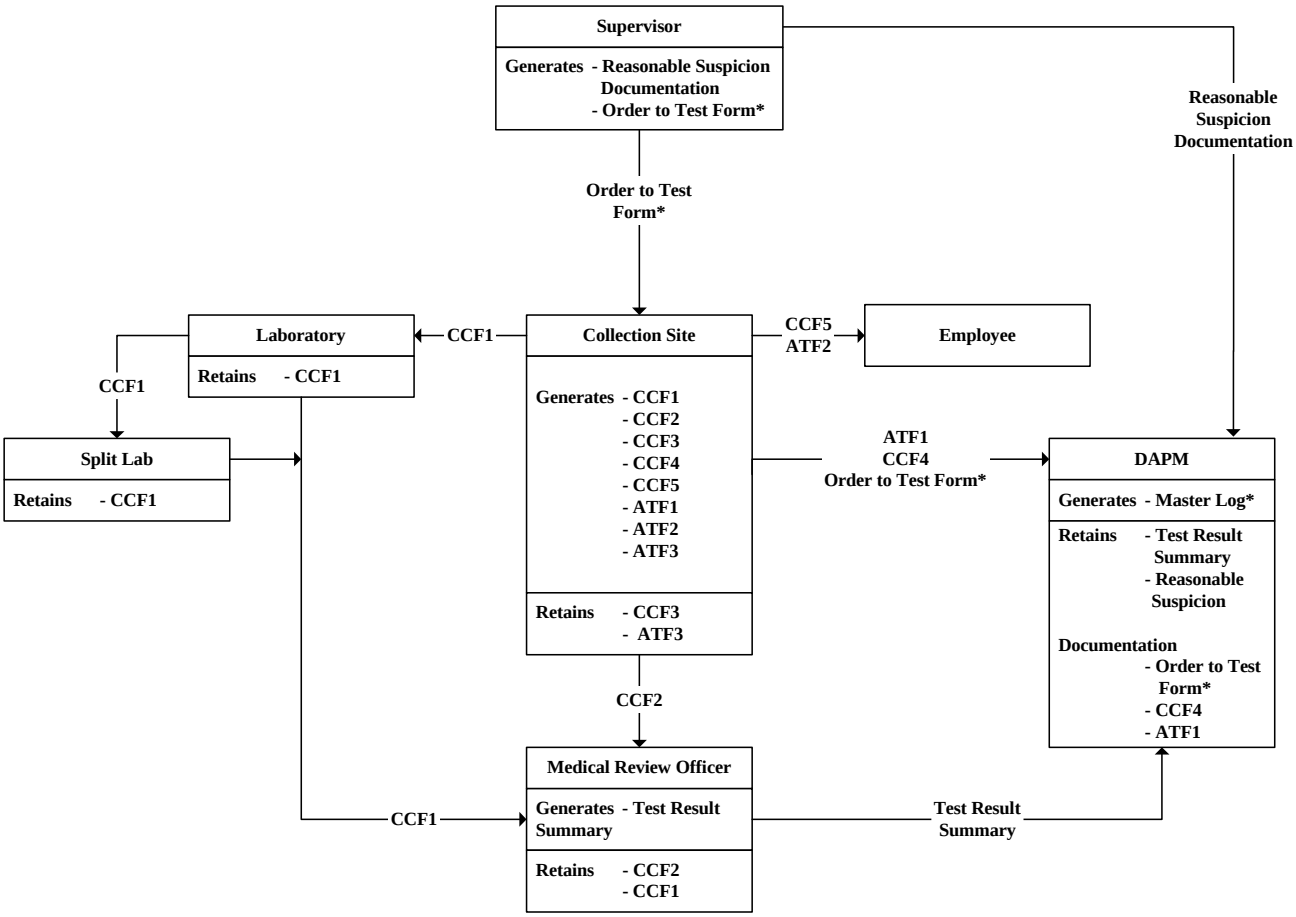
POST-ACCIDENT FORM FLOW



CCF Chain of Custody & Control Form
ATF Alcohol Testing Form

* Optional

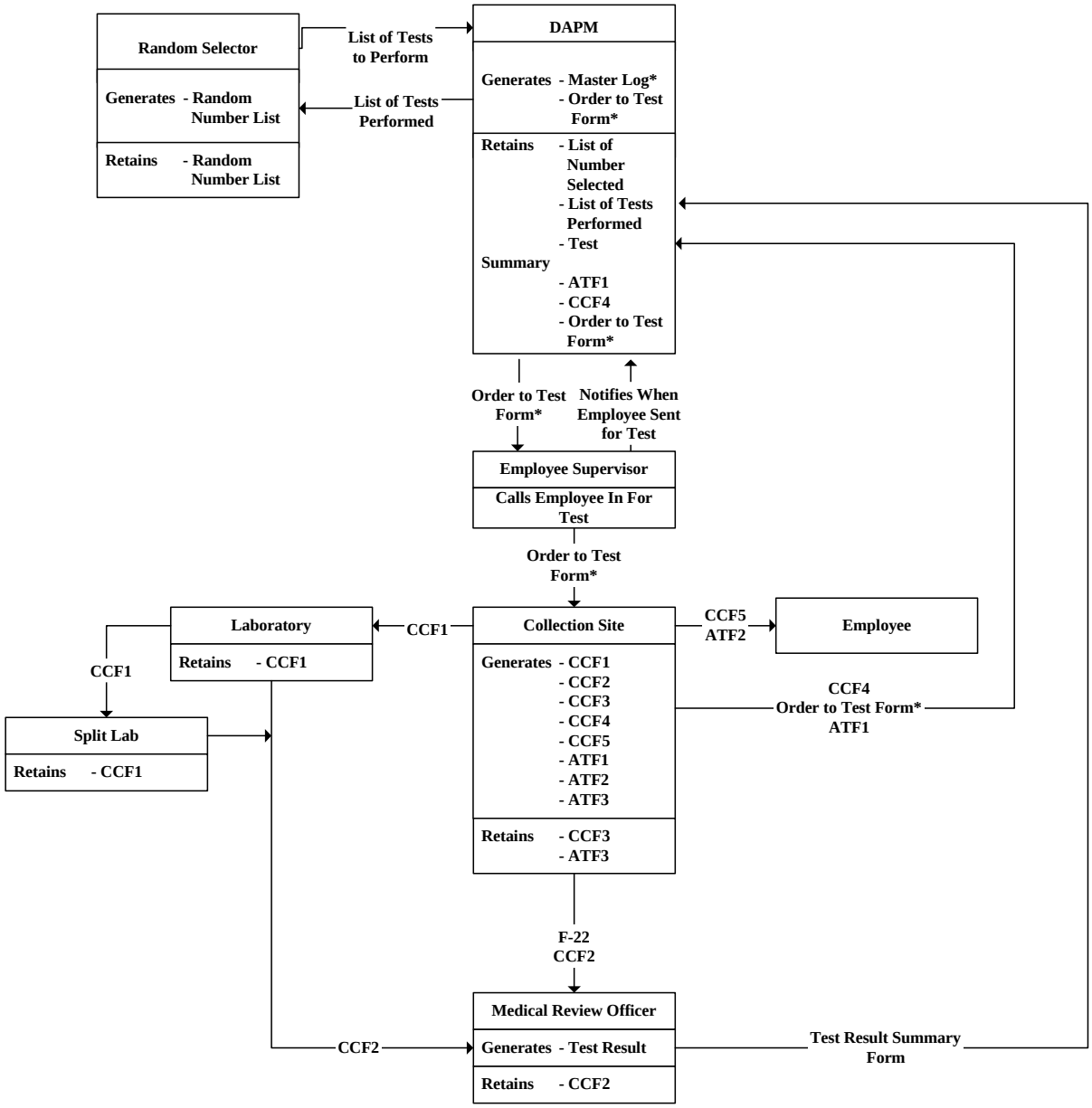
REASONABLE SUSPICION FORM FLOW



CCF Chain of Custody & Control Form
ATF Alcohol Testing Form

* Optional

RANDOM TESTING FORM FLOW



CCF Chain of Custody & Control Form
ATF Alcohol Testing Form

* Optional

U.S. DEPARTMENT OF TRANSPORTATION DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

Calendar Year Covered by this Report: _____ OMB No. 2105-0529

I. Employer:

Company Name:_____

Doing Business As (DBA) Name (if applicable):_____

Address:_____ E-mail: _____

Name of Certifying Official: _____ Signature: _____

Telephone: (_____)_____ Date Certified: _____

Prepared by (if different): _____ Telephone: (_____)_____

C/TPA Name and Telephone (if applicable): _____ (_____)_____

Check the DOT agency for which you are reporting MIS data; and complete the information on that same line as appropriate:

___ FMCSA – Motor Carrier: DOT #: _____ Owner-operator: (circle one) YES or NO Exempt (Circle One) YES or NO

___ FAA – Aviation: Certificate # (if applicable): _____ Plan / Registration # (if applicable):_____

___ RSPA – Pipeline: (Check) Gas Gathering__ Gas Transmission__ Gas Distribution__ Transport Hazardous Liquids__ Transport Carbon Dioxide__

___ FRA – Railroad: Total Number of observed/documented Part 219 "Rule G" Observations for covered employees: _____

___ USCG – Maritime: Vessel ID # (USCG- or State-Issued): _____ (If more than one vessel, list separately.)

___ FTA – Transit

II. Covered Employees: **(A) Enter Total Number Safety-Sensitive Employees In All Employee Categories:**

(B) Enter Total Number of Employee Categories:

(C)

Employee Category	Total Number of Employees in this Category

If you have multiple employee categories, complete Sections I and II (A) & (B). Take that filled-in form and make one copy for each employee category and complete Sections II (C), III, and IV for each separate employee category.

III. Drug Testing Data:

	1	2	3	4	5	6	7	8	9	10	11	12	13
									Refusal Results				
Type of Test	Total Number Of Test Results [Should equal the sum of Columns 2, 3, 9, 10, 11, and 12]	Verified Negative Results	Verified Positive Results ~ For One Or More Drugs	Positive For Marijuana	Positive For Cocaine	Positive For PCP	Positive For Opiates	Positive For Amphetamines	Adulterated	Substituted	"Shy Bladder" ~ With No Medical Explanation	Other Refusals To Submit To Testing	Cancelled Results
Pre-Employment													
Random													
Post-Accident													
Reasonable Susp./Cause													
Return-to-Duty													
Follow-Up													
TOTAL													

IV. Alcohol Testing Data:

	1	2	3	4	5	6	7	8	9
							Refusal Results		
Type of Test	Total Number Of Screening Test Results [Should equal the sum of Columns 2, 3, 7, and 8]	Screening Tests With Results Below 0.02	Screening Tests With Results 0.02 Or Greater	Number Of Confirmation Tests Results	Confirmation Tests With Results 0.02 Through 0.039	Confirmation Tests With Results 0.04 Or Greater	"Shy Lung" ~ With No Medical Explanation	Other Refusals To Submit To Testing	Cancelled Results
Pre-Employment									
Random									
Post-Accident									
Reasonable Susp./Cause									
Return-to-Duty									
Follow-Up									
TOTAL									

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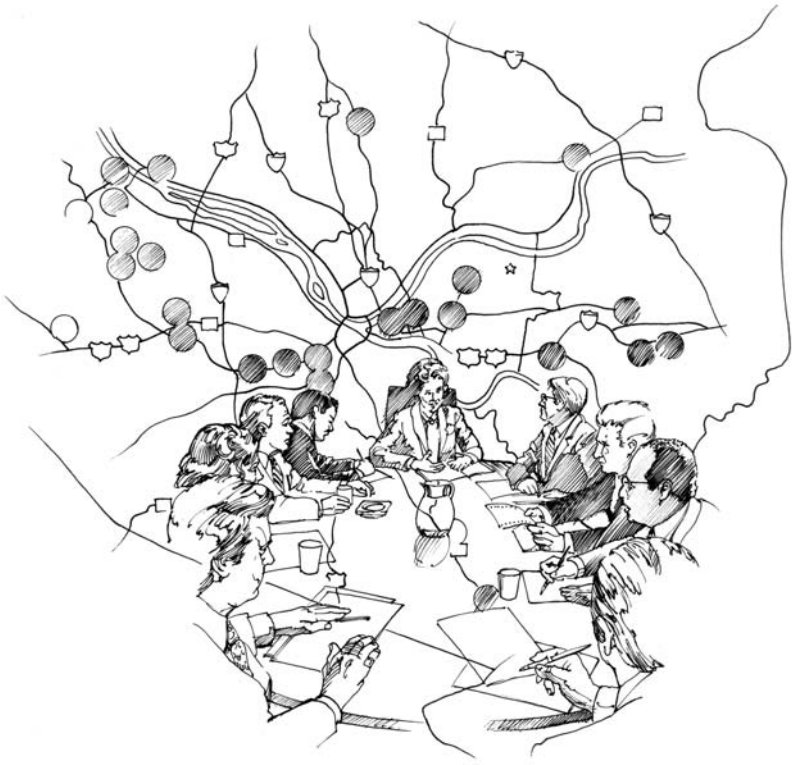
Title 18, USC Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements of representations in any matter within the jurisdiction of any agency of the United States.



Chapter 11. CONSORTIA AND THIRD PARTY ADMINISTRATORS

Implementing your drug and alcohol program is a significant undertaking as it involves planning, contracting, administrative, legal, and monitoring efforts. Even large transit agencies find these responsibilities among the most complex and demanding elements of their safety programs. Small transit agencies may be more seriously challenged.

One way to reduce program burdens and associated costs that transit agencies and transportation employers have tried successfully is the formation of consortia and the use of third party administrators to administer and obtain testing and related services. Consortia/Third Party Administrators (C/TPA) are defined in §40.3 as service agents that provide or coordinate the provision of a variety of drug and alcohol testing services to employers.

Consortiums typically perform administrative tasks concerning the operation of the employer's drug and alcohol testing programs. This term is usually applied to groups of employers who join together as a single entity to administer the DOT drug and alcohol testing programs of its members.

TPAs usually provide a complete package of services that include most aspects of drug testing, alcohol testing and program administration. These services are provided under one contract and for a set price. Third party administrators have different forms and may be called by different names. In general, there are two types of TPAs known as "turnkey vendors" and "service brokers." Each type of TPA provides testing services to clients under

one contract, and bills clients for a variety of services in one invoice.

Turnkey vendors offer a prepackaged set of services to the consortium for a fixed price. The services typically include MRO, laboratory, and collection sites. In contrast, a service broker selects individual service agents, defines services to be provided, and negotiates rates for the consortium.

The goal of using a C/TPA is to make service contracting and monitoring easier. Preferably, all service issues are handled through a single contact person working for the C/TPA. The C/TPA should be accountable for the performance and compliance of all service agents. Transit agencies, however, cannot legally delegate their compliance responsibilities to their C/TPA, since the employer remains ultimately responsible for the agency's compliance.

FTA encourages transit agencies to form or join consortia and to purchase testing services from a TPA. State departments of transportation have also taken an aggressive role in promoting the formation of consortia for use by the small urban and rural programs they administer. Exhibit 11-1 in the Sample Documentation section at the end of this chapter describes different examples of state involvement in consortia development.

Section 1. ADVANTAGES OF CONSORTIA

Transit agencies that form or join consortia generally do so for one or more of the following reasons:

- Lower costs
- Greater expertise
- Reduced administrative burden
- Random Pool Maintenance and Selection
- Reduced liability
- Confidentiality

Lower Costs. Because of overhead (e.g., training, record keeping, reporting, billing, and administrative activities) collection sites, drug testing laboratories, MROs, and SAPs incur smaller per unit costs when they contract with large employers than when they contract with smaller, individual ones. Consequently, a small employer may not be able to buy some services. For example, a contract for fewer than 10 tests per year may not justify a laboratory's proposal effort.

In the majority of cases, however, services can be purchased even though the price may be higher for small employers. The per unit cost to an organization purchasing fewer services (for example, drug tests) may be significantly greater than the per unit costs to a large organization buying more identical services.

A consortium allows several organizations to combine their service needs and buy in larger quantities for a better price. In addition, spreading administrative and other costs among more agencies may further reduce the total cost of drug and alcohol testing. Actual savings are determined by: 1) the number of consortium members; 2) the total number of covered employees; 3) the frequency of testing; and 4) the extent of services provided. Savings may be used to offset the cost of employing a professional manager.

Greater Expertise. The FTA and DOT regulations are not simple. Although the regulations were carefully crafted, experience indicates that you may encounter situations where it is not clear what your responsibilities are under the regulations. The regulations purposely leave many decisions to local management, which should be included in policy statements and operating procedures. Beyond this, no one can anticipate every situation that will arise.

Few transit systems can afford to hire a full-time DAPM to administer its program. In most cases, the administration of the agency's drug and alcohol program is delegated to someone in the organization who has many other responsibilities. This is especially true in small rural transit systems.

Joining a consortium allows employers to pool resources to hire a professional manager with specialized knowledge and experience. The consortium manager can devote his/her full attention to the testing requirements, and can provide oversight to the drug and alcohol programs of member organizations. Depending upon the size of the consortium, the manager may be full or part-time, and his/her salary, as well as consortium expenses may be recovered with testing cost savings.

Reduced Administrative Burden. The administrative burden of operating a program that complies with the regulations can be substantial. Procuring services, training employees and program personnel, maintaining collection equipment and facilities, maintaining the random pool, completing random selection and notification, assuring quality, and record keeping and reporting can each be time consuming activities. Together, these activities can be daunting to a system that wants to operate a first-class safety program.

Pooling Resources – An Example

A consortium of seven transit agencies was established to pool talents to meet the FTA regulations.

Due to the geographic closeness and density of populations served by the transit agencies, the consortium members found it helpful to collectively develop as much of the drug and alcohol testing program as they could. Each member contributed its own special areas of expertise.

The consortium members worked collectively to develop common RFPs, contract specifications, and common language for policy statements. Each transit agency developed its own policy and program using parts of the consortium-developed material.

It was especially valuable to pool employees and obtain better prices for services like collections and laboratory analysis. Another advantage was that it gave the organizations a chance to hear other's opinions on how to implement the regulations, as well as different "readings" or understandings of the regulations.

This consortium approach for developing a drug and alcohol program is a model of how multiple transit agencies, pooling limited resources, can build stronger programs than they could by themselves.

A consortium can manage many of these program-related activities. By pooling administrative functions, a consortium may save its members time

and effort. Because the services are provided for all employers, individual costs to an employer may be less than if each employer were to provide these services on its own.

Random Pool Maintenance and Selection. Beyond cost savings and expertise comes practicality in maintaining a random pool and selecting employees for random tests. This can be particularly difficult for small systems. With only one safety-sensitive employee, it is clear who will be selected.

The regulations permit consortia to pool the safety-sensitive employees of members for the purposes of random testing. Thus, testing at the required rates is easier, and there is less predictability regarding who will be tested. Larger pools administered by a third party are also perceived by employees as being more objective and impartial, since the selection process is outside the direct control of the employer. Therefore, the employee is less likely to charge abuse or harassment.

Reduced Liability. Transit operators are rightly concerned about testing program liabilities. The FTA regulations were designed to reduce your risks if you are in full compliance with the regulations.

Exposure may relate to either employer action or technical liability. Employer action liability corresponds to the normal risks of all employers in the course of their business. This would include such items as discrimination, sexual harassment, wrongful discharge, and harassment for referring personnel for drug or alcohol testing.

Technical liability refers to the potential exposure of operating a testing program, including improperly disclosing test results, improperly collecting/testing specimens, and misrepresenting test result consequences.

Although employers cannot legally contract away their responsibility to comply with the DOT regulations, a consortium can distance employers from the actual operation of the testing program, thereby limiting an employer's exposure to technical liability. For example, a well-managed consortium may reduce liability for improper disclosure of individual test results, improper collection procedures, and mishandling confidentiality and security of testing records.

Confidentiality. Having a consortium manage parts of a testing program with its own separate staff may enhance the impartiality, professionalism, and confidentiality of the testing program, thereby reducing employee apprehension regarding the inappropriate release of testing information.

Employers should be diligent in selecting a consortium and monitoring performance. Employers should consult their attorneys for specific information regarding how to structure and operate a consortium to decrease liabilities.

Section 2. CONSIDERATIONS IN ESTABLISHING CONSORTIA

Although there are many advantages, particularly for small transit operators, to establish consortia, the advantages have a "cost." Consider those costs to your organization prior to establishing or joining a consortium and allow for the following:

- Shared design
- Reduced control
- Financial considerations
- Administrative burden

Shared Design. Often, employers establish the consortium's operating policies and procedures by consensus. This process enables the consortium to achieve its various goals while addressing the needs of its individual members, which will require some level of compromise. Consequently, you may need to compromise on some elements of your program design and conform to the design wishes of other consortium members. For example, you may join a consortium that provides services that comply with the FTA and DOT regulations, but may not provide other elements that you consider important (e.g., monthly random number selections rather than quarterly). Accordingly, you may need to contract for these services on your own, or settle for a less than optimum design.

Reduced Control. By joining a consortium, each employer loses operational autonomy over its testing program. If you operated your own program, your agency's DAPM would be solely responsible for its administration following policies and procedures under your sole control. This will not be the case in a consortium. As a result, it will be more difficult and time consuming to effect changes in the program. Conversely, the consortium may make changes that you do not agree with, but are powerless to avoid. In addition, timely services may be difficult to ensure, such as obtaining records or resolving problems.

Your best protection against reduced control is a sound contract with the consortium. While you still may not be able to effect changes by yourself, you can ensure compliance with all applicable laws and regulations. You might also limit the consortium's ability to make changes without your approval and provide for prompt withdrawal if warranted.

Financial Considerations. Although a consortium should reduce your substance abuse program costs, financial risks do exist. Failure of some consortium members to pay their costs may increase the burden on others under some consortia models.

Consortia usually require a membership fee when you join, in addition to payments for testing services. This fee may include the provision of initial services such as policy development or educational materials. Charging a membership fee is a reasonable and common practice, and in virtually all cases the membership fee will be less than the initial investment of an in-house program. Nonetheless, the membership fee may be several times the cost of a single drug test, and small agencies that anticipate joining consortia should expect the fee and budget accordingly.

Members of a consortium that incorporate all of its members into a single random pool may not be able to anticipate the exact number of random tests that will be conducted on their employees. Even though the pool as a whole must meet the minimum criteria for drug and alcohol tests (50 percent for drugs and 10 percent for alcohol), individual employers may have more or fewer tests given the "luck of the draw." For example, a transit system with 10 safety-sensitive employees would conduct 5 random tests if they were in a random pool of their own. However, this same system may conduct seven tests one year and two tests the next as part of a larger consortium. This uncertainty can make budgeting difficult.

Shared Compliance. Each consortium member will impact the random testing rate compliance of the other members. If the consortium as a whole meets the criteria, then all members are in compliance. However, if the consortium falls short of the minimum requirements, then all members are out of compliance. Therefore, if you belong to a consortium with employers that do not conduct all their random tests, routinely purge their employee list, or communicate cancelled or omitted tests with the pool administrator, the consortium will not meet its goals and all members will be out of compliance. This risk can be minimized by aggressive program management and by establishing pools of like-minded employers.

Administrative Burden. The amount of time and effort required to administer a consortium depends upon its size, type, and available expertise. Generally, consortia require a great deal of time to establish and maintain. The program requires the dedication and ongoing commitment of many people. Problem solving is a time-consuming task and requires significant effort by members. Also, a growing membership requires increased investments in administration and problem-solving efforts.

Section 3. C/TPA LIMITATIONS

The C/TPA and/or individual service agents may perform most tasks needed to comply with the regulations (see Exhibit 11-2 in the Sample Documentation section at the end of this chapter). The choice of which tasks will be delegated to a C/TPA, however, is left to the discretion of the employer. However, there are some limitations on the functions that a C/TPA or service agent can perform (§40.355). A C/TPA or service agent must <u>not</u> do the following:

- Require an employee to sign a consent, release, waiver of liability, or indemnification agreement for any part of the drug or alcohol testing process covered by Part 40;
- Act as an intermediary in the transmission of drug test results from the laboratory to the MRO;
- Transmit drug test results directly from the laboratory to the employer--all employer interaction with the laboratory must be through the MRO;
- Act as an intermediary in the transmission of alcohol test

results (≥0.02) between the BAT and the DER;
- Act as an intermediary in the transmission of individual SAP reports to the employer;
- Decide when reasonable suspicion, post accident, return-to-duty, and follow-up tests are needed;
- Make a determination that an employee has refused a drug or alcohol test (except for the MRO in the case of an adulterated or substituted test);
- Act as the DER;
- Send additional information to a laboratory besides the laboratory copy of the CCF;
- Impose conditions or requirements on employers not authorized by the regulations; or
- Intentionally delay the transmission of drug or alcohol test results or related documents due to a payment dispute.

Section 4. TYPES OF CONSORTIA

Consortia can provide the same services as those available through separate or individual contract arrangements (e.g., education and training, specimen collection, laboratory analysis, MRO services). There are a number of consortia models, each with its own advantages and disadvantages.

Drug and alcohol testing consortia are structured and managed in many different ways. To a large extent, the differences relate to the level of management services the consortium provides. In reviewing consortium models, distinguish between the **administrative services** the consortium provides and the **testing services** the consortium procures.

Administrative services include: organizing the consortium and developing a written agreement among members, developing bids for testing services and contracting with selected service agents, monitoring service performance, identifying and implementing corrective actions when necessary, and record keeping and reporting. Testing services include: urine specimen collection, laboratory analysis, MRO services, BAT/STT alcohol testing services, and in some cases, SAPs.

Three consortium models for administrative services are:

- Purchasing cooperative
- Separate management entity
- Managing partner

Purchasing Cooperative. In a cooperative purchasing model, the consortium seeks services at a reduced price by taking advantage of large-volume buying power and management efficiencies. The consortium negotiates terms and conditions with service agents, but generally provides no other management services. Once a suitable pricing schedule is established, service agents deal directly with each individual participating agency.

Although the purchasing cooperative model should help small agencies obtain needed services at reduced prices, it generally does not provide the administrative services required of a

complete drug and alcohol testing program, such as monitoring service agents, training, record keeping, etc. This model, although in use today by several transit agencies, is not technically considered a consortium under the FTA regulations, since the participating agencies have no ongoing relationship beyond the initial purchase arrangement.

Separate Management Entity. In a separate management entity model, the consortium provides more extensive management functions for member agencies. The consortium may assist member agencies by monitoring and training employees, preparing reports, and procuring testing services at reduced prices. Member agencies sign an agreement, which specifies the management responsibilities of the consortium, how costs will be shared, and how testing will be achieved.

Often, a state transit association or a state department of transportation takes the lead in establishing the consortium. The lead agency may hire staff and manage the program itself, or more commonly, contract with a TPA to perform management functions and procure testing services from individual service agents.

This model requires strong leadership and agency commitment. A consortium administrator who is knowledgeable about the testing regulations, contracting, and the needs of the consortium members is required to provide oversight of the TPA or individual service agents. The cost of managing and operating the consortium is in addition to the cost of purchasing drug and alcohol testing services. However, the administrative costs are spread among the member agencies.

Either consortium staff or a TPA obtain testing services. In-house management requires a staff large enough to oversee each of the individual service contracts, process billing, and perform administrative functions of the consortium. Hiring a TPA allows for a single point of control between the consortium and the individual service agents. The TPA should have demonstrated expertise with the DOT testing program. The TPA is essentially a general contractor, who subcontracts with other service agents to provide the full package of testing services required.

The separate management entity model provides members with management expertise and avoids the costs each member would otherwise be forced to absorb in the hiring or training of its own expert. While this model provides expertise and flexibility in management, this high level of service may be expensive. Also, TPAs have limitations (previously discussed in Section 3) that must be taken into

consideration. Thus, the more diverse the needs of the consortium members, the more difficult this model will be to implement effectively.

If you believe the separate entity model is best, you can either create a new one, or join an existing one. If you join an existing consortium, remember that other transportation modes subject to their own USDOT regulations may have regulatory requirements that differ from those of the transit industry. You must ensure that the consortium will always comply with the FTA regulations in all respects. In addition, if the existing consortium does not provide all required services, you must make separate arrangements for those services. Your system might provide them internally or purchase them elsewhere.

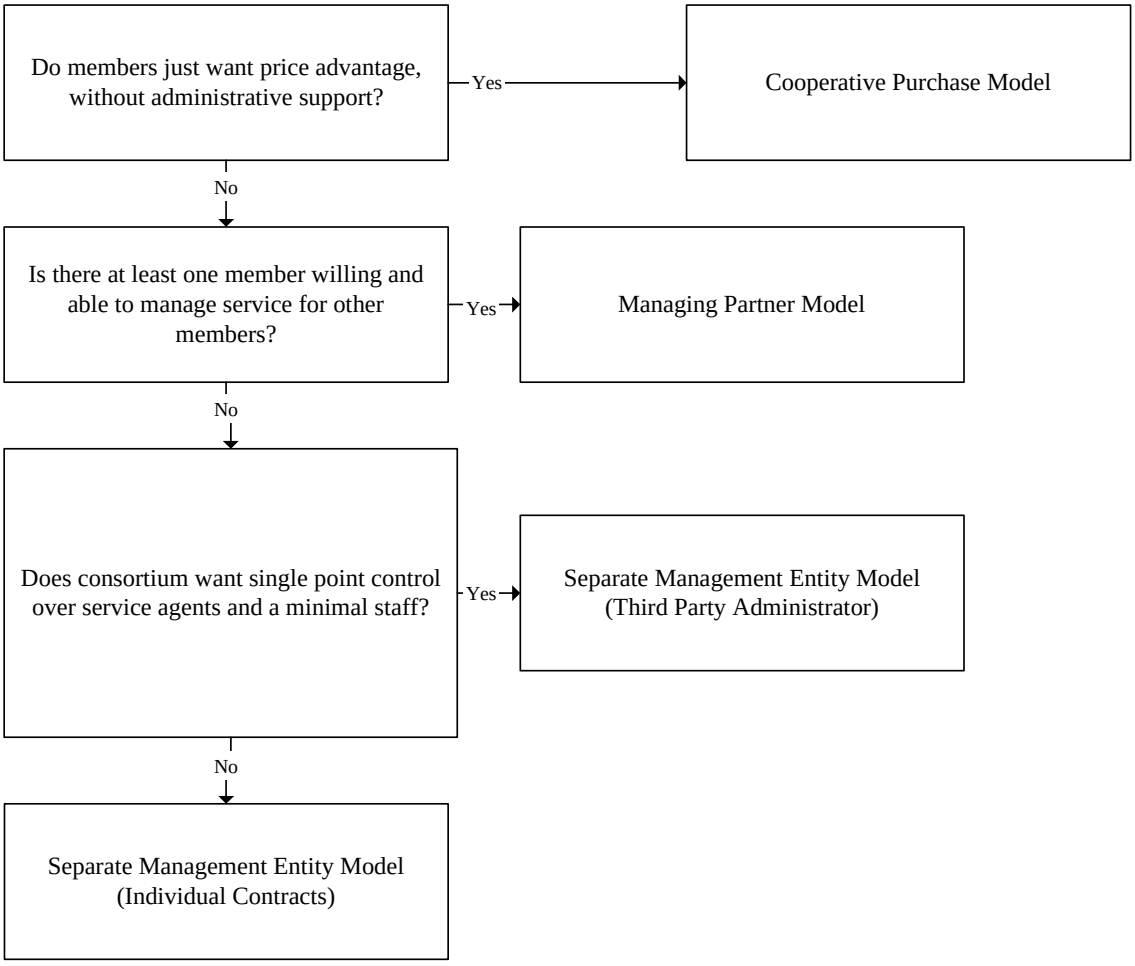
Forming a new consortium may be best to ensure that the consortium will be fully compliant with FTA regulations. If you pursue this model, you will need to identify other transit agencies interested in participating. Your personal network, state transit association, or state department of transportation may be useful in identifying other interested transit agencies, just as they might be useful in helping you identify existing consortia that you might choose to join.

In most cases, establishing a consortium will require forming a legal entity. The consortium would probably operate as a nonprofit corporation. The consortium would have power to conduct business, enter into contracts, and legally represent members according to a charter and bylaws. A governing board of the members would be responsible for supervising the consortium.

Managing Partner. In a managing partner model, typically smaller transit agencies contract for services with a larger organization that is also subject to USDOT testing regulations. This could be a city or county, transit agency, or school district. The larger organization utilizes its staff and resources to manage its own testing program, and simultaneously provides staff time to the other entities in administering their testing programs. This is typically done on a fee basis, thereby providing an economic benefit to both the managing partner and the other member entities. The larger organization becomes the managing partner with the responsibility of ensuring the testing needs of its smaller partners are met. The managing partner model could be an option for an agency that cannot afford their own professional management of the drug and alcohol testing program. However, the smaller agency must be willing to give up control and may become overdependent on the managing partner's knowledge and expertise.

If you are a small transit operator with a neighboring large transit system, the managing partner model may be an attractive choice. Contact the large transit operator to determine how that operator is meeting the drug and alcohol regulations. Many large agencies have had their own program for many years, and they may be able to accommodate your needs without a lot of effort or expense.

Consortium Decision Flow Chart



Section 5. IS A CONSORTIUM RIGHT FOR YOU?

Although consortium membership may offer significant advantages, there are also potential disadvantages, which should be considered. Consider available resources and your need or desire for specific services before deciding to join a consortium.

First, identify your agency's specific needs:

- Consider the number and types of tests you will be conducting, where the testing will be performed, and the hours when testing may be required. The number of tests needed will be an indicator of the amount of time required to oversee the program and determine potential cost savings that may be achieved in a consortium.

- The random selection process must be acceptable. Will a larger pool ensure the credibility of the test? Will confidentiality be enhanced? Will employees perceive the selection process to be objective?

- The size of your service area will affect your needs. Are service agents readily available in your service area, or do you need help identifying service agents that are willing and able to meet all of your needs?

- Political and legal concerns may determine if you should distance the testing program from your operation. This distance may minimize issues concerning confidentiality or the integrity of the testing process.

- Does the consortium have members regulated by other DOT agencies?

- Will the consortium be comprised of members that fall under the FTA, Federal Motor Carrier Safety Administration (FMCSA), other modal administrations, or some combination thereof? While the testing requirements by themselves have essentially parallel components, there are differences in policy orientation that should be taken into consideration. Will this impact the quality of service you are provided?

Next, find out what staffing, financial, and legal resources are available internally. Your staff's size, expertise, and their availability will determine how much of your testing program can be in-house. Testing programs require a significant amount of time to set up. Efforts must be made to train supervisors and employers, procure services, monitor service agent performance, oversee billing, and prepare reports.

The financial resources available to your agency are another factor. When analyzing costs, consider the cost per

test and the administrative costs. Given the existing demands on your staff, it may be less expensive in the aggregate to purchase administrative services from another entity rather than providing those services on an in-house basis. You should also consider if your agency has the necessary legal resources and expertise available to guide the development and implementation of your program. Is it better to have an independent, professional third party involved to help with program compliance?

Exhibit 11-3 (located in the Sample Documentation section) defines consortium responsibilities for the four major program parts. Which of these functions can your agency perform? Which should be left to a C/TPA?

After evaluating your needs and available resources, then decide if consortium membership is the best option for your organization. There are no uniform criteria for answering this question. In the end, your agency is responsible for full implementation of your drug and alcohol testing program, regardless of whether or not you contract for individual testing services.

If, after weighing the advantages and disadvantages, you determine a consortium membership is the best approach, decide whether to join an existing consortium, or if you need to work with others to develop a new consortium to meet your specific needs. The *Drug and Alcohol Consortia Manual,* prepared for the Ohio Department of Transportation in 1996 and reprinted and distributed by the FTA, provides guidance on how to design, establish, and administer a drug and alcohol testing consortium. This publication should be consulted for additional background information, sample procurement documents, contracts, and a member agency Memorandum of Agreement.

Section 6. THE IMPORTANCE OF YOUR CONSORTIUM CONTRACT

Regardless of the consortium model you select, you should realize that you are entering into a contractual relationship, and your interests should be protected. Although you are following the regulations through a consortium, you remain responsible to FTA for compliance. This means that if the consortium is implementing some aspect of the program incorrectly, your system is implementing it incorrectly. You should exercise due diligence in selecting a consortium, and in monitoring its operations.

Federal law prohibits FTA from funding your transit system if it is out of compliance with alcohol misuse or prohibited drug regulations. Therefore, you must exercise your best management practices both before and after you select or establish a consortium.

Depending on your needs and those of other consortium members, you may purchase a variety of required or optional services offered by the consortium. Some consortia require members to purchase all their services, where others allow you to buy only those you need. Consortium assistance might include the following:

- Policy development

- Procurement of testing services
- DHHS-certified laboratory specimen analysis
- Collection services
- Mobile or on-site collection services
- BAT/STT (breath analysis technician/screen test technician)
- EBT (evidentiary breath testing equipment)
- SAP (Substance Abuse Professional)
- MRO (Medical Review Officer)
- Employee and supervisor training
- Employee Assistance Program (EAP) alternatives
- Consultation services/legal services/ expert witness testimony
- Random testing – selection and management
- Quality control (blind sample) programs for drug testing
- Record keeping
- Federal report preparation
- Service agent monitoring

Regardless of the services you obtain from the consortium, you should have a written contract with its manager, specifying the following:

- The specific services you are purchasing;
- The prices and how they are calculated, any discounts, and the payment schedule;
- The requirement that all services will be delivered in accordance with 49 CFR Parts 40 and 655, and other applicable federal laws and regulations; that the consortium manager will stay current on all requirements, and will immediately change consortium policies and procedures to comply with changes. The contract should reference §40.11(c) which states: "All agreements and arrangements, written or unwritten, between and among employers and service agents concerning the implementation of DOT drug and alcohol testing requirements are deemed, as a matter of law, to require compliance with all applicable provisions of [Part 40] and DOT agency drug and alcohol testing regulations."
- The responsibilities of the C/TPA in the case of its sale or merger. At a minimum, the C/TPA should notify members of any changes in structure. All records should remain the property of the employer. The C/TPA should also ensure the secure transfer of confidential records;
- The contract term. Because stability in a drug and alcohol testing program is essential for program credibility, ease of administration and overall program compliance, you should consider negotiating a 3-year contract term with two 1-year

extensions (e.g., total of 5 years). Both parties should have the right to terminate the contract for cause and/or convenience with advance written notice;

- Your right to examine consortium and individual service agent facilities, records, and procedures at your expense. State your right to review all written, printed, and computer-based drug and alcohol program records and reports (including name-specific records or reports), files, materials, data, documents, agreements, contracts, policies, service agent training records, and statements required by Part 40 and FTA regulations. A transit agency official or a third party authorized to access such confidential records will conduct the review, and all personal, name-specific information will be kept confidential;

- The need for periodic (i.e., monthly, quarterly, semi-annual) reports of activities related to your transit agency. Specify the information that is to be included in the reports and the format. Also indicate if the consortium will be responsible for preparing information for inclusion in the transit system's annual MIS report.

- Timeliness requirements. Since the consortium potentially adds an additional administrative layer to your testing program, you must ensure that it acts expeditiously to avoid negative effects on your employees or your operations through unnecessary reporting delays. Section 40.345(c) states that C/TPAs must ensure in every case, that the transmission of information to employers meets all requirements for confidentiality and timing as if the service agent sent the information directly to the employer. You may wish to negotiate liquidated damage clauses for consortium failures in this area.

- Quality control requirements. Specify quality control procedures the consortium will perform, including degree of service agent oversight and enforcement, and if needed, blind sample testing

Section 7. HOW TO EXPLORE CONSORTIA FURTHER

For more information on consortia:

- Obtain and review a copy of FTA's *Drug and Alcohol Consortia Manual* that is available from the Office of Safety and Security at (202) 366-2896.

- Contact other transit systems participating in consortia, ask about their experience, and find out if their approaches might work for you.

- Consider which consortium model will best serve your needs. While the cooperative purchasing model is not technically a consortium, and all you are interested in is better pricing, then this may be a viable program approach for you. Look for purchasing cooperatives already in place through local organizations (e.g., chambers of commerce).

- Check C/TPA references thoroughly. National and regional C/TPAs provide services of varying quality. Some are excellent and may provide you with a better program than you could operate on your own. Others may fail to comply with the FTA regulations. The experience of other employers, particularly transit agencies, will be your best guide. Use a written contract detailing your requirements.

Sample Documentation

Exhibit 11-1

Role of State DOTs in Consortia Formulation

In the infancy of the DOT drug and alcohol testing program, several DOTs formed advisory panels to identify some of the key issues facing transit operators, notably small transit operators in very rural areas. Many concluded that a consortium approach would represent the best solution, and worked with the transit systems to determine service needs, test volumes, and other specifics.

State DOTs have also helped establish consortiums by providing grants to transit districts or associations to organize and manage consortiums.

For example, in one case a transit district representing several transit agencies within a state developed a request for proposal (RFP) for turnkey management of a TPA. After mailing RFPs to prospective vendors, the transit district and the state DOT jointly interviewed four finalists and chose a TPA. The transit district monitors the program and the TPA, and receives summary statistical reports. The TPA provides all services including random selection, collection and laboratory services, MRO, BAT, and litigation support. The TPA also provides a 24-hour hotline staffed by knowledgeable professionals ready to respond to any employee testing situation.

The consortium manager says she "would not run a program any other way than with a consortium and TPA" because the approach promotes high quality service, consistency, and confidentiality.

In another state, the DOT needed to help transit operators who had no programs. Motor carriers in the state had been subject to FHWA/FMCSA drug testing regulations for some time and had complied with those regulations through the establishment of a consortium managed by one of the motor carrier companies. The DOT approached the consortium to determine whether it could serve the transit industry. The consortium agreed.

In a relatively short time, policies were developed and informational and education materials were printed and distributed to all the transit systems. Personnel from the consortium and the DOT delivered training sessions regionally. Despite the fact that parts of the state are quite rural, the consortium is able to provide one to three collection sites in 30- to 50-mile radii from each transit system. The consortium added mobile vans for collection. The unions have been very supportive of the state program and of the consortium. There have been no labor disagreements over the program.

Exhibit 11-2

Drug and Alcohol Testing Information
That <u>May</u> Be Maintained by C/TPAs

Drug Testing Information

- Previous 2 years' test results
- Notice to collectors of contact information for DER
- Notification to DER that an employee is a "no show" for a drug test
- Notification to DER of a collection under direct observation
- Notification to DER of a refusal to provide a specimen or an insufficient specimen
- Transmission of CCF copies to DER (however, MRO copy of CCF must be sent by collector directly to the MRO, not through the C/TPA)
- Transmission of laboratory statistical report to employer
- Report of test results to DER
- Report to DER of confirmed positive test in stand-down situation
- Report to DER of changed test result
- Report to DER of dilute specimen
- Report to DER that test is cancelled
- Report to DER concerning the reconfirmation of tests
- Notice to DER concerning refusals to test
- Notification to DER of refusal in shy bladder situation
- Notification to DER of insufficient specimen
- Transmission of CCF copies to DER (not to MRO)
- Report to DER of cancelled test and direction to DER for additional collection
- Report to DER of cancelled test

Alcohol Testing Information

- Notice to BATs and STTs of contact information for DER
- Notification to DER that an employee is a "no show" for an alcohol test
- Transmission of alcohol screening tests only when the test result is less than 0.02
- Transmission of alcohol confirmation test results only when the test result is less than 0.02
- Notification of insufficient saliva and failure to provide sufficient amount of breath

Exhibit 11-3

CONSORTIA RESPONSIBILITIES TO MEMBERS BY FUNCTION

Random Testing

- Ensure each employee in the testing pool has an equal chance of being selected in each random draw.
- Ensure the random pool is current (i.e., including new hires and excluding employees on leave or discharge).
- Ensure that random testing is conducted at the required rate whether combined or separate pools are used.
- Develop a method to notify members of random selection, indicating in writing the type of test, testing cycle (day, week, month or quarter), and numbers selected.
- Ensure the list of randomly selected employees reaches the members with adequate time to complete testing within the testing cycle.
- Establish alternative notification procedures when the program manager is included in the pool.
- Develop a procedure to track selection, versus random tests completed.
- Ensure that the random selections are made as frequently as possible, but not less often than quarterly. The larger the pool size, the more frequent the selections.

Specimen Collection

- Ensure specimen collection procedures are followed in accordance with 49 CFR Part 40.
- Establish quality control methods to ensure collection sites meet DOT requirements, including:
  - Close geographic proximity to company
  - Ability to handle the number of tests required
  - Ability to test employees promptly

- Availability during the hours that safety-sensitive job functions are being performed

- Ability to conduct both alcohol and/or drug tests

Medical Review Officer

- Ensure the MRO performs responsibilities under 49 CFR Parts 40 and 655.

- Ensure the MRO's duties are maintained in confidence and performed independent of the consortium.

- Ensure only consortium staff who are under day-to-day supervision of the MRO, perform the specific staff functions outlined in 49 CFR Part 40.

- Ensure the MRO properly notifies the employee of positive test results.

- Ensure there is always an MRO available to receive and review test results.

- Ensure confirmed test results are sent directly from the laboratory to the designated MRO.

- Ensure the results are sent from the MRO and/or BAT directly to the employer as soon as available.

- Arrange for a physical examination of individuals with opiate positives.

Record Keeping and Reporting

- Provide employers with semiannual reports from the laboratory (§40.111), and provide all information necessary for the transit systems' annual MIS report.

- Store all records in a secure location.

- Maintain security of records and limit access (consortia have the same confidential requirements as their members).

Chapter 12. PROGRAM MONITORING

As an FTA grantee/subrecipient, you can contract out your drug and alcohol testing program functions, but you cannot contract away your compliance responsibilities. If your service agents do not perform testing services consistent with the regulations, your agency's good faith effort is not a defense to a DOT enforcement action [§40.15(c)] (i.e., loss of FTA funds). You are always accountable for noncompliance, whether it's your own program, or you outsource to contractors who perform safety-sensitive functions. You must ensure that contractors meet the regulatory requirements and their respective service agents have the required qualifications. In order to remain in compliance, you must take whatever action is necessary to ensure compliance.

As a result, transit systems should periodically assess the compliance of their program, re-evaluate their program needs, assess their level of satisfaction with current service agents, and apraise the program's benefits.

Section 1. PROGRAM MANAGEMENT

Prior to implementation of their drug and alcohol testing programs, many transit managers expressed concern regarding the cost of the program and the subsequent burden it would have on their operating environment. Now that several years have passed, most of these concerns have not materialized or have been overcome. For the most part, testing programs are operating smoothly and have become part of the

standard operating procedures of transit systems, large and small.

However, you should objectively evaluate your program to ensure that policies and procedures have been updated and its integrity remains intact. Agencies often find that as drug and alcohol testing programs become engrained within an organization, compliance can be compromised over time as the program evolves and components are modified to reflect the operational realities of the system. If the DAPM is not diligent in his/her oversight responsibilities, the program may be modified out of compliance. Seemingly simple and innocuous changes may have significant implications.

Thus, a comprehensive assessment is recommended. FTA has produced a self-assessment checklist that can be used to identify incorrect or omitted components of a program, or as an oversight tool to assess compliance. A copy of this checklist is provided in Appendix J.

DAPMs may also wish to periodically assess the cost and benefit of the program. This information can be helpful for board members, system management, elected officials, and others who wish to quantify the cost-effectiveness and overall worth of the program. Assessing the program periodically based on actual experience will ensure that the true benefits and costs to the organization are being identified. The cost-benefit analysis should include at a minimum the out-of-pocket cost of the program, employee productivity, number of positive test results, number and nature of accidents, absenteeism, worker's compensation claims, and insurance premium savings. Other intangibles that may be assessed include employee morale, union/management relations, agency/management credibility, public relations, and system image.

Section 2. SERVICE AGENT MONITORING

Since the regulations were first published, the testing industry has gone through an evolution with service agents entering and leaving the market, while others have merged to form large consortia or third party administrators (C/TPA). At the same time, the transit industry has matured through its increased knowledge and experience base. The regulations make it clear that employers are responsible for ensuring their service agents meet the qualifications set forth in Part 40. An employer also has an affirmative responsibility to get needed information from service agents to document compliance.

Service agents must follow the DOT regulations (Part 40). However, the employer remains accountable to DOT/FTA for compliance. Failure of the service agent to implement any aspect of Part 40 as required, results in the noncompliance of the employer. All agreements and arrangements, written or unwritten, between employers and service agents concerning the implementation of DOT drug and alcohol testing requirements are deemed, as a matter of law, to require compliance with all applicable provisions of the DOT/FTA drug and alcohol testing regulations [§40.11(c)].

Even though the regulation does not stipulate how an employer should monitor its service agents, the following activities have become standard industry practice:

- Conduct periodic mock collections to identify procedural flaws.

- Conduct periodic review of service agent employee credentials including training documentation.
- Investigate any employee reports of flawed procedures.
- Provide service agents with copies of appropriate DOT guidelines, regulations, and related materials.
- Although not a regulatory requirement, recommend that service agents hold memberships with their respective industry's trade association or otherwise demonstrate methods for remaining up to date.
- Monitor cancelled tests and require detailed explanations for each.
- Include minimum performance standards in contracts that provide disincentives for cancelled tests or non-performance.

If a service agent is unwilling or unable to perform their duties consistent with the regulations, cancel their contract and obtain service elsewhere.

Under Subpart R of Part 40, employers also have another recourse. If a service agent fails or refuses to provide testing services consistent with the regulations or fails to cooperate with DOT or employer oversight activities, the DOT may institute a Public Interest Exclusion (PIE) that excludes that vendor from participating in the DOT's drug and alcohol testing program. There must be serious uncorrected noncompliance violations that affect safety, test results, privacy, employee due process, integrity of the testing program, or a lack of cooperation with the DOT to warrant the issuance of a PIE.

A PIE is a serious action that the DOT takes to protect the public interest and to ensure that covered employers deal only with responsible service agents. The DOT intends to use PIEs to remedy situations of serious noncompliance, but not as punishment. The process for initiating a PIE is described in the chart on the following page.

The scope of a PIE can reach beyond the service agent in question to other divisions such as other corporate divisions, affiliates, individuals, or service agents that are involved with or affected by the noncompliance that is the basis for the PIE. The duration of a PIE will be between 1 and 5 years.

Service agents who receive a PIE will be placed on a "List of Excluded Drug and Alcohol Service Agents" published on the DOT's Web site at: www.dot.gov/ost/dapc and in the Federal Register. The service agent must also notify in writing each of its DOT regulated employers for which it performs services of the PIE. The notice must be sent within 3 business days from issuance of the PIE.

Once an employer is notified that one of its service agents has received a PIE, the employer must stop using their services no later than 90 days after the DOT has published the notice in the Federal Register or posted it on its Web site.

The issuance of a PIE does not result in the cancellation of drug or alcohol tests conducted by the service agent.

Steps to Initiate a PIE
1. The noncompliance issue is brought to the attention of the Office of Drug and Alcohol Policy and Compliance (ODAPC) or the drug and alcohol program manager of a DOT agency. Employers covered under the FTA regulations should contact Mark Snider, Office of Safety and Security at (202) 366-2896.
2. The DOT agency will conduct fact-finding to determine the extent and nature of the noncompliance issue. Information will be obtained from credible sources and the service agent will be contacted to obtain relevant information.
3. If the situation warrants, the initiating official will send a correction notice to the service agent identifying the specific areas that must be corrected to avoid a PIE proceeding.
4. If the service agent does not make and document changes within 60 days of the notice, the initiating official will start a PIE proceeding by sending the service agent a Notice of Proposed Exclusion (NOPE). The NOPE will state the factual basis for initiating the PIE and the initiating officials recommendation for the scope and duration of the PIE.
5. The information presented in the NOPE will be provided to the ODAPC Director or his/her designee for consideration when determining whether to issue a PIE. The service agent may contest the proposed PIE within 30 days of receipt of the NOPE. The burden of proof is on the initiating official to demonstrate (by a preponderance of the evidence) that the service agent is in serious noncompliance with the regulations. The PIE proceedings will be conducted in a fair and informal manner.
6. Based on the information provided, the ODAPC Director or his/her designee will determine if a PIE is warranted, its scope and duration. The determination will be made within 60 days of the date of record completion. The service agent will receive written notice of the PIE.

Section 3. CONTRACTOR OVERSIGHT

As the FTA grantee/subrecipient, you are fully responsible for the compliance of your system with the drug and alcohol testing regulations, including your contractors who perform safety-sensitive job functions. While maintenance contractors for FTA recipients of Section 5309 and 5307 funding that serve a population of 200,000 or less (as delineated by the FTA apportionment definition) and Section 5311 rural funding recipients are exempt, all others must meet the same standard of compliance as the grantee/subrecipients themselves.

Therefore, you must oversee your contractors to ensure compliance and certify their compliance to FTA as part of your annual compliance certification.

You should not assume that your contractors are knowledgeable of the regulatory requirements or that they have compliant policies or programs. Even though the regulation does not specify the nature or extent of your oversight duties, it is your responsibility to take whatever actions are necessary to ensure their

compliance. You are encouraged to communicate the requirements to your contractors, and if necessary, provide them with tools and technical assistance, such as the following:

- Provide copies of the regulations (Part 655 and Part 40).
- Provide copies of resource materials: *Implementation Guidelines; Best Practices manual; Random Drug Testing Manual;* and the *FTA Drug and Alcohol Regulations Update.*
- Provide contractor DAPMs with education and training on the regulations.
- Offer substance abuse awareness training to safety-sensitive employees.
- Offer reasonable suspicion training for supervisors.
- Provide assistance in establishing a scientifically valid random selection process.
- Develop specification and evaluation criteria for service agents.
- Conduct a detailed policy review.
- Assist in the establishment of record keeping procedures.
- Assist in the preparation of MIS reports.

If your contractor(s) is unable to comply, you may include them in your own program (e.g., random selection process, testing services). Under this scenario, the contractor will still be responsible for program administration, but you will have greater control over the technical aspect of their testing program.

You should also conduct ongoing oversight of your contractor(s) to ensure that their programs remain in compliance. Oversight functions might include requiring and monitoring periodic (e.g., monthly, quarterly) management reports on policy modifications, changes in service agents, training, and the number, type, and results of tests. You can also perform mock audits on contractors mimicking the FTA audit process (see Chapter 14 for information on the audit process). The *Best Practices* manual also discusses contractor oversight and provides examples of contactor oversight checklists in Section 4.2 and Appendix C. This checklist can be used to structure the contractor review, document your oversight efforts, and identify areas that require corrective action. If your agency has direct oversight responsibilities, you may also directly access contractor employee records including test results.

You must take whatever actions are necessary and appropriate to ensure contractor compliance. If a contractor is unwilling or unable to comply with the regulations, you must discontinue using this contractor for safety-sensitive duties, or jeopardize your FTA funding. Contractors that bid on safety-sensitive work should be considered non-responsive if they do not have or are not able to establish an FTA-compliant drug and alcohol testing program.

Section 4. STATE OVERSIGHT OF SUBRECIPIENT

The FTA regulation (§655.81) requires that each grantee including states, ensure that recipients of funds under 49 U.S.C.

5307, 5309, 5311, or 23 U.S.C. 103(e)(4) comply with this part. The regulation (§655.82(c)) also requires that each state certify compliance on behalf of its subrecipients of these funding programs. In order to provide the certification, the state must ensure that each subrecipient is in compliance with Part 655 and Part 40. If a subrecipient is not in compliance with the regulations, the state may suspend its funding.

FTA does not specify what actions must be taken by states to ensure subrecipient compliance, but they are encouraged to develop an oversight program that provides a reasonable level of confidence that their subrecipients are complying before they certify compliance. Successful oversight activities include policy review, ongoing training, technical assistance and compliance checklists. The *Best Practices* manual provides additional information and examples of monitoring forms and checklists for state DOTs (Section 4.2 and Appendix C).

Policy reviews are informative, and several states evaluate their subrecipient's policies to make certain that every system has a policy in place and that its contents comply. These states have found the reviews useful because they often reveal the nature and extent of a subrecipient's compliance problems.

Information sharing and training are also effective oversight activities. Most states have provided some level of training for their subrecipients. A few states have supplemented their initial training by providing refresher courses to inform subrecipients of regulatory changes, new interpretations, and ways to avoid common mistakes. Several states have also developed resource libraries that are available to subrecipients and have disseminated information through newsletters, alerts, emails, and faxes.

Some states have developed monitoring programs that require subrecipients to complete comprehensive checklists and provide documentation showing how they complied with each regulatory requirement. A review of the checklists enables the state to identify problems and require the subrecipients to take corrective actions. Other states have included abbreviated testing program checklists in their ongoing regulatory compliance review process.

Regardless of the methods used, each state should be committed to the program and should take their oversight responsibilities seriously. Oversight programs that successfully identify problem areas and initiate corrective actions will enhance the integrity of each subrecipient's testing program, minimize compliance issues, avoid potential legal conflicts, and improve the overall effectiveness of the program.

Chapter 13. THE DRUG-FREE WORKPLACE ACT OF 1988

Congress enacted the Drug-Free Workplace Act (DFWA) of 1988 on November 18, 1988. This act (Pub. L. 100-690, title V, subtitle D) requires direct recipients of $25,000 or more of federal funds to certify that they will provide drug-free workplaces for their employees. The certification is a precondition for receiving a contract or grant from a federal agency.

Agencies receiving large urban or discretionary funds (Section 5307 or 5309) directly from FTA must comply with the DFWA. They must certify compliance in their annual grant application certification and assurances. Rural transit systems that receive Section 5311 and/or Section 5309 funding are subrecipients of FTA as the funding programs are administered through their respective state DOTs. Most state DOTs pass along the certification requirement to their subrecipients and require a compliance certification in their annual grant applications.

Even though this act addresses drug use in the federal workplace, it is separate and distinct from the FTA drug and alcohol testing rules. Compliance with one does not necessarily mean compliance with the other; nor does one supercede the other. Most transit systems will have to comply with both.

The Drug-Free Workplace Act of 1988 is reprinted in Appendix I of these guidelines.

Section 1. REQUIREMENTS

To comply with the act, recipients must certify that they will provide a drug-free workplace by doing the following:

- Publish and distribute a written policy on substance abuse that notifies employees that the unlawful manufacture, distribution, dispensing,

possession, or use of a controlled substance is prohibited in the workplace.

- Make an ongoing, good faith effort to maintain a drug-free workplace.
- Establish an ongoing employee education program that informs employees of the dangers of drug abuse, the employer's written policy provisions, the availability of drug counseling, rehabilitation, and employee assistance programs, and the possible penalties for drug abuse violations occurring in the workplace.
- Require each employee to abide by the company's written policy and to notify the transit agency within 5 days of any criminal drug statute conviction for a violation occurring in the workplace.
- Notify the federal government of each violation within 10 days of notification of the violation.
- Within 30 days following conviction, impose sanctions on the employee. These sanctions include (1) appropriate personnel action against the employee, up to and including termination; or (2) requiring the employee's satisfactory participation in a rehabilitation program approved by a federal, state, or local health, law enforcement, or other appropriate agency.

The DFWA does not require or sanction any drug testing. However, the DFWA and the FTA drug and alcohol testing regulation (49 CFR Part 655) complement one another. Most employers write one policy statement that addresses the requirements of both. In addition, the DFWA exceeds the education and awareness training requirements specified in Part 655 by requiring that the education effort be ongoing.

Section 2. GRANT CERTIFICATION

For the purposes of this act, the term "grant" includes only direct assistance from FTA to a grantee. If a federal agency provides financial assistance to a state, which in turn passes the assistance to a transit agency, only the state agency that receives the assistance directly (and not the local transit agency) is required to make a drug-free certification under the regulation.

Every grantee, except a state, must certify for each grant. A state may elect to make a single annual certification to the FTA, rather than making a separate certification for each grant.

The FTA DFWA certification is provided as Exhibit 13-1 in the Sample Documentation section.

Section 3. SANCTIONS

The imposition of sanctions under DFWA requires a written determination of violation from the federal "agency head" or designee. The first ground for sanctions is false certification (e.g., an employee awareness program was never established). The second is failure to comply with the requirements of the certification (e.g., the employee awareness program was not ongoing). The third is "such a number of employees of the grantee" have been convicted of criminal drug statute violations occurring in the workplace "as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace."

Employees' criminal drug statute violations occurring outside the workplace do not trigger sanctions. Likewise, employees' drug abuse in the workplace without criminal convictions do not trigger sanctions.

Violations of the act may result in: (1) suspension of grant payments; (2) suspension or termination of grants; or (3) suspension or debarment of the recipient. The decision of which sanction or sanctions to apply in a particular case is left to the discretion of the FTA. A debarred recipient is ineligible for any award from a federal agency during the term of the debarment, which may be up to 5 years. The agency head may waive a particular grant, suspension if it is determined by the agency head that such a waiver would be in the public interest. This authority cannot be delegated to any other federal official.

The DFWA does not require employers to test for drugs and alcohol or pay for rehabilitation.

Sample Documentation

Exhibit 13-1

DRUG-FREE WORKPLACE ACT CERTIFICATION
FOR A PUBLIC OR PRIVATE ENTITY

1. The _____

(Name of Applicant for a Grant or Cooperative Agreement) certifies that it will provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the applicant's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about:

(1) The dangers of drug abuse in the workplace;
(2) The applicant's policy of maintaining a drug-free workplace;
(3) Any available drug counseling, rehabilitation, and employee assistance programs; and
(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace.

(c) Making it a requirement that each employee be engaged in the performance of the grant or cooperative agreement, and be given a copy of the statement.

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant or cooperative agreement, the employee will:

(1) Abide by the terms of the state; and
(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than 5 calendar days after such conviction.

(e) Notifying the federal agency in writing, within 10 calendar days after receiving notice under subparagraph (d) (2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every project officer or other designee on whose project activity the convicted employee was working, unless the federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant or cooperative agreement.

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d) (2), with respect to any employee who is so convicted of:

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, state, or local health, law enforcement, or other appropriate agency.

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

2. The applicant's headquarters is located at the following address. The addresses of workplaces maintained by the applicant are provided on an accompanying list.

Name of Applicant:
Address:
City:
County:
State:
Zip code:

_____
(Signature of Authorized Official)

_____
(Title of Authorized Official)

_____
(Name of Applicant)

_____
(Date)

Chapter 14. SUBSTANCE ABUSE MANAGEMENT OVERSIGHT AUDIT

The primary intent of the Omnibus Transportation Employee Testing Act of 1991 is to achieve a drug- and alcohol-free transportation workforce in the interest of the health and safety of employees and the public. The resulting regulations (49 CFR Parts 40 and 655) are designed to deter and detect the illegal use of drugs and misuse of alcohol by safety-sensitive transit employees. When the regulations were initially published, FTA undertook an aggressive outreach effort to assist grantees/subrecipients in complying with the new rules.

To determine compliance, FTA's Office of Safety and Security began auditing grantee drug and alcohol testing programs in March, 1997. The audits give FTA the opportunity to provide extensive technical assistance and to obtain a better understanding of the difficulties that grantees encounter when implementing the rules.

In the first 5 years, FTA conducted 335 Substance Abuse Management Oversight audits including 105 transit systems, 20 states, and 210 state subrecipients and contractors.

The FTA audits assess compliance with FTA drug and alcohol testing regulations (49 CFR Part 655) and appropriate provisions of the DOT testing procedures (49 CFR Part 40). A team of experts, including FTA and Volpe Center staff and private consultants, perform the audits. The audit team typically consists of three to eight auditors who spend 2 to 4 days on site

depending on the size and complexity of the transit system.

The audit process is comprehensive in nature, including a review of each grantee/subrecipient's policies, procedures, and record keeping. Each agency's service agents including collection sites, medical review officers, substance abuse professionals, and third party administrators, if appropriate, are also interviewed and a mock collection is performed. Complete audits are also performed on a select number of grantees/subrecipient's safety-sensitive contractors and their respective service agents. These contractors are held to the same standards as the direct grantees/subrecipients.

Transit systems are selected for audits through a process that ensures a representative cross section of FTA recipients including system size, location, and mode of operation. Systems with compliance issues identified in FTA Triennial Reviews or MIS reports will also be candidates for a detailed FTA audit. Transit systems that have previously been audited may be selected for a re-audit. Re-audits are limited in scope and address the non-compliant issues identified in the original audit. A detailed discussion of re-audits is provided in Section 5 of this chapter.

Section 1. AUDIT TIME LINE

The audit process was designed to be completed in 22 weeks. The process is initiated once the grantee is notified of selection, and ends when the grantee receives a letter of compliance from FTA. Grantees/subrecipients are notified directly. State DOTs are notified of rural systems selected for an audit.

The on-site portion of the audit begins 7 weeks following the first notification. Every effort is made to schedule audits to avoid conflicts with other FTA oversight efforts such as triennial reviews, financial management oversight reviews, or state management reviews. The audit is scheduled so as not to be an undue burden, but once the dates are set, they are firm and not negotiable.

The audit notification letter will outline the schedule of the audit as illustrated in the Audit Time Line chart on the following page. The letter will also include an agenda and summary of expectations for the audit.

The on-site review will take 2 to 4 days to complete. The audit team generally completes all on-site questioning and record review within 3 days. On the fourth day, the team compiles the report and the final report is provided to the grantee during an exit interview held on the fifth day. Following the exit interview, you and your safety-sensitive contractors and service agents will have 90 days to respond to the audit and resolve any identified deficiencies associated with your drug and alcohol testing program. Additional audit responses may be required following the 90-day period if audit findings have not been completely addressed to the satisfaction of the FTA. The FTA will notify you of your compliance status within 30 days after receiving a completed response.

Audit Time Line

	Weeks from Initial Notification																					
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22
Notification of audit																						
Requested material sent to FTA and audit team																						
Grantee/Subrecipient /Contractor prepares for audit																						
Audit																						
Grantee/Subrecipient /Contractor takes corrective action																						
Documentation of corrective action due																						

Section 2. AUDIT PROCESS

The process begins with a phone call from the audit team leader to your DAPM notifying him/her of your agency's selection and explaining the audit process. This call is followed with a letter from FTA confirming your selection. This letter will request that the DAPM send various materials documenting your drug and alcohol testing program to the audit team within 2 weeks of receiving the letter, and prior to the team's arrival. Electronic (.xls or .mdb) and hard copy versions are requested, if possible. Examples of information FTA will request are as follows:

- The name, address, and phone number of the contact person for the visit.
- Directions on how to get to the main transit agency from the nearest interstate or primary roadway.
- The address of each operating terminal and directions on how to get to each of them from the main facility.
- An organization chart.
- A complete copy of the current Drug and Alcohol Policy Statement, Procedures Manual, and Notice of Availability to employees.
- The current number of covered employees by safety-sensitive function.
- A table showing the hours and days (including weekends and holidays) during which safety-sensitive functions (including vehicle maintenance) are performed.
- A list of all new hires with hire date or the date a person began performing safety-sensitive functions (if different from the hire date) for the previous 12-month period. Include all employees hired and subsequently terminated during the previous 12-month period.

- Information on how often the list of employees is updated for random test selection.

- A list of all employees who were selected to be randomly tested in the previous 12-month period, whether or not the test was completed.

- A list of all accidents as defined by FTA rules that triggered a post-accident drug and alcohol test in the previous 12-month period. Must include date and time of the accident.

- Copies of the previous 2 years MIS forms for your agency and those of your contractors.

- A description of the methods used for drug and alcohol records management.

- Identify the storage locations of the accident records and all drug and alcohol test records and test results. Provide a copy of the Test Notification Form.

- A description of the random selection protocol/methodology. This requires documentation of the scientific validation of the selection process; the method of notification; the security of the information; the distribution of information to the operations locations; the chain of command for distribution of the notices to individuals for tests. Include everything necessary for the auditors to determine whether the system is in compliance on this issue.

- The names, addresses, and phone numbers of the service agents used by your system that will be interviewing [e.g., the medical review officer(s), the testing laboratory(ies), the substance abuse professional(s), the breath alcohol technician(s), the saliva test technician(s), the collection sites, and any consortium used]. Also indicate whether the interviews with the MRO and SAP will be phone interviews or in-person interviews.

- The addresses of test collection site location(s), directions on how to get to them from the main facility, and an estimate of travel time from the main facility.

- Name, address, and phone number of primary contact at each test collection site.

- Complete descriptions of arbitration/litigation decisions adversely impacting implementation of the drug and alcohol rules and/or program (e.g., an arbitration that resulted in the overturning of a verified positive test).

- Methodology used to oversee and monitor contractors' compliance with the rules.

The FTA will also request that while the auditors are on site, the following items be provided for your agency and for your safety-sensitive contractors.

- A visitor pass for each auditor or escort to allow

them to move throughout the facility.

- A lockable office with workspace and power outlets.

- Access to a photocopy machine.

- An opportunity to talk with the medical review officer, substance abuse professional, any third party administrator, breath alcohol technicians, saliva test technician, urine specimen collectors, and management representatives at the collection site.

- Documentation that employees testing positive were removed from safety-sensitive duty.

- Blind testing documentation (if applicable).

- Completed chain of custody forms for pre-employment, random, post-accident, reasonable suspicion, return-to-duty, and follow-up tests.

- Results of pre-employment, random, post-accident, reasonable suspicion, return-to-duty, and follow-up tests.

- The dates when the operating locations were notified about who had been selected for random tests.

- The dates and times employees were notified to go for a random test.

- Employee grievances pertaining to FTA-mandated alcohol and drug testing.

The table on the following page lists the documents auditors will need to access while on site. The time retention requirements as specified by 49 CFR Parts 40 and 655 are also noted in the table.

The audit letter will also include a schedule for the on-site portion of the audit. All agency personnel, contractors, and service agents that have drug and alcohol program responsibilities should be available according to the schedule. You will be requested to complete the portions of the schedule that include the contact persons' names, phone numbers, and the locations where the audit portion will take place. The sample agenda on page 14-8 illustrates a 5-day audit schedule.

Section 3. ON-SITE AUDIT

The audit begins with the FTA representative explaining the audit process and introducing the audit team. During this time, the grantee should ensure that all personnel and materials are present or easily accessible.

You are encouraged to include all personnel with drug and alcohol program responsibilities in the introduction. You may choose to have all safety-sensitive contractors that are being audited present, as well as any service agents (i.e., collection site representatives, MROs, SAPs and/or Third Party Administrators). Any questions regarding the process should be raised

Alcohol Testing Records	Drug Testing Records
Alcohol testing records you must retain for 1 Year Records of test results less than 0.02. ——Employer's copy of the alcohol test form, including results of the test.	**Drug testing records you must retain for 1 Year** Records of verified negative drug test results. ——Employer's copy of custody and control form.
Alcohol testing records you must retain for 2 Years **1**. Records related to the collection process **except** calibration of Evidentiary Breath Testing devices. ——Collection logbooks, if used. ——Documents relating to the random selection process. ——Verification of Breath Alcohol Technician training. ——Documents generated in connection with decisions to administer reasonable suspicion alcohol tests. ——Documents generated in connection with decisions on post-accident alcohol tests. ——Documents showing existence of medical explanation of inability of safety-sensitive employee to provide enough breath for test. **2**. Education and training records. ——Materials on alcohol abuse awareness, including a copy of the employer's policy on alcohol abuse. ——Documentation of compliance with 49 CFR 655 concerning development and dissemination of the employer's policy. ——Educational materials that explain the regulatory requirements. ——The employer's policy and procedures with respect to implementing the regulatory requirements. ——Written notice to every safety-sensitive employee of the availability of the above materials. ——Written notice to all safety-sensitive employee organizations (i.e., collective bargaining units) of the availability of the	**Drug testing records you must retain for 2 Years** **1**. Records relating to the collection process. ——Collection logbooks, if used. ——Documents relating to the random selection process. ——Documents generated in connection with decisions to administer reasonable suspicion drug tests. ——Documents generated in connection with decisions on post-accident drug tests. ——MRO documents showing existence of medical explanation of inability of safety-sensitive employee to provide enough urine. **2**. Education and training records. ——Training materials on drug abuse awareness, including a copy of the employer's policy on prohibited drug use. ——Names of safety-sensitive employees attending training on prohibited drug use and dates and times of such training. ——Documentation of training provided to supervisors to qualify them to make reasonable suspicion determinations. ——Certification that this training complies with the regulatory requirements.

above materials. ——Procedures to assess those with verified positive tests, providing available services, referral, suspension, and dismissal.	
Alcohol testing records you must retain for 3 Years Records related to previous employer record checks	**Drug testing records you must retain for 3 Years** Records related to previous employer record checks
Alcohol testing records you must retain for 5 years **1**. Alcohol test records with alcohol readings of 0.02 or greater. ——The employer's copy of the alcohol test form, including the results of the test. ——Documents related to the refusal of any safety-sensitive employee to submit to an alcohol test required by 49 CFR 655. ——Documents presented by a covered employee to dispute the results of an alcohol test administered under 49 CFR 655. **2**. Calibration documentation. ——Documents specifying the machine calibrated (e.g., by serial number), the date of calibration, the certified technician calibrating the equipment, and the results of the calibration. ——Signed by calibrating technician. ——Manufacturer's calibration schedule for the model of equipment used. ——Certification record for the calibrating technician. **3**. Employee evaluation and referrals. ——Records pertaining to a determination by a substance abuse professional concerning a safety-sensitive employee's need for assistance. ——Records concerning a safety-sensitive employee's compliance with the recommendations of the substance abuse professional. **4**. Annual MIS reports.	**Drug testing records you must retain for 5 years** **1**. Records of covered employee verified positive drug test results. ——Employer's copy of the chain-of-custody form. ——Documents relating to the refusal of any safety-sensitive employee to submit to a drug test required by 49 CFR 655. ——Documents presented by a covered employee to dispute the results of a drug test administered under 49 CFR 655. **2**. Covered employee referrals to substance abuse professional and return-to-duty and follow-up requirements. ——Records pertaining to a determination by a substance abuse professional concerning a safety-sensitive employee's suitability to return to work as a safety-sensitive employee. ——Records concerning a safety-sensitive employee's entry into and completion of the program of rehabilitation recommended by the substance abuse professional. **3**. Annual MIS reports.

Sample Audit Agenda

DAY 1

Time	Activity	Team	Address of Facility	Contact Name and Phone
1:00 p.m.	Arrive on-site (Transit System Name)	FTA Rep., Auditors #1, #2, #3, #4, & #5		
1:00 to 2:00 p.m.	Introduction to audit process	FTA Rep. to deliver introduction while others are present		
2:00 to 4:00 p.m.	Administer DAPM interview	Auditor #1 & #2		
2:00 to 5:00 p.m.	Records review: pull and review random, accident, post-accident, and pre-employment	Auditor #3 & #5		
2:00 to 5:00 p.m.	Visit collection site	FTA Rep., Auditor #4		

DAY 2

Time	Activity	Team	Address of Facility	Contact Name and Phone
8:00 a.m.	Arrive on-site (Transit System Name)	FTA Rep., Auditors #1, #2, #3, #4, & #5		
8:00 a.m. to Noon	Records review: pull and review random, accident, post-accident, and pre-employment	FTA Rep., Auditors #3, #4, & #5		
2:00 to 3:00 p.m.	Administer MRO interview	Auditor #1		
3:00 to 4:00 p.m.	Administer SAP interview	Auditor #2		
2:00 to 5:00 p.m.	Records Review: Pull and review random, accident, post-accident, And pre-employment	Auditors #3, & #5		
2:00 to 5:00 p.m.	Records management interview	FTA Rep., Auditor #4		

DAY 3

Time	Activity	Team	Address of Facility	Contact Name and Phone
8:00 a.m.	Arrive on-site (Contractor Name)	FTA Rep., Auditors #1, #2, #3, #4, & #5		
8:00 to 10:00 a.m.	DAPM Interview	FTA Rep., Auditor #2		
8:00 a.m. to 12:00 p.m.	Records review: pull and review random, accident, post-accident, and pre-employment	Auditors #3, & #5		
10:00 to 11:00 a.m.	Conduct MRO interview	Auditor #4		
11:00 a.m. to Noon	Conduct SAP interview	Auditor #4		
Noon to 1:00 p.m.	Lunch	All		
1:00 to 3:00 p.m.	Records review: pull and review random, accident, post-accident, and pre-employment	Auditors #4, #3, #5, & FTA Rep.		
1:00 to 4:00 p.m.	Visit contractor collection site, mock collection	Auditors #1 & #2		
3:00 to 4:00 p.m.	Conduct records management interview	FTA Rep., Auditor #4		

DAY 4

At Hotel

Time	Activity	Team	Address of Facility	Contact Name and Phone
8:00 a.m. to 4:00 p.m.	Compile audit report for grantee	FTA Rep., Auditors #1 & #2,		
8:00 a.m. to 4:00 p.m.	Compile contractor audit report	Auditors #3, #4 & #5		

DAY 5

Time	Activity	Team	Address of Facility	Contact Name and Phone
8:00 to 10:00 a.m.	Conduct exit interview (Transit System Name)	FTA Rep., Auditors #1, #2, #3, #4 & #5		

during the introduction. You are also encouraged to be active in the process by accompanying the auditors to the contractor and service agent facilities.

Following the introductions, the audit team will break into smaller teams as indicated in the schedule. The auditors follow a set line of questions. A copy of the questions is contained in Appendix K.

The auditors will review your policy before the on-site visit. Some common problems found in substance abuse policies include the following:

- Failure to obtain policy adoption by local governing board or other authorized official
- Confuse FTA/FMCSA requirements
- Not current with regulatory changes
- Consequences for policy violation not clearly defined
- Use of boilerplate policy without modifying for local circumstances
- Failure to adequately identify safety-sensitive employees

For the records review portion of the audit, the auditors will generally chart their findings on a computer. Figures 14-1 through 14-8 are examples of the types of charts the auditors will include in the Final Audit report. Figure 14-1 shows an acceptable example of random testing reasonably spread across the year. Figure 14-2 is an unacceptable example of random tests lumped together at the beginning of each testing period. Figures 14-3 and 14-4 present acceptable and unacceptable examples of random tests reasonably spread across the week, and Figures 14-5 and 14-6 present acceptable and unacceptable examples of the random tests reasonably spread across the workday. Figures 14-7 and 14-8 are examples of what the auditors may include in the Final Audit report to show the compliance of post-accident testing. The auditors will show if the alcohol test was delayed more than 2 hours from the time of the accident.

The team will generally complete all on-site questioning of the grantee, contractor(s), and service agents in 3 days. On the fourth day, the team will compile the report.

Section 4. FINAL REPORT

After the audit is complete, the team conducts an exit interview presenting the findings, if any, to the transit system management. A letter and final report documenting the deficiencies and necessary corrective actions will be generated and given to the DAPM at the exit interview.

In the early years of the audit program, the audit report only identified areas of deficiency. More recently, the audit process and the software have been enhanced to enable the audit reporter to identify the compliant areas of the program. The report represents a compilation of the facts as presented by the grantee/subrecipient staff, service agents, safety-sensitive contractors, and their respective records.

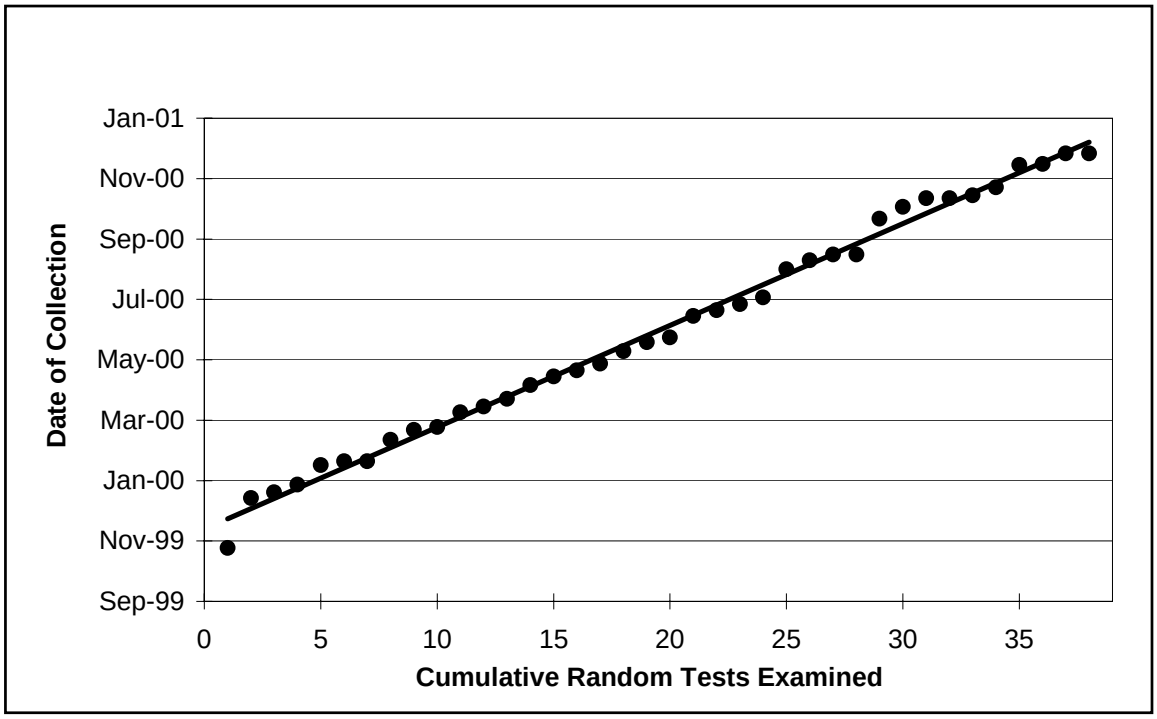


Figure 14-1. Random Tests Are Reasonably Spread Throughout the Calendar Year

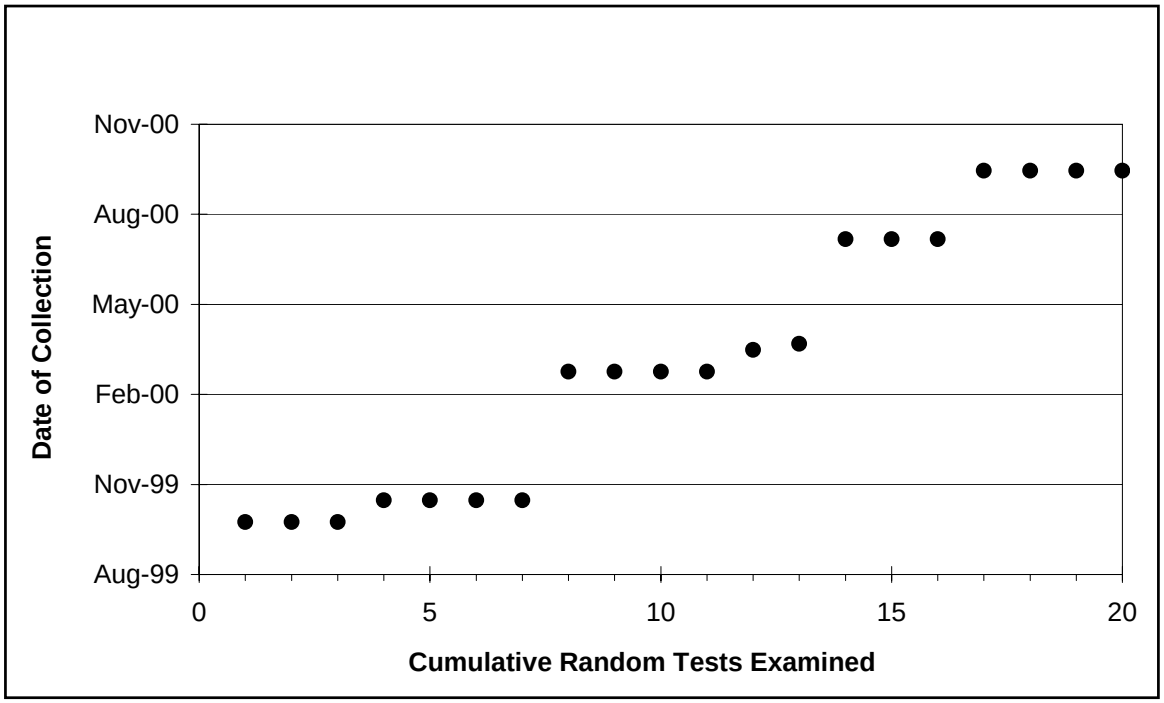


Figure 14-2. Random Tests Not Reasonably Spread Throughout the Calendar Year

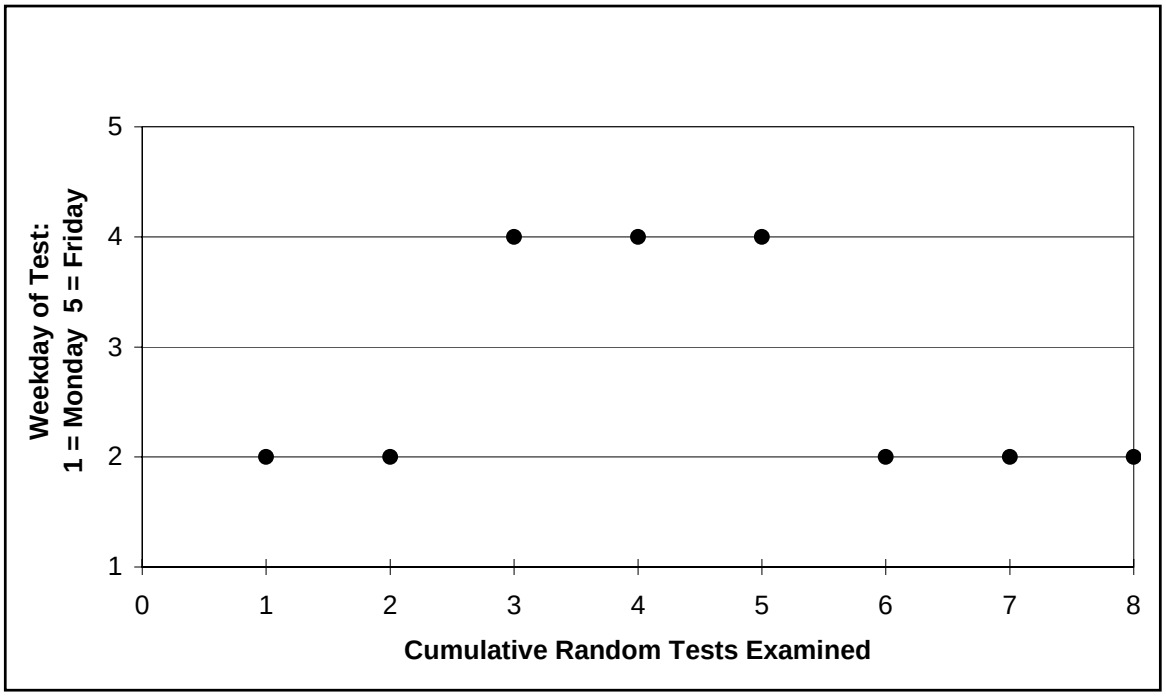


Figure 14-3. Random Testing Is Not Reasonably Spread Across All Service Days

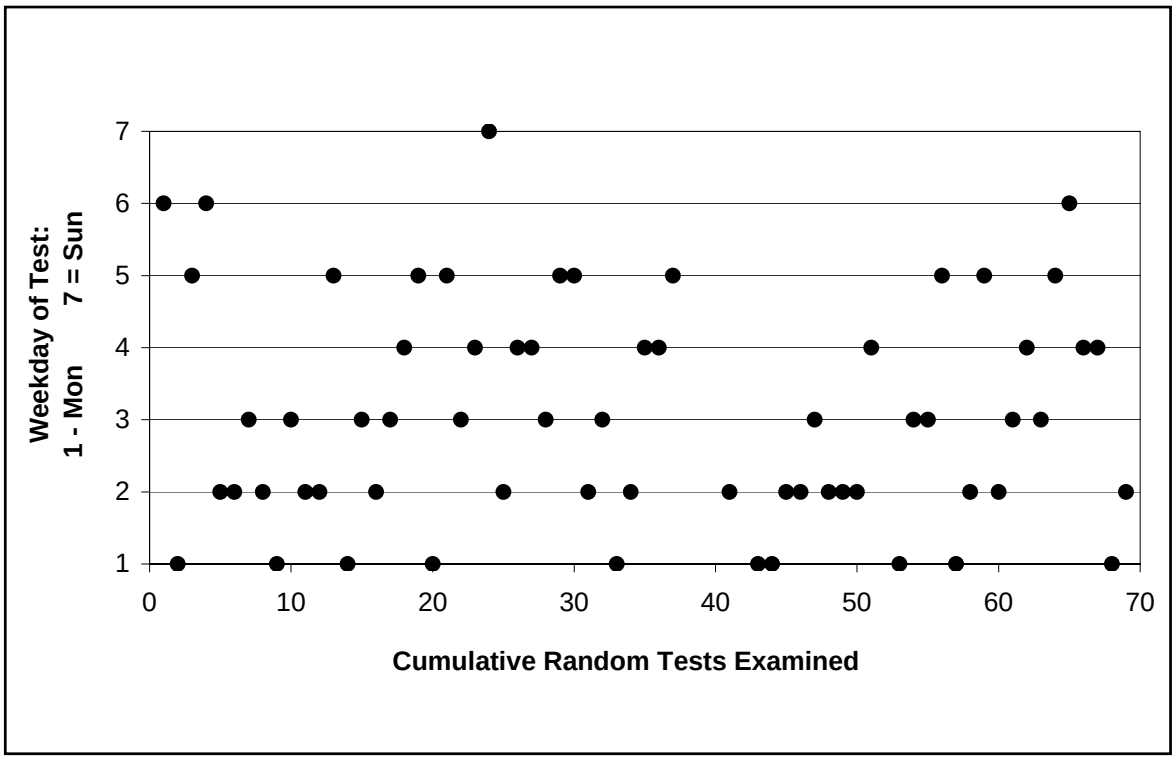


Figure 14-4. Random Testing Reasonably Spread Across All Days of the Week

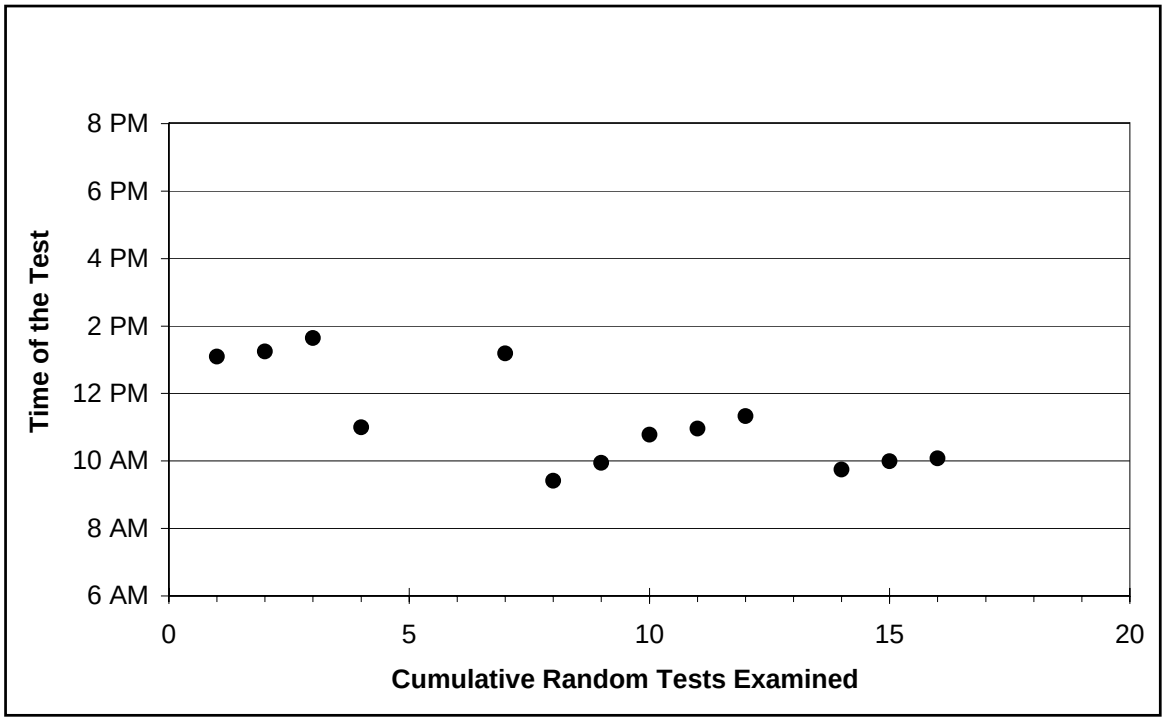


Figure 14-5. Random Testing Not Reasonably Spread Across All Service Hours

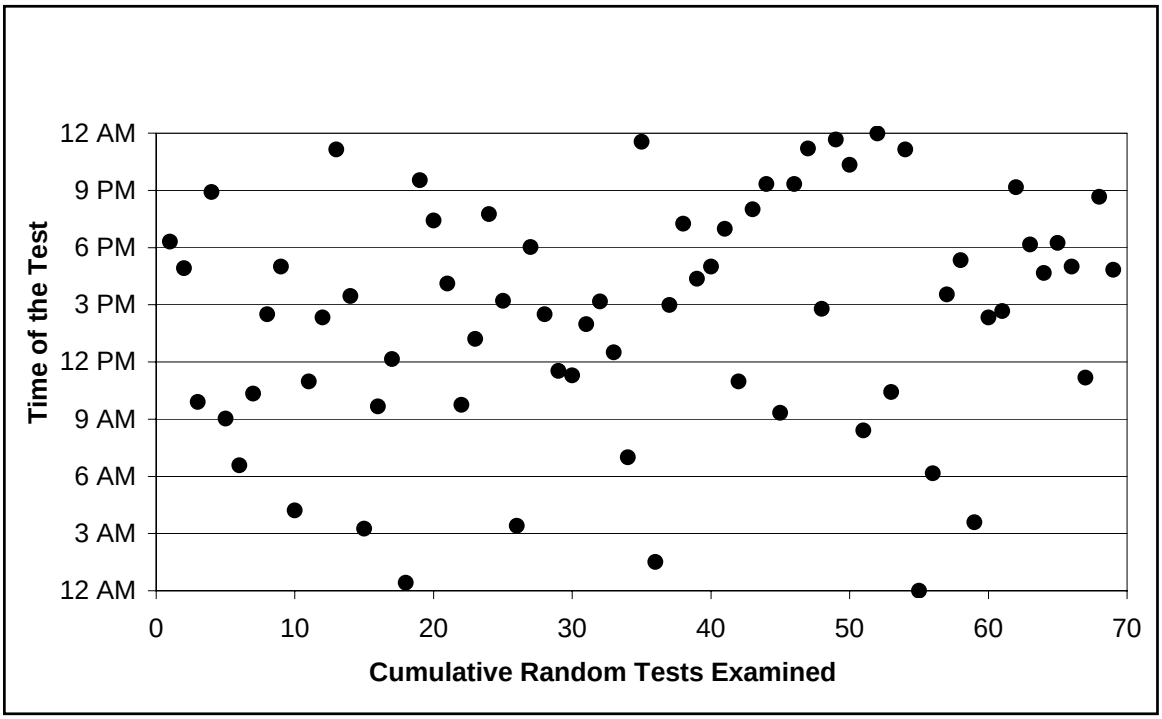


Figure 14-6. Random Testing Reasonably Spread Across All Hours of Operation

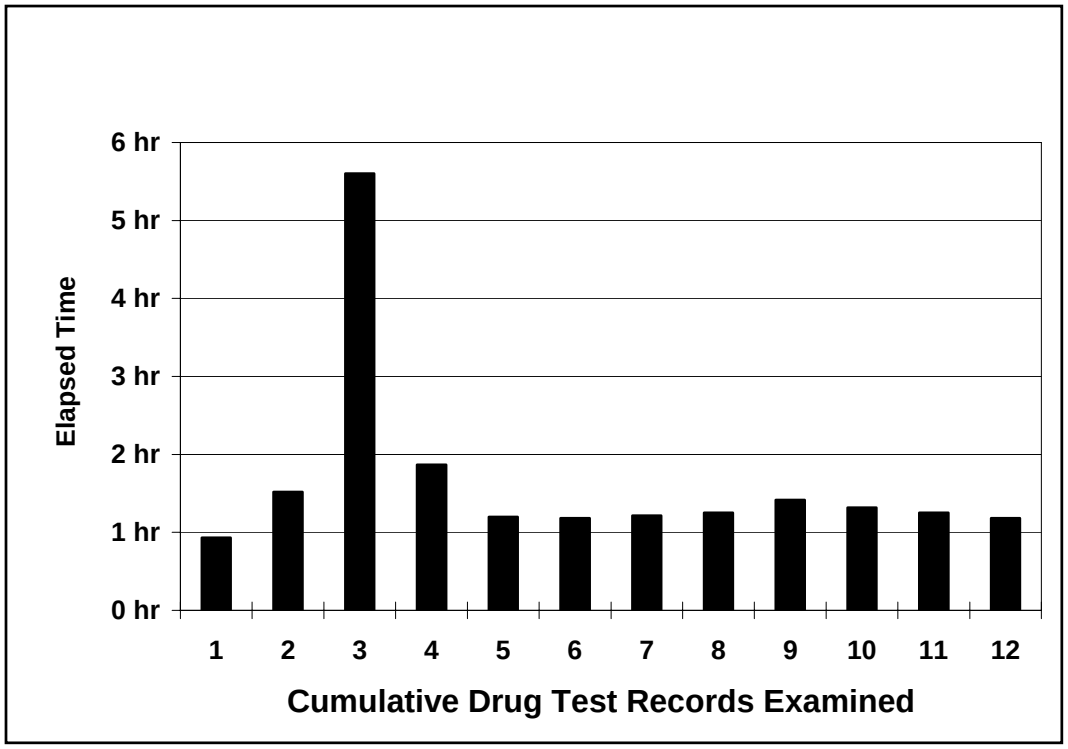


Figure 14-7. Number of Hours After Accident Post-Accident Drug Testing Performed

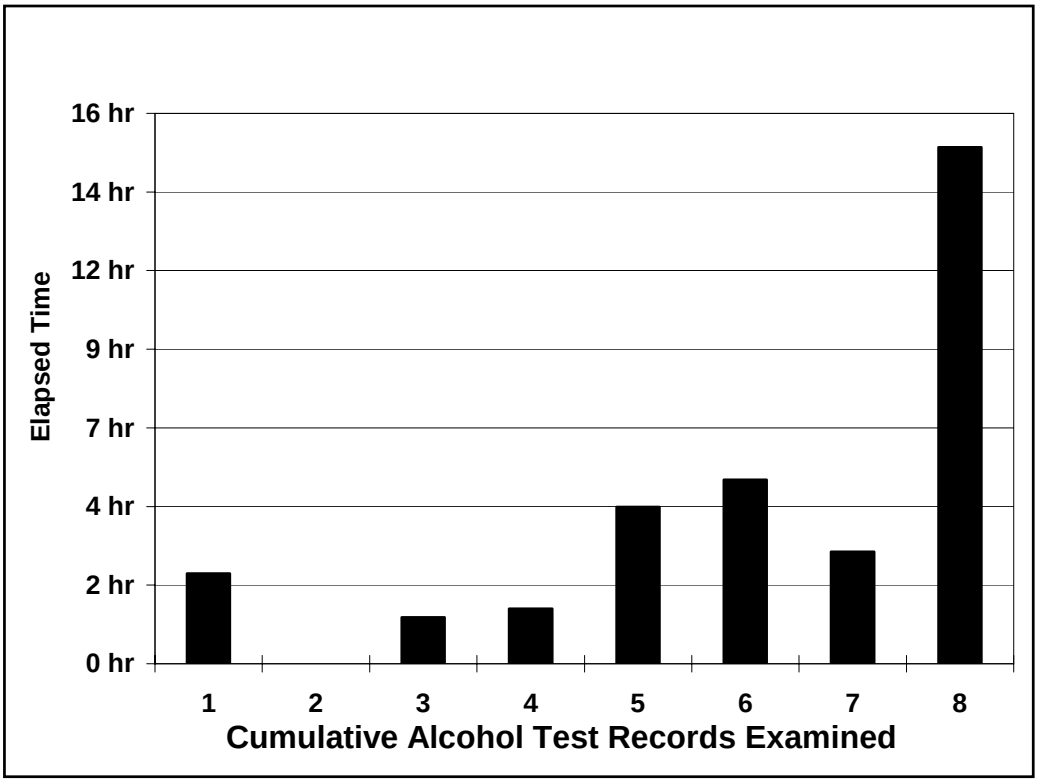


Figure 14-8. Number of Hours After Accident Post-Accident Breath Alcohol Test Performed

Each auditor will discuss the portion of the audit that he/she completed. The auditor will also offer suggestions as to how deficiencies can be corrected. You will be given the opportunity to ask questions regarding the findings, however, they will not be negotiated. You will then be given 90 days to correct the deficiencies and submit a response with appropriate supporting documentation demonstrating the corrective action taken. The audit report and exit letter will explain the type of documentation needed in the audit response. You are responsible for the audit findings and subsequent compliance of your safety-sensitive contractors and service agents.

It is imperative that all grantees/subrecipients, their safety-sensitive contractors, and service agents understand the nature, extent, and seriousness of the audit process and prepare accordingly. If you do not take action to comply, you may jeopardize your agency's current and future FTA funding. You are encouraged to assess the extent of your program's compliance with the drug and alcohol testing regulations and take corrective action in anticipation of an audit rather than in response to one.

Section 5. RE-AUDITS

In November 2001, the FTA began re-audits of systems that had previously been audited. Re-audits are designed to ensure that grantees/subrecipients have successfully implemented policies and procedures to correct the deficiencies identified in the previous audit. The re-audit will address the grantee, safety-sensitive contractors and service agents who were involved in the original audit. The re-audits are limited in scope and only address the non-compliant issues identified in the original audit.

Grantees selected for a re-audit will be contacted by the audit team leader by telephone and notified of the process and time line. An official FTA letter confirming the re-audit will follow. You will be asked to submit documentation to the audit team 2 weeks from notification. The requested information will be similar to that made for the initial audit request. The information will vary by site depending on the specific nature of the compliance issues raised in the original audit.

In addition, you may be asked to have the following items available for the audit team during the on-site portion of the audit.

- A visitor pass for each auditor or escort to allow them to move throughout the facility.
- A lockable office with workspace and power outlets to support the team.
- Access to a photocopy machine.
- An opportunity to talk with the MRO, SAP, C/TPA, BAT, STT, urine specimen collectors, and management representatives at the collection site.
- Documentation that employees testing positive

were removed from safety-sensitive duty.

- Completed chain of custody forms for pre-employment, random, post-accident, reasonable suspicion, return-to-duty, and follow-up tests.

- Results of pre-employment, random, post-accident, reasonable suspicion, return-to-duty, and follow-up tests.
- The dates when the operating locations were notified as to who had been selected for random tests.

- The dates and times employees were notified to go for a random test.

- Employee grievances pertaining to FTA alcohol and drug testing.

Section 6. RE-AUDIT SCHEDULE

The FTA will provide a schedule for the time on-site and will ask the grantee to ensure all personnel will be available during that time. The typical re-audit on-site visit will last 2 to 3 days. The charts on the following page illustrate a typical re-audit agenda.

Section 7. RE-AUDIT TIME LINE

The time from notification until the on-site audit is 4 weeks. The on-site review will last approximately 3 days. An exit interview will be held on the third day to describe the re-audit findings. The grantee will have 45 days to correct deficiencies and provide supporting documentation to FTA. The chart on page 14-18 illustrates the re-audit time line from notification of the re-audit, to the grantee providing documentation of actions to correct deficiencies.

While on-site, the audit team will review areas of the original audit that were non-compliant. One grantee's re-audit may not contain the same questioning as another. For example, re-audit questions for a grantee with non-compliant random testing and program management in the original audit will focus on the program management and random testing records. Another grantee with non-compliant collection sites, MRO, and post-accident testing will have only these portions of the program reviewed during the re-audit.

The final report will be given at the exit interview. Each auditor will discuss the portion of the audit that he/she completed, and will also offer suggestions on how the deficiencies can be corrected. You will have the opportunity to ask questions regarding the findings, however, they will not be negotiated. The re-audit report and exit letter will explain the type of documentation that needs to be included in the response, and you will have 45 days to correct the deficiencies.

Sample Re-audit Agenda

DAY 1

Time	Activity	Team	Address of Facility	Contact Name and Phone
9:00 a.m.	Arrive on-site (Transit System Name)	FTA Rep., Auditors #1, #2, #3, #4, & #5		
9:00 a.m. to 2:00 p.m.	Introduction to audit process	FTA Rep. to deliver introduction while others are present		
2:00 to 4:00 p.m.	Administer DAPM interview	Auditors #1 & #2		
2:00 to 5:00 p.m.	Records review: pull and review random, accident, post-accident, and pre-employment	Auditors #3 & #5		
2:00 to 5:00 p.m.	Visit collection site	FTA Rep., Auditor #4		

DAY 2

At Hotel

Time	Activity	Team	Address of Facility	Contact Name and Phone
8:00 a.m. to 4:00 p.m.	Compile audit report for grantee	FTA Rep., Auditors #1 & #2		
8:00 a.m. to 4:00 p.m.	Compile contractor audit report	Auditors #3, #4 & #5		

DAY 3

Time	Activity	Team	Address of Facility	Contact Name and Phone
8:00 to 10:00 a.m.	Conduct exit interview (Transit System Name)	FTA Rep.,, Auditors #1, #2, #3, #4 & #5		

Re-audit Time Line

	Weeks from Initial Notification											
	1	2	3	4	5	6	7	8	9	10	11	12
Notification of re-audit												
Requested material sent to FTA and audit team												
Grantee/Subrecipient/ Contractor prepares for re-audit												
Re-audit												
Grantee/Subrecipient/ Contractor takes corrective action												
Documentation of corrective action due												

Index of Appendices

Appendix A

Acronyms

Appendix A. Acronyms

AA	Alcoholics Anonymous
AAMRO	American Association of Medical Review Officers
ACOEM	American College of Occupational and Environmental Medicine
ADA	Americans with Disabilities Act
ASAM	American Society of Addition Medicine
ASD	Alcohol Screen Device
ATF	Alcohol Test Form
BAC	Breath Alcohol Concentration
BAT	Breath Alcohol Technician
CCF	Federal Drug Testing Custody and Control Form
CDL	Commercial Driver's License
CESAR	Center for substance Abuse Research
CFR	Code of Federal Regulations
CPL	NHTSA Conforming Products List
C/TPA	Consortia/Third Party Administrator
DAMIS	Drug and Alcohol Management Information System
DAPM	Drug and Alcohol Program Manager
DER	Designated Employer Representative
DFWA	Drug-Free Workplace Act
DHHS	Department of Health and Human Services
DOT	Department of Transportation
EAP	Employee Assistance Program
EAPA	Employee Assistance Professional Association
EASNA	Employee Assistance Society of North America
EBT	Evidential Breath Testing (device)
EMIT	Enzyme Multiplied Immunoassay Technique
FAA	Federal Aviation Administration

FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
FPIA	Fluorescein Polarization Immunoassay
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
GC	Gas Chromatograph
GC/MS	Gas Chromatography/Mass Spectrometry
HHS	Department of Health and Human Services
ICRC	International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse
MIS	Management Information System
MPO	Metropolitan Planning Organization
MRO	Medical Review Officer
MROCC	Medical Review Officer Certification Council
MS	Mass Spectrometer
NAADAC	National Association of Alcoholism and Drug Abuse Counselors Certification Commission
NCADI	National Clearinghouse for Alcohol and Drug Information
NHTSA	National Highway Traffic Safety Administration
NOPE	Notice of Public Interest Exclusion
NPRM	Notice of Proposed Rulemaking
NIDA	National Institute on Drug Abuse
NTSB	National Transportation Safety Board
ODAPC	Office of Drug and Alcohol Policy and Compliance
OST	Office of the Secretary of Transportation
OTC	Over-the-Counter Medication
PCP	Phencyclidine
PIE	Public Interest Exclusion
PM	Program Manager

RFP	Request for Proposal
RIA	Radio Immunoassay
RSPA	Research and Special Programs Administration
SAID	Substance Abuse Information Database
SAMHSA	Substance Abuse Mental Health Services Administration
SAP	Substance Abuse Professional
SAPAA	Substance Abuse Program Administrators Association
SS	Safety-Sensitive
STT	Screen Test Technician
THC	delta-9-tetrahydrocannabinol (marijuana)
TSI	Transportation Safety Institute
UMTA	Urban Mass Transportation Administration
USCG	United States Coast Guard

Appendix B

Additional Resources

Appendix B. Additional Resources

Newsletters

Federal Transit Administration, *Drug and Alcohol Regulations Updates.* FTA – Office of Safety and Security, 400 7th Street SW, Washington, D.C. 20590. Telephone: (202) 366-2780.

Business Publishers Inc., *Drug Detection Report.* Business Publishers Inc. 8737 Colesville Rd. Suite 1100, Silver Springs, MD 20910-3928. Telephone: (301) 589-5103.

Mass Transit Lawyer/Administrator, P.O. Box 19647, Alexandria, VA 22320. Telephone: (703) 548-5177.

Institute for Drug-Free Workplace, *The Drug-Free Workplace Report.* Institute for a Drug-Free Workplace, 1301 K Street, N.W., East Tower, Suite 1010, Washington, D.C. 20005. Telephone: (202) 842-7400.

FTA Publications

Federal Transit Administration, *Best Practices Manual: FTA Drug and Alcohol Testing Program*, March 2002. National Technical Information Service, Springfield, VA 22161.

Federal Transit Administration, *Drug and Alcohol Consortia Manual,* 1996. National Technical Information Service, Springfield, VA 22161.

Federal Transit Administration, *Employee Assistance Program for Transit Systems,* September 1991. Report No. UMTA-CT-06-0020-1, National Technical Information Service, Springfield, VA 22161.

Federal Transit Administration, *Random Drug Testing Manual,* September 1991. National Technical Information Service, Springfield, VA 22161.

Federal Transit Administration, *Substance Abuse in the Transit Industry,* November 1991. National Technical Information Service, Springfield, VA 22161.

Office of Drug and Alcohol Policy and Compliance Publications

U.S. DOT Urine Specimen Collection Guidelines for the U.S. Department of Transportation Workplace Drug Testing Programs (49 CFR Part 40) August 2001, Version 1.01. The Office of the Secretary, Room 10403 (S-1), 400 7th St., SW Washington, D.C. 20590. Telephone: (202)-366-3784.

U.S. DOT Substance Abuse Professional Guidelines, August 2001. The Office of the Secretary, Room 10403 (S-1), 400 7th St., SW Washington, D.C. 20590. Telephone: (202)-366-3784.

U.S. DOT BAT Training: DOT Model Course, 2001. The Office of the Secretary, Room 10403 (S-1), 400 7th St., SW Washington, D.C. 20590. Telephone: (202)-366-3784.

U.S. STT Training: DOT Model Course, 2001, The Office of the Secretary, Room 10403 (S-1), 400 7th St., SW Washington, D.C. 20590. Telephone: (202)-366-3784.

Databases

U.S. Department of Labor, *Substance Abuse Information Database (SAID).* Telephone: 1-800-775-SAID.

Professional Associations

American Association of Medical Review Officers, 6320 Quadrangle Drive, Suite 340, Chapel Hill, NC 27514.

American College of Occupational and Environmental Medicine, 55 West Seegers Road, Arlington Heights, IL 60005.

Drug & Alcohol Testing Industry Association, 1600 Duke Street, Suite 220, Alexandria, VA 22314.

Employee Assistance Professionals Association (EAPA), 4601 North Fairfax Drive, Suite 1001, Arlington, VA 22203.

Employee Assistance Society of North America (EASNA), 2728 Phillips, Berkeley, MI 48072.

*The Association For Addiction Professionals (NAADAC) ,*901 N. Washington St., Suite 600, Alexandria, VA 22314.

Medical Review Officer Certification Council, 1821 Walden Office Square, Suite 300, Schaumburg, Illinois 60173.

Substance Abuse Program Administrators Association (SAPAA), P.O. Box 158694, Nashville, TN 37215-8694.

Department of Labor Publications

U.S. Department of Labor, *An Employer's Guide to Dealing with Substance Abuse,* October 1990. The National Clearing House for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847. Telephone: 1-800-729-6686; FAX: (301) 468-6433.

U.S. Department of Labor, *What Works: Workplaces Without Alcohol and Other Drugs,* October 1991. The National Clearing House for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847. Telephone: 1-800-729-6686; FAX: (301) 468-6433.

U.S. Department of Labor. *What Works: Workplaces Without Drugs,* August 1990. The National Clearing House for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847. Telephone: 1-800-729-6686; FAX: (301) 468-6433.

U.S. Department of Health and Human Services Publications

Alcohol Alert No. 44: *Alcohol in the Workplace*- July 1999. The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847. Telephone: 1-800-729-6686; FAX: (301) 468-6433.

Cost Effectiveness and Preventive Implications of Employee Assistance Programs. The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847. Telephone: 1-800-729-6686; FAX: (301) 468-6433.

CSAP Substance Abuse Resource Guide: Employee Assistance Programs MS439. The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847. Telephone: 1-800-729-6686; FAX: (301) 468-6433.

CSAP Substance Abuse Resource Guide: Prevention in the Workplace MS704A, 1993. The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847. Telephone: 1-800-729-6686; FAX: (301) 468-6433.

Additional Resources

Center for Substance Abuse Protection – Drug Free Workplace Helpline (1-800-843-4971).

Model Plan for a Comprehensive Drug-Free Workplace Program, 1990 (DHHS Publication No. (ADM) 90-1635). The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847. Telephone: 1-800-729-6686; FAX: (301) 468-6433.

Comprehensive Procedures for Drug Testing in the Workplace, 1991 (DHHS Publication No. (ADM) 90-1635.) The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847. Telephone: 1-800-729-6686; FAX: (301) 468-6433.

Publications Catalog, 2002. The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847. Telephone: 1-800-729-6686; FAX: (301) 468-6433.

*Blind Sample (Quality Control)***.** A listing of the organizations that provide samples can be received from DHHS, Division of Workplace Programs. Telephone: (301) 443-6014.

FTA Safety & Security Bulletin Board (1-800-231-2061).

Web sites
Resources from the Federal Transit Administration Office of Safety and Security

Office of Safety and Security
http://transit-safety.volpe.dot.gov/safety/DATesting.asp
Web site has information on the following topics:

- Regulation and Frequently Asked Questions
- 49 CFR Part 655, Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations.
- Substance Abuse Publications
- Documents and Reports relating to Substance Abuse, including yearly DAMIS annual reports, located in Publications section of this web site.
- Seminar Presentations
- Current and Previous Drug and Alcohol Regulation Updates Newsletters
- Audit Program Items related to the Drug and Alcohol Audit Program
- Emerging Issues
- New items relating to Drug and Alcohol Testing
- Legal Interpretations Drug and Alcohol Testing Regulations Interpretation Letters

Publications available from the FTA Web site
http://transit-safety.volpe.dot.gov/publications/default.asp#Substance
The following publications are available on the FTA Web site:

- Best Practices Manual: FTA Drug and Alcohol Testing Program
- DOT Urine Specimen Collection Guidelines for the U.S. Department of Transportation Workplace Drug Testing Programs
- The Substance Abuse Professional Guidelines
- Drug and Alcohol Testing Results 2001 Annual Report
- Drug and Alcohol Testing Results 2000 Annual Report
- Drug and Alcohol Testing Results 1999 Annual Report
- Drug and Alcohol Testing Results 1998 Annual Report
- Drug and Alcohol Testing Results 1997 Annual Report
- Drug and Alcohol Testing Results 1996 Annual Report
- Reasonable Suspicion Referral for Drug and Alcohol Testing
- Drug and Alcohol Consortia Manual

Resources from the Office of Drug and Alcohol Policy and Compliance
http://www.dot.gov/ost/dapc/prog_guidance.html

Drug and Alcohol Regulations
http://www.dot.gov/ost/dapc/regulations.html

Other Government Web sites

Drug and Alcohol Information on the Department of Labor Web site
http://www.dol.gov/dol/workingpartners.htm

National Institute of Health
http://www.nida.nih.gov

Department of Health and Human Services
www.health.org

Office of National Drug Control Policy
www.whitehousedrugpolicy.gov

Industry Web sites

American Association of Medical Review Officers
http://www.aamro.com/

American College of Occupational and Environmental Medicine (ACOEM)
http://www.acoem.org/.

American Society of Addiction Medicine
http://www.asam.org/

Center for Substance Abuse Research (CESAR)
http://www.cesar.umd.edu

Drug & Alcohol Testing Industry Association
http://www.datia.org

Employees Assistance Professionals Association
http://www.eap-association.org.

Institute for Drug-Free Workplace
http://www.drugfreeworkplace.org

International Certification and Reciprocity Consortium (ICRC)
http://icrcaoda.org

Medical Review Officer Certification Council
http://www.mrocc.com/index.htm

National Association of Alcoholism and Drug Abuse Counselors (NAADAC)
http://www.naadac.org/

National Council on Alcoholism & Drug Dependence, Inc.
http://www.ncadd.org

Partners for a Drug-Free America
http://www.drugfreeamerica.org

Substance Abuse Program Administrators Association
http://www.sapaa.com/

Appendix C

Americans with Disabilities Act Discussion

Appendix C. Americans with Disabilities Act Discussion

This discussion is reproduced from the February 15, 1994 *Federal Register* (59 FR 7311) for your reference. The Department referenced here refers to the Department of Transportation. The DOT Office of the Chief Counsel was consulted to determine the continued applicability of the paper. The conclusion was that the paper was still valid and appropriately described the relationship between the ADA and DOT drug and alcohol testing. Therefore, it is reprinted herein without any modification.

The Americans with Disabilities Act and DOT Drug and Alcohol Testing

The Americans with Disabilities Act of 1990 (ADA) (Pub. L. 101-36) does not, in any way, preclude or interfere with employers' compliance with the Department's new or existing drug and alcohol testing regulations. However, Title I of the ADA, which prohibits discrimination against a "qualified individual with a disability," may affect the personnel actions an employer might wish to take with respect to some individuals who test positive for alcohol or drugs, or otherwise violate the prohibitions of the Department's drug and alcohol rules.

Title I covers employers who have 15 or more employees for more than 20 calendar weeks in a year (§101(5)(A)). (Until July 26, 1994, only employers with 25 or more such employees are covered.) Covered employers may not discriminate against a qualified individual with a disability with respect to applications, hiring, advancement, discharge, compensation, or other terms, conditions, or privileges of employment (§102(a)).

Before discussing the effect Title I may have on an employer's personnel action following a positive DOT-mandated drug or alcohol test or other violations of DOT drug and alcohol rules, it is important to note the specific ADA provisions that address DOT drug and alcohol rules. The ADA specifically authorizes employers covered by DOT regulations to require their employees to comply with the standards established in those regulations, including complying with any rules that apply to employment in safety-sensitive positions as defined in the DOT regulations (§104©(5)(C)). By authorizing employers to require employees to comply with the standards in DOT rules, this provision authorizes compliance not only with testing provisions of the rules, but also of other drug- and alcohol-related provisions that affect safety-sensitive employees (e.g., pre-duty abstinence, on-the-job use). The legality under the ADA of employer compliance with DOT drug and alcohol requirements, other than those concerning testing, is underlined by several other provisions of Title I. An employer may prohibit the use of drugs and alcohol in the workplace, may require that employees not be under the influence of alcohol, or be engaging in the illegal use of drugs in the workplace, and may require that employees conform to the requirements for the Drug-Free Workplace Act (Pub. L. 100-690, Title V, Subtitle D) (§104(c)(1-3)).

Concerning drug and alcohol testing and its consequences, the statute further provides that nothing in Title I shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to (1) test employees of such entities in, and applicants for, positions involving safety-

sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and (2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c). (Subsection (c) includes the statutory language cited above [§104(e)]. These ADA provisions clearly specify that the ADA does not interfere with the compliance by covered employers with DOT regulations concerning drug and alcohol use, including requirements for testing and for removing persons from safety-sensitive positions who test positive for drugs or alcohol. Under the ADA, an employer is not viewed as "discriminating" for following the mandates of DOT drug and alcohol rules.

In considering the effects on the personnel actions that employers choose to take after a safety-sensitive employee tests positive for drugs or alcohol or otherwise violates DOT drug or alcohol rules, it is important to note that the ADA's prohibition of employment discrimination applies only with respect to a "qualified individual with a disability." The ADA specifically provides that an employee or applicant who is currently engaging in the illegal use of drugs is **not** a "qualified individual with a disability" (§104(a)). The ADA does not protect such an employee from adverse personnel actions. For purposes of the ADA, the drugs that trigger this provision are those that the use, possession, or distribution of which is prohibited by the Controlled Substances Act (§101(6)). The five drugs for which DOT mandates tests fit this definition (alcohol is not a drug covered by the Controlled Substances Act).

What does "currently engaging" in the illegal use of drugs mean? According to the Equal Employment Opportunity Commission (EEOC), whose rules carry out Title I, the term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks of, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct (56 FR 35745-46, July 26, 1991). It is clear that an individual who has a positive result on a DOT-mandated drug test is currently engaging in the illegal use of drugs. Therefore, under Title I, an employer may discharge or deny employment to an individual who has a positive result on a DOT-mandated drug test.

This provision, that an individual who is currently engaging in the illegal use of drugs is not a "qualified individual with a disability" does not apply, of course, if the individual is **erroneously** regarded as having engaged in the illegal use of drugs. In addition, if an individual, even a former user of illegal drugs, is not currently engaging in the illegal use of drugs and (1) has successfully completed a supervised rehabilitation program or otherwise has been successfully rehabilitated, or (2) is participating in a supervised rehabilitation program, the individual can continue to be regarded as a "qualified individual with a disability," if the individual is otherwise entitled to this status (§104(b)). An employer may seek reasonable assurance that an individual is not currently engaging in the illegal use of drugs (including requiring a drug test) or is in or has completed rehabilitation. Some employers (EEOC uses the example of a law enforcement agency) may also be able to impose a job qualification standard that would exclude someone with a history of drug abuse if it can show that the standard is job-related and consistent with business necessity (56 FR 35746, July 26, 1991).

Unlike the situation with respect to current use of illegal drugs, the use of alcohol contrary to law, federal regulation, or employer policy does not deprive an individual of status as a "qualified individual with a disability" that he or she would otherwise have under Title I. An individual is protected by Title I, however, only if the individual has a disability in the first place. (This is also true with respect to a former drug user or any other individual who seeks the protection of the ADA.) To have a disability, an individual must have a "physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such impairment, or being regarded as having such impairment" (§1(2)). While, as the EEOC notes in its Title I regulation, "individuals disabled by alcoholism are accorded the same protections accorded other individuals with disabilities" (56 FR 35752, July 26, 1991), not all individuals who use alcohol in violation of the law, federal regulation, or employer policy are "disabled by alcoholism."

The courts interpreting section 504 of the Rehabilitation Act of 1973 (with which ADA employment provisions are intended to be consistent) have concluded that alcoholism can be a disability which may call for reasonable accommodation. See e.g., **Walker v. Weinberger,** 600 F.Supp. 757 (D.D.C., 1985); **Tinch v. Walters,** 765 F.2d 599 (6th Cir., 1985); **McKelvey v. Walters,** 596 F.Supp. 1317 (D.D.C., 1984); **Anderson v. University of Wisconsin,** 665 F.Supp. 1372 (W.D. Wis., 1987), **aff'd** 841 f.2d 737 (7th Cir., 1988); **Richardson v. Postal Service,** 613 F.Supp. 1213 (D.D.C., 1985); and, **Sullivan v. City of Pittsburg,** 811 F.2d 171 (3rd Cir., 1987).

The logic of the ADA and EEOC's regulatory provisions implementing the statute, suggest that in determining whether an employee or applicant who has a positive result on a DOT-mandated alcohol test or otherwise violates a DOT alcohol rule is disabled by alcoholism, the employer would answer to questions. First, does the individual have a physical or mental impairment; e.g., is the individual an alcoholic? (People who test positive for alcohol are not necessarily an alcoholic.) This question would probably have to be answered with the assistance of a physician or substance abuse professional. Second, if the individual is an alcoholic, does this impairment substantially limit a major life activity or is it (even erroneously) regarded as substantially limiting a major life activity? This question would be answered on a case-by-case basis, following EEOC's guidelines (see 56 FR 35740-44, July 26, 1991). Under DOT's alcohol prevention rules, it is required that these determinations be made by or in cooperation with the substance abuse professional following a positive test or rule violation.

The determination of whether an individual is a qualified individual with a disability is made in two steps: (1) whether the individual has the appropriate education, experience, skills, and licenses, and meets the other prerequisites of the position; and (2) whether the individual can perform the essential functions of the job desired or held with or without reasonable accommodation. Essential functions are the functions that the individual holding the position must be able to perform unaided or with reasonable accommodation. Several factors are considered in determining whether a job function is essential, including whether the employer actually requires employees in the position to perform the function, whether the position exists to perform the function, whether there are other employees who could perform the function, and whether there is a high degree of expertise or skill required to perform the function.

If the individual is qualified and determined to be disabled by alcoholism, then the employer may not discriminate against the individual on the basis of his or her disability, and if job performance and behavior are not affected by alcoholism, the employer must make "reasonable accommodations" to the individual's known physical or mental limitations, **unless** the employer can demonstrate that doing so would impose an "undue hardship" on the employer's business.

The selection of an appropriate "reasonable accommodation" is done on a case-by-case basis, as EEOC guidance provides (see 56 FR 35744, July 26, 1991). Reasonable accommodation for an individual disabled by alcoholism could include such actions as referral to an Employee Assistance Program or other rehabilitation program, provision of rehabilitation services, and giving an employee sufficient time to demonstrate that rehabilitation has been successful. See, e.g., **Washington v. Department of Navy,** 30 M.S.P.R. 323 (1986); **Swafford v. Tennessee Valley Authority,** 18 M.S.P.R. 481 (1983).

Even when an individual is disabled by alcoholism, however, the employer is not required to provide a reasonable accommodation that creates an "undue hardship." Undue hardship involves significant difficulty or expense in, or resulting from, providing an accommodation. EEOC describes an undue hardship as "an accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business" (Id). This concept takes into account the financial resources of the employer (e.g., an accommodation that would be reasonable for a large business may be an undue hardship for a small business). But the concept is not limited to financial difficulty. For example, if a small trucking company determined that the accommodation that one of its drivers needed for an alcoholism-related disability was lengthy in-patient rehabilitation, the company might not only find the accommodation beyond its financial resources, but also too disruptive of its operations (i.e., a temporary replacement would have to be hired or the work of the firm be reduced significantly).

Under Title I, an employer may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment, job performance, and behavior as it holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of the employee (§104(c)(4)). For example, if as the result of alcoholism, an employee is chronically late or absent, or makes frequent job errors, the employee would be subject to personnel action on the same basis as any other employee who exhibited similar behavior for other reasons. (However, if the alcoholic employee were subjected to personnel actions that were not used against non-alcoholic employees who were chronically late or absent, or made frequent job errors, then the alcoholic employee might have a cause of action under the ADA.) The employer is not precluded from accommodating this alcoholic employee, but is not required to do so.

It should also be pointed out that the ADA does not preclude an employer from disciplining or dismissing an employee who commits a violation of the employer's conduct and performance standards, even if the individual is an alcoholic or has another disability. For example, a violation of a DOT operating administration's alcohol misuse rules (e.g., a test demonstrating a prohibited alcohol concentration) could be a violation of the employer's performance and

conduct rules, for which the employer's policy could call for the employee's dismissal. This result would not violate the ADA.

There are also situations in which meeting qualification standards of DOT safety rules, or having a valid license or certificate from a DOT operating administration is an essential job qualification. If a truck driver does not meet FHWA qualification standards to obtain a Commercial Driver's License from a state, or if a pilot does not qualify for an FAA medical certificate, that individual is not a "qualified individual with a disability," even if the reason for the failure to meet DOT qualifications is a condition that an employer might be required to accommodate under the ADA. The legislative history of the ADA specifically recognizes this special status for DOT qualification standards (see *Senate Report 101-116* at 27, August 30, 1989).

Another issue that has been raised in context of the relationship between the ADA and alcohol testing concerns whether an alcohol test is a "medical examination." Non-regulatory guidance issued by the EEOC suggests that "a test to determine an individual's blood alcohol level would be a 'medical examination' and only could be required by an employer in conformity with the ADA." It should be pointed out that this statement does not, at face value, apply to breath testing (or other methods that do not involve blood samples) for alcohol. The EEOC has not determined whether it views breath testing for alcohol as a "medical examination."

The Department of Transportation takes the position that alcohol testing under the program required by these rules is not properly viewed as a required medical examination. It is not the collection of a breath or body fluid sample that makes a test "medical" in nature. The tests in question are solely for the purpose of determining whether an employee has violated a DOT-mandated safety requirement. The tests are not used for any diagnostic or therapeutic purpose. They are not intended to ascertain whether an employee has any medical condition, and they will not be used for such a purpose. Under these circumstances, the policies underlying the ADA provisions on medical examinations do not apply. Because of the uncertainty that may be created by the EEOC guidance, however, it is useful to consider the implications of regarding alcohol tests as "medical examinations." (The Department is working with the EEOC to resolve this uncertainty.)

Even if alcohol tests were considered "medical examinations" for ADA purposes, the effects on compliance with DOT-mandated alcohol testing would be minimal. Medical examinations are permitted by the ADA if made after a conditional offer of employment. The pre-employment testing approach set forth in the rules clearly fits this model. For this reason, as well as for reasons of efficiency, the Department believes that conducting pre-employment testing after an offer of employment, but before the first performance of a safety-sensitive function, has much to recommend it. In addition, EEOC has stated to the Department that, because of the statutory requirement in the Omnibus Transportation Employee Testing Act of 1991 for pre-employment testing, EEOC does not object to pre-offer alcohol testing under the DOT rules mandated by this statute. Other types of testing mandated by these rules, such as reasonable suspicion, post-accident, and random testing, are likewise acceptable under ADA. (See 29 CFR 1630.15(e), which makes compliance with the requirements of federal law or regulation a defense to an

allegation of discrimination under Title I of the ADA.) Congress passed the Omnibus Act more than a year after it passed the ADA, and the former statute's specific mandates for various types of testing clearly, as a matter of statutory interpretation, would prevail over any contrary inferences anyone would attempt to draw from the more general provisions of the latter.

A related issue concerns the confidentiality of the records of alcohol tests. To the extent that an alcohol test is regarded as a medical examination, the records of the test would be "treated as a confidential medical record" under the ADA (see §102(c)(3)(B) of the ADA). Under this provision, records of a medical examination are required to be kept in a separate medical file. The purpose of any requirements for confidentiality of a medical record is to safeguard the employee's right of privacy with respect to personal medical information. An employee may, of course, waive such a right. (As a general matter, medical confidentiality provisions allow a patient to permit medical information to be provided to third parties.) The DOT rules, by requiring the employee to consent in writing, to the provision of test records to subsequent employers or third parties, are fully consistent with normal medical confidentiality waiver practices and with the ADA. It would clearly be anomalous to view a medical records confidentiality provision as prohibiting an employee from voluntarily agreeing that a previous employer or physician could send a medical record to a current employer or physician.

Appendix D

Certified Laboratories

Appendix D. Certified Laboratories

DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)
SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

SUMMARY:

The Department of Health and Human Services notifies federal agencies of the laboratories currently certified to meet standards of Subpart C of Mandatory Guidelines for Federal Workplace Drug Testing Programs (59 FR 29916, 29925). A notice listing all currently certified laboratories is published in the Federal Register during the first week of each month. If any laboratory's certification is suspended or revoked, the laboratory will be omitted from subsequent lists until such time as it is restored to full certification under the Guidelines.
The Federal Register is also available on the Internet at the following Web sites:

http://www.gpoaccess.gov/fr/index.html

FOR FURTHER INFORMATION CONTACT:
Mrs. Giselle Hersh or Dr. Walter Vogl, Division of Workplace Programs, 5600 Fishers Lane, Rockwall 2 Building, Room 815, Rockville, Maryland 20857; Tel.: (301) 443-6014, Fax: (301) 443-3031.

ACL Laboratories
8901 W. Lincoln Ave.
West Allis, WI 53227
414-328-7840/800-877-7016
(Formerly: Bayshore Clinical Laboratory)

ACM Medical Laboratory, Inc.
160 Elmgrove Park
Rochester, NY 14624
716-429-2264

Advanced Toxicology Network
3560 Air Center Cove, Suite 101
Memphis, TN 38118
901-794-5770/888-290-1150

Aegis Analytical Laboratories, Inc.
345 Hill Ave.
Nashville, TN 37210
615-255-2400

Alliance Laboratory Services
3200 Burnet Ave.
Cincinnati, OH 45229
513-585-9000
(Formerly: Jewish Hospital of Cincinnati, Inc.)

American Medical Laboratories, Inc.
14225 Newbrook Dr.
Chantilly, VA 20151
703-802-6900

Associated Pathologists Laboratories, Inc.
4230 South Burnham Ave., Suite 250
Las Vegas, NV 89119-5412
702-733-7866 / 800-433-2750

Baptist Medical Center - Toxicology Laboratory
9601 I-630, Exit 7
Little Rock, AR 72205-7299
501-202-2783
(Formerly: Forensic Toxicology Laboratory Baptist Medical Center)

Clinical Laboratory Partners, LLC
129 East Cedar St.
Newington, CT 06111
860-696-8115
(Formerly: Hartford Hospital Toxicology Laboratory)

Clinical Reference Lab
8433 Quivira Rd.
Lenexa, KS 66215-2802
800-445-6917

Cox Health Systems, Department of Toxicology
1423 North Jefferson Ave.
Springfield, MO 65802
800-876-3652 / 417-269-3093
(Formerly: Cox Medical Centers)

Diagnostic Services Inc., dba DSI
12700 Westlinks Drive
Fort Myers, FL 33913
941-561-8200 / 800-735-5416

Doctors Laboratory, Inc.
P.O. Box 2658
2906 Julia Dr.
Valdosta, GA 31602
912-244-4468

DrugProof, Divison of Dynacare
543 South Hull St.
Montgomery, AL 36103
888-777- 9497 / 334-241-0522
(Formerly: Alabama Reference Laboratories, Inc.)

DrugProof, Division of Dynacare/Laboratory of Pathology, LLC
1229 Madison St., Suite 500, Nordstrom Medical Tower
Seattle, WA 98104
206-386-2672 / 800-898-0180
(Formerly: Laboratory of Pathology of Seattle, Inc., DrugProof, Division of Laboratory of Pathology of Seattle, Inc.)

DrugScan, Inc.
P.O. Box 2969
1119 Mearns Rd.
Warminster, PA 18974
215-674-9310

Dynacare Kasper Medical Laboratories *
14940-123 Ave.
Edmonton, Alberta
Canada T5V 1B4
780-451-3702 / 800-661-9876

ElSohly Laboratories, Inc.
5 Industrial Park Dr.
Oxford, MS 38655
662-236-2609

Express Analytical Labs
1301 18th Ave NW, Suite 110
Austin, MN 55912
507-437-7322

Gamma-Dynacare Medical Laboratories*
A Division of the Gamma-Dynacare Laboratory Partnership
245 Pall Mall St.
London, ONT
Canada N6A 1P4
519-679-1630

General Medical Laboratories
36 South Brooks St.
Madison, WI 53715
608-267-6267

Kroll Laboratory Specialists, Inc.
1111 Newton St.
Gretna, LA 70053
504-361-8989 / 800-433-3823
(Formerly: Laboratory Specialists, Inc.)

LabOne, Inc.
10101 Renner Blvd.
Lenexa, KS 66219
913-888-3927 / 800-728-4064
(Formerly: Center for Laboratory Services, a Division of LabOne, Inc.)

Laboratory Corporation of America Holdings
7207 N. Gessner Road
Houston, TX 77040
713-856-8288 / 800-800-2387

Laboratory Corporation of America Holdings
69 First Ave.
Raritan, NJ 08869
908-526-2400 / 800-437-4986
(Formerly: Roche Biomedical Laboratories, Inc.)

Laboratory Corporation of America Holdings
1904 Alexander Drive
Research Triangle Park, NC 27709
919-572-6900 / 800-833-3984
(Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group)

Laboratory Corporation of America Holdings
10788 Roselle Street
San Diego, CA 92121
800-882-7272
(Formerly: Poisonlab, Inc.)

Laboratory Corporation of America Holdings
1120 Stateline Road West
Southaven, MS 38671
866-827-8042 / 800-233-6339
(Formerly: LabCorp Occupational Testing Services, Inc., MedExpress/National Laboratory Center)

Marshfield Laboratories
Forensic Toxicology Laboratory
1000 North Oak Ave.
Marshfield, WI 54449
715-389-3734 / 800-331-3734

MAXXAM Analytics Inc.*
5540 McAdam Rd.
Mississauga, ON
Canada L4Z 1P1
905-890-2555
(Formerly: NOVAMANN (Ontario) Inc.)

Medical College Hospitals Toxicology Laboratory, Department of Pathology
3000 Arlington Ave.
Toledo, OH 43699
419-383-5213

MedTox Laboratories, Inc.
402 W. County Rd. D
St. Paul, MN 55112
651-636-7466 / 800-832-3244

MetroLab-Legacy Laboratory Services
1225 NE 2nd Ave.
Portland, OR 97232
503-413-5295 / 800-950-5295

Minneapolis Veterans Affairs Medical Center
Forensic Toxicology Laboratory
1 Veterans Drive
Minneapolis, Minnesota 55417
612-725-2088

National Toxicology Laboratories, Inc.
1100 California Ave.
Bakersfield, CA 93304
661-322-4250 / 800-350-3515

Northwest Drug Testing, a division of NWT Inc.
1141 E. 3900 South
Salt Lake City, UT 84124
801-293-2300 / 800-322-3361
(Formerly: NWT Drug Testing, NorthWest Toxicology, Inc.)

One Source Toxicology Laboratory, Inc.
1705 Center Street
Deer Park, TX 77536
713-920-2559
(Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory)

Oregon Medical Laboratories
P.O. Box 972
722 East 11th Ave.
Eugene, OR 97440-0972
541-687-2134

Pacific Toxicology Laboratories
6160 Variel Ave.
Woodland Hills, CA 91367
818-598-3110 / 800-328-6942
(Formerly: Centinela Hospital Airport Toxicology Laboratory

Pathology Associates Medical Laboratories
11604 E. Indiana Ave.
Spokane, WA 99206
509-926-2400 / 800-541-7891

PharmChem Laboratories, Inc., Texas Division
7606 Pebble Dr.
Fort Worth, TX 76118
817-215-8800
(Formerly: Harris Medical Laboratory)

Physicians Reference Laboratory
7800 West 110th St.
Overland Park, KS 66210
913-339-0372 / 800-821-3627

Quest Diagnostics Incorporated
3175 Presidential Dr.
Atlanta, GA 30340
770-452-1590
(Formerly: SmithKline Beecham Clinical Laboratories, SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated
4770 Regent Blvd.
Irving, TX 75063
800-842-6152
(Moved from the Dallas location on 03/31/01; Formerly: SmithKline Beecham Clinical Laboratories, SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated
400 Egypt Rd.
Norristown, PA 19403
610-631-4600 / 800-877-7484
(Formerly: SmithKline Beecham Clinical Laboratories, SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated
506 E. State Pkwy.
Schaumburg, IL 60173
800-669-6995/847-885-2010
(Formerly: SmithKline Beecham Clinical Laboratories, International Toxicology Laboratories)

Quest Diagnostics Incorporated
7470 Mission Valley Rd.
San Diego, CA 92108-4406
619-686-3200 / 800-446-4728
(Formerly: Nichols Institute, Nichols Institute Substance Abuse Testing (NISAT), CORNING Nichols Institute, CORNING Clinical Laboratories)

Quest Diagnostics Incorporated
7600 Tyrone Ave.
Van Nuys, CA 91405
818-989-2520 / 800-877-2520
(Formerly: SmithKline Beecham Clinical Laboratories)

Scientific Testing Laboratories, Inc.
463 Southlake Blvd.
Richmond, VA 23236
804-378-9130

S.E.D. Medical Laboratories
5601 Office Blvd.
Albuquerque, NM 87109
505-727-6300 / 800-999-5227

South Bend Medical Foundation, Inc.
530 N. Lafayette Blvd.
South Bend, IN 46601
219-234-4176

Southwest Laboratories
2727 W. Baseline Rd.
Tempe, AZ 85283
602-438-8507 / 800-279-0027

Sparrow Health System
Toxicology Testing Center, St. Lawrence Campus
1210 W. Saginaw
Lansing, MI 48915
517-377-0520
(Formerly: St. Lawrence Hospital & Healthcare System)

St. Anthony Hospital Toxicology Laboratory
1000 N. Lee St.
Oklahoma City, OK 73101
405-272-7052

Toxicology & Drug Monitoring Laboratory
University of Missouri Hospital & Clinics
2703 Clark Lane, Suite B, Lower Level
Columbia, MO 65202
573-882-1273

Toxicology Testing Service, Inc.
5426 N.W. 79th Ave.
Miami, FL 33166
305-593-2260

Universal Toxicology Laboratories (Florida),LLC
5361 NW 33rd Avenue
Fort Lauderdale, FL 33309
954-717-0300, 800-522-0232x419
(Formerly:Integrated Regional Laboratories, Cedars Medical Center, Department of Pathology)

Universal Toxicology Laboratories, LLC
9930 W. Highway 80
Midland, TX 79706
915-561-8851 / 888-953-8851

US Army Forensic Toxicology Drug Testing Laboratory
Fort Meade
Building 2490
Wilson Street
Fort George G. Meade, MD 20755-5235
301-677-7085

The following laboratories are voluntarily withdrawing from the NLCP:

Withdrawal effective November 1, 2001:

Dept. of the Navy, Navy Drug Screening Laboratory, Great Lakes, IL
Building 38H, P. O. Box 88-6819
Great Lakes, IL 60088-6819
847-688-2045 / 847-688-4171

Withdrawal effective October 1, 2001:

Quest Diagnostics Incorporated
801 East Dixie Ave., Suite 105A
Leesburg, FL 34748
352-787-9006x4343
(Formerly: SmithKline Beecham Clinical Laboratories, Doctors & Physicians Laboratory)

Withdrawal effective October 1, 2001:

Quest Diagnostics Incorporated
4444 Giddings Road
Auburn Hills, MI 48326
248-373-9120 / 800-444-0106
(Formerly: HealthCare/Preferred Laboratories, HealthCare/MetPath, CORNING Clinical Laboratories)

Withdrawal effective October 1, 2001:

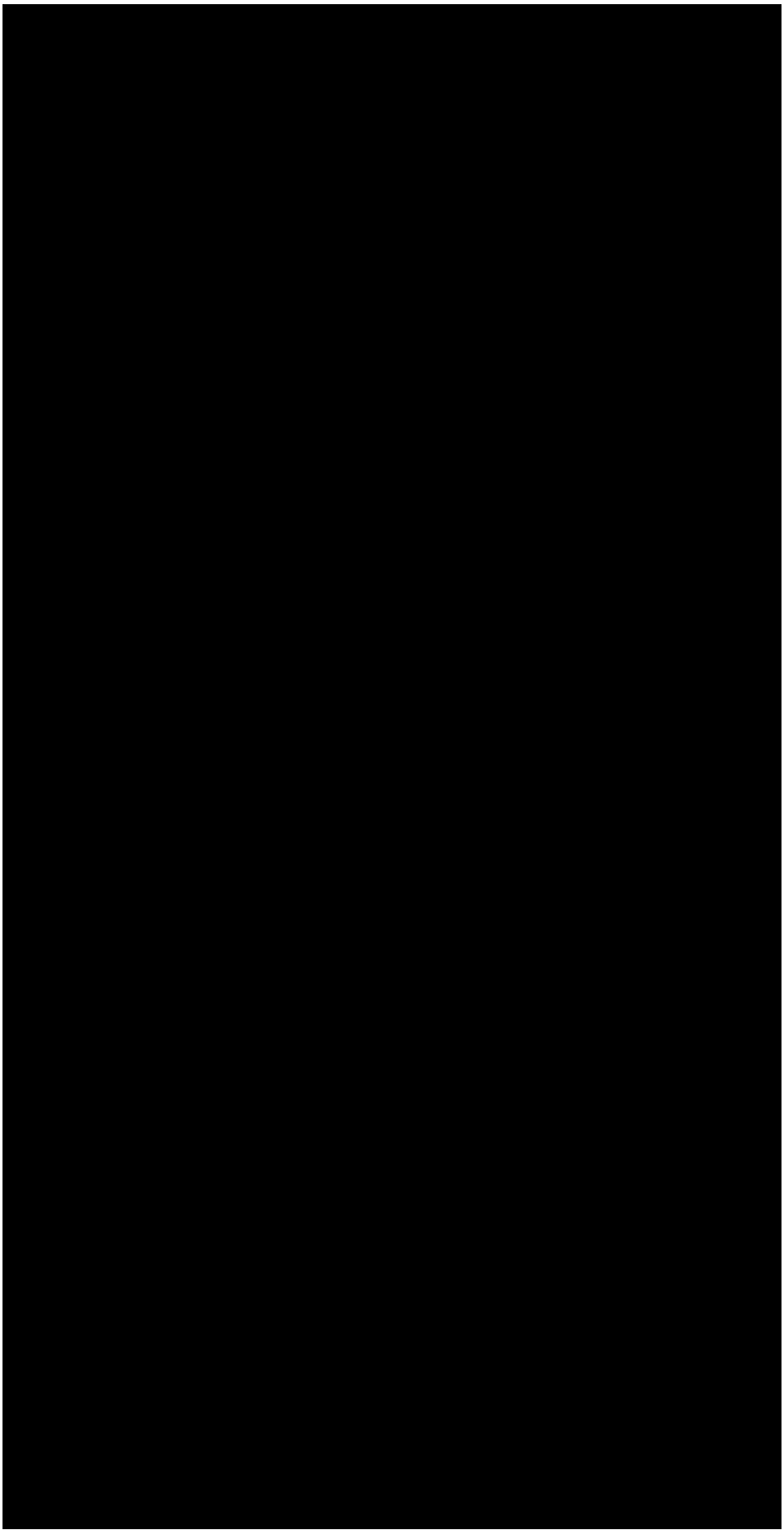
Quest Diagnostics Incorporated
One Malcomb Ave.
Teterboro, NJ 07608
201-393-5590
(Formerly: MetPath, Inc., CORNING MetPath Clinical Laboratories, CORNING Clinical Laboratory)

***The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. DHHS, with the DHHS' National Laboratory Certification Program (NLCP) contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.**

Upon finding a Canadian laboratory to be qualified, the DHHS will recommend that DOT certify the laboratory (Federal Register, 16 July 1996) as meeting the minimum standards of the "Mandatory Guidelines for Workplace Drug Testing" (59 Federal Register, 9 June 1994, Pages 29908-29931). After receiving the DOT certification, the laboratory will be included in the monthly list of DHHS certified laboratories and participate in the NLCP certification maintenance program.

Appendix E

Conforming Products List of Evidential Breath Measurement Devices



DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–00–7570]

Highway Safety Programs; Model Specifications for Devices To Measure Breath Alcohol

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice amends the Conforming Products List for instruments that conform to the Model Specifications for Evidential Breath Testing Devices (58 FR 48705).

EFFECTIVE DATE: July 21, 2000.

FOR FURTHER INFORMATION CONTACT: Dr. James F. Frank, Office of Traffic Injury Control Programs, Impaired Driving Division (NTS–11), National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington, D.C. 20590; Telephone: (202) 366–5593.

SUPPLEMENTARY INFORMATION: On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol (38 FR 30459). A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974 (39 FR 41399).

On December 14, 1984 (49 FR 48854), NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices, and published a conforming Products List (CPL) of instruments that were found to conform to the Model Specifications as Appendix D to that notice (49 FR 48864).

On September 17, 1993, NHTSA published a notice (58 FR 48705) to amend the Model Specifications. The notice changed the alcohol concentration levels at which instruments are evaluated, from 0.000, 0.050, 0.101, and 0.151 BAC, to 0.000, 0.020, 0.040, 0.080, and 0.160 BAC; added a test for the presence of acetone; and expanded the definition of alcohol to include other low molecular weight alcohols including methyl or isopropyl. On June 4, 1999, the most recent amendment to the Conforming Products List (CPL) was published (64 FR 30097), identifying those instruments found to conform with the Model Specifications.

Since the last publication of the CPL, two (2) instruments have been evaluated and found to meet the model specifications, as amended on September 17, 1993, for mobile and

non-mobile use. They are: (1) Intoxilyzer 400PA manufactured by CMI, Inc. of Owensboro, KY. This device is a hand-held breath tester with a fuel cell alcohol sensor. (2) Alco Sensor IV–XL manufactured by Intoximeters, Inc. of St. Louis, MO. This device is a hand-held breath tester with a fuel cell alcohol sensor that is microprocessor controlled. It is designed to minimize operator involvement in performing the test and processing the test data.

The CPL has been amended to add these two instruments to the list.

In accordance with the foregoing, the CPL is therefore amended, as set forth below.

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES

Manufacturer and model	Mobile	Nonmobile
Alcohol Countermeasure Systems Corp., Mississauga, Ontario, Canada:		
Alert J3AD*	X	X
PBA3000C	X	X
BAC Systems, Inc., Ontario, Canada: Breath Analysis Computer*	X	X
CAMEC Ltd., North Shields, Tyne and Ware, England: IR Breath Analyzer*	X	X
CMI, Inc., Owensboro, KY:		
Intoxilyzer Model:		
200	X	X
200D	X	X
300	X	X
400	X	X
400PA	X	X
1400	X	X
4011*	X	X
4011A*	X	X
4011AS*	X	X
4011AS–A*	X	X
4011AS–AQ*	X	X
4011 AW*	X	X
4011A27–10100*	X	X
4011A27–10100 with filter*	X	X
5000	X	X
5000 (w/Cal. Vapor Re-Circ.)	X	X
5000 (w3/8″ ID Hose option)	X	X
5000CD	X	X
5000CD/FG5	X	X
5000EN	X	X
5000 (CAL DOJ)	X	X
5000VA	X	X
PAC 1200*	X	X
S–D2	X	X
Decator Electronics, Decator, IL: Alco-Tector model 500*		X
Draeger Safety, Inc., Durango, CO:		
Alcotest Model:		
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII–C	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
900*	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410–II	X	X
Gall's Inc., Lexington, KY: Alcohol Detection System-A.D.S. 500	X	X
Intoximeters, Inc., St. Louis, MO:		
Photo Electric Intoximeter*	X	
GC Intoximeter MK II*	X	X
GC Intoximeter MK IV*	X	X
Auto Intoximeter*	X	X
Intoximeter Model:		
3000*	X	X
3000 (rev B1)*	X	X
3000 (rev B2)*	X	X
3000 (rev B2A)*	X	X
3000 (rev B2A) w/FM option*	X	X
3000 (Fuel Cell)*	X	X
3000 D*	X	X
3000 DFC*	X	X
Alcomonitor		X
Alcomonitor CC	X	
Alco-Sensor III	X	X
Alco-Sensor IV	X	X
Alco-Sensor IV–XL	XL	X
Alco-Sensor AZ	X	X
RBT–AZ	X	X
RBT III	X	X
RBT III–A	X	X
RBT IV	X	X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
RBT IV with CEM (cell enhancement module)	X	X
Intox EC/IR	X	X
Portable Intox EC/IR	X	X
Komyo Kitagawa, Kogyo, K.K.:		
Alcolyzer DPA–2*	X	X
Breath Alcohol Meter PAM 101B*	X	X
Lifeloc Technologies, Inc., (formerly Lifeloc, Inc.), Wheat Ridge, CO:		
PBA 3000B	X	X
PBA 3000–P*	X	X
PBA 3000C	X	X
Alcohol Data Sensor	X	X
Phoenix	X	X
Lion Laboratories, Ltd., Cardiff, Wales, UK:		
Alcolmeter Model:		
300	X	X
400	X	X
AE–D1*	X	X
SD–2*	X	X
EBA*	X	X
Auto-Alcolmeter*	X	
Intoxilyzer Model:		
200	X	X
200D	X	X
1400	X	X
5000 CD/FG5	X	X
5000 EN	X	X
Luckey Laboratories, San Bernadino, CA:		
Alco-Analyzer Model:		
1000*		X
2000*	X	
National Draeger, Inc., Durango, CO:		
Alcotest Model:		
7010*	X	X
7110*	X	X
7110 MKIII	X	X
7110 MKIII–C	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
900*	X	X
900A*	X	X
900BG*	X	X
7410	X	X
7410–II	X	X
National Patent Analytical Systems, Inc., Mansfield, OH:		
BAC DataMaster (with or without the Delta-1 accessory)	X	X
BAC Verifier Datamaster (with or without the Delta-1 accessory)	X	X
DataMaster cdm (with or without the Delta-1 accessory)	X	X
Omicron Systems, Palo Alto, CA:		
Intoxilyzer Model:		
4011*	X	X
4011AW*	X	X
Plus 4 Engineering, Minturn, CO: 5000 Plus4*	X	X
Seres, Paris, France:		
Alco Master	X	X
Alcopro	X	X
Siemans-Allis, Cherry Hill, NJ:		
Alcomat*	X	X
Alcomat F*	X	X
Smith and Wesson Electronics, Springfield, MA:		
Breathalyzer Model:		
900*	X	X
900A*	X	X
1000*	X	X
2000*	X	X
2000 (non-Humidity Sensor)*	X	X
Sound-Off, Inc., Hudsonville, MI:		
AlcoData	X	X
Seres Alco Master	X	X
Seres Alcopro	X	X
Stephenson Corp.: Breathalyzer 900*	X	X
U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, CA:		
Alco-Analyzer 1000		X

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
Alco-Analyzer 2000		X
Alco-Analyzer 2100	X	X
Verax Systems, Inc., Fairport, NY:		
BAC Verifier*	X	X
BAC Verifier Datamaster	X	X
BAC Verifier Datamaster II*	X	X

*Instruments marked with an asterisk (*) meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (*i.e.,* instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC.) Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids.

(23 U.S.C. 402; delegations of authority at 49 CFR 1.50 and 501.1)

Issued on: July 17, 2000.

Rose A. McMurray,

Associate Administrator for Traffic Safety Programs.

[FR Doc. 00–18455 Filed 7–20–00; 8:45 am]

BILLING CODE 4910–59–P

Appendix F

Fact Sheets

Appendix F. Fact Sheets

Drug Detection Periods

Detection periods vary; rates of metabolism and excretion are different for each drug and use. Detection periods should be viewed as estimates. Cases can always be found to contradict these approximations.

Drug	Detection Period
Amphetamines	
Amphetamine	2-4 days
Methamphetamine	2-4 days
Cocaine	
Benzoylecgonine	12-72 hours
Cannabinoids (Marijuana)	
Casual Use	2-7 days
Chronic Use	Up to 30 days
Ethanol (Alcohol)	12-24 hours
Opiates	
Codeine	2-4 days
Hydromorphone (Dilaudid)	2-4 days
Morphine (for Heroin)	2-4 days
Phencyclidine (PCP)	
Casual Use	2-7 days
Chronic Use	Up to 30 days

Alcohol Fact Sheet

Alcohol is a socially acceptable drug that has been consumed throughout the world for centuries. It is considered a recreational beverage when consumed in moderation for enjoyment and relaxation during social gatherings. However, when consumed primarily for its physical and mood-altering effects, it is a substance of abuse. As a depressant, it slows down physical responses and progressively impairs mental functions.

Signs and Symptoms of Use

- Dulled mental processes
- Lack of coordination
- Odor of alcohol on breath
- Possible constricted pupils
- Sleepy or stuporous condition
- Slowed reaction rate
- Slurred speech

(Note: Except for the odor, these are general signs and symptoms of any depressant substance.)

Health Effects

The chronic consumption of alcohol (average of three servings per day of beer [12 ounces], whiskey [1 ounce], or wine [6 ounce glass]) over time may result in the following health hazards:

- Decreased sexual functioning
- Dependency (up to 10 percent of all people who drink alcohol become physically and/or mentally dependent on alcohol and can be termed “alcoholic”)
- Fatal liver diseases
- Increased cancers of the mouth, tongue, pharynx, esophagus, rectum, breast, and malignant melanoma
- Kidney disease
- Pancreatitis
- Spontaneous abortion and neonatal mortality
- Ulcers
- Birth defects (up to 54 percent of all birth defects are alcohol related)

Social Issues

- Two-thirds of all homicides are committed by people who drink prior to the crime.
- Two to three percent of the driving population is legally drunk at any one time. This rate is doubled at night and on weekends.
- Two-thirds of all Americans will be involved in an alcohol-related vehicle accident during their lifetimes.
- The rate of separation and divorce in families with alcohol dependency problems is 7 times the average.
- Forty percent of family court cases are alcohol problem related.
- Alcoholics are 15 times more likely to commit suicide than are other segments of the population.
- More than 60 percent of burns, 40 percent of falls, 69 percent of boating accidents, and 76 percent of private aircraft accidents are alcohol related.

The Annual Toll

- 24,000 people will die on the nation's highways due to the legally impaired driver.
- 12,000 more will die on the nation's highways due to the alcohol-affected driver.
- 15,800 will die in non-highway accidents.
- 30,000 will die due to alcohol-caused liver disease.
- 10,000 will die due to alcohol-induced brain disease or suicide.
- Up to another 125,000 will die due to alcohol-related conditions or accidents.

Workplace Issues

- It takes one hour for the average person (150 pounds) to process one serving of an alcoholic beverage from the body.
- Impairment in coordination and judgment can be objectively measured with as little as two drinks in the body.
- A person who is legally intoxicated is 6 times more likely to have an accident than a sober person.

Amphetamine Fact Sheet

Amphetamines are central nervous system stimulants that speed up the mind and body. The physical sense of energy at lower doses and the mental exhilaration at higher doses are the reasons for their abuse. Although widely prescribed at one time for weight reduction and mood elevation, the legal use of amphetamines is now limited to a very narrow range of medical conditions. Most amphetamines that are abused are illegally manufactured in foreign countries and smuggled into the U.S. or clandestinely manufactured in crude laboratories.

Description

- Amphetamine is sold in counterfeit capsules or as white, flat, double-scored "mini-bennies." It is usually taken by mouth.

- Methamphetamine is often sold as a creamy white and granular powder or in lumps, and is packaged in aluminum foil wraps or sealable plastic bags. Methamphetamine may be taken orally, injected, or snorted into the nose.

- Trade/street names include Biphetamine, Delcobese, Desotyn, Detedrine, Chetrol, Ritalin, Speed, Meth, Crank, Crystal, Monster, Black Beauties, and Rits.

Signs and Symptoms of Use

- Hyperexcitability, restlessness
- Dilated pupils
- Increased heart rate and blood pressure
- Heart palpitations and irregular beats
- Profuse sweating
- Rapid respiration
- Confusion
- Panic
- Talkativeness
- Inability to concentrate
- Heightened aggressive behavior

Health Effects

- Regular use produces strong psychological dependence and increasing tolerance to the drug.

- High doses may cause toxic psychosis resembling schizophrenia.

- Intoxication may induce a heart attack or stroke due to spiking of blood pressure.

- Chronic use may cause heart and brain damage due to severe constriction of capillary blood vessels.

- The euphoric stimulation increases impulsive and risk-taking behaviors, including bizarre and violent acts.

- Withdrawal from the drug may result in severe physical and mental depression.

Workplace Issues

- Since amphetamines alleviate the sensation of fatigue, they may be abused to increase alertness because of unusual overtime demands or failure to get rest.

- Low-dose amphetamine use will cause a short-term improvement in mental and physical functioning. With greater use or increasing fatigue, the effect reverses and has an impairing effect. Hangover effect is characterized by physical fatigue and depression, which may make operation of equipment or vehicles dangerous.

Cocaine Fact Sheet

Cocaine is used medically as a local anesthetic. It is abused as a powerful physical and mental stimulant. The entire central nervous system is energized. Muscles are more tense, the heart beats faster and stronger, and the body burns more energy. The brain experiences an exhilaration caused by a large release of neurohormones associated with mood elevation.

Description

- The source of cocaine is the coca bush, grown almost exclusively in the mountainous regions of northern South America.

- Cocaine Hydrochloride – "snorting coke" is a white to creamy granular or lumpy powder that is chopped into a fine powder before use. It is snorted into the nose, rubbed on the gums, or injected in veins. The effect is felt within minutes and lasts 40 to 50 minutes per "line" (about 60 to 90 milligrams). Common paraphernalia include a single-edged razor blade and a small mirror or piece of smooth metal, a half straw or metal tube, and a small screw cap vial or folded paper packet containing the cocaine.

- Cocaine Base – a small crystalline rock about the size of a small pebble. It boils at a low temperature, is not soluble in water, and is up to 90 percent pure. It is heated in a glass pipe and the vapor is inhaled. The effect is felt within 7 seconds. Common paraphernalia includes a "crack pipe" (a small glass smoking device for vaporizing the crack crystal) and a lighter, alcohol lamp, or small butane torch for heating.

- Trade/street names include Coke, Rock, Crack, Free Base, Flake, Snow, Smoke, and Blow.

Signs and Symptoms of Use

- Financial problems
- Frequent and extended absences from meetings or work assignment
- Increased physical activity and fatigue
- Isolation and withdrawal from friends and normal activities
- Secretive behaviors, frequent nonbusiness visitors, delivered packages, phone calls
- Unusual defensiveness, anxiety, agitation
- Wide mood swings
- Runny or irritated nose
- Difficulty in concentration
- Dilated pupils and visual impairment
- Restlessness
- Formication (sensation of bugs crawling on skin)
- High blood pressure, heart palpitations, and irregular rhythm
- Hallucinations
- Hyperexcitability and overreaction to stimulus
- Insomnia

- Paranoia
- Profuse sweating and dry mouth
- Talkativeness

Health Effects

- Research suggests that regular cocaine use may upset the chemical balance of the brain. As a result, it may speed up the aging process by causing irreparable damage to critical nerve cells. The onset of nervous system illnesses such as Parkinson's disease could also occur.

- Cocaine use causes the heart to beat faster and harder and rapidly increases blood pressure. In addition, cocaine causes spasms of blood vessels in the brain and heart. Both effects lead to ruptured vessels causing strokes or heart attacks.

- Strong psychological dependency can occur with one "hit" of crack. Usually, mental dependency occurs within days (crack) or within several months (snorting coke). Cocaine causes the strongest mental dependency of any known drug.

- Treatment success rates are lower than for other chemical dependencies.

- Cocaine is extremely dangerous when taken with depressant drugs. Death due to overdose is rapid. The fatal effects of an overdose are not usually reversible by medical intervention. The number of cocaine overdose deaths has tripled in the last 4 years.

- Cocaine overdose was the second most common drug emergency in 1986 – up from 11th place in 1980.

Workplace Issues

- Extreme mood and energy swings create instability. Sudden noises can cause a violent reaction.

- Lapses in attention and ignoring warning signals greatly increase the potential for accidents.

- The high cost of cocaine frequently leads to workplace theft and/or dealing.

- A developing paranoia and withdrawal create unpredictable and sometimes violent behavior.

- Work performance is characterized by forgetfulness, absenteeism, tardiness, and missed assignments.

Cannabinoids (Marijuana) Fact Sheet

Marijuana is one of the most misunderstood and underestimated drugs of abuse. People use marijuana for the mildly tranquilizing and mood- and perception-altering effects it produces.

Description

- Usually sold in plastic sandwich bags, leaf marijuana will range in color from green to light tan. The leaves are usually dry and broken into small pieces. The seeds are oval with one slightly pointed end. Less prevalent, hashish is a compressed, sometimes tarlike substance ranging in color from pale yellow to black. It is usually sold in small chunks wrapped in aluminum foil. It may also be sold in any oily liquid.

- Marijuana has a distinctly pungent aroma resembling a combination of sweet alfalfa and incense.

- Cigarette papers, roach clip holders, and small pipes made of bone, brass, or glass are commonly used. Smoking "bongs" (large bore pipes for inhaling large volumes of smoke) can easily be made from soft drink cans and toilet paper rolls.

- Trade/street names include Marinol, THC, Pot, Grass, Joint, Reefer, Acapulco Gold, Sinsemilla, Thai Sticks, Hash, and Hash Oil.

Signs and Symptoms of Use

- Reddened eyes (often masked by eyedrops)
- Slowed speech
- Distinctive odor on clothing
- Lackadaisical "I don't care" attitude
- Chronic fatigue and lack of motivation
- Irritating cough, chronic sore throat

Health Effects

General

- When marijuana is smoked, it is irritating to the lungs. Chronic smoking causes emphysema-like conditions.

- One joint causes the heart to race and be overworked. People with undiagnosed heart conditions are at risk.

- Marijuana is commonly contaminated with the fungus *Aspergillus*, which can cause serious respiratory tract and sinus infections.

- Marijuana smoking lowers the body's immune system response, making users more susceptible to infection. The U.S. government is actively researching a possible

connection between marijuana smoking and the activation of AIDS in positive human immunodeficiency virus (HIV) carriers.

Pregnancy Problems and Birth Defects

- The active chemical, tetrahydrocannabinol (THC), and 60 other related chemicals in marijuana concentrate in the ovaries and testes.

- Chronic smoking of marijuana in males causes a decrease in sex hormone, testosterone, and an increase in estrogen, the female sex hormone. The result is a decrease in sperm count, which can lead to temporary sterility. Occasionally, the onset of female sex characteristics including breast development occurs in heavy users.

- Chronic smoking of marijuana in females causes a decrease in fertility and an increase in testosterone.

- Pregnant women who are chronic marijuana smokers have a higher than normal incidence of stillborn births, early termination of pregnancy, and higher infant mortality rate during the first few days of life.

- In test animals, THC causes birth defects, including malformations of the brain, spinal cord, forelimbs, and liver and water on the brain and spine.

- Offspring of test animals who were exposed to marijuana have fewer chromosomes than normal, causing gross birth defects or death of the fetus. Pediatricians and surgeons are concluding that the use of marijuana by either or both parents, especially during pregnancy, leads to specific birth defects of the infant's feet and hands.

- One of the most common effects of prenatal cannabinoid exposure is underweight newborn babies.

- Fetal exposure may decrease visual functioning and causes other ophthalmic problems.

Mental Function

Regular use can cause the following effects:

- Delayed decision-making

- Diminished concentration

- Impaired short-term memory, interfering with learning

- Impaired signal detection (ability to detect a brief flash of light), a risk for users who are operating machinery

- Impaired tracking (the ability to follow a moving object with the eyes) and visual distance measurements

- Erratic cognitive function

- Distortions in time estimation

- Long-term negative effects on mental function known as “acute brain syndrome,” which is characterized by disorders in memory, cognitive function, sleep patterns, and physical conditions

Acute Effects

- Aggressive urges
- Anxiety
- Confusion
- Fearfulness
- Hallucinations
- Heavy sedation
- Immobility
- Mental dependency
- Panic
- Paranoid reaction
- Unpleasant distortions in body image

Workplace Issues

- The active chemical, THC stores in body fat and slowly releases over time. Marijuana smoking has a long-term effect on performance.

- A 500 to 800 percent increase in THC concentration in the past several years makes smoking three to five joints a week today equivalent to 15 to 40 joints a week in 1978.

- Combining alcohol or other depressant drugs and marijuana can produce a multiplied effect, increasing the impairing effect of <u>both</u> the depressant and marijuana.

Opiates (Narcotics) Fact Sheet

Opiates (also called narcotics) are drugs that alleviate pain, depress body functions and reactions, and when taken in large doses, cause a strong euphoric feeling.

Description

- Natural and natural derivatives – opium, morphine, codeine, and heroin.
- Synthetics – meperidine (Demerol), oxymorphone (Numorphan), and oxycodone (Percodan)
- May be taken in pill form, smoked, or injected, depending upon the type of narcotic used.
- Trade/street names include Smack, Horse, Emma, Big D, Dollies, Juice, Syrup, and China White.

Signs and Symptoms of Use

- Mood changes
- Impaired mental functioning and alertness
- Constricted pupils
- Depression and apathy
- Impaired coordination
- Physical fatigue and drowsiness
- Nausea, vomiting, and constipation
- Impaired respiration

Health Effects

- IV needle users have a high risk for contracting hepatitis and AIDS due to the sharing of needles.
- Narcotics increase pain tolerance. As a result, people could more severely injure themselves or fail to seek medical attention after an accident due to the lack of pain sensitivity.
- Narcotics' effects are multiplied when used in combination with other depressant drugs and alcohol, causing increased risk for an overdose.

Social Issues

- There are over 500,000 heroin addicts in the United States most of whom are IV needle users.
- An even greater number of medicinal narcotic-dependent persons obtain their narcotics through prescriptions.

- Because of tolerance, there is an ever-increasing need for more narcotics to produce the same effect.

- Strong mental and physical dependency occurs.

- The combination of tolerance and dependency creates an increasing financial burden for the user. Costs for heroin can reach hundreds of dollars a day.

Workplace Issues

- Unwanted side effects such as nausea, vomiting, dizziness, mental clouding, and drowsiness place the legitimate user and abuser at higher risk for an accident.

- Narcotics have a legitimate medical use in alleviating pain. Workplace use may cause impairment of physical and mental functions.

Phencyclidine (PCP) Fact Sheet

Phencyclidine (PCP) was originally developed as an anesthetic, but the adverse side effects prevented its use except as a large animal tranquilizer. Phencyclidine acts as both a depressant and a hallucinogen, and sometimes as a stimulant. It is abused primarily for its variety of mood-altering effects. Low doses produce sedation and euphoric mood changes. The mood can change rapidly from sedation to excitation and agitation. Larger doses may produce a coma-like condition with muscle rigidity and a blank stare with the eyelids half closed. Sudden noises or physical chocks may cause a "freak out" in which the person has abnormal strength, extremely violent behavior, and an inability to speak or comprehend communication.

Description

- PCP is sold as a creamy, granular powder and is often packaged in one-inch square aluminum foil or folded paper "packets."

- It may be mixed with marijuana or tobacco and smoked. It is sometimes combined with procaine, a local anesthetic, and sold as imitation cocaine.

- Trade/street names include Angel Dust, Dust, and Hog.

Signs and Symptoms of Use

- Impaired coordination
- Severe confusion and agitation
- Extreme mood shifts
- Muscle rigidity
- Nystagmus (jerky eye movements)
- Dilated pupils
- Profuse sweating
- Rapid heartbeat
- Dizziness

Health Effects

- The potential for accidents and overdose emergencies is high due to the extreme mental effects combined with the anesthetic effect on the body.

- PCP is potentiated by other depressant drugs, including alcohol, increasing the likelihood of an overdose reaction.

- Misdiagnosing the hallucinations as LSD induced, and then treating with Thorazine, can cause a fatal reaction.

- Use can cause irreversible memory loss, personality changes, and thought disorders.

- There are four phases to PCP abuse. The first phase is acute toxicity. It can last up to 3 days and can include combativeness, catatonia, convulsions, and coma. Distortions of size, shape, and distance perception are common. The second phase, which does not always follow the first, is a toxic psychosis. Users may experience visual and auditory delusions, paranoia, and agitation. The third phase is a drug-induced schizophrenia that may last a month or longer. The fourth phase is PCP-induced depression. Suicidal tendencies and mental dysfunction can last for months.

Workplace Issues

- PCP abuse is less common today than in recent years. It is also not generally used in a workplace setting because of the severe disorientation that occurs.

Appendix G

Questions and Answers

Appendix G. Questions and Answers

GENERAL ISSUES

Q. Under what authority did FTA create this rule?

A. The Omnibus Transportation Employee Testing Act of 1991 has given FTA the necessary statutory authority to require its grantees to implement both drug and alcohol testing programs. This act also gives the FTA specific statutory authority to pre-empt inconsistent State or local laws with regard to drug and alcohol testing.

Q. How will the Federal Transit Administration ensure compliance with the regulations?

A. Recipients of Federal funds must certify annually that they are in compliance with these regulations. False certification is a violation of federal law. Each recipient must complete annual reports summarizing the results of its drug and alcohol testing programs, and upon request, submit them to FTA. A full review and evaluation of the performance of grant recipients is conducted every 3 years under FTA's Triennial Review process. In addition, the FTA conducts drug and alcohol oversight compliance audits on a random basis. All four processes will be used to determine compliance.

Q. Who will regulate employees subject to the jurisdiction not only of the FTA but also of other modes as well?

A. The FTA has resolved jurisdictional issues with other modes having concurrent jurisdiction over transit employees. In general, the FTA rule will apply to safety-sensitive employees of its grantees, except for ferryboat operators covered under the U.S. Coast Guard. The details of this deferral mechanism are spelled out in the FTA rule.

Q. What are the consequences if employers do not comply with the FTA drug and alcohol regulations?

A. Compliance with these regulations is a condition of FTA funding. Failure to implement drug and alcohol programs pursuant to the regulations may result in suspension or termination of FTA funding.

Q. Contract employees are deemed to "stand in the shoes" of covered employees. How does this impact the user-side subsidy programs? Are taxi drivers, dispatchers, and mechanics subject to the FTA rule? Would all taxi drivers in a firm be subject to testing even if only a small part of their business involved a user-side subsidy supported through an FTA program?

A. To the extent that a taxi company does not provide service under an arrangement with an FTA recipient, but is chosen by a passenger, it would not be subject to the rule. If, however, the taxicab company or private operator provides service under an arrangement with an FTA

recipient, and someone other than the passenger chooses the provider (i.e. broker, dispatcher) it is covered by the rule as a contractor, as defined by the rule. In such cases, the taxi company may wish to designate only certain drivers to provide such services, in which case only those designated drivers would be subject to the rule. Taxi operators that are independent contractors for a taxi company that is under contract to an FTA recipient. Operators must ensure the compliance of maintenance providers that "stand in the shoes" for the operator. Section 5311, 5307, and 5309 systems, with service populations less than 200,000, are exempt from the maintenance requirement.

Q. What is FTA's definition of an accident?

A. FTA has defined "accident" to distinguish among different kinds of mass transit vehicles. The definition states that an accident occurs when a road vehicle (whether a mass transit vehicle or another vehicle, such as a private automobile) suffers disabling damage and is towed away from the scene of the accident. In addition, if other types of vehicles (e.g., rail, vessel) are removed from revenue service as the result of the occurrence, an "accident" is deemed to take place.

Q. If a passenger has a heart attack on a transit vehicle and dies, is a post-accident test required?

A. No, the fatality was not associated with the operation of the vehicle.

Q. How does the FTA determine who is covered by this rule?

A. The FTA determined that job function rather than job title was critical to transit safety because each transit system uses its own job classification categories. FTA concluded that five job functions were critical to safety – operating, maintaining, and controlling the movement of a revenue service vehicle, maintaining revenue service equipment, security personnel who carry firearms, and holders of CDLs who operate nonrevenue service vehicles. However, the employer must ultimately determine the job categories that directly impact the safe operation of revenue service vehicles.

Q. Are supervisors also covered by this rule?

A. Supervisors are included only if they perform one of the five designated safety-sensitive functions.

Q. Are volunteers included under this rule?

A. No, unless the volunteer receives remuneration in excess of their actual expenses or the volunteer is required to have a CDL to operate the employer's vehicles.

Q. If a transit operator has contract employees that perform safety-sensitive functions, do they have to be tested?

A. Yes, except contract mechanics who perform work for system that serve populations of 200,000 or less, this includes Section 5311, 5307, and 5309 recipients.

Q. Transferees are included under pre-employment testing. When do you test a transfer employee?

A. When an employee transfers from a non-safety-sensitive position to a safety-sensitive position, he must be tested prior to the first time he performs a safety-sensitive function.

Q. Must a supervisor use personal observations as a determinant for a reasonable suspicion referral?

A. Yes, the supervisor's determination must be made based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the employee. All these determinants are short-term indicators of prohibited drug use or alcohol misuse. Hence, long-term indicators such as absenteeism may not be used as a basis for a reasonable suspicion determination. Hearsay or observations made by others may not be a determinate unless verified by the supervisor's direct personal observations.

Q. After an accident, what is the employer's immediate responsibility under the rule?

A. After a fatal accident, the employer must test the safety-sensitive employee (operator) on duty in the vehicle at the time of the accident. Then the employer must determine whether to test other safety-sensitive employees who may have contributed to the accident. After a nonfatal accident, the employer must determine whether to test safety-sensitive employees on duty in the vehicle at the time of the accident or who may have contributed to the accident. In both fatal and nonfatal accidents, the employer must test the employee as soon as possible, following an accident, but no later than 8 hours for alcohol and 32 hours for drugs.

Q. Can an employee leave the scene of an accident before taking a drug or alcohol test?

A. An employee may leave the scene of an accident, without being tested, as long as he remains readily available for testing. That means that the supervisor must know the whereabouts of the employee until he is tested and that the employee is available to be tested immediately after being notified by the employer (within 32 hours of the accident for drug testing and/or 8 hours for alcohol testing).

Q. Does the rule apply to Indian tribal governments?

A. Yes. As a general matter, statutes apply to Indian nations or tribes unless: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations. In this regard, there is no legislative history indicating congressional intent not to apply the act to Indian tribes. FTA concludes that the act would preempt Indian law.

Q. Can transit operators receive waivers from the requirement of these rule?

A. No. The Omnibus Transportation Employee Testing Act does not give the FTA authority to "waive" any particular requirement of this rule.

Q. Which DOT rule applies to Section 5310 recipients, FTA, or FMCSA?

A. Employees of Section 5310 recipients are not covered by FTA's rule, but are covered by FMCSA if the driver of the vehicle is required to have a CDL.

Q. Light rail systems that share tracks with the general railroad systems are covered by the FRA. Whose rule applies if an employer has employees covered by more than one DOT modal administration?

A. If a recipient operates a railroad as well as other mass transit services, its railroad operations are subject to FRA's rule, while its nonrailroad mass transit operators are subject to the FTA rule.

Q. What about employers who operate ferry vessels that are regulated by the United States Coast Guard (USCG)?

A. FTA has determined that ferry operations that receive federal transit funds and comply with the USCG chemical testing and alcohol testing requirements at 46 CFR parts 4 and 16, and 33 CFR part 95 will be in concurrent compliance with the controlled substance testing requirements of 49 CFR part 655. The ferry operators will also be in concurrent compliance with most of FTA's alcohol testing requirements; however, they are required to continue to comply with FTA's random alcohol testing requirements under 49 CFR part 655.45 because random alcohol testing is a statutory requirement for FTA recipients, and the USCG does not have a substantially similar provision.

RANDOM RATES

Q. What is the random testing rate for drugs and how is it determined?

A. The random drug testing rate is set at 50 percent. However, the rate may be lowered to 25 percent if the violation rate is less than 1.0 percent per year for 2 consecutive years.

Q. What is the random testing rate for alcohol and how is it determined?

A. The rule requires employers to randomly test for alcohol at 25 percent. However, the rate may be lowered to 10 percent if the violation rate is less than 0.5 percent per year for 2 consecutive years. It may also be increased to 50 percent, if the violation rate is equal to or greater than 1 percent for one year. FTA will publish a notice in the *Federal Register* annually announcing its random alcohol testing rate based on the data collected from the

transit industry. The rate is calculated and implemented industry-wide, and not on the basis of any individual employer's rate.

TESTING PROCEDURES

Q. If an applicant tests positive, do I have to refer him/her to a SAP?

A. Yes, You must provide the applicant with a list of SAPs. Once the list is provided, you have fulfilled your obligation.

Q. If the employee receives a verified positive drug test result or a breath alcohol test result of 0.04 or greater, is the employee subject to referral to a SAP and/or rehabilitation?

A. Yes, he or she must be referred to the SAP. If the employer has a "second chance" policy, the employee must complete the return-to-duty process, including SAP recommended education or treatment prior to being reassigned to safety-sensitive duty. Payment for the education/treatment is a local policy decision.

Q. Will it be possible for an agency to belong to one consortium for alcohol testing and a second consortium for drug testing?

A. Yes. This decision remains with the transit operator. It may be based on any negotiated labor-management agreement, and the operator's budgetary conditions.

Q. Is an employer required to keep an SAP on retainer or can the employer refer an employee to a list of SAPs, but have no formal connection with the SAPs?

A. The relationship an employer has with the SAP is left up to the employer. Evaluation and rehabilitation may be provided by the employer, (e.g., an EAP program), by an SAP under contract with the employer, or by a SAP not affiliated with the employer. The only requirement is that the SAPs listed met the minimum requirements specified in the regulations. The choice and assignment of costs will be determined by labor/management agreements and the company's policies.

Q. The rule mandates a minimum of six (6) follow-up tests in the first 12 months following an employee's return to duty. Can these follow-up tests be counted toward the number needed for random testing?

A. No, follow-up testing cannot be counted toward the number needed for random testing.

Q. The rule specifies a minimum of six (6) follow-up tests in 12 months after an employee returns to duty. Are employees who return to duty also returned to the general random testing pool?

A. Yes. The employee is returned to the random pool upon returning to duty.

Q. If an employee changed jobs prior to the completion of the SAP recommended follow-up testing plan, what testing would be required of the new employer – just a pre-employment test or a continuation of the follow-up test?

A. The new employer would require a pre-employment test and would have to continue the follow-up testing.

Q. If an employer conducts road tests on applicants prior to hire, do they have to have a drug test before the road test is given, even though they have not been hired?

A. Yes, operation of a revenue service vehicle is considered a safety-sensitive function even if the vehicle is not in revenue service.

Q. The rule requires referral to a SAP. If any employer's policy is to fire all employees who receive verified positive drug test results or tests for alcohol at 0.04 or above, what is the purpose of the SAP? Must an employer refer prior to dismissal?

A. Any employee who is covered by FTA's drug and alcohol regulations and has a verified positive drug test or alcohol test result of 0.04 or greater must be referred to an SAP. This does not preclude the employer from applying additional consequences, e.g., immediate dismissal, to the affected employee. However, it must be clearly understood that the employer is doing so under its own company policy, and not any federal authority. For the employee to be able to return-to-duty for another DOT covered employer, the employee must be able to show that they fulfilled a SAP's treatment recommendation and met the return-to-duty requirements of 49 CFR Part 40.

Q. Can an employer conduct both a drug test and alcohol test under the return-to-duty provision?

A. An employer may, based on the recommendations of the SAP, subject an employee who previously had a verified positive drug test result to a return-to-duty alcohol test. In addition, an employer may, based on the recommendations of the SAP, subject an employee who previously had an alcohol test result at or greater than 0.04 to a return-to-duty test for prohibited drugs.

Q. Can a traffic citation be used as a reason for a post-accident test?

A. No. Traffic citations are not included as part of the post-accident testing criteria established by FTA.

Q. If an employee is required to submit to follow-up testing for a positive drug test, can he or she be required to also submit to follow-up testing for alcohol also?

A. If the SAP thinks it is appropriate, then the employer may test for drugs and alcohol on follow-up.

Q. After being notified by a Medical Review Officer (MRO) if a verified positive drug test, an employee has 72 hours to request that the split sample be tested. When does the 72-hour period begin and end?

A. The 72 hours begin when the employee has been notified by the MRO. The 72-hour time period includes both holidays and weekends.

TRAINING

Q. Why are you requiring training for mass transit employees on drug use but not on alcohol misuse?

A. Among many employees, information about drugs – what they are, what their effects are, what legal consequences for their use are – is less likely to be a matter of common knowledge than information about alcohol and its misuse. Training is more useful when it fills what may be an information gap.

Q. Employees are to be provided with materials on the drug and alcohol testing policies and procedures. What materials should be provided to contract employees? Do they get the materials from the FTA recipient or from their own firm? What if the policies of the operator differ from the subcontractor (i.e., the recipient provides rehabilitation for its safety-sensitive employees, but the subcontractor fires all drivers who fail a drug test)? Which policies will prevail?

A. The FTA drug and alcohol rule requires an employer to make available to every safety-sensitive employee, a policy statement describing the employer's prohibited drug and alcohol misuse programs. The rule does not preclude the employer from having sanctions under its own authority in addition to those mandated by FTA, but it must be clearly defined as separate from FTA's requirements. Likewise, the rule does not preclude the recipient from stipulating consequences as part of its contractual relationship with the subcontractor.

Q. The rule specifies a certain number of hours of training for employees and supervisors. Are these hours of training a one-time requirement or are they periodic? What would happen if a supervisor changed jobs? Would additional training hours be required?

A. The training requirements in the rule are one-time requirements. While it could be considered "best practice" to provide refresher training, the rule does not elaborate on this issue, and additional training is left to the discretion of the employers. If a supervisor becomes responsible for making reasonable suspicion referrals, that supervisor must receive additional training. If a supervisor changed employers, the new FTA-covered employer would be required to provide training for the supervisor. The fact that the supervisor had training at the previous employer is not relevant.

Q. How much training are employers required to provide under these regulations?

A. No specific training is required for safety-sensitive employees for alcohol misuse; however, 60 minutes of instruction is required for employees on prohibited drug use. Supervisors who make reasonable suspicion determinations must receive 60 minutes of training for drugs and 60 minutes to detect the signs and symptoms of alcohol misuse for a combined total of 2 hours.

RECORD KEEPING

Q. The rule mandates the retention of many records for varying periods of time. Who would be responsible for maintaining the records of an agency that ceased operation – especially private nonprofit agencies that have no direct connection with a successor agency?

A. Recipients have the ultimate responsibility to maintain the records. In the case of a defunct agency, the recipient would be responsible to FTA for maintaining the records. The company should ensure that this requirement is met in the event of the situation described above. A possible repository of these records could be the state DOT or its legal counsel.

Q. The confidentiality of tests is an integral part of the overall program. Can results of alcohol or drug tests be kept as part of a permanent personnel file, especially if the files contain other materials that are part of a grievance or termination process?

A. Employers are required to maintain drug and alcohol testing records in a secure manner, so that disclosure of information to unauthorized persons does not occur. It is suggested that test results be maintained in a confidential drug and alcohol file separate from personnel files to ensure employee privacy and prevent unauthorized information disclosure.

Q. How should forms be filled out when one person performs several safety-sensitive functions? In small agencies a supervisor may be a backup driver or a driver may double as a dispatcher.

A. The employee should be accounted for in whichever safety-sensitive function constitutes the most of his or her on-duty time.

REHABILITATION

Q. Does the FTA require treatment or rehabilitation as a mandatory requirement of a transit operator's substance abuse program? If so, who pays?

A. The FTA does not require rehabilitation for employees. If an employee undergoes treatment, the rule does not address the issue of who should pay for it. We believe that this issue should be decided at the local level.

DRUG TESTING

Q. Is testing for additional drugs authorized? Must a separate specimen be obtained?

A. Under 49 CFR part 40, an employer must test for the following drugs: marijuana, cocaine, amphetamines, opiates, and phencyclidine. An employer may not test for any other substances *under DOT authority*. 49 CFR part 40 does not, however, prohibit an employer from testing for other controlled substances *as long as that testing is done under the authority of the employer*.

Employers in the transportation industry who establish a drug testing program that tests beyond the five drugs currently required by 49 CFR part 40 must also make a clear distinction to their employees what testing is required by DOT authority and what testing is required by the company. Additionally, employers must ensure that DOT urine specimens are collected in accordance with the provisions outlined in 49 CFR part 40 and that a separate specimen collection process including a separate act of urination is used to obtain specimens for company testing programs.

PREPARATION FOR TESTING

Q. Does the regulation require the drug testing custody and control form to have a pre-printed specimen ID number?

A. 49 CFR part 40 *does* require use of a federal drug testing custody and control form that has a unique preprinted specimen identification number on all copies of the form. The label on the specimen bottle must also bear the same specimen identification number as that on the custody and control form accompanying the specimen. If the specimen identification number on the bottle and on the custody and control form do not match, the specimen's chain of custody is broken and the test is cancelled.

Q. Can the drug testing custody and control form be used for non-DOT tests?

A. Employee drug testing conducted under local, state, or private authority should not be represented to the employee as being federally mandated or required. The use of the custody and control form required under 49 CFR part 40 conveys that the testing is being conducted in accordance with applicable federal regulations. Thus a DOT form can not be used for a non-DOT test.

Q. Is the collection of blood or hair authorized? Can blood or hair specimens be supported by the drug testing custody and control form? Can blood or hair test results be used to take DOT-required administrative actions?

A. The collection of blood or hair for drug testing under DOT authority is not authorized. Therefore, while a company, under its own authority, may require a blood or hair specimen to be collected and tested for drugs and/or alcohol under certain circumstances, it is not

acceptable for the company-required blood or hair specimen to be supported by the same custody and control form that accompanies a DOT-required urine specimen.

Under no circumstances can the results of the blood or hair test be used to take administrative or disciplinary action against an employee using DOT authority for the reasons cited above.

Q. How and to whom are drug testing custody and control forms distributed?

A. The only acceptable procedures for handling the custody and control form as specified in 49 CFR part 40 (§40.73) are as follows: Parts 1 must accompany the urine specimen in a sealed container to the laboratory; Part 2 (MRO) must be sent from the collection site directly to the physician (MRO); Part 3 is retained by the collection site personnel; and Part 4 is provided to the employer representative, and Part 5 is given to the donor at the collection site.

Q. Must the collector provide a real name on the collector certification section of drug testing custody and control form?

A. The intent of the DOT drug testing custody form is to provide complete documentation of the specimen collection process, including the name of the collector and the location of the collection site. The collection site person who receives the urine specimen from the donor should be identified by name on the block specifying "collector's name." Use of a "code name," collector I.D. number, or other substitution for the collector's name is not acceptable. The collector's name should be the same as that appearing on the identification each collector is required to make available to the donor, if so requested.

Q. Are middle names required on the drug testing custody and control form?

A. 49 CFR part 40, *Procedures for Transportation Workplace Drug Testing Programs*, specifies that the custody and control form used to document DOT-mandated drug testing shall provide space for collector, donor, and laboratory certifying scientist names and signatures. The regulation does *not* specify that a middle name must be used. The intent of the regulation is to provide for the identification of the person(s) signing the certification statements. The use of supplemental instructions on the custody and control form (e.g. further defining name to include first, middle, last), does not impact on the security, identification, or integrity of the urine specimen and should not be used as a basis for invalidating the specimen results.

Q. Is the MRO name required on the drug testing custody and control form? Can the MRO's company name be used instead?

A. The regulation, 49 CFR Part 40.45 (c) (2), specifies that the MRO information must include the specific physician's name and address, as opposed to only a generic clinic, health care organization, or company name.

SPECIMEN COLLECTION PROCEDURES

Q. Is the collector's name required on the drug testing custody and control form?

A. Pursuant to 49 CFR part 40, the collector's name and signature are required as part of the collection process. This is necessary to ensure the integrity of the testing process and to initiate the chain of custody. It is the Department's position that an individual submitting to testing under this rule shall have a reciprocal right to know the collector's name and to see the collector's work identification

Q. May donors be required to strip, wear a hospital gown, or empty pockets?

A. The Department's procedures for transportation workplace drug testing programs contained in 49 CFR part 40, December 1, 1989, §40.61(f)(3)(4) states: "You must not ask the employee to remove other clothing (e.g., shirts, pants, dresses, underwear), to remove all clothing, or to change into a hospital or examination gown (unless the urine collection is being accomplished simultaneously with a DOT agency-authorized medical examination). You must direct the employee to empty his or her pockets and display the items in them to ensure that no items are present which could be used to adulterate the specimen. If nothing is there that can be used to adulterate a specimen, the employee can place the items back into his or her pockets. As the employee, you must allow the collector to make this observation."

Q. Is a consent form authorized?

A. Consent forms are prohibited by 49 CFR Part 40.355 (a)

Q. Is the donor's presence required when the collector prepares a specimen for shipment?

A. The tamper-proof seal placed on the specimen bottle must be affixed in the presence of the donor, but the regulation is clear that the donor does not have to be present when the specimens are prepared for shipment to the laboratory. In fact, the rule allows the use of shipment containers that accommodates multiple specimen bottles. It would be impossible to have more than one donor witness the sealing of their specimen bottles in one shipment container when collectors are restricted by rule to administer to only one donor at a time.

Q. What should donors do if specimen collection procedures are not being followed?

A. Under DOT agency regulations, the employer is responsible for ensuring that specimens are collected in accordance with 49 CFR part 40. If the employees subject to DOT-mandated drug testing regulations believe that collection procedures are not being followed as prescribed in 49 CFR part 40, they should so inform the employer. If the employer does not respond to the complaints and take appropriate corrective actions, the employees may seek resolution of their complaints through a DOT agency that has regulatory authority over the employer.

Q. In a post-accident situation requiring both a company test and a DOT test, which should be conducted first?

A. In a post-accident situation in which drug/alcohol testing is required under company authority or policy, and DOT mandated tests are required, the DOT tests must be conducted first.

Q. Is failure to check the temperature box on the Drug Testing custody and control form considered a fatal flaw?

A. In accordance with 49 CFR part 40 Section 40.65, the collector is to check the temperature of the specimen to ensure the integrity of the specimen. The fact that it was checked should be marked appropriately on the custody and control form. Inadvertently *not* marking the temperature taken box, in and of itself, does not constitute a "fatal flaw" in the DOT chain of custody process. However, a corrective action on the part of the collector must take place.

REPORTING AND REVIEW OF RESULTS

Q. When can the MRO notify an employer of a positive drug test result?

A. The MRO may not notify the employer of a positive test until he/she has *verified* the test as positive. Verification requires that the MRO review the chain of custody documentation, contact the employee, offer the employee the opportunity to explain the test result, review any documentation of a legitimate medical explanation for a positive test, and determine that the positive resulted from unauthorized use of a controlled substance. The MRO is not required to delay verification pending the outcome of the split analysis. Upon verification, the MRO shall notify the employer of the positive result, and the employer shall then remove the employee from their safety-sensitive duties/position. Once having received notice of a verified positive result from the MRO, the employer shall not delay removal of the employee from safety-sensitive duties pending the outcome of the reanalysis or the split analysis. In a case where the employee refuses to speak to the MRO, or the MRO and the employer are unable to contact the employee, the MRO may verify the test result without speaking to the employee.

Q. Please explain the release of drug test results for unemployment compensation.

A. The provisions of 49 CFR part 40 do not permit the employer, simply on the basis of a claim for unemployment compensation being filed, to protest in full from the outset, citing the positive drug test and furnishing all related documents. If the employee's dismissal is based on misconduct as defined in company policy, and the employee protests the dismissal for cause, the employer may introduce drug test information during the hearing or appeal process as evidence of violation of the company policy prohibiting drug use.

The drug testing laboratory may release drug test information to the decision-maker in a proceeding initiated by or on behalf of the employee and arising from a certified positive drug test. Drug test results may be released by the laboratory to the employer at the hearing

or appeal process, but not at the initial filing for benefits. Documentation of the Medical Review Officer's verification of a certified laboratory result is available to the employer and the employee.

The DOT regulations do not require that employees who test positive be discharged, only that they cannot perform safety-sensitive functions until again qualified in accordance with the applicable provisions of the regulations. Accordingly, any decision to discharge an employee who tests positive must be based on some grounds independent of the positive test result (an employer policy, for example). If a discharged employee later asserts in a claim for unemployment compensation that he/she had not violated the company policy on drug use, information about the results of a drug test could be introduced by the employer. Additionally, the DOT has no opinion on the state's ruling on the employee's entitlement to unemployment compensation.

USE OF DHHS-CERTIFIED LABORATORIES

Q. Why use DHHS-certified laboratories?

A. DOT requires that all drug testing mandated under the provisions of its drug testing rule must be conducted in DHHS-certified laboratories. DOT decided to require the use of DHHS-certified laboratories for drug testing mandate in the regulated industries for several reasons. Most significantly, the DHHS standards for certification and the proficiency testing requirements comprise the most stringent laboratory accreditation program available in analytical forensic toxicology for urine drug testing. Additionally, the DHHS-certification program provides for standardization of laboratory methodology and procedures, ensuring equal treatment of all specimens analyzed. And finally, the use of DHHS-certified laboratories provides a standard that has withstood the test of legal challenges in federal drug testing.

Q. Is use of a consortium to conduct random testing allowed?

A. The Department allows and even advocates the use of a consortium to assist smaller companies in complying with the current drug testing regulations. While it is true that in a combined employer pool, some employers will have a higher percentage of their employees selected for testing than others in a given 12-month period, over time this will even out. Additionally, the Department believes that the deterrent effect of random drug testing remains as powerful in a combined employers pool as it would be in a stand-alone single company pool. With this in mind, the Department has determined that combining employer pools within a consortium meets the spirit and intent of the drug testing regulations and is, therefore, permissible.

Q. Can an employer combine DOT and non-DOT random pools?

A. While it would seem advantageous for an employer to combine all employees into one random testing pool, this move could dilute the number of DOT-covered employees who would actually be tested. For example, in a pool that is comprised of 50 DOT-covered

employees and 50 non-DOT employees, and assuming a testing rate of 50 percent, it is possible that no DOT-covered employees would be tested (100 employees, 50 tests, all 50 tests conducted on nonDOT employees). The likelihood of this happening, albeit remote, is possible under a truly random scheme. On the other hand, keeping the above two classes of employees in separate pools *assures* that at least 25 of the tests conducted by the company will be conducted on DOT employees. It is this assurance that ultimately mandates DOT-covered employees remain in separate random pools.

Q. Can an employer combine employees covered by different operating administration rule into a single pool for random testing?

A. The Department has determined that it is permissible for an employer to combine covered employees from different operating administrations, (e.g. Federal Motor Carrier's Safety Administration, Coast Guard, and Federal Transit Administration) into a single selection pool for the purpose of conducting random drug testing under DOT authority. When exercising this option, however, the employer must ensure that the random testing rate is at least equal to the highest rate required by each of the operating administrations.

Q. Is it permissible to separate union and nonunion employees, both covered by DOT, into stand-alone pools?

A. The Department has determined that it is permissible for an employer to separate union and nonunion employees into separate pools for the purpose of random drug testing. If using this approach, the employer must ensure that the employees from each pool are tested at equal rates. For example, if pool "A" consists of 50 nonunion employees and pool "B" consists of 50 union employees, the employer must ensure, if testing is done at a 50 percent rate, that 25 tests are conducted annually on employees from each pool.

Q: If an applicant admits to testing positive on or refusing to take a pre-employment test within the past 2 years, must the applicant be held out of safety-sensitive duties if he or she did not complete the return-to-duty process (i.e., the SAP process)?

A: If the applicant admits that he or she had a positive or a refusal to test result on a pre-employment test, the employer is not permitted to use the applicant to perform safety-sensitive duties until and unless the applicant documents successful completion of the return-to-duty process. This Part 40 requirement applies whether or not the pre-employment positive or refusal occurred before, on, or after August 1, 2001. Should no proof exist that the return-to-duty process was successfully complied with by the applicant, a current return-to-duty process must occur before the individual can again perform safety-sensitive functions.

Q: When an employee leaves an employer for a period of time (but not exceeding 2 years) and returns to that same employer, must the employer once again seek to obtain information it may have received previously from other employers?

A: No. If the information received previously is still on file with the employer, the employer need not seek to obtain the testing data again. However, the employer must seek information from all other employers for whom the employee performed safety-sensitive duties since the employee last worked for the employer.

Q: Because Part 40 requires collectors, MROs, BATs and STTs, and SAPs to maintain their own training records, can employers or training entities refuse to provide these service agents their training records?

A: No. Employers and trainers who provide training for these service agents must not withhold training documentation from them when they have successfully completed the training requirements. If a collector, BAT, STT, MRO, or SAP is not in possession of training documentation, he or she is in violation of Part 40. Therefore, Part 40 does not permit the withholding of such documentation from these service agents.

Q: Is error correction training required if a drug test is cancelled due to a specimen having an insufficient amount of urine?

A: If the laboratory finds there is an insufficient amount of urine in the primary bottle for analysis, the laboratory will report to the MRO that the specimen is "rejected for testing" (unless the laboratory can redesignate the specimens). Subsequently, the MRO must cancel the test. The MRO should seek to determine (with the assistance of the laboratory) if the specimen leaked in transit or if not enough urine was collected. Specimen leakage while in transit to a laboratory will not cause a cancellation requiring the collector to have error correction training. If the laboratory finds no evidence of leakage, indications would be strong that the collector failed to collect the appropriate amount of urine. If this were the case, the collector would need error correction training. If specimen leakage is a recurrent problem for a collection site, the MRO may be wise to inquire whether or not the shipping containers used are sufficient to adequately protect the specimens or whether or not collectors are securing the bottle lids properly.

Q: Where can billing information be entered onto the Federal Drug Testing Custody and Control Form (CCF)?

A: 40.45(c)(1) states that the CCF my include billing information if the information is in the area outside the border of the form. Therefore, if account codes or collection site codes are entered, they must be placed outside the border, only. CCFs with this information pre-printed inside the border (i.e., in the Step 1 box) may be used until the supply of these forms is exhausted. CCFs produced or re-ordered after February 15, 2002, must not have this information inside the border. No corrective action is needed nor will a result be impacted if the CCF contains this information inside the border. However, employers and service providers may be subject to enforcement action if this requirement is not met.

Q: What actual address is required for "Collection Site Address" in Step 1 of the CCF, and what telephone number should the collector provide?

A: The collection site address should reflect the location where the collection takes place. If the collection takes place at a clinic, the actual address of that clinic should be used: not a corporate or a "main office"address of the clinic/collection company. If the collection takes place on-site at the employer's place of business (e.g., a bus terminal, a rail yard), the actual address of the employer site should be used. If the collection takes place in a "mobile unit" or takes place at an accident site, the collector should enter the actual location address of the collection (or as near an approximation as possible, under the circumstances). The required collector telephone number should be the number at which it is most likely that the laboratory, MRO, or employer, if necessary, may contact the collector and the collector's supervisor. Pre-printing certain information onto the CCF is problematic if the information is subject to change.

Q: Can a collector mark through pre-printed employer, MRO, collection site, and/or laboratory information on the CCF if that information is not accurate for a particular collection?

A: Yes. When the collector has no "blank" CCFs and the CCFs on-hand contain inaccurate pre-printed employer, MRO, collection site, and/or laboratory information, the collector is permitted to "line through" the inaccurate information and insert legibly the proper information. The likelihood of a collection site having CCFs with inaccurate information increases with unexpected collection events (e.g., employee arrives unannounced for post-accident testing). If the specimen will be sent to a laboratory different than the one pre-printed on the available CCF, it becomes important for the collector to modify the CCF so that it reflects the name and address of the laboratory to which the specimen will actually be sent. It is also important for the collector to line through any pre-printed billing code and insert the appropriate one, if it is available. Finally, laboratories should honor collection site requests to provide an adequate number of "blank" CCFs for use during unexpected collection events. It is important to note that the DOT permits overprinting or pre-printing of CCFs in an effort to streamline the entire testing process, not to limit the distribution of the forms to collection sites.

Q: If the primary laboratory must redesignate bottle B for bottle A, can the laboratory test the specimen if only 15 mL of urine is present in the redesignated bottle A?

A: The Department permits specimen redesignation only in limited circumstances – one such occurrence would be if the A specimen has leaked in transit, leaving only the B specimen to be tested. In such a case, the laboratory should test the redesignated specimen despite the fact that, under normal circumstances, a sufficient amount of specimen would not have been available for testing.

Q: Must a certifying scientist's signature be on Copy 1 of the CCF if the drug test result is negative?

A: The certifying scientist's signature must be on Copy 1 of the CCF for non-negative results only. Therefore, the certifying scientist may simply initial (and date) the CCF when the test result is negative.

Q: Must an employer or C/TPA who is required to submit blind specimens to laboratories send adulterated or substituted blinds if the employer or C/TPA is not yet having specimens undergo validity testing?

A: At the present time, validity testing remains an employer option. Therefore, if an employer or C/TPA required to submit blind specimens is not conducting validity testing during the course of its normal testing, the employer or C/TPA needs not send adulterated or substituted blind specimens to the laboratories used. However, if an employer or C/TPA conducts validity testing, adulterated or substituted blind specimens must be sent to the laboratories used. Part 40 requires that approximately 75 percent of the blinds must be blank (i.e., containing no drugs, nor adulterated or substituted); 15 percent must be positive for one or more drugs; and 10 percent must be adulterated or substituted. If the employer or C/TPA is not exercising the option to conduct validity testing, approximately 75 percent of blinds must be blank and 25 percent must be positive for one or more drugs.

Q: Is it appropriate for the MRO to attempt to contact the employee after normal office hours?

A: Yes. Copy 2 of the CCF contains spaces for the employee's daytime and evening telephone numbers. We expect MROs or their staffs to attempt to contact the employee at the evening phone number if the employee is not available at the daytime number.

Q: May the MRO report an "interim" or "preliminary" test result to the employer (or C/TPA) while awaiting receipt of the MRO copy and/or the laboratory result?

A: No. An MRO must not report tests results until and unless he or she has received all required information from the collection site and laboratory. This means the MRO must have Copy 2 or a legible copy of Copy 2 (or any legible copy of a CCF page signed by the employee) and must have the drug test result (sent in the appropriate manner for negatives and non-negatives) from the laboratory. An MRO sending "in-progress" negative or non-negative results will be considered to be in violation of Part 40.

Q: Can someone other than the employee direct that an MRO have the employee's split specimen tested?

A: No. Because the split specimen exists to provide the employee with "due process" in the event that he or she desires to challenge the primary specimen's results, only the employee can request that the split specimen be tested. In addition, an employer or a union (or other labor representative) may not act on the behalf of the employee in requesting that the split specimen be tested. The employee must make the request directly to the MRO.

Q: Can a split specimen be sent to a second laboratory that is under the same corporate title as the primary laboratory?

A: Yes. The rule requires the split specimen to be tested at a different or second HHS-certified laboratory. For example, if the primary specimen was tested at XYZ Laboratory in Dallas, TX, the split specimen may be sent to XYZ Laboratory in Chicago, IL. HHS certifies each laboratory separately and on its own merits. Laboratories on the HHS listing of certified laboratories, and those under the same corporate title are individually certified and are considered separate and unique from one another.

Q: Can the MRO require an employee's split specimen test request to be in writing rather than verbal?

A: 40.171(a) states that the employee's request may be verbal or in writing. Therefore, the MRO must accept a verbal request. The MRO may ask the employee for written documentation, but must immediately honor the verbal request. An MRO should always document whether or not an employee requested to have the split tested. The MRO must document the date and time of the employee's request.

Q: Do the 5 days within which an employee is given to obtain a medical evaluation after providing an insufficient amount of urine or breath include holidays and weekends, or does this refer to 5 business days?

A: The 5-day limit for obtaining an examination by a licensed physician refers to business days. Therefore, holidays and weekend days should not be included in the 5-day time frame.

Q: Is error correction training required if an alcohol test is cancelled due to equipment failure?

A: Normally, equipment failure will not require the BAT to have error correction training. However, if it is determined that the equipment failure was related to the BAT's failure to properly maintain equipment (e.g., the EBT), error correction training would be in order. In addition, error correction would be required if the BAT does not attempt to accomplish the test following equipment failure using another device – provided that another device was reasonably available.

Q: Is an employer considered to be in compliance with Part 40 if EBTs are not available within 30 minutes of an alcohol screening test location?

A: An employer is not considered to be in compliance if an EBT is not available for use within 30 minutes to confirm the screening test. However, there may exist unusual circumstances (e.g., post-accident testing) in which an EBT is not available within the appropriate time frame. In such a case, the employer would not be considered out of compliance with the regulation if documentation exists showing a "good faith" effort to get an EBT. [It is important to note that most operating administrations give employers up to 8 hours to administer the appropriate alcohol test following a qualifying accident.]

Q: May an employer conduct follow-up testing under company authority that goes beyond the follow-up testing which the SAP determines necessary?

A: No. The regulation (at 40.307(d)(4)) and SAP guidelines state that employers must not impose additional testing requirements that go beyond the SAP's follow-up testing plan. This includes additional testing requirements under company authority. In addition to follow-up testing and random testing, an employer has other means available to ascertain an employee's alcohol- and drug-free performance and functions. The employer can choose to monitor the employee's compliance with the SAP's recommendations for continuing treatment and/or education as part of a return-to-duty agreement with the employee. The employer can conduct reasonable suspicion testing if the employee exhibits signs and symptoms of drug or alcohol use. The employer can meet regularly with the employee to discuss their continuing sobriety and drug-free status. The Department is not opposed to an employer discussing his or her desires for having more than the minimum rule requirement (i.e., 6 tests in the first year) for follow-up testing with SAPs they intend to utilize.

Q: If an employee requests his/her records from the MRO, do these records include the MRO's notes and comments or only copies of the CCF and laboratory result?

A: In general, the MRO should provide all records that are available related to that employee, to include written notes, checklists, or comments. All of this information was obtained from the employee or from appropriate individuals or organizations (with the employee's authorization) or from documentation provided by the employee. Consistent with appropriate medical record constraints, the MRO may need to withhold or interpret sensitive medical, psychiatric, and mental health record information.

Q: Can an employer wishing to conduct pre-employment alcohol testing, do so?

A: A DOT-regulated employer (except under USCG and RSPA rules) wishing to conduct pre-employment alcohol testing under DOT authority may do so if certain conditions are met. The testing must be accomplished for all applicants (i.e., the employer cannot select for testing some applicants and not others) and the testing must be conducted as a post-offer requirement (i.e., the employer needs to inform the applicant that he or she has the job if he or she passes a DOT alcohol test) In addition, the testing and its consequences must comply with requirements of Part 40.

Q: Can the employer act as a Designated Employer Representative (DER), as opposed to appointing another employee to play this role?

A: The employer (e.g., the owner of a small business) may act personally as the DER.
The employer may also appoint an employee or employees to play this role.
The DER must exercise his or her authority to remove an employee from safety sensitive functions either directly or by causing the employee to be removed from performing these functions (e.g., by having the employee's supervisor effect the actual removal).
The employer may not delegate the DER role to a service agent. Only the employer or an

actual employee of the employer may perform this function. The Department will not authorize a "DER-for-hire" concept (e.g., a person under contract by several companies to serve as their DER), either.

Q: If a C/TPA is hired as an "independent safety consultant" that executes all aspects of the employer's safety and drug and alcohol testing programs, can the C/TPA act as a DER?

A: Service agents are prohibited from acting as DERs under any circumstances. The fact that an organization that is called an "independent safety consultant" acts as a consultant to an employer for purposes of executing a drug and alcohol testing or safety program does not make it any less a service agent. It is still prohibited from acting as a DER.

Q: Can union hiring halls, driver-leasing companies, and other entities have a stand-down policy, or is the ability to obtain a waiver for this purpose limited to actual employers?

A: The rule permits "employers" to apply for a stand-down waiver. It does not permit any other entity to do so. Only entities that are viewed as "employers" for purposes of DOT agency drug and alcohol testing regulations can apply for stand-down waivers. If a DOT agency rule provides that hiring halls, leasing agencies, etc., are treated as employers, such organizations could apply for a stand-down waiver.

Q: Does an employer need a stand-down waiver in order to implement a policy that requires employees to cease performing safety-sensitive functions following a reasonable suspicion or post-accident test?

A: §40.21 requires an employer to obtain a waiver to do one very specific thing: remove employees from performance of safety-sensitive functions on the basis of the report of confirmed laboratory test results that have not yet been verified by the MRO. An employer does not need a §40.21 waiver to take other actions involving the performance of safety-sensitive functions. For example, an employer could (if it is not prohibited by DOT agency regulations and it is consistent with applicable labor-management agreements) have a company policy saying that, on the basis of an event (e.g., the occurrence of an accident that requires a DOT post-accident test, the finding of reasonable suspicion that leads to a DOT reasonable suspicion test), the employee would immediately stop performing safety-sensitive functions. Such a policy, which is not triggered by the MRO's receipt of a confirmed laboratory test result, would not require a §40.21 waiver. It would not be appropriate for an employer to remove employees from performance of safety-sensitive functions pending the result of a random or follow-up test, since there is no triggering event to which the action could rationally be tied.

Q: When an employer is inquiring about an applicant's previous DOT drug and alcohol test results, is the employer required to send the inquiry via certified mail?

A: No. Certified mail is not required. The employer can make this inquiry through a variety of means, including mail (certified or not), fax, telephone, or email. However, the employer

must provide the former employer the signed release or a faxed or scanned copy of the employee's signed release. The former employer must respond via a written response (e.g., fax, letter, email) that ensures confidentiality. The employer should document an attempt or attempts to contact and contacts with previous employers, no matter how they were made, so that it can show a good faith effort to obtain the required information.

Q: When a previous employer receives an inquiry from a new employer for drug and alcohol testing information, does the previous employer provide information it may have received from other employers in the past?

A: As an employer, when you receive an inquiry about a former employee, you must provide all the information in your possession concerning the employee's DOT drug and alcohol tests that occurred in the 2 years preceding the inquiry. This includes information you received about an employee from a former employer (e.g., in response to the Federal Motor Carrier Safety Administration's pre-employment inquiry requirement). It is not a violation of Part 40 or DOT agency rules if you provide, in addition, information about the employee's DOT drug and alcohol tests obtained from former employers that dates back more than 2 years ago.

Q: If a collector makes a mistake resulting in a cancellation of a test before he or she has obtained qualification training (e.g., in the period before January 31, 2003), does he or she have to obtain error correction training under §40.33(f)?

A: Yes. If a collector makes a mistake that causes a test to be cancelled, the collector must undergo error correction training (even if the collector has yet to undergo qualification training). There are no exceptions to this requirement.

Q: A collector who is notified that he or she made a mistake has 30 days in which to obtain error correction training. Can the collector continue to perform DOT collections during this 30-day period?

A: Yes. A collector may continue to perform DOT collections during this period. After 30 days have elapsed following the notification to the collector of the need to obtain error correction training, the collector is no longer qualified to conduct DOT collections until and unless he or she has successfully completed error correction training. As provided in §40.209(b)(3), collection of a specimen by a collector who has not met training requirements does not result in the cancellation of the test, assuming the collection is otherwise proper. However, use of an unqualified collector can result in enforcement action.

Q: Who is responsible for notifying a collector that error correction training is needed?

A: The MRO, in canceling a drug test, will determine if the collector is at fault. When the MRO reports the cancelled test to the employer, the MRO will note the reason for the cancellation and that, if appropriate, it was the result of collector error. The employer or service agent (e.g., MRO, C/TPA) designated by the employer is responsible for notifying the collection site of the error and the retraining requirement; and for ensuring that the training takes place.

Q: Must collectors, BATs, STTs, MROs, and SAPs maintain documentation of meeting training requirements on their persons?

A: These individuals are responsible for maintaining documentation that they currently meet all training requirements (see, for example, §40.33(g)). However, they are not required to keep this documentation on their person. They must be able to produce this documentation within a short, reasonable time of a request by a DOT representative or an employer. Nothing precludes an organization (e.g., a collection site) from also maintaining a file of the training records of its personnel, if it wishes to do so.

Q: What does the rule require with respect to the qualifications of persons who train collectors?

A: Part 40 does not specify any set of specific qualifications for persons who train collectors. The training must cover the items required by Part 40.

Q: Does a person who monitors proficiency demonstrations as a part of collector qualification training have to be a qualified collector?

A: Yes. It is very important for persons who monitor mock collections to have a thorough "book" and practical knowledge of relevant DOT rules and procedures. It is also very important that, before determining whether trainees have successfully completed a proficiency demonstration, the monitor have experienced and successfully completed the same training that collectors have to undergo. Consequently, mock collection monitors have to meet collector qualification training requirements. In addition, the monitor must meet any one of three other requirements. The monitor can be a qualified collector who has regularly conducted DOT drug testing collections for a least a year before serving as a monitor, or the monitor can be a qualified collector who has had a "train-the-trainer" course. Such a course could include the mandatory elements of collector qualification training as well as instruction on how to conduct training effectively, or the monitor can be a qualified collector who has conducted collector training under Part 40 for at least a year before serving as a monitor. Monitors in the second and third categories do not need to practice actively as collectors, so long as they have met collector qualification requirements. Individuals acting as collectors prior to August 1, 2001, have until January 31, 2003, to meet qualification training requirements. In the meantime, such collectors can serve as monitors even though they may not have met the qualification and mock collection requirements (so long as they meet any one of the three other requirements).

Q: How should the employer's decision to have a C/TPA act as intermediary in the handling of drug test results be documented?

A: When an employer chooses to use the C/TPA as the intermediary in the transmission of the MRO's verified drug test results, this decision should be communicated from the employer to the MRO and the C/TPA. We advise the MRO to obtain some documentation of the employer's decision prior to sending results through the C/TPA. Documentation could be in the form of a letter, an email, or record of a telephone conversation with the employer. DOT

also recommends that MROs maintain listings of the names, addresses, and phone numbers of C/TPA points of contact.

Q: May the MRO's address entered on the CCF be a post office box number only?

A: No. The address must contain at least a number and street address. The reason for this requirement is that CCFs are often delivered by courier or messenger services who do not deliver items to post office box addresses. The post office box can be included, but not in lieu of the number and street address.

Q: May a DOT urine specimen be obtained via catheterization from a patient who is catheterized as part of a medical procedure or who is unconscious?

A: No one is ever permitted to obtain a urine specimen for DOT testing purposes from an unconscious individual, whether by catheterization or any other means. No one is permitted to catheterize a conscious employee for the purpose of collecting urine for a DOT drug test. However, if a person has been catheterized for medical purposes (e.g., a conscious, hospitalized patient in a post-accident test situation), it is permissible to use urine collected by this means for DOT testing purposes. All necessary documentation for a DOT collection must be provided (e.g., the CCF). In addition, an employee who normally voids through self-catheterization is required to provide a specimen in that manner.

Q: Part 40 directs the collector to discard the first specimen if the temperature was out of range or the specimen showed signs of tampering <u>and</u> the employee refused to provide a second specimen under direct observation. The Urine Specimen Collection Guidelines [at Section 8, Directly Observed Collection, Number 7] indicate that, in such a situation, the first specimen should be retained and sent to the laboratory. Which requirement is correct?

A: When a specimen is out of temperature range or shows signs of tampering <u>and</u> the employee refuses to provide a second specimen under direct observation, it is considered a refusal to test. The collector does <u>not</u> retain the first specimen, but discards it. The requirement in the Urine Specimen Collection Guidelines, Version 1.0, to retain the specimen and send it to the laboratory, was inserted inadvertently. Urine Specimen Collection Guidelines, Version 1.01, contain the proper procedures as directed by 40.65.

Q: Can the monitor (or direct observer) of a collection be a co-worker or immediate supervisor of the employee?

A: The immediate supervisor of a particular employee may not act as the collector when that employee is tested, unless no other collector is available and the supervisor is permitted to do so under a DOT operating administration's drug and alcohol regulation. The immediate supervisor may act as a monitor or observer (if same gender) if there is no alternate method at the collection site to conduct a monitored or observed collection. An employee who is in a safety-sensitive position and subject to the DOT drug testing rules should not be a collector,

an observer, or a monitor for co-workers who are in the same testing pool or who work together with that employee on a daily basis.

Q: After the laboratory reports a test result, someone (e.g., the employer, a service agent) discovers that the CCF listed the wrong reason for the test (e.g., the CCF says the test was a pre-employment test when it was actually a random test). How is this corrected and by whom?

A: This is another example of an error that does not have a significant adverse effect on the right of an employee to have a fair and accurate test (see §40.209). The test is not cancelled as the result of such a mistake. While concerned parties may wish to correct the faulty description of the reason for the test, Part 40 does not require a correction to be made. Employers or their designated service agents should ensure that appropriate changes are documented (e.g., for MIS reporting purposes).

Q: Must an MRO use the full 24-hour period to contact the donor if the MRO is sure that the donor is not and will not be available at the phone numbers provided by the donor?

A: 40.131(a)(1) states that if the phone numbers provided by the donor are wrong, an MRO may contact the DER to inform the donor to contact the MRO without waiting the full 24 hours. If the MRO discovers that phone numbers provided by the donor will not permit the MRO to contact the donor within the 24-hour period, the MRO may contact the DER immediately. For example, the MRO may discover that the employee is not expected to be available for another 5 days at the number provided.

Q: Can arbitrators change or overturn the MRO's determination about the verification of a test result?

A: No. The MRO is the only person authorized to change a verified test result (see §40.149(c)). The MRO can do so with respect to a verification decision he or she has made, in the circumstances described in §40.149. An arbitrator is someone who derives his authority from the employer, or from a labor-management agreement. The arbitrator cannot exercise authority that the employer could not exercise on its own. The arbitrator could not overturn a decision of the MRO concerning a test verification any more than the employer could on its own. This prohibition applies to substantive decisions the MRO makes about the merits of a test (e.g., with respect to whether there is a legitimate medical explanation for a positive, adulterated, or substituted test result or whether a medical condition precluded an individual from providing a sufficient specimen). An arbitrator could determine that a test result should be cancelled because of a defect in the drug testing process involving the MRO (e.g., that the MRO failed to afford the employee the opportunity for a verification interview). But an arbitrator could not overturn the substantive judgment of the MRO about whether, for example, the information submitted by the employee constituted a legitimate medical explanation.

Q. What is an employer to do if an arbitrator's decision claims to overturn the result of a DOT drug or alcohol test on grounds contrary to DOT regulations?

A: There could be instances in which an arbitrator makes a decision that purports to cancel a DOT test for reasons that the DOT regulation does not recognize as valid. For example, the arbitrator might make a decision based on a disagreement with an MRO's judgment about a legitimate medical explanation (see §40.149) or on the basis of a procedural error that is not sufficient to cancel a test (see §40.209). Such a test result remains valid under DOT regulations, notwithstanding the arbitrator's decision. Consequently, as a matter of federal safety regulation, the employer must not return the employee to the performance of safety-sensitive functions until the employee has completed the return-to-duty process. The employer may still be bound to implement the personnel policy outcome of the arbitrator's decision in such a case. This can result in hardship for the employer (e.g., being required to pay an individual at the same time as the Department's rules prevent the individual from performing the duties of his job).

Q: Is it acceptable for an MRO to transmit a number of reports of drug test results per page to the employer, rather than one per page?

A: The Department recommends that MROs use Copy 2 of the CCF as the means of reporting all drug test results to employers. However, if you use a written report (all results) or an electronic report (negative results) meeting all the requirements of §40.163, rather than using Copy 2 of the CCF for this purpose, you must put only one such report on each page. This will help to prevent inadvertent breaches of confidentiality by the employer resulting from photocopying a multiple result report and putting a copy in the file of each employee involved.

Q: If the MRO uses a written report instead of a copy of the CCF to report results to employers, how should those reports be signed?

A: The MRO must sign all reports of non-negative results (i.e., positives, refusals, tests canceled, and invalids). The MRO or an MRO's staff member may rubber stamp and initial negative results. The rubber stamp should identify the MRO. Each written report should be dated and indicate the address of the MRO.

Q: May an employer have a policy of declining to hire applicants who have a negative dilute test result on a pre-employment drug test?

A. The Department's rules do not require an employer to hire anyone. That is an employer's decision. While §40.197(b) authorizes an employer to obtain one additional test following a negative dilute result (in pre-employment or other testing situations), a negative dilute test result is a valid negative test for DOT's purposes. Because a negative dilute test result is a negative test for DOT program purposes, the employer is authorized to have the applicant begin performing safety-sensitive functions. If the employer declines to hire the applicant in this situation, the employer's decision is based solely on its own policy. The employer cannot claim that its action is required or authorized by DOT rules.

Q: If a collector makes an error on a CCF and the collector is not available to sign a corrective statement (e.g., collector on vacation, no longer with the company), can the collector's supervisor sign the corrective statement for the collector?

A: If the error was the use of a non-DOT form (to include use of the old Federal CCF), the collector or the collector's supervisor may sign the corrective statement explaining the circumstances of why a non-DOT form was used. If the missing information is the printed name and signature of the collector, neither the collector nor the supervisor may supply the missing information. This is a fatal, uncorrectable flaw. If the CCF contains the printed name of the collector, but the signature is missing, the collector or the collector's supervisor may attest that that collector performed the collection, but did not sign his or her name. If the employee's signature is omitted and there is no notation in the "Remarks" line, only the collector can provide the corrective statement. The collector's supervisor cannot sign the corrective statement.

Q: Is it acceptable to affix printed alcohol test results on the back of the Alcohol Testing Form (ATF) rather than on the front?

A: §40.243(f) and §40.253(g) instruct the BAT to affix the printout of the information from the alcohol testing device to the designated space on the ATF. The designated space on the ATF is on the front of the form. That is where BATs and STTs should affix the printouts. However, because the instructions on the ATF also permit the printout to be affixed to the back of the ATF, the Department has no objections to having the printouts on the back of the ATF.

Q: Suppose the SAP fails to make the required recommendation for education and/or treatment of an employee who has violated a DOT agency drug or alcohol testing rule, and simply sends the employee back to the employer for a return-do-duty (RTD) test. What is the employer to do?

A: The employer should not administer an RTD test under these circumstances. The employer should refer the employee back to the SAP with direction to prescribe education and/or treatment and conduct a re-evaluation of the employee to determine whether the employee has successfully complied with the SAP's instructions. If the employer has compounded the problem by having conducted the RTD test and returned the employee to safety-sensitive duties (i.e., only realizes that a mistake has been made some time after the fact), the employer should work with the SAP to "go back and do it right." This means that the employee should be removed from performance of safety-sensitive functions, referred back to the SAP for an education and/or treatment prescription, and re-evaluated by the SAP for successful compliance. Following the receipt of a successful compliance report from the SAP, the employer would conduct another RTD test before returning the employee to performance of safety-sensitive functions.

Q: What is meant by "SAP's own letterhead?"

A: By "SAP's own letterhead" we mean the letterhead the SAP uses in his or her daily counseling practice. If the SAP is in private practice, the SAP should use the letterhead of his or her practice. If the SAP works as an employee assistance professional for an organization, the SAP should use the employee assistance program's letterhead. If the SAP works for a community mental health service, the SAP should use the community mental health service's letterhead. The Department wants to avoid a SAP network provider requiring the SAP to use the provider's letterhead rather than that of the SAP. The Department wants to avoid another service agent contracting the SAP's services to require the contracted SAP to use the service agent's letterhead. The Department wants to avoid any appearance that anyone changed the SAP's recommendations or that the SAP's report failed to go directly from the SAP to the employer. The Department does not want the SAP to use a "fill-in-the-blanks" or "check-the-appropriate-boxes" type of pre-printed form, including any that are issued to the SAP by a SAP network provider, to which the network or SAP would affix the SAP's letterhead information. The SAP must generate and complete all information on the SAP report.

Q: If an MRO knows the identity of a physician responsible for determining whether a DOT-regulated employee is physically qualified to perform safety-sensitive duties (e.g., under Federal Motor Carrier Safety Administration regulations for physical qualifications of motor carrier drivers) for another company, can the MRO report drug test results as well as medical information to that physician?

A: Under §40.327(a), an MRO must report drug test results and medical information to third parties without the employee's consent, under certain circumstances spelled out in the rule. Under §40.327(b), a physician responsible for determining the medical qualifications of an employee under an applicable DOT agency safety regulation is a party to whom the MRO is instructed to provide this information. Consequently, if an MRO knows the identity of such a physician – even if the physician performs this function for a different employer – the MRO would provide the information. However, the MRO is not required to affirmatively seek out such physicians.

Q: When records are stored and transferred electronically, how should they be made available to DOT representatives?

A: The obligations of employers and service agents to make records available expeditiously to DOT representatives applies regardless of how the records are maintained. All records must be easily and quickly accessible, legible, and formatted, and stored in a well-organized and orderly way. If electronic records do not meet these criteria, then the employer or service agent must convert them to printed documentation in a rapid and readily auditable way.

Appendix H

Terms and Definitions

Appendix H. Terms and Definitions

Accident

An occurrence associated with the operation of a vehicle if, as a result –

- An individual dies;
- An individual suffers a bodily injury and immediately receives medical treatment away from the scene of the accident;
- With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, or any non-revenue service vehicle, one or more vehicles incurs disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle. For purposes of this definition, "disabling damage" means damage that precludes departure of any vehicle from the scene of the occurrence, in its usual manner, in daylight, after simple repairs. Disabling damage includes damage to vehicles that could have been operated but would have been further damaged if so operated, but does not include damage that can be remedied temporarily at the scene of the occurrence without special tools or parts; tire disablement without other damage even if no spare is available; or damage to headlights, taillights, turn signals, horn, or windshield wipers that makes them inoperative;
- With respect to an occurrence in which the mass transit vehicle involved is a railcar, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from revenue service.

Administrator

The Administrator of the Federal Transit Administration or the Administrator's designee.

Adulterated specimen

A specimen that contains a substance that is not expected to be present in human urine, or contains a substance expected to be present but is at a concentration so high that it is not consistent with human urine.

Affiliate

Persons are affiliates of one another if, directly or

	indirectly, one controls or has the power to control the other, or a third party controls or has the power to control both. Indicators of control include, but are not limited to: interlocking management or ownership; shared interest among family members; shared facilities or equipment; or common use of employees. Following the issuance of a public interest exclusion, an organization having the same or similar management, ownership, or principal employees as the service agent concerning whom a public interest exclusion is in effect is regarded as an affiliate. This definition is used in connection with the public interest exclusion procedures of Subpart R of Part 40.
Air blank	A reading by an EBT of ambient air containing no alcohol.
Alcohol	The intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols, including methyl or isopropyl alcohol.
Alcohol concentration	The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part.
Alcohol confirmation test	A subsequent test using an EBT, following a screening test with a result of 0.02 or greater, that provides quantitative data about the alcohol concentration.
Alcohol screening device (ASD)	A breath or saliva device, other than an EBT, that is approved by the National Highway Traffic Safety Administration (NHTSA) and placed on a conforming products list (CPL) for such devices.
Alcohol screening test	An analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath or saliva specimen.
Alcohol testing site	A place selected by the employer where employees present themselves for the purpose of providing breath or saliva for an alcohol test.
Alcohol use	The drinking or swallowing of any beverage, liquid mixture or preparation (including any medication), containing alcohol.

Aliquot	A portion of a specimen used for testing.
Anti-drug program	Program to detect and deter the use of prohibited drugs as required by 49 CFR Part 655.
Blind sample or Blind performance test specimen	A urine specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from employee specimens, and which is spiked with known quantities of specific drugs or which is blank, containing no drugs.
Breath Alcohol Technician (BAT)	An individual who instructs and assists individuals in the alcohol testing process and operates an EBT.
Cancelled test	A drug or alcohol test that has a problem identified that cannot be or has not been corrected, or which this part otherwise requires to be cancelled. A cancelled test is neither a positive nor a negative test.
Certification	A recipient's written statement, authorized by the organization's governing board or other authorizing official, that the recipient has complied with the provisions of this part.
Chain of Custody	The procedure used to document the handling of the urine specimen from the time the employee gives the specimen to the collector until the specimen is destroyed. This procedure uses the Federal Drug Testing Custody and Control Form (CCF).
Collection container	A container into which the employee urinates to provide the urine sample used for a drug test.
Collection site	A place designated by the employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.
Collection site person	A person who instructs and assists individuals at a collection site and who receives and makes a screening examination of the urine specimen provided by those individuals.
Confirmation (or Confirmatory) test	In drug testing, a second analytical procedure to identify the presence of a specific drug or metabolite that is independent of the screening test and that uses a

	different technique and chemical principle from that of the screening test to ensure reliability and accuracy. (Gas chromatography/mass spectrometry [GC/MS] is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.) In alcohol testing, a second test, following a screening test with a result of 0.02 or greater, which provides quantitative data of alcohol concentration.
Confirmation validity test	A second test performed on a urine specimen to further support a validity test result.
Confirmed drug test	A confirmation test result received by an MRO from a laboratory.
Consortium/ Third Party Administrator (C/TPA)	A service agent who provides or coordinates the provision of a variety of drug and alcohol testing services to employers. C/TPAs typically perform administrative tasks concerning the operation of the employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members. C/TPAs are not "employers" for purposes of this part.
Contractor	A person or organization who provides a service for a recipient, subrecipient, employer, or operator consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement that reflects an ongoing relationship between the parties.
Continuing education	Training for medical review officers (MROs) and substance abuse professionals (SAPs) who have completed qualification training and are performing MRO or SAP functions, designed to keep MROs and SAPs current on changes and developments in the DOT drug and alcohol testing program.
Covered employee	An applicant or transferee, who performs or will perform a safety sensitive function for an entity subject to this part. A volunteer is a covered employee if, the volunteer is required to hold a commercial driver's license to operate the vehicle, or the volunteer performs a safety-sensitive function for an entity subject to this part and receives remuneration in excess of his or her

	actual expenses incurred while engaged in the volunteer activity.
Designated Employer Representative (DER)	An employee authorized by the employer to take immediate action(s) to remove employees from safety sensitive duties, or cause employees to be removed from these covered duties, and to make required decisions in the testing and evaluation processes. The DER also receives test results and other communications for the employer, consistent with the requirements of 49 CFR Part 40. Service agents cannot act as DERs.
Dilute specimen	A specimen with creatinine and specific gravity values that are lower than expected for human urine. A dilute test will be reported as positive or negative. For a positive dilute test the employer treats the result as a positive test and removes the employee from safety-sensitive duty. For a negative dilute test, the employer may require, as a matter of policy, employees to retest without direct observation. The second test is the test of record, even if the second test is also negative dilute.
Disabling damage	Damage that precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs. Including, damage to a motor vehicle, where the vehicle could have been driven, but would have been damaged further. Excluding, damage that can be remedied temporarily at the scene of the accident without special tools or parts. Tire disablement without other damage even if no spare tire is available. Headlamp or tail light damage. Damage to turn signals, horn, or windshield wipers, which makes the vehicle inoperable.
Department of Health and Human Services (DHHS)	See HHS
DOT, The Department, DOT agency	These terms encompass all DOT agencies, including, but not limited to, the United States Coast Guard (USCG), the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Transit Administration (FTA), the National Highway Traffic Safety Administration (NHTSA), the Research and Special Programs Administration (RSPA), and the Office of the Secretary (OST).

	These terms include any designee of a DOT agency.
Drug and Alcohol Program Manager (DAPM)	An employee authorized by the employer to manage and monitor the drug and alcohol testing program. This person may make required decisions in the testing and evaluation process, maintain required records, update policy and procedures, and monitor contractors and vendors. The DAPM may also receive test results and other communications for the employer, consistent with the requirements of 49 CFR Part 655. The DAPM may act as the DER.
Drugs	The drugs for which tests are required under this part and DOT agency regulations are: marijuana, cocaine, amphetamines, phencyclidine (PCP), and opiates.
Drug metabolite	The specific substance produced when the human body metabolizes a given prohibited drug as it passes through the body and is excreted in urine.
Drug test	The laboratory analysis of a urine specimen collected in accordance with 49 CFR part 40 and analyzed in a DHHS-approved laboratory.
EBT or Evidential Breath Testing Device	An EBT approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA's *Conforming Products List of Evidential Breath Measurement Devices* (CPL).
Education	Efforts that include the display and distribution of information materials, a community service hot-line telephone number for employee assistance, and the transit entity policy regarding drug use in the workplace.
Employee	An individual designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. As used in this part, "employee" includes an applicant for employment. "Employee" and "individual" or "individual to be tested" have the same meaning for purposes of this part.
Employee Assistance Program (EAP)	A program provided directly by an employer, or through a contracted service provider, to assist employees in dealing with drug or alcohol dependency and other personal problems.

	Rehabilitation and reentry to the work force are usually arranged through an EAP.
Employer	A recipient or other entity that provides mass transportation service, or performs a safety-sensitive function for such a recipient or other entity. This term includes subrecipients, operators, and contractors.
Error correction training	Training provided to BATs, collectors, and screening test technicians (STTs) following an error that resulted in the cancellation of a drug or alcohol test. Error correction training must be provided in person or by a means that provides real time observation and interaction between the instructor and trainee.
FMCSA	The Federal Motor Carrier's Safety Administration, an agency of the U.S. Department of Transportation.
FTA	The Federal Transit Administration, an agency of the U.S. Department of Transportation.
HHS	The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.
Invalid drug test	The result of a drug test for a urine specimen that contains an unidentified adulterant or an unidentified interfering substance, has abnormal physical characteristics, or has an endogenous substance at an abnormal concentration that prevents the laboratory from completing or obtaining a valid drug test result.
Initial validity test	The first test used to determine if a specimen is adulterated, diluted, or substituted.
Laboratory	Any U.S. laboratory certified by HHS under the National Laboratory Certification Program as meeting the minimum standards of Subpart C of the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs, or in the case of foreign laboratories, a laboratory approved for participation by DOT under this part. (The HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs are available on the internet at http://www.health.org/workplace/ or from the Division of Workplace Programs, 5600 Fishers Lane, Rockwall II Building, Suite 815, Rockville, MD 20857.)

Medical Review Officer (MRO)	A person who is a licensed physician and is responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.
Negative test result	Drug test with a verified presence of the identified drug or its metabolite below the minimum levels specified in 49 CFR Part 40, as amended. An alcohol concentration of less than 0.02 BAC is a negative test result.
Non-negative test	Test result found to be adulterated, substitute, invalid, or positive for drug/drug metabolites. Non-negative results are considered a positive test or refusal to test if MRO cannot determine legitimate medical explanation.
Office of Drug and Alcohol Policy and Compliance (ODAPC)	An office in the Office of the Secretary DOT, that is responsible for coordinating drug and alcohol testing program matters within the Department and providing information concerning the implementation of 49 CFR Part 40.
Performing (a safety sensitive function)	A covered employee is considered to be performing a safety-sensitive function and includes any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.
Permanent employee	An employee hired for a period of more than 120 days.
Permanent record book	A permanently bound book in which identifying data on each specimen collected at a collection site are permanently recorded in the sequence of collection. May be used in conjunction with a modified urine custody and control form to document collection.
Positive rate	The sum of the annual number of positive results for random drug tests conducted under this part plus the annual number of refusals to submit to a random drug test authorized under this part divided by the sum of the annual number of random drug tests conducted under this part plus the annual number of refusals to submit to a random drug test authorized under 49 CFR Part 655.
Positive test	Drug test with a verified presence of the identified drug or its metabolite at or above the minimum levels

	specified in 49 CFR Part 40, as amended. A positive alcohol test result means a confirmed alcohol concentration of 0.04 BAC, or greater.
Post-accident test	A drug test administered to an employee when an accident (as previously defined) has occurred and the employee performed a safety-sensitive function that either contributed to the accident, or cannot be completely discounted as a contributing factor in the accident.
Primary specimen	In drug testing, the urine specimen bottle that is opened and tested by a primary laboratory to determine whether the employee has a drug or drug metabolite in his or her system; and for the purpose of validity testing. The primary specimen is distinguished from the split specimen, defined in this section.
Pre-employment test	A drug test given to an applicant or employee who is being considered for a safety-sensitive position. The test is also administered when transferring an employee from a non-safety-sensitive position to a safety-sensitive position. Employers are also required to conduct a pre-employment test when a covered employee or applicant has not performed a safety-sensitive function for 90 consecutive calendar days regardless of the reason, and the employee has not been in the employer's random selection pool during that time. The applicant or employee must be informed of the purpose for the urine collection prior to actual collection.
Prohibited drug	Marijuana, cocaine, opiates, amphetamines, or phencyclidine.
Protocol	A procedure requiring strict adherence to achieve scientifically valid test results from specimen collection and laboratory testing of urine specimens.
Qualification training	The training required in order for a collector, BAT, MRO, SAP, or STT to be qualified to perform their functions in the DOT drug and alcohol testing program. Qualification training may be provided by any appropriate means (e.g., classroom instruction, internet application, CDROM, video).
Railroad	All forms of non-highway ground transportation that run

	on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service that was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high-speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.
Random test	A drug test administered annually to a predetermined percentage of employees who perform safety-sensitive functions and who are selected on a scientifically defensible random and unannounced basis.
Reason to believe	Objective information indicating that a particular individual may alter or substitute a urine specimen.
Reasonable cause test	A drug test given to a current employee who performs in a safety-sensitive position, and who is reasonably suspected by one or more trained supervisors or company officials of using a prohibited drug or misusing alcohol.
Recipient	An entity receiving federal financial assistance under 49 U.S.C. 5307, 5309, or 5311; or under 23 U.S.C. 103(e)(4).
Refresher training	The training required periodically for qualified collectors, BATs, and STTs to review basic requirements and provide instruction concerning changes in technology (e.g., new testing methods that may be authorized) and amendments, interpretations, guidance, and issues concerning this part and DOT agency drug and alcohol testing regulations. Refresher training can be provided by any appropriate means (e.g., classroom instruction, internet application, CDROM, video).
Refusal to test	A covered employee fails to provide a urine sample as required by 49 CFR Part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this subpart, or engages in conduct that

clearly obstructs the testing process.
An employee is considered to have refused to test if he/she fails to do the following:

- Appear for any test within a reasonable time, as determined by the employer, after being directed to do so by the employer;
- Remain at the testing site until the testing process is complete;
- Provide a urine or breath specimen for any drug test required by this part or DOT agency regulations;
- In the case of a directly observed or monitored collection in a drug test, fails to permit the observation or monitoring of your provision of a specimen;
- Provide a sufficient amount of urine or breath when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure;
- Declines to take a second test the employer or collector has directed him/her to take;
- Undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER as part of the "shy bladder" or "shy lung" procedures;
- Cooperate with any part of the testing process (e.g., refuse to empty pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process), if the MRO reports that there is verified adulterated, or substituted test result; or
- Sign "Step 2" of the alcohol testing form.

Return-to-duty test

An initial drug test prior to return to duty given to employees performing in safety-sensitive functions who previously tested positive to a drug test and are returning to safety-sensitive positions. A return-to-duty test is also required of an individual who has refused another type of test required by the FTA rule. As of August 31, 2009, USDOT requires mandatory direct observation for all return-to-duty tests.

Revenue service vehicle

A vehicle used to transport passengers, including a bus, van, car, railcar, locomotive, trolley car, trolley bus, ferry boat, or a vehicle used on a fixed guideway or inclined plane.

Safety-sensitive function

Any of the following duties are considered safety sensitive:

- Operating a revenue service vehicle, including when not in revenue service;
- Operating a non-revenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
- Controlling dispatch or movement of a revenue service vehicle;
- Maintaining a revenue service vehicle or equipment used in revenue service, unless the recipient receives section 18 funding and contracts out such services; and
- Carrying a firearm for security purposes.

Safety-sensitive position

A duty position or job category that requires the performance of a safety-sensitive function(s).

Screening test (or initial test)

In drug testing, an immunoassay screen to eliminate "negative" urine specimens from further analysis. In alcohol testing, an analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath specimen.

Screening Test Technician (STT)

A person who instructs and assists employees in the alcohol testing process and operates an ASD.

Secretary

The Secretary of Transportation or the Secretary's designee.

Service agent

Any person or entity, other than an employee of the employer, who provides services specified under this part to employers and/or employees in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, SAPs, and C/TPAs. To act as service agents, persons and organizations must meet the qualifications set forth in applicable sections of this part. Service agents are not employers for purposes of 49 CFR Part 655.

Shipping container	A container that is used for transporting and protecting urine specimen bottles and associated documents from the collection site to the laboratory.
Specimen bottle	The bottle that, after being sealed and labeled according to the procedures in this part, is used to hold the urine specimen during transportation to the laboratory.
Split specimen	In drug testing, a part of the urine specimen that is sent to a primary laboratory and retained unopened, and is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result.
Stand down	The practice of temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test result.
Substance Abuse Professional (SAP)	A person who evaluates employees who have violated a DOT drug and alcohol regulation and makes recommendations concerning education, treatment, follow-up testing, and aftercare.
Substituted specimen	A specimen with creatinine and specific gravity values that are so diminished that they are not consistent with human urine.
Training	Providing information about the effects and consequences of drug use on personal health, safety, and the work environment, about the work environment, and about the manifestations and behavioral cues that may indicate drug use and abuse.
Validity testing	The evaluation of the specimen to determine if it is consistent with normal human urine. The purpose of validity testing is to determine whether certain adulterants or foreign substances were added to the urine, if the urine was diluted, or if the specimen was substituted.
Vehicle	A bus, electric bus, van, automobile, railcar, trolley car,

	trolley bus, or vessel. A "mass transit vehicle" is a vehicle used for mass transportation.
Verified negative (drug test result)	A drug test result reviewed by a MRO and determined to have no evidence of prohibited drug use.
Verified positive (drug test result)	A drug test result reviewed by a MRO and determined to have evidence of prohibited drug use.
Verified test	A drug test result or validity testing result from an HHS-certified laboratory that has undergone review and final determination by the MRO.
Violation rate	The number of covered employees found during random tests to have an alcohol concentration of 0.04 or greater, plus the number of employees who refuse a random test required, divided by the total reported number of employees in the industry given random alcohol tests plus the total reported number of employees in the industry who refuse a random test.

Appendix I - Regulations

49 CFR Part 40
Updated August 31, 2009

49 CFR Part 382
Federal Motor Carrier Safety Administration

14 CFR Part 121
Federal Aviation Administration

49 CFR Part 655
Federal Transit Administration

49 CFR Part 219
Federal Railroad Administration

49 CFR Part 199
Research and Special Programs Administration

Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Drug and Alcohol Management Information System Reporting
December 31, 2003

49 CFR Part 655

Drug-Free Workplace Act

49 CFR Part 40
Updated August 31, 2009

TITLE 49: TRANSPORTATION

PART 40 - PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

(Updated as of August 31, 2009)

Reprinted by the Department of Transportation, Drug and Alcohol Policy and Compliance Office,
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Subpart G - Medical Review Officers and the Verification Process

Subpart H - Split Specimen Tests

Authority: 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 et seq.
Source: 65 FR 79526, Dec. 19, 2000, unless otherwise noted.

Subpart A - Administrative Provisions

§ 40.1 Who does this regulation cover?

(a) This part tells all parties who conduct drug and alcohol tests required by Department of Transportation (DOT) agency regulations how to conduct these tests and what procedures to use.

(b) This part concerns the activities of transportation employers, safety-sensitive transportation employees (including self-employed individuals, contractors and volunteers as covered by DOT agency regulations), and service agents.

(c) Nothing in this part is intended to supersede or conflict with the implementation of the Federal Railroad Administration's post-accident testing program (see 49 CFR 219.200).

§ 40.3 What do the terms used in this regulation mean?

In this part, the terms listed in this section have the following meanings:

Adulterated specimen. A urine specimen containing a substance that is not a normal constituent or containing an endogenous substance at a concentration that is not a normal physiological concentration.

Affiliate. Persons are affiliates of one another if, directly or indirectly, one controls or has the power to control the other, or a third party controls or has the power to control both. Indicators of control include, but are not limited to: interlocking management or ownership; shared interest among family members; shared facilities or equipment; or common use of employees. Following the issuance of a public interest exclusion, an organization having the same or similar management, ownership, or principal employees as the service agent concerning whom a public interest exclusion is in effect is regarded as an affiliate. This definition is used in connection with the public interest exclusion procedures of Subpart R of this part.

Air blank. In evidential breath testing devices (EBTs) using gas chromatography technology, a reading of the device's internal standard. In all other EBTs, a reading of ambient air containing no alcohol.

Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols, including methyl or isopropyl alcohol.

Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part.

Alcohol confirmation test. A subsequent test using an EBT, following a screening test with a result of 0.02 or greater, that provides quantitative data about the alcohol concentration.

Alcohol screening device (ASD). A breath or saliva device, other than an EBT, that is approved by the National Highway Traffic Safety Administration (NHTSA) and placed on a conforming products list (CPL) for such devices.

Alcohol screening test. An analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath or saliva specimen.

Alcohol testing site. A place selected by the employer where employees present themselves for the purpose of providing breath or saliva for an alcohol test.

Alcohol use. The drinking or swallowing of any beverage, liquid mixture or preparation (including any medication), containing alcohol.

Aliquot. A fractional part of a specimen used for testing. It is taken as a sample representing the whole specimen.

Blind specimen or blind performance test specimen. A specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from an employee specimen.

Breath Alcohol Technician (BAT). A person who instructs and assists employees in the alcohol testing process and operates an evidential breath testing device.

Cancelled test. A drug or alcohol test that has a problem identified that cannot be or has not been corrected, or which this part otherwise requires to be cancelled. A cancelled test is neither a positive nor a negative test.

Chain of custody. The procedure used to document the handling of the urine specimen from the time the employee gives the specimen to the collector until the specimen is destroyed. This procedure uses the Federal Drug Testing Custody and Control Form (CCF).

Collection container. A container into which the employee urinates to provide the specimen for a drug test.

Collection site. A place selected by the employer where employees present themselves for the purpose of providing a urine specimen for a drug test.

Collector. A person who instructs and assists employees at a collection site, who receives and makes an initial inspection of the specimen provided by those employees, and who initiates and completes the CCF.

Confirmatory drug test. A second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy. (Gas chromatography/ mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine).

Confirmatory validity test. A second test performed on a different aliquot of the original urine specimen to further support a validity test result.

Confirmed drug test. A confirmation test result received by an MRO from a laboratory.

Consortium/Third-party administrator (C/TPA). A service agent that provides or coordinates the provision of a variety of drug and alcohol testing services to employers. C/TPAs typically perform administrative tasks concerning the operation of the employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members. C/TPAs are not “employers” for purposes of this part.

Continuing education. Training for medical review officers (MROs) and substance abuse professionals (SAPs) who have completed qualification training and are performing MRO or SAP functions, designed to keep MROs and SAPs current on changes and developments in the DOT drug and alcohol testing program.

Designated employer representative (DER). An employee authorized by the employer to take immediate action(s) to remove employees from safety-sensitive duties, or cause employees to be removed from these covered duties, and to make required decisions in the testing and evaluation processes. The DER also receives test results and other communications for the employer, consistent with the requirements of this part. Service agents cannot act as DERs.

Dilute specimen. A urine specimen with creatinine and specific gravity values that are lower than expected for human urine.

DOT, The Department, DOT agency. These terms encompass all DOT agencies, including, but not limited to, the United States Coast Guard (USCG), the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Transit Administration (FTA), the National Highway Traffic Safety Administration (NHTSA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the Office of the Secretary (OST). These terms include any designee of a DOT agency.

Drugs. The drugs for which tests are required under this part and DOT agency regulations are marijuana, cocaine, amphetamines, phencyclidine (PCP), and opiates.

Employee. Any person who is designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. The term includes individuals currently performing safety-sensitive functions designated in DOT agency regulations and applicants for employment subject to pre-employment testing. For purposes of drug testing under this part, the term employee has the same meaning as the term “donor” as found on CCF and related guidance materials produced by the Department of Health and Human Services.

Employer. A person or entity employing one or more employees (including an individual who is self-employed) subject to DOT agency regulations requiring compliance with this part. The term includes an employer's officers, representatives, and management personnel. Service agents are not employers for the purposes of this part.

Error Correction Training. Training provided to BATs, collectors, and screening test technicians (STTs) following an error that resulted in the cancellation of a drug or alcohol test. Error correction training must be provided in person or by a means that provides real-time observation and interaction between the instructor and trainee.

Evidential Breath Testing Device (EBT). A device approved by NHTSA for the evidential testing of breath at the .02 and .04 alcohol concentrations, placed on NHTSA's Conforming Products List (CPL) for “Evidential Breath Measurement Devices” and identified on the CPL as conforming with the model specifications available from NHTSA's Traffic Safety Program.

HHS. The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.

Initial drug test (also known as a Screening drug test). An immunoassay test to eliminate “negative” urine specimens from further consideration and to identify the presumptively positive specimens that require confirmation or further testing.

Initial validity test. The first test used to determine if a urine specimen is adulterated, diluted, or substituted.

Invalid result. The result reported by a laboratory for a urine specimen that contains an unidentified adulterant, contains an unidentified interfering substance, has an abnormal physical characteristic, or has an endogenous substance at an abnormal concentration that prevents the laboratory from completing testing or obtaining a valid drug test result.

Laboratory. Any U.S. laboratory certified by HHS under the National Laboratory Certification Program as meeting the minimum standards of Subpart C of the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs; or, in the case of foreign laboratories, a laboratory approved for participation by DOT under this part. (The HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs are available on the internet at http://www.health.org/workpl.htm or from the Division of Workplace Programs, 1 Choke Cherry Road, Room 2-1035, Rockville, MD 20857)

Limit of Detection (LOD). The lowest concentration at which an analyte can be reliably shown to be present under defined conditions.

Medical Review Officer (MRO). A person who is a licensed physician and who is responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.

Non-negative specimen. A urine specimen that is reported as adulterated, substituted, positive (for drug(s) or drug metabolite(s)), and/or invalid.

Office of Drug and Alcohol Policy and Compliance (ODAPC). The office in the Office of the Secretary, DOT, that is responsible for coordinating drug and alcohol testing program matters within the Department and providing information concerning the implementation of this part.

Oxidizing adulterant. A substance that acts alone or in combination with other substances to oxidize drugs or drug metabolites to prevent the detection of the drug or drug metabolites, or affects the reagents in either the initial or confirmatory drug test.

Primary specimen. In drug testing, the urine specimen bottle that is opened and tested by a first laboratory to determine whether the employee has a drug or drug metabolite in his or her system; and for the purpose of validity testing. The primary specimen is distinguished from the split specimen, defined in this section.

Qualification Training. The training required in order for a collector, BAT, MRO, SAP, or STT to be qualified to perform their functions in the DOT drug and alcohol testing program. Qualification training may be provided by any appropriate means (e.g., classroom instruction, internet application, CD–ROM, video).

Refresher Training. The training required periodically for qualified collectors, BATs, and STTs to review basic requirements and provide instruction concerning changes in technology (e.g., new testing methods that may be authorized) and amendments, interpretations, guidance, and issues concerning this part and DOT agency drug and alcohol testing regulations. Refresher training can be provided by any appropriate means (e.g., classroom instruction, internet application, CD–ROM, video).

Screening Drug Test. See Initial drug test definition above.

Screening Test Technician (STT). A person who instructs and assists employees in the alcohol testing process and operates an ASD.

Secretary. The Secretary of Transportation or the Secretary's designee.

Service agent. Any person or entity, other than an employee of the employer, who provides services specified under this part to employers and/or employees in connection with DOT drug and alcohol testing requirements. This includes, but is not limited to, collectors, BATs and STTs, laboratories, MROs, substance abuse professionals, and C/TPAs. To act as service agents, persons and organizations must meet the qualifications set forth in applicable sections of this part. Service agents are not employers for purposes of this part.

Shipping container. A container that is used for transporting and protecting urine specimen bottles and associated documents from the collection site to the laboratory.

Specimen bottle. The bottle that, after being sealed and labeled according to the procedures in this part, is used to hold the urine specimen during transportation to the laboratory.

Split specimen. In drug testing, a part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result.

Stand-down. The practice of temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test result.

Substance Abuse Professional (SAP). A person who evaluates employees who have violated a DOT drug and alcohol regulation and makes recommendations concerning education, treatment, follow-up testing, and aftercare.

Substituted specimen. A urine specimen with creatinine and specific gravity values that are so diminished or so divergent that they are not consistent with normal human urine.

Verified test. A drug test result or validity testing result from an HHS-certified laboratory that has undergone review and final determination by the MRO.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41950, Aug. 9, 2001; 71 FR 49384, August 23, 2006; 71 FR 55347, Sept. 22, 2006; 73 FR 35969, June 25, 2008]

§ 40.5 Who issues authoritative interpretations of this regulation?

ODAPC and the DOT Office of General Counsel (OGC) provide written interpretations of the provisions of this part. These written DOT interpretations are the only official and authoritative interpretations concerning the provisions of this part. DOT agencies may incorporate ODAPC/OGC interpretations in written guidance they issue concerning drug and alcohol testing matters. Only Part 40 interpretations issued after August 1, 2001, are considered valid.

§ 40.7 How can you get an exemption from a requirement in this regulation?

(a) If you want an exemption from any provision of this part, you must request it in writing from the Office of the Secretary of Transportation, under the provisions and standards of 49 CFR part 5. You must send requests for an exemption to the following address: Department of Transportation, Deputy Assistant General Counsel for Regulation and Enforcement, 1200 New Jersey Avenue, SE, Washington, DC 20590.

(b) Under the standards of 49 CFR part 5, we will grant the request only if the request documents special or exceptional circumstances, not likely to be generally applicable and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impracticable.

(c) If we grant you an exemption, you must agree to take steps we specify to comply with the intent of the provision from which an exemption is granted.

(d) We will issue written responses to all exemption requests.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 33329, June 12, 2008]

Subpart B - Employer Responsibilities

§ 40.11 What are the general responsibilities of employers under this regulation?

(a) As an employer, you are responsible for meeting all applicable requirements and procedures of this part.

(b) You are responsible for all actions of your officials, representatives, and agents (including service agents) in carrying out the requirements of the DOT agency regulations.

(c) All agreements and arrangements, written or unwritten, between and among employers and service agents concerning the implementation of DOT drug and alcohol testing requirements are deemed, as a matter of law, to require compliance with all applicable provisions of this part and DOT agency drug and alcohol testing regulations. Compliance with these provisions is a material term of all such agreements and arrangements.

§ 40.13 How do DOT drug and alcohol tests relate to non-DOT tests?

(a) DOT tests must be completely separate from non-DOT tests in all respects.

(b) DOT tests must take priority and must be conducted and completed before a non-DOT test is begun. For example, you must discard any excess urine left over from a DOT test and collect a separate void for the subsequent non-DOT test.

(c) Except as provided in paragraph (d) of this section, you must not perform any tests on DOT urine or breath specimens other than those specifically authorized by this part or DOT agency regulations. For example, you may not test a DOT urine specimen for additional drugs, and a laboratory is prohibited from making a DOT urine specimen available for a DNA test or other types of specimen identity testing.

(d) The single exception to paragraph (c) of this section is when a DOT drug test collection is conducted as part of a physical examination required by DOT agency regulations. It is permissible to conduct required medical tests related to this physical examination (e.g., for glucose) on any urine remaining in the collection container after the drug test urine specimens have been sealed into the specimen bottles.

(e) No one is permitted to change or disregard the results of DOT tests based on the results of non-DOT tests. For example, as an employer you must not disregard a verified positive DOT drug test result because the employee presents a negative test result from a blood or urine specimen collected by the employee's physician or a DNA test result purporting to question the identity of the DOT specimen.

(f) As an employer, you must not use the CCF or the ATF in your non-DOT drug and alcohol testing programs. This prohibition includes the use of the DOT forms with references to DOT programs and agencies crossed out. You also must always use the CCF and ATF for all your DOT-mandated drug and alcohol tests.

§ 40.15 May an employer use a service agent to meet DOT drug and alcohol testing requirements?

(a) As an employer, you may use a service agent to perform the tasks needed to comply with this part and DOT agency drug and alcohol testing regulations, consistent with the requirements of Subpart Q and other applicable provisions of this part.

(b) As an employer, you are responsible for ensuring that the service agents you use meet the qualifications set forth in this part (e.g., §40.121 for MROs). You may require service agents to show you documentation that they meet the requirements of this part (e.g., documentation of MRO qualifications required by §40.121(e)).

(c) You remain responsible for compliance with all applicable requirements of this part and other DOT drug and alcohol testing regulations, even when you use a service agent. If you violate this part or other DOT drug and alcohol testing regulations because a service agent has not provided services as our rules require, a DOT agency can subject you to sanctions. Your good faith use of a service agent is not a defense in an enforcement action initiated by a DOT agency in which your alleged noncompliance with this part or a DOT agency drug and alcohol regulation may have resulted from the service agent's conduct.

(d) As an employer, you must not permit a service agent to act as your DER.

§ 40.17 Is an employer responsible for obtaining information from its service agents?

Yes, as an employer, you are responsible for obtaining information required by this part from your service agents. This is true whether or not you choose to use a C/TPA as an intermediary in transmitting information to you. For example, suppose an applicant for a safety-sensitive job takes a pre-employment drug test, but there is a significant delay in your receipt of the test result from an MRO or C/TPA. You must not assume that “no news is good news” and permit the applicant to perform safety-sensitive duties before receiving the result. This is a violation of the Department's regulations.

§ 40.19 [Reserved]

§ 40.21 May an employer stand down an employee before the MRO has completed the verification process?

(a) As an employer, you are prohibited from standing employees down, except consistent with a waiver a DOT agency grants under this section.

(b) You may make a request to the concerned DOT agency for a waiver from the prohibition of paragraph (a) of this section. Such a waiver, if granted, permits you to stand an employee down following the MRO's receipt of a laboratory report of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test pertaining to the employee.

(1) For this purpose, the concerned DOT agency is the one whose drug and alcohol testing rules apply to the majority of the covered employees in your organization. The concerned DOT agency uses its applicable procedures for considering requests for waivers.

(2) Before taking action on a waiver request, the concerned DOT agency coordinates with other DOT agencies that regulate the employer's other covered employees.

(3) The concerned DOT agency provides a written response to each employer that petitions for a waiver, setting forth the reasons for the agency's decision on the waiver request.

(c) Your request for a waiver must include, as a minimum, the following elements:

(1) Information about your organization:

(i) Your determination that standing employees down is necessary for safety in your organization and a statement of your basis for it, including any data on safety problems or incidents that could have been prevented if a stand-down procedure had been in place;

(ii) Data showing the number of confirmed laboratory positive, adulterated, and substituted test results for your employees over the two calendar years preceding your waiver request, and the number and percentage of those test results that were verified positive, adulterated, or substituted by the MRO;

(iii) Information about the work situation of the employees subject to stand-down, including a description of the size and organization of the unit(s) in which the employees work, the process through which employees will be informed of the stand-down, whether there is an in-house MRO, and whether your organization has a medical disqualification or stand-down policy for employees in situations other than drug and alcohol testing; and

(iv) A statement of which DOT agencies regulate your employees.

(2) Your proposed written company policy concerning stand-down, which must include the following elements:

(i) Your assurance that you will distribute copies of your written policy to all employees that it covers;

(ii) Your means of ensuring that no information about the confirmed positive, adulterated, or substituted test result or the reason for the employee's temporary removal from performance of safety-sensitive functions becomes available, directly or indirectly, to anyone in your organization (or subsequently to another employer) other than the employee, the MRO and the DER;

(iii) Your means of ensuring that all covered employees in a particular job category in your organization are treated the same way with respect to stand-down;

(iv) Your means of ensuring that a covered employee will be subject to stand-down only with respect to the actual performance of safety-sensitive duties;

(v) Your means of ensuring that you will not take any action adversely affecting the employee's pay and benefits pending the completion of the MRO's verification process. This includes continuing to pay the employee during the period of the stand-down in the same way you would have paid him or her had he or she not been stood down;

(vi) Your means of ensuring that the verification process will commence no later than the time an employee is temporarily removed from the performance of safety-sensitive functions and that the period of stand-down for any employee will not exceed five days, unless you are informed in writing by the MRO that a longer period is needed to complete the verification process; and

(vii) Your means of ensuring that, in the event that the MRO verifies the test negative or cancels it—

(A) You return the employee immediately to the performance of safety-sensitive duties;

(B) The employee suffers no adverse personnel or financial consequences as a result; and

(C) You maintain no individually identifiable record that the employee had a confirmed laboratory positive, adulterated, or substituted test result (i.e., you maintain a record of the test only as a negative or cancelled test).

(d) The Administrator of the concerned DOT agency, or his or her designee, may grant a waiver request only if he or she determines that, in the context of your organization, there is a high probability that the procedures you propose will effectively enhance safety and protect the interests of employees in fairness and confidentiality.

(1) The Administrator, or his or her designee, may impose any conditions he or she deems appropriate on the grant of a waiver.

(2) The Administrator, or his or her designee, may immediately suspend or revoke the waiver if he or she determines that you have failed to protect effectively the interests of employees in fairness and confidentiality, that you have failed to comply with the requirements of this section, or that you have failed to comply with any other conditions the DOT agency has attached to the waiver.

(e) You must not stand employees down in the absence of a waiver, or inconsistent with the terms of your waiver. If you do, you are in violation of this part and DOT agency drug testing regulations, and you are subject to enforcement action by the DOT agency just as you are for other violations of this part and DOT agency rules.

§ 40.23 What actions do employers take after receiving verified test results?

a) As an employer who receives a verified positive drug test result, you must immediately remove the employee involved from performing safety-sensitive functions. You must take this action upon receiving the initial report of the verified positive test result. Do not wait to receive the written report or the result of a split specimen test.

(b) As an employer who receives a verified adulterated or substituted drug test result, you must consider this a refusal to test and immediately remove the employee involved from performing safety-sensitive functions. You must take this action on receiving the initial report of the verified adulterated or substituted test result. Do not wait to receive the written report or the result of a split specimen test.

(c) As an employer who receives an alcohol test result of 0.04 or higher, you must immediately remove the employee involved from performing safety-sensitive functions. If you receive an alcohol test result of 0.02—0.039, you must temporarily remove the employee involved from performing safety-sensitive functions, as provided in applicable DOT agency regulations. Do not wait to receive the written report of the result of the test.

(d) As an employer, when an employee has a verified positive, adulterated, or substituted test result, or has otherwise violated a DOT agency drug and alcohol regulation, you must not return the employee to the performance of safety-sensitive functions until or unless the employee successfully completes the return-to-duty process of Subpart O of this part.

(e) As an employer who receives a drug test result indicating that the employee's specimen was dilute, take action as provided in §40.197.

(f) As an employer who receives a drug test result indicating that the employee's urine specimen test was cancelled because it was invalid and that a second collection must take place under direct observation—

(1) You must immediately direct the employee to provide a new specimen under direct observation.

(2) You must not attach consequences to the finding that the test was invalid other than collecting a new specimen under direct observation.

(3) You must not give any advance notice of this test requirement to the employee.

(4) You must instruct the collector to note on the CCF the same reason (e.g. random test, post-accident test) as for the original collection.

(5) You must ensure that the collector conducts the collection under direct observation.

(g) As an employer who receives a cancelled test result when a negative result is required (e.g., pre-employment, return-to-duty, or follow-up test), you must direct the employee to provide another specimen immediately.

(h) As an employer, you may also be required to take additional actions required by DOT agency regulations (e.g., FAA rules require some positive drug tests to be reported to the Federal Air Surgeon).

(i) As an employer, you must not alter a drug or alcohol test result transmitted to you by an MRO, BAT, or C/TPA.

[65 FR 79526, Dec.19, 2000, as amended at 71 FR 49384, Aug. 23, 2006; 73 FR 35970, June 25, 2008]

§ 40.25 Must an employer check on the drug and alcohol testing record of employees it is intending to use to perform safety-sensitive duties?

(a) Yes, as an employer, you must, after obtaining an employee's written consent, request the information about the employee listed in paragraph (b) of this section. This requirement applies only to employees seeking to begin performing safety-sensitive duties for you for the first time (i.e., a new hire, an employee transfers into a safety-sensitive position). If the employee refuses to provide this written consent, you must not permit the employee to perform safety-sensitive functions.

(b) You must request the information listed in this paragraph (b) from DOT-regulated employers who have employed the employee during any period during the two years before the date of the employee's application or transfer:

(1) Alcohol tests with a result of 0.04 or higher alcohol concentration;

(2) Verified positive drug tests;

(3) Refusals to be tested (including verified adulterated or substituted drug test results);

(4) Other violations of DOT agency drug and alcohol testing regulations; and

(5) With respect to any employee who violated a DOT drug and alcohol regulation, documentation of the employee's successful completion of DOT return-to-duty requirements (including follow-up tests). If the previous employer does not have information about the return-do-duty process (e.g., an employer who did not hire an employee who tested positive on a pre-employment test), you must seek to obtain this information from the employee.

(c) The information obtained from a previous employer includes any drug or alcohol test information obtained from previous employers under this section or other applicable DOT agency regulations.

(d) If feasible, you must obtain and review this information before the employee first performs safety-sensitive functions. If this is not feasible, you must obtain and review the information as soon as possible. However, you must not permit the employee to perform safety-sensitive functions after 30 days from the date on which the employee first performed safety-sensitive functions, unless you have obtained or made and documented a good faith effort to obtain this information.

(e) If you obtain information that the employee has violated a DOT agency drug and alcohol regulation, you must not use the employee to perform safety-sensitive functions unless you also obtain information that the employee has subsequently complied with the return-to-duty requirements of Subpart O of this part and DOT agency drug and alcohol regulations.

(f) You must provide to each of the employers from whom you request information under paragraph (b) of this section written consent for the release of the information cited in paragraph (a) of this section.

(g) The release of information under this section must be in any written form (e.g., fax, e-mail, letter) that ensures confidentiality. As the previous employer, you must maintain a written record of the information released, including the date, the party to whom it was released, and a summary of the information provided.

(h) If you are an employer from whom information is requested under paragraph (b) of this section, you must, after reviewing the employee's specific, written consent, immediately release the requested information to the employer making the inquiry.

(i) As the employer requesting the information required under this section, you must maintain a written, confidential record of the information you obtain or of the good faith efforts you made to obtain the information. You must retain this information for three years from the date of the employee's first performance of safety-sensitive duties for you.

(j) As the employer, you must also ask the employee whether he or she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied for, but did not obtain, safety-sensitive transportation work covered by DOT agency drug and alcohol testing rules during the past two years. If the employee admits that he or she had a positive test or a refusal to test, you must not use the employee to perform safety-sensitive functions for you, until and unless the employee documents successful completion of the return-to-duty process (see paragraphs (b)(5) and (e) of this section).

§ 40.26 What form must an employer use to report Management Information System (MIS) data to a DOT agency?

As an employer, when you are required to report MIS data to a DOT agency, you must use the form and instructions at appendix H to part 40. You must submit the MIS report in accordance with rule requirements (e.g., dates for submission; selection of companies required to submit, and method of reporting) established by the DOT agency regulating your operation.

[68 FR 43952, July 25, 2003]

§ 40.27 May an employer require an employee to sign a consent or release in connection with the DOT drug and alcohol testing program?

No, as an employer, you must not require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by this part (including, but not limited to, collections, laboratory testing, MRO and SAP services).

[66 FR 41950, Aug. 9, 2001]

§ 40.29 Where is other information on employer responsibilities found in this regulation?

You can find other information on the responsibilities of employers in the following sections of this part:

§40.3—Definition.

§40.35—Information about DERs that employers must provide collectors.
§40.45—Modifying CCFs, Use of foreign-language CCFs.
§40.47—Use of non-Federal forms for DOT tests or Federal CCFs for non-DOT tests.
§40.67—Requirements for direct observation.
§§40.103–40.105—Blind specimen requirements.
§40. 173—Responsibility to ensure test of split specimen.
§40.193—Action in "shy bladder" situations.
§40.197—Actions following report of a dilute specimen.
§40.207—Actions following a report of a cancelled drug test.
§40.209—Actions following and consequences of non-fatal flaws in drug tests.
§40.215—Information about DERs that employers must provide BATs and STTs.
§40.225—Modifying ATFs; use of foreign-language ATFs.
§40.227—Use of non-DOT forms for DOT tests or DOT ATFs for non-DOT tests.
§40.235 (c) and (d)—responsibility to follow instructions for ASDs.
§40.255 (b)—receipt and storage of alcohol test information.
§40.265 (c)–(e)—actions in "shy lung" situations.
§40.267—Cancellation of alcohol tests.
§40.271—Actions in "correctable flaw" situations in alcohol tests.
§40.273—Actions following cancelled tests in alcohol tests.
§40.275—Actions in "non-fatal flaw" situations in alcohol tests.
§§40.287–40.289—Responsibilities concerning SAP services.
§§40.295–40.297—Prohibition on seeking second SAP evaluation or changing SAP recommendation.
§40.303—Responsibilities concerning aftercare recommendations.
§40.305—Responsibilities concerning return-to-duty decision.
§40.309—Responsibilities concerning follow-up tests.
§40.321—General confidentiality requirement.
§40.323—Release of confidential information in litigation.
§40.331—Other circumstances for the release of confidential information.
§40.333—Record retention requirements.
§40.345—Choice of who reports drug testing information to employers.
[65 FR 79526, Dec. 19, 2000. Redesignated at 66 FR 41950, Aug. 9, 2001]

Subpart C - Urine Collection Personnel

§ 40.31 Who may collect urine specimens for DOT drug testing?

(a) Collectors meeting the requirements of this subpart are the only persons authorized to collect urine specimens for DOT drug testing.

(b) A collector must meet training requirements of §40.33.

(c) As the immediate supervisor of an employee being tested, you may not act as the collector when that employee is tested, unless no other collector is available and you are permitted to do so under DOT agency drug and alcohol regulations.

(d) You must not act as the collector for the employee being tested if you work for a HHS-certified laboratory (e.g., as a technician or accessioner) and could link the employee with a urine specimen, drug testing result, or laboratory report.

§ 40.33 What training requirements must a collector meet?

To be permitted to act as a collector in the DOT drug testing program, you must meet each of the requirements of this section:

(a) Basic information. You must be knowledgeable about this part, the current "DOT Urine Specimen Collection Procedures Guidelines," and DOT agency regulations applicable to the employers for whom you perform collections, and you must keep current on any changes to these materials. The DOT Urine Specimen Collection Procedures Guidelines document is available from ODAPC (Department of Transportation, 1200 New Jersey Avenue, SE, Washington DC, 20590, 202–366–3784, or on the ODAPC web site (*http://www.dot.gov/ost/dapc).*

(b) Qualification training. You must receive qualification training meeting the requirements of this paragraph. Qualification training must provide instruction on the following subjects:

(1) All steps necessary to complete a collection correctly and the proper completion and transmission of the CCF;

(2) "Problem" collections (e.g., situations like "shy bladder" and attempts to tamper with a specimen);

(3) Fatal flaws, correctable flaws, and how to correct problems in collections; and

(4) The collector's responsibility for maintaining the integrity of the collection process, ensuring the privacy of employees being tested, ensuring the security of the specimen, and avoiding conduct or statements that could be viewed as offensive or inappropriate;

(c) Initial Proficiency Demonstration. Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in collections under this part by completing five consecutive error-free mock collections.

(1) The five mock collections must include two uneventful collection scenarios, one insufficient quantity of urine scenario, one temperature out of range scenario, and one scenario in which the employee refuses to sign the CCF and initial the specimen bottle tamper-evident seal.

(2) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between the instructor and trainee, and attest in writing that the mock collections are “error-free.” This person must be a qualified collector who has demonstrated necessary knowledge, skills, and abilities by—

i) Regularly conducting DOT drug test collections for a period of at least a year;

(ii) Conducting collector training under this part for a year; or

(iii) Successfully completing a “train the trainer” course.

(d) Schedule for qualification training and initial proficiency demonstration. The following is the schedule for qualification training and the initial proficiency demonstration you must meet:

(1) If you became a collector before August 1, 2001, and you have already met the requirements of paragraphs (b) and (c) of this section, you do not have to meet them again.

(2) If you became a collector before August 1, 2001, and have yet to meet the requirements of paragraphs (b) and (c) of this section, you must do so no later than January 31, 2003.

(3) If you become a collector on or after August 1, 2001, you must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform collector functions.

(e) Refresher training. No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c) of this section.

(f) Error Correction Training. If you make a mistake in the collection process that causes a test to be cancelled (i.e., a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining.

(1) Error correction training must be provided and your proficiency documented in writing by a person who meets the requirements of paragraph (c)(2) of this section.

(2) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(3) As part of the error correction training, you must demonstrate your proficiency in the collection procedures of this part by completing three consecutive error-free mock collections. The mock collections must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in writing that the mock collections were “error-free.”

(g) Documentation. You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or negotiating to use your services.

[65 FR 79526, Dec 19, 2000; 66 FR 3885, Jan. 17, 2001, as amended at 66 FR 41950, Aug. 9, 2001; 73 FR 33329, June 12, 2008]

§ 40.35 What information about the DER must employers provide to collectors?

As an employer, you must provide to collectors the name and telephone number of the appropriate DER (and C/TPA, where applicable) to contact about any problems or issues that may arise during the testing process.

§ 40.37 Where is other information on the role of collectors found in this regulation?

You can find other information on the role and functions of collectors in the following sections of this part:

§40.3—Definition.

§40.43—Steps to prepare and secure collection sites.

§§40.45–40.47—Use of CCF.

§§40.49–40.51—Use of collection kit and shipping materials.

§§40.61–40.63—Preliminary steps in collections.

§40.65—Role in checking specimens.

§40.67—Role in directly observed collections.

§40.69—Role in monitored collections.

§40.71—Role in split specimen collections.

§40.73—Chain of custody completion and finishing the collection process.

§40.103—Processing blind specimens.
§40.191—Action in case of refusals to take test.
§40.193—Action in “shy bladder” situations.
§40.199–40.205—Collector errors in tests, effects, and means of correction.

Subpart D - Collection Sites, Forms, Equipment and Supplies Used in DOT Urine Collections

§ 40.41 Where does a urine collection for a DOT drug test take place?

(a) A urine collection for a DOT drug test must take place in a collection site meeting the requirements of this section.

(b) If you are operating a collection site, you must ensure that it meets the security requirements of §40.43.

(c) If you are operating a collection site, you must have all necessary personnel, materials, equipment, facilities and supervision to provide for the collection, temporary storage, and shipping of urine specimens to a laboratory, and a suitable clean surface for writing.

(d) Your collection site must include a facility for urination described in either paragraph (e) or paragraph (f) of this section.

(e) The first, and preferred, type of facility for urination that a collection site may include is a single-toilet room, having a full-length privacy door, within which urination can occur.

(1) No one but the employee may be present in the room during the collection, except for the observer in the event of a directly observed collection.

(2) You must have a source of water for washing hands, that, if practicable, should be external to the closed room where urination occurs. If an external source is not available, you may meet this requirement by securing all sources of water and other substances that could be used for adulteration and substitution (e.g., water faucets, soap dispensers) and providing moist towelettes outside the closed room.

(f) The second type of facility for urination that a collection site may include is a multistall restroom.

(1) Such a site must provide substantial visual privacy (e.g., a toilet stall with a partial-length door) and meet all other applicable requirements of this section.

(2) If you use a multi-stall restroom, you must either—

(i) Secure all sources of water and other substances that could be used for adulteration and substitution (e.g., water faucets, soap dispensers) and place bluing agent in all toilets or secure the toilets to prevent access; or

(ii) Conduct all collections in the facility as monitored collections (see §40.69 for procedures). This is the only circumstance in which you may conduct a monitored collection.

(3) No one but the employee may be present in the multistall restroom during the collection, except for the monitor in the event of a monitored collection or the observer in the event of a directly observed collection.

(g) A collection site may be in a medical facility, a mobile facility (e.g., a van), a dedicated collection facility, or any other location meeting the requirements of this section.

§ 40.43 What steps must operators of collection sites take to protect the security and integrity of urine collections?

(a) Collectors and operators of collection sites must take the steps listed in this section to prevent unauthorized access that could compromise the integrity of collections.

(b) As a collector, you must do the following before each collection to deter tampering with specimens:

(1) Secure any water sources or otherwise make them unavailable to employees (e.g., turn off water inlet, tape handles to prevent opening faucets);

(2) Ensure that the water in the toilet is blue;

(3) Ensure that no soap, disinfectants, cleaning agents, or other possible adulterants are present;

(4) Inspect the site to ensure that no foreign or unauthorized substances are present;

(5) Tape or otherwise secure shut any movable toilet tank , or put bluing in the tank;

6) Ensure that undetected access (e.g., through a door not in your view) is not possible;

(7) Secure areas and items (e.g., ledges, trash receptacles, paper towel holders, under-sink areas) that appear suitable for concealing contaminants; and

(8) Recheck items in paragraphs (b)(1) through (7) of this section following each collection to ensure the site's continued integrity.

(c) If the collection site uses a facility normally used for other purposes, like a public rest room or hospital examining room, you must, as a collector, also ensure before the collection that:

(1) Access to collection materials and specimens is effectively restricted; and

(2) The facility is secured against access during the procedure to ensure privacy to the employee and prevent distraction of the collector. Limited-access signs must be posted.

(d) As a collector, you must take the following additional steps to ensure security during the collection process:

(1) To avoid distraction that could compromise security, you are limited to conducting a collection for only one employee at a time. However, during the time one employee is in the period for drinking fluids in a "shy bladder" situation (see §40.193(b)), you may conduct a collection for another employee.

(2) To the greatest extent you can, keep an employee's collection container within view of both you and the employee between the time the employee has urinated and the specimen is sealed.

(3) Ensure you are the only person in addition to the employee who handles the specimen before it is poured into the bottles and sealed with tamper-evident seals.

(4) In the time between when the employee gives you the specimen and when you seal the specimen, remain within the collection site.

(5) Maintain personal control over each specimen and CCF throughout the collection process.

(e) If you are operating a collection site, you must implement a policy and procedures to prevent unauthorized personnel from entering any part of the site in which urine specimens are collected or stored.

(1) Only employees being tested, collectors and other collection site workers, DERs, employee and employer representatives authorized by the employer (e.g., employer policy, collective bargaining agreement), and DOT agency representatives are authorized persons for purposes of this paragraph (e).

(2) Except for the observer in a directly observed collection or the monitor in the case of a monitored collection, you must not permit anyone to enter the urination facility in which employees provide specimens.

3) You must ensure that all authorized persons are under the supervision of a collector at all times when permitted into the site.

(4) You or the collector may remove any person who obstructs, interferes with, or causes a delay in the collection process.

(f) If you are operating a collection site, you must minimize the number of persons handling specimens.

§ 40.45 What form is used to document a DOT urine collection?

(a) The Federal Drug Testing Custody and Control Form (CCF) must be used to document every urine collection required by the DOT drug testing program. The CCF must be a five-part carbonless manifold form. You may view this form on the Department's web site (http://www.dot.gov/ost/dapc) or the HHS web site (http://www.workplace.samhsa.gov).

(b) You must not use a non-Federal form or an expired Federal form to conduct a DOT urine collection. As a laboratory, C/TPA or other party that provides CCFs to employers, collection sites, or other customers, you must not provide copies of an expired Federal form to these participants. You must also affirmatively notify these participants that they must not use an expired Federal form (e.g., that beginning August 1, 2001, they may not use the old 7-part Federal CCF for DOT urine collections).

(c) As a participant in the DOT drug testing program, you are not permitted to modify or revise the CCF except as follows:

(1) You may include, in the area outside the border of the form, other information needed for billing or other purposes necessary to the collection process.

(2) The CCF must include the names, addresses, telephone numbers and fax numbers of the employer and the MRO, which may be preprinted, typed, or handwritten. The MRO information must include the specific physician's name and address, as opposed to only a generic clinic, health care organization, or company name. This information is required, and it is prohibited for an employer, collector, service agent or any other party to omit it. In addition, a C/TPA's name, address, fax number, and telephone number may be included, but is not required. The employer may use a C/TPA's address in place of its own, but must continue to include its name, telephone number, and fax number.

(3) As an employer, you may add the name of the DOT agency under whose authority the test occurred as part of the employer information.

(4) As a collector, you may use a CCF with your name, address, telephone number, and fax number preprinted, but under no circumstances may you sign the form before the collection event.

(d) Under no circumstances may the CCF transmit personal identifying information about an employee (other than a social security number (SSN) or other employee identification (ID) number) to a laboratory.

(e) As an employer, you may use an equivalent foreign-language version of the CCF approved by ODAPC. You may use such a non-English language form only in a situation where both the employee and collector understand and can use the form in that language.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41950, Aug. 9, 2001]

§ 40.47 May employers use the CCF for non-Federal collections or non-Federal forms for DOT collections?

(a) No, as an employer, you are prohibited from using the CCF for non-Federal urine collections. You are also prohibited from using non-Federal forms for DOT urine collections. Doing either subjects you to enforcement action under DOT agency regulations.

(b) (1) In the rare case where the collector, either by mistake or as the only means to conduct a test under difficult circumstances (e.g., post-accident or reasonable suspicion test with insufficient time to obtain the CCF), uses a non-Federal form for a DOT collection, the use of a non-Federal form does not present a reason for the laboratory to reject the specimen for testing or for an MRO to cancel the result.

(2) The use of the non-Federal form is a "correctable flaw." As an MRO, to correct the problem you must follow the procedures of §40.205(b)(2).

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41950, Aug. 9, 2001]

§ 40.49 What materials are used to collect urine specimens?

For each DOT drug test, you must use a collection kit meeting the requirements of Appendix A of this part.

§ 40.51 What materials are used to send urine specimens to the laboratory?

(a) Except as provided in paragraph (b) of this section, you must use a shipping container that adequately protects the specimen bottles from shipment damage in the transport of specimens from the collection site to the laboratory.

(b) You are not required to use a shipping container if a laboratory courier hand-delivers the specimens from the collection site to the laboratory.

Subpart E - Urine Specimen Collections

§ 40.61 What are the preliminary steps in the collection process?

As the collector, you must take the following steps before actually beginning a collection:

(a) When a specific time for an employee's test has been scheduled, or the collection site is at the employee's work site, and the employee does not appear at the collection site at the scheduled time, contact the DER to determine the appropriate interval within which the DER has determined the employee is authorized to arrive. If the employee's arrival is delayed beyond that time, you must notify the DER that the employee has not reported for testing. In a situation where a C/TPA has notified an owner/operator or other individual employee to report for testing and the employee does not appear, the C/TPA must notify the employee that he or she has refused to test (see §40.191(a)(1)).

(b) Ensure that, when the employee enters the collection site, you begin the testing process without undue delay. For example, you must not wait because the employee says he or she is not ready or is unable to urinate or because an authorized employer or employee representative is delayed in arriving.

(1) If the employee is also going to take a DOT alcohol test, you must, to the greatest extent practicable, ensure that the alcohol test is completed before the urine collection process begins.

Example to Paragraph (b)(1): An employee enters the test site for both a drug and an alcohol test. Normally, the collector would wait until the BAT had completed the alcohol test process before beginning the drug test process. However, there are some situations in which an exception to this normal practice would be reasonable. One such situation might be if several people were waiting for the BAT to conduct alcohol tests, but a drug testing collector in the same facility were free. Someone waiting might be able to complete a drug test without unduly delaying his or her alcohol test. Collectors and BATs should work together, however, to ensure that post-accident and reasonable suspicion alcohol tests happen as soon as possible (e.g., by moving the employee to the head of the line for alcohol tests).

(2) If the employee needs medical attention (e.g., an injured employee in an emergency medical facility who is required to have a post-accident test), do not delay this treatment to collect a specimen.

(3) You must not collect, by catheterization or other means, urine from an unconscious employee to conduct a drug test under this part. Nor may you catheterize a conscious employee. However, you must inform an employee who normally voids through self-catheterization that the employee is required to provide a specimen in that manner.

(4) If, as an employee, you normally void through self-catheterization, and decline to do so, this constitutes a refusal to test.

(c) Require the employee to provide positive identification. You must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employed individual) or a Federal, state, or local government (e.g., a driver's license). You may not accept faxes or photocopies of identification. Positive identification by an employer representative (not a co-worker or another employee being tested) is also acceptable. If the employee cannot produce positive identification, you must contact a DER to verify the identity of the employee.

(d) If the employee asks, provide your identification to the employee. Your identification must include your name and your employer's name, but does not have to include your picture, address, or telephone number.

(e) Explain the basic collection procedure to the employee, including showing the employee the instructions on the back of the CCF.

(f) Direct the employee to remove outer clothing (e.g., coveralls, jacket, coat, hat) that could be used to conceal items or substances that could be used to tamper with a specimen. You must also direct the employee to leave these garments and any briefcase, purse, or other personal belongings with you or in a mutually agreeable location. You must advise the employee that failure to comply with your directions constitutes a refusal to test.

(1) If the employee asks for a receipt for any belongings left with you, you must provide one.

(2) You must allow the employee to keep his or her wallet.

(3) You must not ask the employee to remove other clothing (e.g., shirts, pants, dresses, underwear), to remove all clothing, or to change into a hospital or examination gown (unless the urine collection is being accomplished simultaneously with a DOT agency-authorized medical examination).

(4) You must direct the employee to empty his or her pockets and display the items in them to ensure that no items are present which could be used to adulterate the specimen. If nothing is there that can be used to adulterate a specimen, the employee can place the items back into his or her pockets. As the employee, you must allow the collector to make this observation.

(5) If, in your duties under paragraph (f)(4) of this section, you find any material that could be used to tamper with a specimen, you must:

(i) Determine if the material appears to be brought to the collection site with the intent to alter the specimen, and, if it is, conduct a directly observed collection using direct observation procedures (see §40.67); or

(ii) Determine if the material appears to be inadvertently brought to the collection site (e.g., eye drops), secure and maintain it until the collection process is completed and conduct a normal (i.e., unobserved) collection.

(g) You must instruct the employee not to list medications that he or she is currently taking on the CCF. (The employee may make notes of medications on the back of the employee copy of the form for his or her own convenience, but these notes must not be transmitted to anyone else.)

§ 40.63 What steps does the collector take in the collection process before the employee provides a urine specimen?

As the collector, you must take the following steps before the employee provides the urine specimen:

(a) Complete Step 1 of the CCF.

(b) Instruct the employee to wash and dry his or her hands at this time. You must tell the employee not to wash his or her hands again until after delivering the specimen to you. You must not give the employee any further access to water or other materials that could be used to adulterate or dilute a specimen.

(c) Select, or allow the employee to select, an individually wrapped or sealed collection container from collection kit materials. Either you or the employee, with both of you present, must unwrap or break the seal of the collection container. You must not unwrap or break the seal on any specimen bottle at this time. You must not allow the employee to take anything from the collection kit into the room used for urination except the collection container.

(d) Direct the employee to go into the room used for urination, provide a specimen of at least 45 mL, not flush the toilet, and return to you with the specimen as soon as the employee has completed the void.

(1) Except in the case of an observed or a monitored collection (see §§40.67 and 40.69), neither you nor anyone else may go into the room with the employee.

(2) As the collector, you may set a reasonable time limit for voiding.

(e) You must pay careful attention to the employee during the entire collection process to note any conduct that clearly indicates an attempt to tamper with a specimen (e.g., substitute urine in plain view or an attempt to bring into the collection site an adulterant or urine substitute). If you detect such conduct, you must require that a collection take place immediately under direct observation (see §40.67) and note the conduct and the fact that the collection was observed in the “Remarks” line of the CCF (Step 2). You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

§ 40.65 What does the collector check for when the employee presents a specimen?

As a collector, you must check the following when the employee gives the collection container to you:

(a) Sufficiency of specimen. You must check to ensure that the specimen contains at least 45 mL of urine.

(1) If it does not, you must follow “shy bladder” procedures (see §40.193(b)).

(2) When you follow “shy bladder” procedures, you must discard the original specimen, unless another problem (i.e., temperature out of range, signs of tampering) also exists.

(3) You are never permitted to combine urine collected from separate voids to create a specimen.

(4) You must discard any excess urine.

(b) Temperature. You must check the temperature of the specimen no later than four minutes after the employee has given you the specimen.

(1) The acceptable temperature range is 32–38 °C/90–100 °F.

(2) You must determine the temperature of the specimen by reading the temperature strip attached to the collection container.

(3) If the specimen temperature is within the acceptable range, you must mark the “Yes” box on the CCF (Step 2).

(4) If the specimen temperature is outside the acceptable range, you must mark the “No” box and enter in the “Remarks” line (Step 2) your findings about the temperature.

(5) If the specimen temperature is outside the acceptable range, you must immediately conduct a new collection using direct observation procedures (see §40.67).

(6) In a case where a specimen is collected under direct observation because of the temperature being out of range, you must process both the original specimen and the specimen collected using direct observation and send the two sets of specimens to the laboratory. This is true even in a case in which the original specimen has insufficient volume but the temperature is out of range. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

(7) In a case where the employee refuses to provide another specimen (see §40.191(a)(3)) or refuses to provide another specimen under direct observation (see §40.191(a)(4)), you must notify the DER. As soon as you have notified the DER, you must discard any specimen the employee has provided previously during the collection procedure.

(c) Signs of tampering. You must inspect the specimen for unusual color, presence of foreign objects or material, or other signs of tampering (e.g., if you notice any unusual odor).

(1) If it is apparent from this inspection that the employee has tampered with the specimen (e.g., blue dye in the specimen, excessive foaming when shaken, smell of bleach), you must immediately conduct a new collection using direct observation procedures (see §40.67).

(2) In a case where a specimen is collected under direct observation because of showing signs of tampering, you must process both the original specimen and the specimen collected using direct observation and send the two sets of specimens to the laboratory. This is true even in a case in which the original specimen has insufficient volume but it shows signs of tampering. You must also, as soon as possible, inform the DER and collection site supervisor that a collection took place under direct observation and the reason for doing so.

(3) In a case where the employee refuses to provide a specimen under direct observation (see §40.191(a)(4)), you must discard any specimen the employee provided previously during the collection procedure. Then you must notify the DER as soon as practicable.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41950, Aug. 9, 2001]

§ 40.67 When and how is a directly observed collection conducted?

(a) As an employer, you must direct an immediate collection under direct observation with no advance notice to the employee, if:

(1) The laboratory reported to the MRO that a specimen is invalid, and the MRO reported to you that there was not an adequate medical explanation for the result;

(2) The MRO reported to you that the original positive, adulterated, or substituted result had to be cancelled because the test of the split specimen could not be performed; or

(3) The laboratory reported to the MRO that the specimen was negative-dilute with a creatinine concentration greater than or equal to 2 mg/dL but less than or equal to 5 mg/dL, and the MRO reported the specimen to you as negative-dilute and that a second collection must take place under direct observation (see §40.197(b)(1)).

(b) As an employer, you must direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.

(c) As a collector, you must immediately conduct a collection under direct observation if:

(1) You are directed by the DER to do so (see paragraphs (a) and (b) of this section); or

(2) You observed materials brought to the collection site or the employee's conduct clearly indicates an attempt to tamper with a specimen (see §§40.61(f)(5)(i) and 40.63(e)); or

(3) The temperature on the original specimen was out of range (see §40.65(b)(5)); or (4) The original specimen appeared to have been tampered with (see §40.65(c)(1)).

(d)(1) As the employer, you must explain to the employee the reason for a directly observed collection under paragraph (a) or (b) of this section.

(2) As the collector, you must explain to the employee the reason, if known, under this part for a directly observed collection under paragraphs (c)(1) through (3) of this section.

(e) As the collector, you must complete a new CCF for the directly observed collection.

(1) You must mark the “reason for test” block (Step 1) the same as for the first collection.

(2) You must check the “Observed, (Enter Remark)” box and enter the reason (see §40.67(b)) in the “Remarks” line (Step 2).

(f) In a case where two sets of specimens are being sent to the laboratory because of suspected tampering with the specimen at the collection site, enter on the “Remarks” line of the CCF (Step 2) for each specimen a notation to this effect (e.g., collection 1 of 2, or 2 of 2) and the specimen ID number of the other specimen.

(g) As the collector, you must ensure that the observer is the same gender as the employee. You must never permit an opposite gender person to act as the observer. The observer can be a different person from the collector and need not be a qualified collector.

(h) As the collector, if someone else is to observe the collection (e.g., in order to ensure a same gender observer), you must verbally instruct that person to follow procedures at paragraphs (i) and (j) of this section. If you, the collector, are the observer, you too must follow these procedures.

(i) As the observer, you must request the employee to raise his or her shirt, blouse, or dress/skirt, as appropriate, above the waist; and lower clothing and underpants to show you, by turning around, that they do not have a prosthetic device. After you have determined that the employee does not have such a device, you may permit the employee to return clothing to its proper position for observed urination.

(j) As the observer, you must watch the employee urinate into the collection container. Specifically, you are to watch the urine go from the employee's body into the collection container.

(k) As the observer but not the collector, you must not take the collection container from the employee, but you must observe the specimen as the employee takes it to the collector.

(l) As the collector, when someone else has acted as the observer, you must include the observer's name in the “Remarks” line of the CCF (Step 2).

(m) As the employee, if you decline to allow a directly observed collection required or permitted under this section to occur, this is a refusal to test.

(n) As the collector, when you learn that a directly observed collection should have been collected but was not, you must inform the employer that it must direct the employee to have an immediate recollection under direct observation.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41950, Aug. 9, 2001; 68 FR 31626, May 28, 2003; 69 FR 64867, Nov.9, 2004; 73 FR 35970, June 25, 2008; 73 FR 70283, November 20, 2008; 74 FR 37949, July 30, 2009]

§ 40.69 How is a monitored collection conducted?

(a) As the collector, you must secure the room being used for the monitored collection so that no one except the employee and the monitor can enter it until after the collection has been completed.

(b) As the collector, you must ensure that the monitor is the same gender as the employee, unless the monitor is a medical professional (e.g., nurse, doctor, physician's assistant, technologist, or technician licensed or certified to practice in the jurisdiction in which the collection takes place). The monitor can be a different person from the collector and need not be a qualified collector.

(c) As the collector, if someone else is to monitor the collection (e.g., in order to ensure a same-gender monitor), you must verbally instruct that person to follow the procedures of paragraphs (d) and (e) of this section. If you, the collector, are the monitor, you must follow these procedures.

(d) As the monitor, you must not watch the employee urinate into the collection container. If you hear sounds or make other observations indicating an attempt to tamper with a specimen, there must be an additional collection under direct observation (see §§40.63(e), 40.65(c), and 40.67(b)).

(e) As the monitor, you must ensure that the employee takes the collection container directly to the collector as soon as the employee has exited the enclosure.

(f) As the collector, when someone else has acted as the monitor, you must note that person's name in the “Remarks” line of the CCF (Step 2).

(g) As the employee being tested, if you decline to permit a collection authorized under this section to be monitored, it is a refusal to test.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001]

§ 40.71 How does the collector prepare the specimens?

(a) All collections under DOT agency drug testing regulations must be split specimen collections.

(b) As the collector, you must take the following steps, in order, after the employee brings the urine specimen to you. You must take these steps in the presence of the employee.

(1) Check the box on the CCF (Step 2) indicating that this was a split specimen collection.

(2) You, not the employee, must first pour at least 30 mL of urine from the collection container into one specimen bottle, to be used for the primary specimen.

(3) You, not the employee, must then pour at least 15 mL of urine from the collection container into the second specimen bottle to be used for the split specimen.

(4) You, not the employee, must place and secure (i.e., tighten or snap) the lids/caps on the bottles.

(5) You, not the employee, must seal the bottles by placing the tamper-evident bottle seals over the bottle caps/lids and down the sides of the bottles.

(6) You, not the employee, must then write the date on the tamper-evident bottle seals.

(7) You must then ensure that the employee initials the tamper-evident bottle seals for the purpose of certifying that the bottles contain the specimens he or she provided. If the employee fails or refuses to do so, you must note this in the “Remarks” line of the CCF (Step 2) and complete the collection process.

(8) You must discard any urine left over in the collection container after both specimen bottles have been appropriately filled and sealed. There is one exception to this requirement: you may use excess urine to conduct clinical tests (e.g., protein, glucose) if the collection was conducted in conjunction with a physical examination required by a DOT agency regulation. Neither you nor anyone else may conduct further testing (such as adulteration testing) on this excess urine and the employee has no legal right to demand that the excess urine be turned over to the employee.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001]

§ 40.73 How is the collection process completed?

(a) As the collector, you must do the following things to complete the collection process. You must complete the steps called for in paragraphs (a)(1) through (a)(7) of this section in the employee's presence.

(1) Direct the employee to read and sign the certification statement on Copy 2 (Step 5) of the CCF and provide date of birth, printed name, and day and evening contact telephone numbers. If the employee refuses to sign the CCF or to provide date of birth, printed name, or telephone numbers, you must note this in the “Remarks” line (Step 2) of the CCF, and complete the collection. If the employee refuses to fill out any information, you must, as a minimum, print the employee's name in the appropriate place.

(2) Complete the chain of custody on the CCF (Step 4) by printing your name (note: you may pre-print your name), recording the time and date of the collection, signing the statement, and entering the name of the delivery service transferring the specimen to the laboratory,

(3) Ensure that all copies of the CCF are legible and complete.

(4) Remove Copy 5 of the CCF and give it to the employee.

(5) Place the specimen bottles and Copy 1 of the CCF in the appropriate pouches of the plastic bag.

(6) Secure both pouches of the plastic bag.

(7) Advise the employee that he or she may leave the collection site.

(8) To prepare the sealed plastic bag containing the specimens and CCF for shipment you must:

(i) Place the sealed plastic bag in a shipping container (e.g., standard courier box) designed to minimize the possibility of damage during shipment. (More than one sealed plastic bag can be placed into a single shipping container if you are doing multiple collections.)

(ii) Seal the container as appropriate.

(iii) If a laboratory courier hand-delivers the specimens from the collection site to the laboratory, prepare the sealed plastic bag for shipment as directed by the courier service.

(9) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must fax or otherwise transmit these copies to the MRO and DER within 24 hours or during the next business day. Keep Copy 3 for at least 30 days, unless otherwise specified by applicable DOT agency regulations.

(b) As a collector or collection site, you must ensure that each specimen you collect is shipped to a laboratory as quickly as possible, but in any case within 24 hours or during the next business day.

[65 FR 79526, Dec. 19, 2000, as amended at 71 FR 49384, Aug. 23, 2006]

Subpart F - Drug Testing Laboratories

§ 40.81 What laboratories may be used for DOT drug testing?

(a) As a drug testing laboratory located in the U.S., you are permitted to participate in DOT drug testing only if you are certified by HHS under the National Laboratory Certification Program (NLCP) for all testing required under this part.

(b) As a drug testing laboratory located in Canada or Mexico which is not certified by HHS under the NLCP, you are permitted to participate in DOT drug testing only if:

(1) The DOT, based on a written recommendation from HHS, has approved your laboratory as meeting HHS laboratory certification standards or deemed your laboratory fully equivalent to a laboratory meeting HHS laboratory certification standards for all testing required under this part; or

(2) The DOT, based on a written recommendation from HHS, has recognized a Canadian or Mexican certifying organization as having equivalent laboratory certification standards and procedures to those of HHS, and the Canadian or Mexican certifying organization has certified your laboratory under those equivalent standards and procedures.

(c) As a laboratory participating in the DOT drug testing program, you must comply with the requirements of this part. You must also comply with all applicable requirements of HHS in testing DOT specimens, whether or not the HHS requirements are explicitly stated in this part.

(d) If DOT determines that you are in noncompliance with this part, you could be subject to PIE proceedings under Subpart R of this part. If the Department issues a PIE with respect to you, you are ineligible to

participate in the DOT drug testing program even if you continue to meet the requirements of paragraph (a) or (b) of this section.

§ 40.83 How do laboratories process incoming specimens?

As the laboratory, you must do the following when you receive a DOT specimen:

(a) You are authorized to receive only the laboratory copy of the CCF. You are not authorized to receive other copies of the CCF nor any copies of the alcohol testing form.

(b) You must comply with applicable provisions of the HHS Guidelines concerning accessioning and processing urine drug specimens.

(c) You must inspect each specimen and CCF for the following "fatal flaws:"

(1) The specimen ID numbers on the specimen bottle and the CCF do not match;

(2) The specimen bottle seal is broken or shows evidence of tampering, unless a split specimen can be redesignated (see paragraph (h) of this section);

(3) The collector's printed name and signature are omitted from the CCF; and

(4) There is an insufficient amount of urine in the primary bottle for analysis, unless the specimens can be redesignated (see paragraph (h) of this section).

(d) When you find a specimen meeting the criteria of paragraph (c) of this section, you must document your findings and stop the testing process. Report the result in accordance with §40.97(a)(3) .

(e) You must inspect each CCF for the presence of the collector's signature on the certification statement in Step 4 of the CCF. Upon finding that the signature is omitted, document the flaw and continue the testing process.

(1) In such a case, you must retain the specimen for a minimum of 5 business days from the date on which you initiated action to correct the flaw.

(2) You must then attempt to correct the flaw by following the procedures of §40.205(b)(1).

(3) If the flaw is not corrected, report the result as rejected for testing in accordance with §40.97(a)(3).

(f) If you determine that the specimen temperature was not checked and the "Remarks" line did not contain an entry regarding the temperature being outside of range, you must then attempt to correct the problem by following the procedures of §40.208.

(1) In such a case, you must continue your efforts to correct the problem for five business days, before you report the result.

(2) When you have obtained the correction, or five business days have elapsed, report the result in accordance with §40.97(a).

(g) If you determine that a CCF that fails to meet the requirements of §40.45(a) (e.g., a non-Federal form or an expired Federal form was used for the collection), you must attempt to correct the use of the improper form by following the procedures of §40.205(b)(2).

(1) In such a case, you must retain the specimen for a minimum of 5 business days from the date on which you initiated action to correct the problem.

(2) If the problem(s) is not corrected, you must reject the test and report the result in accordance with §40.97(a)(3).

(h) If the CCF is marked indicating that a split specimen collection was collected and if the split specimen does not accompany the primary, has leaked, or is otherwise unavailable for testing, you must still test the primary specimen and follow appropriate procedures outlined in §40.175(b) regarding the unavailability of the split specimen for testing.

(1) The primary specimen and the split specimen can be redesignated (i.e., Bottle B is redesignated as Bottle A, and vice-versa) if:

(i) The primary specimen appears to have leaked out of its sealed bottle and the laboratory believes a sufficient amount of urine exists in the split specimen to conduct all appropriate primary laboratory testing; or

(ii) The primary specimen is labeled as Bottle B, and the split specimen as Bottle A; or

(iii) The laboratory opens the split specimen instead of the primary specimen, the primary specimen remains sealed, and the laboratory believes a sufficient amount of urine exists in the split specimen to conduct all appropriate primary laboratory testing; or

(iv) The primary specimen seal is broken but the split specimen remains sealed and the laboratory believes a sufficient amount of urine exists in the split specimen to conduct all appropriate primary laboratory testing.

(2) In situations outlined in paragraph (g)(1) of this section, the laboratory shall mark through the "A" and write "B," then initial and date the change. A corresponding change shall be made to the other bottle by marking through the "B" and writing "A," and initialing and dating the change.

(i) A notation shall be made on Copy 1 of the CCF (Step 5a) and on any laboratory internal chain of custody documents, as appropriate, for any fatal or correctable flaw.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001; 71 FR 49384, Aug. 23, 2006; 73 FR 35970, June 25, 2008]

§ 40.85 What drugs do laboratories test for?

As a laboratory, you must test for the following five drugs or classes of drugs in a DOT drug test. You must not test "DOT specimens" for any other drugs.

(a) Marijuana metabolites.
(b) Cocaine metabolites.
(c) Amphetamines.
(d) Opiate metabolites.
(e) Phencyclidine (PCP).

§ 40.87 What are the cutoff concentrations for initial and confirmation tests?

(a) As a laboratory, you must use the cutoff concentrations displayed in the following table for initial and confirmation drug tests. All cutoff concentrations are expressed in nanograms per milliliter (ng/mL). The table follows:

Type of Drug or Metabolite	Initial Test	Confirmation Test
(1) Marijuana metabolites	50	
(i) Delta-9-tetrahydrocannabinol-9-carboxylic acid (THC)		15
(2) Cocaine metabolites (Benzoylecgonine)	300	150
(3) Phencyclidine (PCP)	25	25
(4) Amphetamines	1000	
(i) Amphetamine		500
(ii) Methamphetamine		500 (Specimen must also contain amphetamine at a concentration of greater than or equal to 200 ng/mL
(5) Opiate metabolites	2000	
(i) Codeine		2000
(ii) Morphine		2000
(iii) 6acetylmorphine		10 Test for 6-AM in the specimen. Conduct this test only when specimen contains morphine at a concentration greater than or equal to 2000 ng/mL.

(b) On an initial drug test, you must report a result below the cutoff concentration as negative. If the result is at or above the cutoff concentration, you must conduct a confirmation test.

(c) On a confirmation drug test, you must report a result below the cutoff concentration as negative and a result at or above the cutoff concentration as confirmed positive.

(d) You must report quantitative values for morphine or codeine at 15,000 ng/mL or above.

§ 40.89 What is validity testing, and are laboratories required to conduct it?

(a) Specimen validity testing is the evaluation of the specimen to determine if it is consistent with normal human urine. The purpose of validity testing is to determine whether certain adulterants or foreign substances were added to the urine, if the urine was diluted, or if the specimen was substituted.

(b) As a laboratory, you must conduct validity testing.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001; 73 FR 35970, June 25, 2008]

§ 40.91 What validity tests must laboratories conduct on primary specimens?

As a laboratory, when you conduct validity testing under §40.89, you must conduct it in accordance with the requirements of this section.

(a) You must determine the creatinine concentration on each primary specimen. You must also determine its specific gravity if you find the creatinine concentration to be less than 20 mg/dL.

(b) You must determine the pH of each primary specimen.

(c) You must perform one or more validity tests for oxidizing adulterants on each primary specimen.

(d) You must perform additional validity tests on the primary specimen when the following conditions are observed:

(1) Abnormal physical characteristics;

(2) Reactions or responses characteristic of an adulterant obtained during initial or confirmatory drug tests (e.g., non-recovery of internal standards, unusual response); or

(3) Possible unidentified interfering substance or adulterant.

(e) If you determine that the specimen is invalid and HHS guidelines direct you to contact the MRO, you must contact the MRO and together decide if testing the primary specimen by another HHS certified laboratory would be useful in being able to report a positive or adulterated test result.

[65 FR 79526, Dec. 19, 2000, as amended at 69 FR 64867, Nov.9, 2004]

§ 40.93 What criteria do laboratories use to establish that a specimen is dilute or substituted?

(a) As a laboratory you must consider the primary specimen to be dilute when:

(1) The creatinine concentration is greater than or equal to 2mg/dL but less than 20 mg/dL, and

(2) The specific gravity is greater than 1.0010 but less than 1.0030 on a single aliquot.

(b) As a laboratory you must consider the primary specimen to be substituted when the creatinine concentration is less than 2 mg/dL and the specific gravity is less than or equal to 1.0010 or greater than or equal to 1.0200 on both the initial and confirmatory creatinine tests and on both the initial and confirmatory specific gravity tests on two separate aliquots.

[65 FR 79526, Dec. 19, 2000, as amended at 69 FR 64867, Nov.9, 2004]

§ 40.95 What are the adulterant cutoff concentrations for initial and confirmation tests?

(a) As a laboratory, you must use the cutoff concentrations for the initial and confirmation adulterant testing as required by the HHS Mandatory Guidelines and you must use two separate aliquots – one for the initial test and another for the confirmation test.

(b) As a laboratory, you must report results at or above the cutoffs (or for pH, at or above or below the values, as appropriate) as adulterated and provide the numerical value that supports the adulterated result.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35970, June 25, 2008]

§ 40.96 What criteria do laboratories use to establish that a specimen is invalid?

(a) As a laboratory, you must use the invalid test result criteria for the initial and confirmation testing as required by the HHS Mandatory Guidelines and you must use two separate aliquots – one for the initial test and another for the confirmation test.

(b) As a laboratory, for a specimen having an invalid result for one of the reasons outlined in the HHS Mandatory Guidelines, you must contact the MRO to discuss whether sending the specimen to another HHS certified laboratory for testing would be useful in being able to report a positive or adulterated result.

(c) As a laboratory, you must report invalid results in accordance with the invalid test result criteria as required by the HHS Guidelines and provide the numerical value that support the invalid result. For pH, report at or above or below the values, as appropriate.

(d) As a laboratory, you must report the reason a test result is invalid.

[73 FR 35970, June 25, 2008]

§ 40.97 What do laboratories report and how do they report it?

(a) As a laboratory, you must report the results for each primary specimen. The result of a primary specimen will fall into one of the following three categories. However, as a laboratory, you must report the actual results (and not the categories):

(1) Category 1: Negative Results. As a laboratory, when you find a specimen to be negative, you must report the test result as being one of the following, as appropriate:

(i) Negative, or

(ii) Negative-dilute, with numerical values for creatinine and specific gravity.

(2) Category 2: Non-negative Results. As a laboratory, when you find a specimen to be non-negative, you must report the test result as being one or more of the following, as appropriate:

(i) Positive, with drug(s)/metabolite(s) noted;

(ii) Positive-dilute, with drug(s)/ metabolite(s) noted, with numerical values for creatinine and specific gravity;

(iii) Adulterated, with adulterant(s) noted, with confirmatory test values (when applicable), and with remarks(s);

(iv) Substituted, with confirmatory test values for creatinine and specific gravity; or

(v) Invalid result, with remark(s). Laboratories will report actual values for pH results.

(3) Category 3: Rejected for Testing. As a laboratory, when you reject a specimen for testing, you must report the result as being Rejected for Testing, with remark(s).

(b) As a laboratory, you must report laboratory results directly, and only, to the MRO at his or her place of business. You must not report results to or through the DER or a service agent (e.g., C/TPA).

(1) Negative results: You must fax, courier, mail, or electronically transmit a legible image or copy of the fully-completed Copy 1 of the CCF which has been signed by the certifying scientist, or you may provide the laboratory results report electronically (i.e., computer data file).

(i) If you elect to provide the laboratory results report, you must include the following elements, as a minimum, in the report format:

(A) Laboratory name and address;

(B) Employer's name (you may include I.D. or account number);

(C) Medical review officer's name;

(D) Specimen I.D. number;

(E) Donor's SSN or employee I.D. number, if provided;

(F) Reason for test, if provided;

(G) Collector's name and telephone number;

(H) Date of the collection;

(I) Date received at the laboratory;

(J) Date certifying scientist released the results;

(K) Certifying scientist's name;

(L) Results (e.g., positive, adulterated) as listed in paragraph (a) of this section; and

(M) Remarks section, with an explanation of any situation in which a correctable flaw has been corrected.

(ii) You may release the laboratory results report only after review and approval by the certifying scientist. It must reflect the same test result information as contained on the CCF signed by the certifying scientist. The information contained in the laboratory results report may not contain information that does not appear on the CCF.

(iii) The results report may be transmitted through any means that ensures accuracy and confidentiality. You, as the laboratory, together with the MRO, must ensure that the information is adequately protected from unauthorized access or release, both during transmission and in storage.

(2) Non-negative and Rejected for Testing results: You must fax, courier, mail, or electronically transmit a legible image or copy of the fully-completed Copy 1 of the CCF that has been signed by the certifying scientist. In addition, you may provide the electronic laboratory results report following the format and procedures set forth in paragraphs (b)(1)(i) and (ii) of this section.

(c) In transmitting laboratory results to the MRO, you, as the laboratory, together with the MRO, must ensure that the information is adequately protected from unauthorized access or release, both during transmission and in storage. If the results are provided by fax, the fax connection must have a fixed telephone number accessible only to authorized individuals.

(d) You must transmit test results to the MRO in a timely manner, preferably the same day that review by the certifying scientist is completed.

(e)(1) You must provide quantitative values for confirmed positive drug test results to the MRO when the MRO requests you to do so in writing. The MRO's request may be either a general request covering all such results you send to the MRO or a specific case-by-case request.

(2) You must provide numerical values that support the adulterated (when applicable) or substituted result, without a request from the MRO.

(3) You must also provide the MRO numerical values for creatinine and specific gravity for the negative-dilute test result, without a request from the MRO.

(f) You must provide quantitative values for confirmed opiate results for morphine or codeine at 15,000 ng/mL or above, even if the MRO has not requested quantitative values for the test result.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001; 68 FR 31626, May 28, 2003; 69 FR 64867, Nov.9, 2004; 73 FR 35970, June 25, 2008]

§ 40.99 How long does the laboratory retain specimens after testing?

(a) As a laboratory testing the primary specimen, you must retain a specimen that was reported with positive, adulterated, substituted, or invalid results for a minimum of one year.

(b) You must keep such a specimen in secure, long-term, frozen storage in accordance with HHS requirements.

(c) Within the one-year period, the MRO, the employee, the employer, or a DOT agency may request in writing that you retain a specimen for an additional period of time (e.g., for the purpose of preserving evidence for litigation or a safety investigation). If you receive such a request, you must comply with it. If you do not receive such a request, you may discard the specimen at the end of the year.

(d) If you have not sent the split specimen to another laboratory for testing, you must retain the split specimen for an employee's test for the same period of time that you retain the primary specimen and under the same storage conditions.

(e) As the laboratory testing the split specimen, you must meet the requirements of paragraphs (a) through (d) of this section with respect to the split specimen.

§ 40.101 What relationship may a laboratory have with an MRO?

(a) As a laboratory, you may not enter into any relationship with an MRO that creates a conflict of interest or the appearance of a conflict of interest with the MRO's responsibilities for the employer. You may not derive any financial benefit by having an employer use a specific MRO.

(b) The following are examples of relationships between laboratories and MROs that the Department regards as creating conflicts of interest, or the appearance of such conflicts. This following list of examples is not intended to be exclusive or exhaustive:

(1) The laboratory employs an MRO who reviews test results produced by the laboratory;

(2) The laboratory has a contract or retainer with the MRO for the review of test results produced by the laboratory;

(3) The laboratory designates which MRO the employer is to use, gives the employer a slate of MROs from which to choose, or recommends certain MROs;

(4) The laboratory gives the employer a discount or other incentive to use a particular MRO;

(5) The laboratory has its place of business co-located with that of an MRO or MRO staff who review test results produced by the laboratory; or

(6) The laboratory permits an MRO, or an MRO's organization, to have a financial interest in the laboratory.

§ 40.103 What are the requirements for submitting blind specimens to a laboratory?

(a) As an employer or C/TPA with an aggregate of 2000 or more DOT-covered employees, you must send blind specimens to laboratories you use. If you have an aggregate of fewer than 2000 DOT-covered employees, you are not required to provide blind specimens.

(b) To each laboratory to which you send at least 100 specimens in a year, you must transmit a number of blind specimens equivalent to one percent of the specimens you send to that laboratory, up to a maximum of 50 blind specimens in each quarter (i.e., January–March, April–June, July–September, October–December). As a C/TPA, you must apply this percentage to the total number of DOT-covered employees' specimens you send to the laboratory. Your blind specimen submissions must be evenly spread throughout the year. The following examples illustrate how this requirement works:

Example 1 to Paragraph (b). You send 2500 specimens to Lab X in Year 1. In this case, you would send 25 blind specimens to Lab X in Year 1. To meet the even distribution requirement, you would send 6 in each of three quarters and 7 in the other.

Example 2 to Paragraph (b). You send 2000 specimens to Lab X and 1000 specimens to Lab Y in Year 1. In this case, you would send 20 blind specimens to Lab X and 10 to Lab Y in Year 1. The even distribution requirement would apply in a similar way to that described in Example 1.

Example 3 to Paragraph (b). Same as Example 2, except that you also send 20 specimens to Lab Z. In this case, you would send blind specimens to Labs X and Y as in Example 2. You would not have to send any blind specimens to Lab Z, because you sent fewer than 100 specimens to Lab Z.

Example 4 to Paragraph (b). You are a C/TPA sending 2000 specimens to Lab X in Year 1. These 2000 specimens represent 200 small employers who have an average of 10 covered employees each. In this case you—not the individual employers—send 20 blind specimens to Lab X in Year 1, again ensuring even distribution. The individual employers you represent are not required to provide any blind specimens on their own.

Example 5 to Paragraph (b). You are a large C/TPA that sends 40,000 specimens to Lab Y in Year 1. One percent of that figure is 400. However, the 50 blind specimen per quarter "cap" means that you need send only 50 blind specimens per quarter, rather than the 100 per quarter you would have to send to meet the one percent rate. Your annual total would be 200, rather than 400, blind specimens.

(c) Approximately 75 percent of the specimens you submit must be negative (i.e., containing no drugs, nor adulterated or substituted). Approximately 15 percent must be positive for one or more of the five drugs involved in DOT tests, and approximately 10 percent must either be adulterated with a substance cited in HHS guidance or substituted (i.e., having specific gravity and creatinine meeting the criteria of §40.93(b)).

(1) All negative, positive, adulterated, and substituted blind specimens you submit must be certified by the supplier and must have supplier-provided expiration dates.

(2) Negative specimens must be certified by immunoassay and GC/MS to contain no drugs.

(3) Drug positive blind specimens must be certified by immunoassay and GC/MS to contain a drug(s)/ metabolite(s) between 1.5 and 2 times the initial drug test cutoff concentration.

(4) Adulterated blind specimens must be certified to be adulterated with a specific adulterant using appropriate confirmatory validity test(s).

(5) Substituted blind specimens must be certified for creatinine concentration and specific gravity to satisfy the criteria for a substituted specimen using confirmatory creatinine and specific gravity tests, respectively.

(d) You must ensure that each blind specimen is indistinguishable to the laboratory from a normal specimen.

(1) You must submit blind specimens to the laboratory using the same channels (e.g., via a regular collection site) through which employees' specimens are sent to the laboratory.

(2) You must ensure that the collector uses a CCF, places fictional initials on the specimen bottle label/seal, indicates for the MRO on Copy 2 that the specimen is a blind specimen, and discards Copies 4 and 5 (employer and employee copies).

(3) You must ensure that all blind specimens include split specimens.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35971, June 25, 2008]

§ 40.105 What happens if the laboratory reports a result different from that expected for a blind specimen?

(a) If you are an employer, MRO, or C/TPA who submits a blind specimen, and if the result reported to the MRO is different from the result expected, you must investigate the discrepancy.

(b) If the unexpected result is a false negative, you must provide the laboratory with the expected results (obtained from the supplier of the blind specimen), and direct the laboratory to determine the reason for the discrepancy.

(c) If the unexpected result is a false positive, adulterated, or substituted result, you must provide the laboratory with the expected results (obtained from the supplier of the blind specimen), and direct the laboratory to determine the reason for the discrepancy. You must also notify ODAPC of the discrepancy by telephone (202-366-3784) or e-mail (addresses are listed on the ODAPC website, http://www.dot.gov/ost/dapc). ODAPC will notify HHS who will take appropriate action.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35971, June 25, 2008]

§ 40.107 Who may inspect laboratories?

As a laboratory, you must permit an inspection, with or without prior notice, by ODAPC, a DOT agency, or a DOT-regulated employer that contracts with the laboratory for drug testing under the DOT drug testing program, or the designee of such an employer.

§ 40.109 What documentation must the laboratory keep, and for how long?

(a) As a laboratory, you must retain all records pertaining to each employee urine specimen for a minimum of two years.

(b) As a laboratory, you must also keep for two years employer-specific data required in §40.111.

(c) Within the two-year period, the MRO, the employee, the employer, or a DOT agency may request in writing that you retain the records for an additional period of time (e.g., for the purpose of preserving evidence for litigation or a safety investigation). If you receive such a request, you must comply with it. If you do not receive such a request, you may discard the records at the end of the two-year period.

§ 40.111 When and how must a laboratory disclose statistical summaries and other information it maintains?

(a) As a laboratory, you must transmit an aggregate statistical summary, by employer, of the data listed in Appendix B to this part to the employer on a semi-annual basis.

(1) The summary must not reveal the identity of any employee.

(2) In order to avoid sending data from which it is likely that information about an employee's test result can be readily inferred, you must not send a summary if the employer has fewer than five aggregate tests results.

(3) The summary must be sent by January 20 of each year for July 1 through December 31 of the prior year.

(4) The summary must also be sent by July 20 of each year for January 1 through June 30 of the current year.

(b) When the employer requests a summary in response to an inspection, audit, or review by a DOT agency, you must provide it unless the employer had fewer than five aggregate test results. In that case, you must send the employer a report indicating that not enough testing was conducted to warrant a summary. You may transmit the summary or report by hard copy, fax, or other electronic means.

(c) You must also release information to appropriate parties as provided in §§40.329 and 40.331.

(d) As a laboratory, you must transmit an aggregate statistical summary of the data listed in Appendix C to this part to DOT on a semi-annual basis. The summary must be sent by January 31 of each year for July 1 through

December 31 of the prior year; it must be sent by July 31 of each year for January 1 through June 30 of the current year.
[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35971, June 25, 2008]

§ 40.113 Where is other information concerning laboratories found in this regulation?

You can find more information concerning laboratories in several sections of this part:
§40.3—Definition.
§40.13—Prohibition on making specimens available for other purposes.
§40.31—Conflicts of interest concerning collectors.
§40.47—Laboratory rejections of test for improper form.
§40.125—Conflicts of interest concerning MROs.
§40.175—Role of first laboratory in split specimen tests.
§40.177—Role of second laboratory in split specimen tests (drugs).
§40.179—Role of second laboratory in split specimen tests (adulterants).
§40.181—Role of second laboratory in split specimen tests (substitution).
§§40.183–40.185—Transmission of split specimen test results to MRO.
§§40.201–40.205—Role in correcting errors.
§40.329—Release of information to employees.
§40.331—Limits on release of information.
§40.355—Role with respect to other service agents.

Subpart G - Medical Review Officers and the Verification Process

§ 40.121 Who is qualified to act as an MRO?

To be qualified to act as an MRO in the DOT drug testing program, you must meet each of the requirements of this section:

(a) Credentials. You must be a licensed physician (Doctor of Medicine or Osteopathy). If you are a licensed physician in any U.S., Canadian, or Mexican jurisdiction and meet the other requirements of this section, you are authorized to perform MRO services with respect to all covered employees, wherever they are located. For example, if you are licensed as an M.D. in one state or province in the U.S., Canada, or Mexico, you are not limited to performing MRO functions in that state or province, and you may perform MRO functions for employees in other states or provinces without becoming licensed to practice medicine in the other jurisdictions.

(b) Basic knowledge. You must be knowledgeable in the following areas:

(1) You must be knowledgeable about and have clinical experience in controlled substances abuse disorders, including detailed knowledge of alternative medical explanations for laboratory confirmed drug test results.

(2) You must be knowledgeable about issues relating to adulterated and substituted specimens as well as the possible medical causes of specimens having an invalid result.

(3) You must be knowledgeable about this part, the DOT MRO Guidelines, and the DOT agency regulations applicable to the employers for whom you evaluate drug test results, and you must keep current on any changes to these materials. The DOT MRO Guidelines document is available from ODAPC (Department of Transportation, 1200 New Jersey Avenue, SE, Washington DC, 20590, 202–366–3784, or on the ODAPC web site (*http://www.dot.gov/ost/dapc*).

(c) Qualification training. You must receive qualification training meeting the requirements of this paragraph (c).

(1) Qualification training must provide instruction on the following subjects:

(i) Collection procedures for urine specimens;

(ii) Chain of custody, reporting, and recordkeeping;

(iii) Interpretation of drug and validity tests results;

(iv) The role and responsibilities of the MRO in the DOT drug testing program;

(v) The interaction with other participants in the program (e.g., DERs, SAPs); and

(vi) Provisions of this part and DOT agency rules applying to employers for whom you review test results, including changes and updates to this part and DOT agency rules, guidance, interpretations, and policies affecting the performance of MRO functions, as well as issues that MROs confront in carrying out their duties under this part and DOT agency rules.

(2) Following your completion of qualification training under paragraph (c)(1) of this section, you must satisfactorily complete an examination administered by a nationally-recognized MRO certification board or subspecialty board for medical practitioners in the field of medical review of DOT-mandated drug tests. The examination must comprehensively cover all the elements of qualification training listed in paragraph (c)(1) of this section.

(3) The following is the schedule for qualification training you must meet:

(i) If you became an MRO before August 1, 2001, and have already met the qualification training requirement, you do not have to meet it again.

(ii) If you became an MRO before August 1, 2001, but have not yet met the qualification training requirement, you must do so no later than January 31, 2003.

(iii) If you become an MRO on or after August 1, 2001, you must meet the qualification training requirement before you begin to perform MRO functions.

(d) Continuing Education. During each three-year period from the date on which you satisfactorily complete the examination under paragraph (c)(2) of this section, you must complete continuing education consisting of at least 12 professional development hours (e.g., Continuing Education Medical Units) relevant to performing MRO functions.

(1) This continuing education must include material concerning new technologies, interpretations, recent guidance, rule changes, and other information about developments in MRO practice, pertaining to the DOT program, since the time you met the qualification training requirements of this section.

(2) Your continuing education activities must include assessment tools to assist you in determining whether you have adequately learned the material.

(3) If you are an MRO who completed the qualification training and examination requirements prior to August 1, 2001, you must complete your first increment of 12 CEU hours before August 1, 2004.

(e) Documentation. You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or negotiating to use your services.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001; 73 FR 33329, June 12, 2008]

§ 40.123 What are the MRO's responsibilities in the DOT drug testing program?

As an MRO, you have the following basic responsibilities:

(a) Acting as an independent and impartial “gatekeeper” and advocate for the accuracy and integrity of the drug testing process.

(b) Providing a quality assurance review of the drug testing process for the specimens under your purview. This includes, but is not limited to:

(1) Ensuring the review of the CCF on all specimen collections for the purposes of determining whether there is a problem that may cause a test to be cancelled (see §§40.199–40.203). As an MRO, you are not required to review laboratory internal chain of custody documentation. No one is permitted to cancel a test because you have not reviewed this documentation;

(2) Providing feedback to employers, collection sites and laboratories regarding performance issues where necessary; and

(3) Reporting to and consulting with the ODAPC or a relevant DOT agency when you wish DOT assistance in resolving any program issue. As an employer or service agent, you are prohibited from limiting or attempting to limit the MRO's access to DOT for this purpose and from retaliating in any way against an MRO for discussing drug testing issues with DOT.

(c) You must determine whether there is a legitimate medical explanation for confirmed positive, adulterated, substituted, and invalid drug tests results from the laboratory.

(d) While you provide medical review of employees' test results, this part does not deem that you have established a doctor-patient relationship with the employees whose tests you review.

(e) You must act to investigate and correct problems where possible and notify appropriate parties (e.g., HHS, DOT, employers, service agents) where assistance is needed, (e.g., cancelled or problematic tests, incorrect results, problems with blind specimens).

(f) You must ensure the timely flow of test results and other information to employers.

(g) You must protect the confidentiality of the drug testing information.

(h) You must perform all your functions in compliance with this part and other DOT agency regulations.

§ 40.125 What relationship may an MRO have with a laboratory?

As an MRO, you may not enter into any relationship with an employer's laboratory that creates a conflict of interest or the appearance of a conflict of interest with your responsibilities to that employer. You may not derive any financial benefit by having an employer use a specific laboratory. For examples of relationships between laboratories and MROs that the Department views as creating a conflict of interest or the appearance of such a conflict, see §40.101(b).

§ 40.127 What are the MRO's functions in reviewing negative test results?

As the MRO, you must do the following with respect to negative drug test results you receive from a laboratory, prior to verifying the result and releasing it to the DER:

(a) Review Copy 2 of the CCF to determine if there are any fatal or correctable errors that may require you to initiate corrective action or to cancel the test (see §§40.199 and 40.203).

(b) Review the negative laboratory test result and ensure that it is consistent with the information contained on the CCF.

(c) Before you report a negative test result, you must have in your possession the following documents:

(1) Copy 2 of the CCF, a legible copy of it, or any other CCF copy containing the employee's signature; and

(2) A legible copy (fax, photocopy, image) of Copy 1 of the CCF or the electronic laboratory results report that conveys the negative laboratory test result.

(d) If the copy of the documentation provided to you by the collector or laboratory appears unclear, you must request that the collector or laboratory send you a legible copy.

(e) On Copy 2 of the CCF, place a check mark in the “Negative” box (Step 6), provide your name, and sign, initial, or stamp and date the verification statement.

(f) Report the result in a confidential manner (see §§40.163–40.167).

(g) Staff under your direct, personal supervision may perform the administrative functions of this section for you, but only you can cancel a test. If you cancel a laboratory-confirmed negative result, check the “Test Cancelled” box (Step 6) on Copy 2 of the CCF, make appropriate annotation in the “Remarks” line, provide your name, and sign, initial or stamp and date the verification statement.

(1) On specimen results that are reviewed by your staff, you are responsible for assuring the quality of their work.

(2) You are required to personally review at least 5 percent of all CCFs reviewed by your staff on a quarterly basis, including all results that required a corrective action. However, you need not review more than 500 negative results in any quarter.

(3) Your review must, as a minimum, include the CCF, negative laboratory test result, any accompanying corrective documents, and the report sent to the employer. You must correct any errors that you discover. You must take action as necessary to ensure compliance by your staff with this part and document your corrective action. You must attest to the quality assurance review by initialing the CCFs that you review.

(4) You must make these CCFs easily identifiable and retrievable by you for review by DOT agencies.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41951, Aug. 9, 2001]

§ 40.129 What are the MRO's functions in reviewing laboratory confirmed non-negative drug test results?

(a) As the MRO, you must do the following with respect to confirmed positive, adulterated, substituted, or invalid drug tests you receive from a laboratory, before you verify the result and release it to the DER:

(1) Review Copy 2 of the CCF to determine if there are any fatal or correctable errors that may require you to cancel the test (see §§40.199 and 40.203). Staff under your direct, personal supervision may conduct this administrative review for you, but only you may verify or cancel a test.

(2) Review Copy 1 of the CCF and ensure that it is consistent with the information contained on Copy 2, that the test result is legible, and that the certifying scientist signed the form. You are not required to review any other documentation generated by the laboratory during their analysis or handling of the specimen (e.g., the laboratory internal chain of custody).

(3) If the copy of the documentation provided to you by the collector or laboratory appears unclear, you must request that the collector or laboratory send you a legible copy.

(4) Except in the circumstances spelled out in §40.133, conduct a verification interview. This interview must include direct contact in person or by telephone between you and the employee. You may initiate the verification process based on the laboratory results report.

(5) Verify the test result, consistent with the requirements of §§ 40.135 through 40.145, 40.159, and 40.160, as:

(i) Negative; or

(ii) Cancelled; or

(iii) Positive, and/or refusal to test because of adulteration or substitution.

(b) Before you report a verified negative, positive, test cancelled, refusal to test because of adulteration or substitution, you must have in your possession the following documents:

(1) Copy 2 of the CCF, a legible copy of it, or any other CCF copy containing the employee's signature; and

(2) A legible copy (fax, photocopy, image) of Copy 1 of the CCF, containing the certifying scientist's signature.

(c) With respect to verified positive test results, place a check mark in the “Positive” box (Step 6) on Copy 2 of the CCF, indicate the drug(s)/ metabolite(s) detected on the “Remarks” line, sign and date the verification statement.

(d) If you cancel a laboratory confirmed positive, adulterated, substituted, or invalid drug test report, check the “test cancelled” box (Step 6) on Copy 2 of the CCF, make appropriate annotation in the “Remarks” line, sign, provide your name, and date the verification statement.

(e) Report the result in a confidential manner (see §§40.163–40.167).

(f) With respect to adulteration or substitution test results, check the “refusal to test because:” box (Step 6) on Copy 2 of the CCF, check the “Adulterated” or “Substituted” box, as appropriate, make appropriate annotation in the “Remarks” line, sign and date the verification statement.

(g) As the MRO, your actions concerning reporting confirmed positive, adulterated, or substituted results to the employer before you have completed the verification process are also governed by the stand-down provisions of §40.21 .

(1) If an employer has a stand-down policy that meets the requirements of §40.21 , you may report to the DER that you have received an employee's laboratory confirmed positive, adulterated, or substituted test result, consistent with the terms of the waiver the employer received. You must not provide any further details about the test result (e.g., the name of the drug involved).

(2) If the employer does not have a stand-down policy that meets the requirements of §40.21 , you must not inform the employer that you have received an employee's laboratory confirmed positive, adulterated, or substituted test result until you verify the test result. For example, as an MRO employed directly by a company, you must not tell anyone on the company's staff or management that you have received an employee's laboratory confirmed test result.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001; 73 FR 35971, June 25, 2008]

§ 40.131 How does the MRO or DER notify an employee of the verification process after receiving laboratory confirmed non-negative drug test results?

(a) When, as the MRO, you receive a confirmed positive, adulterated, substituted, or invalid test result from the laboratory, you must contact the employee directly (i.e., actually talk to the employee), on a confidential basis, to determine whether the employee wants to discuss the test result. In making this contact, you must explain to the employee that, if he or she declines to discuss the result, you will verify the test as positive or as a refusal to test because of adulteration or substitution, as applicable.

(b) As the MRO, staff under your personal supervision may conduct this initial contact for you.

(1) This staff contact must be limited to scheduling the discussion between you and the employee and explaining the consequences of the employee's declining to speak with you (i.e., that the MRO will verify the test without input from the employee). If the employee declines to speak with you, the staff person must document the employee's decision, including the date and time.

(2) A staff person must not gather any medical information or information concerning possible explanations for the test result.

(3) A staff person may advise an employee to have medical information (e.g., prescriptions, information forming the basis of a legitimate medical explanation for a confirmed positive test result) ready to present at the interview with the MRO.

(4) Since you are required to speak personally with the employee, face-to-face or on the phone, your staff must not inquire if the employee wishes to speak with you.

(c) As the MRO, you or your staff must make reasonable efforts to reach the employee at the day and evening telephone numbers listed on the CCF. Reasonable efforts include, as a minimum, three attempts, spaced reasonably over a 24-hour period, to reach the employee at the day and evening telephone numbers listed on the CCF. If you or your staff cannot reach the employee directly after making these efforts, you or your staff must take the following steps:

(1) Document the efforts you made to contact the employee, including dates and times. If both phone numbers are incorrect (e.g., disconnected, wrong number), you may take the actions listed in paragraph (c)(2) of this section without waiting the full 24-hour period.

(2) Contact the DER, instructing the DER to contact the employee.

(i) You must simply direct the DER to inform the employee to contact you.

(ii) You must not inform the DER that the employee has a confirmed positive, adulterated, substituted, or invalid test result.

(iii) You must document the dates and times of your attempts to contact the DER, and you must document the name of the DER you contacted and the date and time of the contact.

(d) As the DER, you must attempt to contact the employee immediately, using procedures that protect, as much as possible, the confidentiality of the MRO's request that the employee contact the MRO. If you successfully contact the employee (i.e., actually talk to the employee), you must document the date and time of the contact, and inform the MRO. You must inform the employee that he or she should contact the MRO immediately. You must also inform the employee of the consequences of failing to contact the MRO within the next 72 hours (see §40.133(a)(2)).

(1) As the DER, you must not inform anyone else working for the employer that you are seeking to contact the employee on behalf of the MRO.

(2) If, as the DER, you have made all reasonable efforts to contact the employee but failed to do so, you may place the employee on temporary medically unqualified status or medical leave. Reasonable efforts include, as a minimum, three attempts, spaced reasonably over a 24-hour period, to reach the employee at the day and evening telephone numbers listed on the CCF.

(i) As the DER, you must document the dates and times of these efforts.

(ii) If, as the DER, you are unable to contact the employee within this 24-hour period, you must leave a message for the employee by any practicable means (e.g., voice mail, e-mail, letter) to contact the MRO and inform the MRO of the date and time of this attempted contact.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001; 68 FR 31626, May 28, 2003; 69 FR 64867, Nov.9, 2004; 73 FR 35971, June 25, 2008]

§ 40.133 Without interviewing the employee, under what circumstances may the MRO verify a test result as positive, or as a refusal to test because of adulteration or substitution, or as cancelled because the test was invalid?

(a) As the MRO, you normally may verify a confirmed positive test (for any drug or drug metabolite, including opiates), or as a refusal to test because of adulteration or substitution, only after interviewing the employee as provided in §§40.135–40.145. However, there are three circumstances in which you may verify such a result without an interview:

(1) You may verify a test result as a positive or refusal to test, as applicable, if the employee expressly declines the opportunity to discuss the test with you. You must maintain complete documentation of this occurrence, including notation of informing, or attempting to inform, the employee of the consequences of not exercising the option to speak with you.

(2) You may verify a test result as a positive or refusal to test, as applicable, if the DER has successfully made and documented a contact with the employee and instructed the employee to contact you and more than 72 hours have passed since the time the DER contacted the employee.

(3) You may verify a test result as a positive or refusal to test, as applicable, if neither you nor the DER, after making and documenting all reasonable efforts, has been able to contact the employee within ten days of the date on which the MRO receives the confirmed test result from the laboratory.

(b) As the MRO, you may verify an invalid test result as cancelled (with instructions to recollect immediately under direct observation) without interviewing the employee, as provided at § 40.159:

(1) If the employee expressly declines the opportunity to discuss the test with you;

(2) If the DER has successfully made and documented a contact with the employee and instructed the employee to contact you and more than 72 hours have passed since the time the DER contacted the employee; or

(3) If neither you nor the DER, after making and documenting all reasonable efforts, has been able to contact the employee within ten days of the date on which you received the confirmed invalid test result from the laboratory.

(c) As the MRO, after you verify a test result as a positive or as a refusal to test under this section, you must document the date and time and reason, following the instructions in § 40.163. For a cancelled test due to an invalid result under this section, you must follow the instructions in § 40.159(a)(5).

(d) As the MRO, after you have verified a test result under this section and reported the result to the DER, you must allow the employee to present information to you within 60 days of the verification to document that serious illness, injury, or other circumstances unavoidably precluded contact with the MRO and/or DER in the times provided. On the basis of such information, you may reopen the verification, allowing the employee to present information concerning whether there is a legitimate medical explanation of the confirmed test result.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35971, June 25, 2008]

§ 40.135 What does the MRO tell the employee at the beginning of the verification interview?

(a) As the MRO, you must tell the employee that the laboratory has determined that the employee's test result was positive, adulterated, substituted, or invalid, as applicable. You must also tell the employee of the drugs for which his or her specimen tested positive, or the basis for the finding of adulteration or substitution.

(b) You must explain the verification interview process to the employee and inform the employee that your decision will be based on information the employee provides in the interview.

(c) You must explain that, if further medical evaluation is needed for the verification process, the employee must comply with your request for this evaluation and that failure to do so is equivalent of expressly declining to discuss the test result.

(d) As the MRO, you must warn an employee who has a confirmed positive, adulterated, substituted or invalid test that you are required to provide to third parties drug test result information and medical information

affecting the performance of safety-sensitive duties that the employee gives you in the verification process without the employee's consent (see §40.327).

(1) You must give this warning to the employee before obtaining any medical information as part of the verification process.

(2) For purposes of this paragraph (d), medical information includes information on medications or other substances affecting the performance of safety-sensitive duties that the employee reports using or medical conditions the employee reports having.

(3) For purposes of this paragraph (d), the persons to whom this information may be provided include the employer, a SAP evaluating the employee as part of the return to duty process (see §40.293(g)), DOT, another Federal safety agency (e.g., the NTSB), or any state safety agency as required by state law.

(e) You must also advise the employee that, after informing any third party about any medication the employee is using pursuant to a legally valid prescription under the Controlled Substances Act, you will allow 5 days for the employee to have the prescribing physician contact you to determine if the medication can be changed to one that does not make the employee medically unqualified or does not pose a significant safety risk. If, as an MRO, you receive such information from the prescribing physician, you must transmit this information to any third party to whom you previously provided information about the safety risks of the employee's other medication.
[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001]

§ 40.137 On what basis does the MRO verify test results involving marijuana, cocaine, amphetamines, or PCP?

(a) As the MRO, you must verify a confirmed positive test result for marijuana, cocaine, amphetamines, and/or PCP unless the employee presents a legitimate medical explanation for the presence of the drug(s)/metabolite(s) in his or her system.

(b) You must offer the employee an opportunity to present a legitimate medical explanation in all cases.

(c) The employee has the burden of proof that a legitimate medical explanation exists. The employee must present information meeting this burden at the time of the verification interview. As the MRO, you have discretion to extend the time available to the employee for this purpose for up to five days before verifying the test result, if you determine that there is a reasonable basis to believe that the employee will be able to produce relevant evidence concerning a legitimate medical explanation within that time.

(d) If you determine that there is a legitimate medical explanation, you must verify the test result as negative. Otherwise, you must verify the test result as positive.

(e) In determining whether a legitimate medical explanation exists, you may consider the employee's use of a medication from a foreign country. You must exercise your professional judgment consistently with the following principles:

(1) There can be a legitimate medical explanation only with respect to a substance that is obtained legally in a foreign country.

(2) There can be a legitimate medical explanation only with respect to a substance that has a legitimate medical use. Use of a drug of abuse (e.g., heroin, PCP, marijuana) or any other substance (see §40.151(f) and (g)) that cannot be viewed as having a legitimate medical use can never be the basis for a legitimate medical explanation, even if the substance is obtained legally in a foreign country.

(3) Use of the substance can form the basis of a legitimate medical explanation only if it is used consistently with its proper and intended medical purpose.

(4) Even if you find that there is a legitimate medical explanation under this paragraph (e) and verify a test negative, you may have a responsibility to raise fitness-for-duty considerations with the employer (see §40.327).

§ 40.139 On what basis does the MRO verify test results involving opiates?

As the MRO, you must proceed as follows when you receive a laboratory confirmed positive opiate result:

(a) If the laboratory detects the presence of 6-acetylmorphine (6-AM) in the specimen, you must verify the test result positive.

(b) In the absence of 6-AM, if the laboratory detects the presence of either morphine or codeine at 15,000 ng/mL or above, you must verify the test result positive unless the employee presents a legitimate medical explanation for the presence of the drug or drug metabolite in his or her system, as in the case of other drugs (see §40.137). Consumption of food products (e.g., poppy seeds) must not be considered a legitimate medical explanation for the employee having morphine or codeine at these concentrations.

(c) For all other opiate positive results, you must verify a confirmed positive test result for opiates only if you determine that there is clinical evidence, in addition to the urine test, of unauthorized use of any opium, opiate, or opium derivative (i.e., morphine, heroin, or codeine).

(1) As an MRO, it is your responsibility to use your best professional and ethical judgement and discretion to determine whether there is clinical evidence of unauthorized use of opiates. Examples of information that you may consider in making this judgement include, but are not limited to, the following:

(i) Recent needle tracks;

(ii) Behavioral and psychological signs of acute opiate intoxication or withdrawal;

(iii) Clinical history of unauthorized use recent enough to have produced the laboratory test result;

(iv) Use of a medication from a foreign country. See §40.137(e) for guidance on how to make this determination.

(2) In order to establish the clinical evidence referenced in paragraphs (c)(1)(i) and (ii) of this section, personal observation of the employee is essential.

(i) Therefore, you, as the MRO, must conduct, or cause another physician to conduct, a face-to-face examination of the employee.

(ii) No face-to-face examination is needed in establishing the clinical evidence referenced in paragraph (c)(1)(iii) or (iv) of this section.

(3) To be the basis of a verified positive result for opiates, the clinical evidence you find must concern a drug that the laboratory found in the specimen. (For example, if the test confirmed the presence of codeine, and the employee admits to unauthorized use of hydrocodone, you do not have grounds for verifying the test positive. The admission must be for the substance that was found).

(4) As the MRO, you have the burden of establishing that there is clinical evidence of unauthorized use of opiates referenced in this paragraph (c). If you cannot make this determination (e.g., there is not sufficient clinical evidence or history), you must verify the test as negative. The employee does not need to show you that a legitimate medical explanation exists if no clinical evidence is established.

§ 40.141 How does the MRO obtain information for the verification decision?

As the MRO, you must do the following as you make the determinations needed for a verification decision:

(a) You must conduct a medical interview. You must review the employee's medical history and any other relevant biomedical factors presented to you by the employee. You may direct the employee to undergo further medical evaluation by you or another physician.

(b) If the employee asserts that the presence of a drug or drug metabolite in his or her specimen results from taking prescription medication, you must review and take all reasonable and necessary steps to verify the authenticity of all medical records the employee provides. You may contact the employee's physician or other relevant medical personnel for further information.

§ 40.143 [Reserved]

§ 40.145 On what basis does the MRO verify test results involving adulteration or substitution?

(a) As an MRO, when you receive a laboratory report that a specimen is adulterated or substituted, you must treat that report in the same way you treat the laboratory's report of a confirmed positive test for a drug or drug metabolite.

(b) You must follow the same procedures used for verification of a confirmed positive test for a drug or drug metabolite (see §§40.129–40.135, 40.141, 40.151), except as otherwise provided in this section.

(c) In the verification interview, you must explain the laboratory findings to the employee and address technical questions or issues the employee may raise.

(d) You must offer the employee the opportunity to present a legitimate medical explanation for the laboratory findings with respect to presence of the adulterant in, or the creatinine and specific gravity findings for, the specimen.

(e) The employee has the burden of proof that there is a legitimate medical explanation.

(1) To meet this burden in the case of an adulterated specimen, the employee must demonstrate that the adulterant found by the laboratory entered the specimen through physiological means.

(2) To meet this burden in the case of a substituted specimen, the employee must demonstrate that he or she did produce or could have produced urine through physiological means, meeting the creatinine concentration criterion of less than 2 mg/dL and the specific gravity of less than or equal to 1.0010 or greater than or equal to 1.0200 (see §40.93(b)).

(3) The employee must present information meeting this burden at the time of the verification interview. As the MRO, you have discretion to extend the time available to the employee for this purpose for up to five days before verifying the specimen, if you determine that there is a reasonable basis to believe that the employee will be able to produce relevant evidence supporting a legitimate medical explanation within that time.

(f) As the MRO or the employer, you are not responsible for arranging, conducting, or paying for any studies, examinations or analyses to determine whether a legitimate medical explanation exists.

(g) As the MRO, you must exercise your best professional judgment in deciding whether the employee has established a legitimate medical explanation.

(1) If you determine that the employee's explanation does not present a reasonable basis for concluding that there may be a legitimate medical explanation, you must report the test to the DER as a verified refusal to test because of adulteration or substitution, as applicable.

(2) If you believe that the employee's explanation may present a reasonable basis for concluding that there is a legitimate medical explanation, you must direct the employee to obtain, within the five-day period set forth in paragraph (e)(3) of this section, a further medical evaluation. This evaluation must be performed by a licensed physician (the "referral physician"), acceptable to you, with expertise in the medical issues raised by the employee's explanation. (The MRO may perform this evaluation if the MRO has appropriate expertise.)

(i) As the MRO or employer, you are not responsible for finding or paying a referral physician. However, on request of the employee, you must provide reasonable assistance to the employee's efforts to find such a physician. The final choice of the referral physician is the employee's, as long as the physician is acceptable to you.

(ii) As the MRO, you must consult with the referral physician, providing guidance to him or her concerning his or her responsibilities under this section. As part of this consultation, you must provide the following information to the referral physician:

(A) That the employee was required to take a DOT drug test, but the laboratory reported that the specimen was adulterated or substituted, which is treated as a refusal to test;

(B) The consequences of the appropriate DOT agency regulation for refusing to take the required drug test;

(C) That the referral physician must agree to follow the requirements of paragraphs (g)(3) through (g)(4) of this section; and

(D) That the referral physician must provide you with a signed statement of his or her recommendations.

(3) As the referral physician, you must evaluate the employee and consider any evidence the employee presents concerning the employee's medical explanation. You may conduct additional tests to determine whether there is a legitimate medical explanation. Any additional urine tests must be performed in an HHS-certified laboratory.

(4) As the referral physician, you must then make a written recommendation to the MRO about whether the MRO should determine that there is a legitimate medical explanation. As the MRO, you must seriously consider and assess the referral physician's recommendation in deciding whether there is a legitimate medical explanation.

(5) As the MRO, if you determine that there is a legitimate medical explanation, you must cancel the test and inform ODAPC in writing of the determination and the basis for it (e.g., referral physician's findings, evidence produced by the employee).

(6) As the MRO, if you determine that there is not a legitimate medical explanation, you must report the test to the DER as a verified refusal to test because of adulteration or substitution.

(h) The following are examples of types of evidence an employee could present to support an assertion of a legitimate medical explanation for a substituted result.

(1) Medically valid evidence demonstrating that the employee is capable of physiologically producing urine meeting the creatinine and specific gravity criteria of §40.93(b) .

(i) To be regarded as medically valid, the evidence must have been gathered using appropriate methodology and controls to ensure its accuracy and reliability.

(ii) Assertion by the employee that his or her personal characteristics (e.g., with respect to race, gender, weight, diet, working conditions) are responsible for the substituted result does not, in itself, constitute a legitimate medical explanation. To make a case that there is a legitimate medical explanation, the employee must present evidence showing that the cited personal characteristics actually result in the physiological production of urine meeting the creatinine and specific gravity criteria of §40.93(b) .

(2) Information from a medical evaluation under paragraph (g) of this section that the individual has a medical condition that has been demonstrated to cause the employee to physiologically produce urine meeting the creatinine and specific gravity criteria of §40.93(b) .

(i) A finding or diagnosis by the physician that an employee has a medical condition, in itself, does not constitute a legitimate medical explanation.

(ii) To establish there is a legitimate medical explanation, the employee must demonstrate that the cited medical condition actually results in the physiological production of urine meeting the creatinine and specific gravity criteria of §40.93(b) .

[65 FR 79526, Dec. 19, 2000, as amended at 68 FR 31626, May 28, 2003; 69 FR 64867, Nov.9, 2004]

§ 40.147 [Reserved]

§ 40.149 May the MRO change a verified drug test result?

(a) As the MRO, you may change a verified test result only in the following situations:

(1) When you have reopened a verification that was done without an interview with an employee (see §40.133(d)).

(2) If you receive information, not available to you at the time of the original verification, demonstrating that the laboratory made an error in identifying (e.g., a paperwork mistake) or testing (e.g., a false positive or negative) the employee's primary or split specimen. For example, suppose the laboratory originally reported a positive test result for Employee X and a negative result for Employee Y. You verified the test results as reported to you. Then the laboratory notifies you that it mixed up the two test results, and X was really negative and Y was really positive. You would change X's test result from positive to negative and contact Y to conduct a verification interview.

(3) If, within 60 days of the original verification decision—

(i) You receive information that could not reasonably have been provided to you at the time of the decision demonstrating that there is a legitimate medical explanation for the presence of drug(s)/metabolite(s) in the employee's specimen; or

(ii) You receive credible new or additional evidence that a legitimate medical explanation for an adulterated or substituted result exists.

Example to Paragraph (a)(3): If the employee's physician provides you a valid prescription that he or she failed to find at the time of the original verification, you may change the test result from positive to negative if you conclude that the prescription provides a legitimate medical explanation for the drug(s)/ metabolite(s) in the employee's specimen.

(4) If you receive the information in paragraph (a)(3) of this section after the 60-day period, you must consult with ODAPC prior to changing the result.

(5) When you have made an administrative error and reported an incorrect result.

(b) If you change the result, you must immediately notify the DER in writing, as provided in §§40.163–40.165.

(c) You are the only person permitted to change a verified test result, such as a verified positive test result or a determination that an individual has refused to test because of adulteration or substitution. This is because, as the MRO, you have the sole authority under this part to make medical determinations leading to a verified test (e.g., a determination that there was or was not a legitimate medical explanation for a laboratory test result). For example, an arbitrator is not permitted to overturn the medical judgment of the MRO that the employee failed to present a legitimate medical explanation for a positive, adulterated, or substituted test result of his or her specimen.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001; 73 FR 35971, June 25, 2008]

§ 40.151 What are MROs prohibited from doing as part of the verification process?

As an MRO, you are prohibited from doing the following as part of the verification process:

(a) You must not consider any evidence from tests of urine samples or other body fluids or tissues (e.g., blood or hair samples) that are not collected or tested in accordance with this part. For example, if an employee tells you he went to his own physician, provided a urine specimen, sent it to a laboratory, and received a negative test result or a DNA test result questioning the identity of his DOT specimen, you are required to ignore this test result.

(b) It is not your function to make decisions about factual disputes between the employee and the collector concerning matters occurring at the collection site that are not reflected on the CCF (e.g., concerning allegations that the collector left the area or left open urine containers where other people could access them).

(c) It is not your function to determine whether the employer should have directed that a test occur. For example, if an employee tells you that the employer misidentified her as the subject of a random test, or directed her to take a reasonable suspicion or post-accident test without proper grounds under a DOT agency drug or alcohol regulation, you must inform the employee that you cannot play a role in deciding these issues.

(d) It is not your function to consider explanations of confirmed positive, adulterated, or substituted test results that would not, even if true, constitute a legitimate medical explanation. For example, an employee may tell you that someone slipped amphetamines into her drink at a party, that she unknowingly ingested a marijuana brownie, or that she traveled in a closed car with several people smoking crack. MROs are unlikely to be able to verify the facts of such passive or unknowing ingestion stories. Even if true, such stories do not present a legitimate medical explanation. Consequently, you must not declare a test as negative based on an explanation of this kind.

(e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the “medical marijuana” laws that some states have adopted).

(f) You must not accept an assertion of consumption or other use of a hemp or other non-prescription marijuana-related product as a basis for verifying a marijuana test negative. You also must not accept such an explanation related to consumption of coca teas as a basis for verifying a cocaine test result as negative. Consuming or using such a product is not a legitimate medical explanation.

(g) You must not accept an assertion that there is a legitimate medical explanation for the presence of PCP or 6-AM in a specimen. There are no legitimate medical explanations for the presence of these substances.

(h) You must not accept, as a legitimate medical explanation for an adulterated specimen, an assertion that soap, bleach, or glutaraldehyde entered a specimen through physiological means. There are no physiological means through which these substances can enter a specimen.

(i) You must not accept, as a legitimate medical explanation for a substituted specimen, an assertion that an employee can produce urine with no detectable creatinine. There are no physiological means through which a person can produce a urine specimen having this characteristic.
[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001]

§ 40.153 How does the MRO notify employees of their right to a test of the split specimen?

(a) As the MRO, when you have verified a drug test as positive for a drug or drug metabolite, or as a refusal to test because of adulteration or substitution, you must notify the employee of his or her right to have the split specimen tested. You must also notify the employee of the procedures for requesting a test of the split specimen.

(b) You must inform the employee that he or she has 72 hours from the time you provide this notification to him or her to request a test of the split specimen.

(c) You must tell the employee how to contact you to make this request. You must provide telephone numbers or other information that will allow the employee to make this request. As the MRO, you must have the ability to receive the employee's calls at all times during the 72 hour period (e.g., by use of an answering machine with a “time stamp” feature when there is no one in your office to answer the phone).

(d) You must tell the employee that if he or she makes this request within 72 hours, the employer must ensure that the test takes place, and that the employee is not required to pay for the test from his or her own funds before the test takes place. You must also tell the employee that the employer may seek reimbursement for the cost of the test (see §40.173).

(e) You must tell the employee that additional tests of the specimen (e.g., DNA tests) are not authorized.

§ 40.155 What does the MRO do when a negative or positive test result is also dilute?

(a) When the laboratory reports that a specimen is dilute, you must, as the MRO, report to the DER that the specimen, in addition to being negative or positive, is dilute.

(b) You must check the “dilute” box (Step 6) on Copy 2 of the CCF.

(c) When you report a dilute specimen to the DER, you must explain to the DER the employer's obligations and choices under §40.197, to include the requirement for an immediate recollection under direct observation if the creatinine concentration of a negative-dilute specimen was greater than or equal to 2mg/dL but less than or equal to 5mg/dL.

(d) If the employee’s recollection under direct observation, in paragraph (c) of this section, results in another negative-dilute, as the MRO, you must:

(1) Review the CCF to ensure that there is documentation that the recollection was directly observed.

(2) If the CCF documentation shows that the recollection was directly observed as required, report this result to the DER as a negative-dilute result.

(3) If CCF documentation indicates that the recollection was not directly observed as required, do not report a result but again explain to the DER that there must be an immediate recollection under direct observation.
[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41952, Aug. 9, 2001; 68 FR 31626, May 28, 2003; 69 FR 64867, Nov.9, 2004; 73 FR 35971, June 25, 2008]

§ 40.157 [Reserved]

§ 40.159 What does the MRO do when a drug test result is invalid?

(a) As the MRO, when the laboratory reports that the test result is an invalid result, you must do the following:

(1) Discuss the laboratory results with a certifying scientist to determine if the primary specimen should be tested at another HHS certified laboratory. If the laboratory did not contact you as required by §§ 40.91(e) and 40.96(c), you must contact the laboratory.

(2) If you and the laboratory have determined that no further testing is necessary, contact the employee and inform the employee that the specimen was invalid. In contacting the employee, use the procedures set forth in § 40.131.

(3) After explaining the limits of disclosure (see §§ 40.135(d) and 40.327), you must determine if the employee has a medical explanation for the invalid result. You must inquire about the medications the employee may have taken.

(4) If the employee gives an explanation that is acceptable, you must:

(i) Place a check mark in the “Test Cancelled” box (Step 6) on Copy 2 of the CCF and enter “Invalid Result” and “direct observation collection not required” on the “Remarks” line.

(ii) Report to the DER that the test is cancelled, the reason for cancellation, and that no further action is required unless a negative test result is required (i.e., pre-employment, return-to-duty, or follow-up tests).

(iii) If a negative test result is required and the medical explanation concerns a situation in which the employee has a permanent or long-term medical condition that precludes him or her from providing a valid specimen, as the MRO, you must follow the procedures outlined at § 40.160 for determining if there is clinical evidence that the individual is an illicit drug user.

(5) If the employee is unable to provide an explanation and/or a valid prescription for a medication that interfered with the immunoassay test but denies having adulterated the specimen, you must:

(i) Place a check mark in the "Test Cancelled" box (Step 6) on Copy 2 of the CCF and enter "Invalid Result" and "direct observation collection required" on the "Remarks" line.

(ii) Report to the DER that the test is cancelled, the reason for cancellation, and that a second collection must take place immediately under direct observation.

(iii) Instruct the employer to ensure that the employee has the minimum possible advance notice that he or she must go to the collection site.

(b) You may only report an invalid test result when you are in possession of a legible copy of Copy 1 of the CCF. In addition, you must have Copy 2 of the CCF, a legible copy of it, or any other copy of the CCF containing the employee's signature.

(c) If the employee admits to having adulterated or substituted the specimen, you must, on the same day, write and sign your own statement of what the employee told you. You must then report a refusal to test in accordance with §40.163.

(d) If the employee admits to using a drug, you must, on the same day, write and sign your own statement of what the employee told you. You must then report that admission to the DER for appropriate action under DOT Agency regulations. This test will be reported as cancelled with the reason noted.

(e) If the employee's recollection (required at paragraph (a)(5) of this section) results in another invalid result for the same reason as reported for the first specimen, as the MRO, you must:

(1) Review the CCF to ensure that there is documentation that the recollection was directly observed.

(2) If the CCF review indicates that the recollection was directly observed as required, document that the employee had another specimen with an invalid result for the same reason.

(3) Follow the recording and reporting procedures at (a)(4)(i) and (ii) of this section.

(4) If a negative result is required (i.e., pre-employment, return-to-duty, or follow-up tests), follow the procedures at § 40.160 for determining if there is clinical evidence that the individual is an illicit drug user.

(5) If the recollection was not directly observed as required, do not report a result but again explain to the DER that there must be an immediate recollection under direct observation.

(f) If the employee's recollection (required at paragraph (a)(5) of this section) results in another invalid result for a different reason than that reported for the first specimen, as the MRO, you must:

(1) Review the CCF to ensure that there is documentation that the recollection was directly observed.

(2) If the CCF review indicates that the recollection was directly observed as required, document that the employee had another specimen with an invalid result for a different reason.

(3) As the MRO, you should not contact the employee to discuss the result, but rather direct the DER to conduct an immediate recollection under direct observation without prior notification to the employee.

(4) If the CCF documentation indicates that the recollection was not directly observed as required, do not report a result but again explain to the DER that there must be an immediate recollection under direct observation.

(g) If, as the MRO, you receive a laboratory invalid result in conjunction with a positive, adulterated, and/or substituted result and you verify any of those results as being a positive and/or refusal to test, you do not report the invalid result unless the split specimen fails to reconfirm the result(s) of the primary specimen.

[65 FR 79526, Dec. 19, 2000 as amended at 73 FR 35972, June 25, 2008]

§ 40.160 What does the MRO do when a valid test result cannot be produced and a negative result is required?

(a) If a valid test result cannot be produced and a negative result is required, (under § 40.159 (a)(5)(iii) and (e)(4)), as the MRO, you must determine if there is clinical evidence that the individual is currently an illicit drug user. You must make this determination by personally conducting, or causing to be conducted, a medical evaluation. In addition, if appropriate, you may also consult with the employee's physician to gather information you need to reach this determination.

(b) If you do not personally conduct the medical evaluation, as the MRO, you must ensure that one is conducted by a licensed physician acceptable to you.

(c) For purposes of this section, the MRO or the physician conducting the evaluation may conduct an alternative test (e.g., blood) as part of the medically appropriate procedures in determining clinical evidence of drug use.

(d) If the medical evaluation reveals no clinical evidence of drug use, as the MRO, you must report this to the employer as a negative test result with written notations regarding the medical examination. The report must also state why the medical examination was required (i.e., either the basis for the determination that a permanent or

long-term medical condition exists or because the recollection under direct observation resulted in another invalid result for the same reason, as appropriate) and for the determination that no signs and symptoms of drug use exist.

(1) Check "Negative" (Step 6) on the CCF.

(2) Sign and date the CCF.

(e) If the medical evaluation reveals clinical evidence of drug use, as the MRO, you must report the result to the employer as a cancelled test with written notations regarding the results of the medical examination. The report must also state why the medical examination was required (i.e., either the basis for the determination that a permanent or long-term medical condition exists or because the recollection under direct observation resulted in another invalid result for the same reason, as appropriate) and state the reason for the determination that signs and symptoms of drug use exist. Because this is a cancelled test, it does not serve the purpose of an actual negative test result (i.e., the employer is not authorized to allow the employee to begin or resume performing safety-sensitive functions, because a negative test result is needed for that purpose).

[73 FR 35972, June 25, 2008]

§ 40.161 What does the MRO do when a drug test specimen is rejected for testing?

As the MRO, when the laboratory reports that the specimen is rejected for testing (e.g., because of a fatal or uncorrected flaw), you must do the following:

(a) Place a check mark in the "Test Cancelled" box (Step 6) on Copy 2 of the CCF and enter the reason on the "Remarks" line.

(b) Report to the DER that the test is cancelled and the reason for cancellation, and that no further action is required unless a negative test is required (e.g., in the case of a pre-employment, return-to-duty, or follow-up test).

(c) You may only report a test cancelled because of a rejected for testing test result when you are in possession of a legible copy of Copy 1 of the CCF. In addition, you must have Copy 2 of the CCF, a legible copy of it, or any other copy of the CCF containing the employee's signature.

§ 40.162 What must MROs do with multiple verified results for the same testing event?

(a) If the testing event is one in which there was one specimen collection with multiple verified non-negative results, as the MRO, you must report them all to the DER. For example, if you verified the specimen as being positive for marijuana and cocaine and as being a refusal to test because the specimen was also adulterated, as the MRO, you should report the positives and the refusal to the DER.

(b) If the testing event was one in which two separate specimen collections (e.g., a specimen out of temperature range and the subsequent observed collection) were sent to the laboratory, as the MRO, you must:

(1) If both specimens were verified negative, report the result as negative.

(2) If either of the specimens was verified negative and the other was verified as one or more non-negative(s), report the non-negative result(s) only. For example, if you verified one specimen as negative and the other as a refusal to test because the second specimen was substituted, as the MRO you should report only the refusal to the DER.

(i) If the first specimen is reported as negative, but the result of the second specimen has not been reported by the laboratory, as the MRO, you should hold – not report – the result of the first specimen until the result of the second specimen is received.

(ii) If the first specimen is reported as non-negative, as the MRO, you should report the result immediately and not wait to receive the result of the second specimen.

(3) If both specimens were verified non-negative, report all of the non-negative results. For example, if you verified one specimen as positive and the other as a refusal to test because the specimen was adulterated, as the MRO, you should report the positive and the refusal results to the DER.

(c) As an exception to paragraphs (a) and (b) of this section, as the MRO, you must follow procedures at § 40.159(f) when any verified non-negative result is also invalid.

[73 FR 35972, June 25, 2008]

§ 40.163 How does the MRO report drug test results?

(a) As the MRO, it is your responsibility to report all drug test results to the employer.

(b) You may use a signed or stamped and dated legible photocopy of Copy 2 of the CCF to report test results.

(c) If you do not report test results using Copy 2 of the CCF for this purpose, you must provide a written report (e.g., a letter) for each test result. This report must, as a minimum, include the following information:

(1) Full name, as indicated on the CCF, of the employee tested;

(2) Specimen ID number from the CCF and the donor SSN or employee ID number;

(3) Reason for the test, if indicated on the CCF (e.g., random, post-accident);

(4) Date of the collection;

(5) Date you received Copy 2 of the CCF;

(6) Result of the test (i.e., positive, negative, dilute, refusal to test, test cancelled) and the date the result was verified by the MRO;

(7) For verified positive tests, the drug(s)/metabolite(s) for which the test was positive;

(8) For cancelled tests, the reason for cancellation; and

(9) For refusals to test, the reason for the refusal determination (e.g., in the case of an adulterated test result, the name of the adulterant).

(d) As an exception to the reporting requirements of paragraph (b) and (c) of this section, the MRO may report negative results using an electronic data file.

(1) If you report negatives using an electronic data file, the report must contain, as a minimum, the information specified in paragraph (c) of this section, as applicable for negative test results.

(2) In addition, the report must contain your name, address, and phone number, the name of any person other than you reporting the results, and the date the electronic results report is released.

(e) You must retain a signed or stamped and dated copy of Copy 2 of the CCF in your records. If you do not use Copy 2 for reporting results, you must maintain a copy of the signed or stamped and dated letter in addition to the signed or stamped and dated Copy 2. If you use the electronic data file to report negatives, you must maintain a retrievable copy of that report in a format suitable for inspection and auditing by a DOT representative.

(f) You must not use Copy 1 of the CCF to report drug test results.

(g) You must not provide quantitative values to the DER or C/TPA for drug or validity test results. However, you must provide the test information in your possession to a SAP who consults with you (see §40.293(g)).

[66 FR 41952, Aug. 9, 2001]

§ 40.165 To whom does the MRO transmit reports of drug test results?

(a) As the MRO, you must report all drug test results to the DER, except in the circumstances provided for in §40.345.

(b) If the employer elects to receive reports of results through a C/TPA, acting as an intermediary as provided in §40.345, you must report the results through the designated C/TPA.

§ 40.167 How are MRO reports of drug results transmitted to the employer?

As the MRO or C/TPA who transmits drug test results to the employer, you must comply with the following requirements:

(a) You must report the results in a confidential manner.

(b) You must transmit to the DER on the same day the MRO verifies the result or the next business day all verified positive test results, results requiring an immediate collection under direct observation, adulterated or substituted specimen results, and other refusals to test.

(1) Direct telephone contact with the DER is the preferred method of immediate reporting. Follow up your phone call with appropriate documentation (see §40.163).

(2) You are responsible for identifying yourself to the DER, and the DER must have a means to confirm your identification.

(3) The MRO's report that you transmit to the employer must contain all of the information required by §40.163.

(c) You must transmit the MRO's report(s) of verified tests to the DER so that the DER receives it within two days of verification by the MRO.

(1) You must fax, courier, mail, or electronically transmit a legible image or copy of either the signed or stamped and dated Copy 2 or the written report (see §40.163(b) and (c)).

(2) Negative results reported electronically (i.e., computer data file) do not require an image of Copy 2 or the written report.

(d) In transmitting test results, you or the C/TPA and the employer must ensure the security of the transmission and limit access to any transmission, storage, or retrieval systems.

(e) MRO reports are not subject to modification or change by anyone other than the MRO, as provided in §40.149(c).

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41953, Aug. 9, 2001]

§ 40.169 Where is other information concerning the role of MROs and the verification process found in this regulation?

You can find more information concerning the role of MROs in several sections of this part:

§40.3—Definition.

§§40.47–40.49—Correction of form and kit errors.

§40.67—Role in direct observation and other atypical test situations.

§40.83—Laboratory handling of fatal and correctable flaws.

Subpart H - Split Specimen Tests

§ 40.171 How does an employee request a test of a split specimen?

(a) As an employee, when the MRO has notified you that you have a verified positive drug test and/or refusal to test because of adulteration or substitution, you have 72 hours from the time of notification to request a test of the split specimen. The request may be verbal or in writing. If you make this request to the MRO within 72 hours, you trigger the requirements of this section for a test of the split specimen. There is no split specimen testing for an invalid result.

(b)(1) If, as an employee, you have not requested a test of the split specimen within 72 hours, you may present to the MRO information documenting that serious injury, illness, lack of actual notice of the verified test result, inability to contact the MRO (e.g., there was no one in the MRO's office and the answering machine was not working), or other circumstances unavoidably prevented you from making a timely request.

(2) As the MRO, if you conclude from the employee's information that there was a legitimate reason for the employee's failure to contact you within 72 hours, you must direct that the test of the split specimen take place, just as you would when there is a timely request.

(c) When the employee makes a timely request for a test of the split specimen under paragraphs (a) and (b) of this section, you must, as the MRO, immediately provide written notice to the laboratory that tested the primary specimen, directing the laboratory to forward the split specimen to a second HHS-certified laboratory. You must also document the date and time of the employee's request.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35973, June 25, 2008]

§ 40.173 Who is responsible for paying for the test of a split specimen?

(a) As the employer, you are responsible for making sure (e.g., by establishing appropriate accounts with laboratories for testing split specimens) that the MRO, first laboratory, and second laboratory perform the functions noted in §§40.175–40.185 in a timely manner, once the employee has made a timely request for a test of the split specimen.

(b) As the employer, you must not condition your compliance with these requirements on the employee's direct payment to the MRO or laboratory or the employee's agreement to reimburse you for the costs of testing. For example, if you ask the employee to pay for some or all of the cost of testing the split specimen, and the employee is unwilling or unable to do so, you must ensure that the test takes place in a timely manner, even though this means that you pay for it.

(c) As the employer, you may seek payment or reimbursement of all or part of the cost of the split specimen from the employee (e.g., through your written company policy or a collective bargaining agreement). This part takes no position on who ultimately pays the cost of the test, so long as the employer ensures that the testing is conducted as required and the results released appropriately.

§ 40.175 What steps does the first laboratory take with a split specimen?

(a) As the laboratory at which the primary and split specimen first arrive, you must check to see whether the split specimen is available for testing.

(b) If the split specimen is unavailable or appears insufficient, you must then do the following:

(1) Continue the testing process for the primary specimen as you would normally. Report the results for the primary specimen without providing the MRO information regarding the unavailable split specimen.

(2) Upon receiving a letter from the MRO instructing you to forward the split specimen to another laboratory for testing, report to the MRO that the split specimen is unavailable for testing. Provide as much information as you can about the cause of the unavailability.

(c) As the laboratory that tested the primary specimen, you are not authorized to open the split specimen under any circumstances (except when the split specimen is redesignated as provided in §40.83).

(d) When you receive written notice from the MRO instructing you to send the split specimen to another HHS-certified laboratory, you must forward the following items to the second laboratory:

(1) The split specimen in its original specimen bottle, with the seal intact;

(2) A copy of the MRO's written request; and

(3) A copy of Copy 1 of the CCF, which identifies the drug(s)/metabolite(s) or the validity criteria to be tested for.

(e) You must not send to the second laboratory any information about the identity of the employee. Inadvertent disclosure does not, however, cause a fatal flaw.

(f) This subpart does not prescribe who gets to decide which HHS-certified laboratory is used to test the split specimen. That decision is left to the parties involved.

§ 40.177 What does the second laboratory do with the split specimen when it is tested to reconfirm the presence of a drug or drug metabolite?

(a) As the laboratory testing the split specimen, you must test the split specimen for the drug(s)/drug metabolite(s) detected in the primary specimen.

(b) You must conduct this test without regard to the cutoff concentrations of §40.87.

(c) If the test fails to reconfirm the presence of the drug(s)/drug metabolite(s) that were reported positive in the primary specimen, you must conduct validity tests in an attempt to determine the reason for being unable to reconfirm the presence of the drug(s)/metabolite(s). You should conduct the same validity tests as you would conduct on a primary specimen set forth in §40.91.

(d) In addition, if the test fails to reconfirm the presence of the drug(s)/drug metabolite(s) reported in the primary specimen, you may send the specimen or an aliquot of it for testing at another HHS-certified laboratory that has the capability to conduct another reconfirmation test.

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35973, June 25, 2008]

§ 40.179 What does the second laboratory do with the split specimen when it is tested to reconfirm an adulterated test result?

(a) As the laboratory testing the split specimen, you must test the split specimen for the adulterant detected in the primary specimen, using the confirmatory test for the adulterant and using criteria in § 40.95 and confirmatory cutoff levels required by the HHS Mandatory Guidelines.

(b) In addition, if the test fails to reconfirm the adulterant result reported in the primary specimen, you may send the specimen or an aliquot of it for testing at another HHS-certified laboratory that has the capability to conduct another reconfirmation test.

[65 FR 79526, Dec. 19, 2000, as amended 73 FR 35973, June 25, 2008]

§ 40.181 What does the second laboratory do with the split specimen when it is tested to reconfirm a substituted test result?

As the laboratory testing the split specimen, you must test the split specimen using the confirmatory tests for creatinine and specific gravity, and using criteria set forth in § 40.93(b).

[65 FR 79526, Dec. 19, 2000, as amended 73 FR 35973, June 25, 2008]

§ 40.183 What information do laboratories report to MROs regarding split specimen results?

(a) As the laboratory responsible for testing the split specimen, you must report split specimen test results by checking the “Reconfirmed” box and/or the “Failed to Reconfirm” box (Step 5(b)) on Copy 1 of the CCF, as appropriate, and by providing clarifying remarks using current HHS Mandatory Guidelines requirements.

(b) As the laboratory certifying scientist, enter your name, sign, and date the CCF.

[65 FR 79526, Dec. 19, 2000, as amended 73 FR 35973, June 25, 2008]

§ 40.185 Through what methods and to whom must a laboratory report split specimen results?

(a) As the laboratory testing the split specimen, you must report laboratory results directly, and only, to the MRO at his or her place of business. You must not report results to or through the DER or another service agent (e.g., a C/TPA).

(b) You must fax, courier, mail, or electronically transmit a legible image or copy of the fully-completed Copy 1 of the CCF, which has been signed by the certifying scientist.

(c) You must transmit the laboratory result to the MRO immediately, preferably on the same day or next business day as the result is signed and released.

§ 40.187 What does the MRO do with split specimen laboratory results?

As the MRO, the split specimen laboratory results you receive will fall into five categories. You must take the following action, as appropriate, when a laboratory reports split specimen results to you.

(a) Category 1: The laboratory reconfirmed one or more of the primary specimen results. As the MRO, you must report to the DER and the employee the result(s) that was/were reconfirmed.

(1) In the case of a reconfirmed positive test(s) for drug(s) or drug metabolite(s), the positive is the final result.

(2) In the case of a reconfirmed adulterated or substituted result, the refusal to test is the final result.

(3) In the case of a combination positive and refusal to test results, the final result is both positive and refusal to test.

(b) Category 2: The laboratory failed to reconfirm all of the primary specimen results because, as appropriate, drug(s)/drug metabolite(s) were not detected; adulteration criteria were not met; and/or substitution criteria were not met. As the MRO, you must report to the DER and the employee that the test must be cancelled.

(1) As the MRO, you must inform ODAPC of the failure to reconfirm using the format in Appendix D to this part.

(2) In a case where the split failed to reconfirm because the substitution criteria were not met and the split specimen creatinine concentration was equal to or greater than 2mg/dL but less than or equal to 5mg/dL, as the MRO, you must, in addition to step in (b)(1) of this paragraph, direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(3) In a case where the split failed to reconfirm and the primary specimen's result was also invalid, direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(c) Category 3: The laboratory failed to reconfirm all of the primary specimen results, and also reported that the split specimen was invalid, adulterated, and/or substituted.

(1) In the case where the laboratory failed to reconfirm all of the primary specimen results and the split was reported as invalid, as the MRO, you must:

(i) Report to the DER and the employee that the test must be cancelled and the reason for the cancellation.

(ii) Direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(iii) Inform ODAPC of the failure to reconfirm using the format in Appendix D to this part.

(2) In the case where the laboratory failed to reconfirm any of the primary specimen results, and the split was reported as adulterated and/or substituted, as the MRO, you must:

(i) Contact the employee and inform the employee that the laboratory has determined that his or her split specimen is adulterated and/or substituted, as appropriate.

(ii) Follow the procedures of § 40.145 to determine if there is a legitimate medical explanation for the laboratory finding of adulteration and/or substitution, as appropriate.

(iii) If you determine that there is a legitimate medical explanation for the adulterated and/or substituted test result, report to the DER and the employee that the test must be cancelled; and inform ODAPC of the failure to reconfirm using the format in Appendix D to this part.

(iv) If you determine that there is not a legitimate medical explanation for the adulterated and/or substituted test result, you must take the following steps:

(A) Report the test to the DER and the employee as a verified refusal to test. Inform the employee that he or she has 72 hours to request a test of the primary specimen to determine if the adulterant found in the split specimen is also present in the primary specimen and/or to determine if the primary specimen meets appropriate substitution criteria.

(B) Except when the request is for a test of the primary specimen and is being made to the laboratory that tested the primary specimen, follow the procedures of §§ 40.153, 40.171, 40.173, 40.179, 40.181, and 40.185, as appropriate.

(C) As the laboratory that tests the primary specimen to reconfirm the presence of the adulterant found in the split specimen and/or to determine that the primary specimen meets appropriate substitution criteria, report your result to the MRO on a photocopy (faxed, mailed, scanned, couriered) of Copy 1 of the CCF.

(D) If the test of the primary specimen reconfirms the adulteration and/or substitution finding of the split specimen, as the MRO you must report the result as a refusal to test as provided in paragraph (a)(2) of this section.

(E) If the test of the primary specimen fails to reconfirm the adulteration and/or substitution finding of the split specimen, as the MRO you must cancel the test, following procedures in paragraph (b) of this section.

(d) Category 4: The laboratory failed to reconfirm one or more but not all of the primary specimen results, and also reported that the split specimen was invalid, adulterated, and/or substituted. As the MRO, in the case where the laboratory reconfirmed one or more of the primary specimen result(s), you must follow procedures in paragraph (a) of this section and:

(1) Report that the split was also reported as being invalid, adulterated, and/or substituted (as appropriate).

(2) Inform the DER to take action only on the reconfirmed result(s).

(e) Category 5: The split specimen was not available for testing or there was no split laboratory available to test the specimen. As the MRO, you must:

(1) Report to the DER and the employee that the test must be cancelled and the reason for the cancellation;

(2) Direct the DER to ensure the immediate recollection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection; and

(3) Notify ODAPC of the failure to reconfirm using the format in Appendix D to this part.

(f) For all split specimen results, as the MRO you must:

(1) Enter your name, sign, and date (Step 7) of Copy 2 of the CCF.

(2) Send a legible copy of Copy 2 of the CCF (or a signed and dated letter, see § 40.163) to the employer and keep a copy for your records. Transmit the document as provided in § 40.167.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41953, Aug. 9, 2001; 68 FR 31626, May 28, 2003; 73 FR 35973, June 25, 2008]

§ 40.189 Where is other information concerning split specimens found in this regulation?

You can find more information concerning split specimens in several sections of this part:

§40.3—Definition.

§40.65—Quantity of split specimen.

§40.67—Directly observed test when split specimen is unavailable.

§§40.71–40.73—Collection process for split specimens.

§40.83—Laboratory accessioning of split specimens.

§40.99—Laboratory retention of split specimens.

§40.103—Blind split specimens.

§40.153—MRO notice to employees on tests of split specimen.

§§40.193 and 40.201—MRO actions on insufficient or unavailable split specimens.

Appendix D to Part 40—Report format for split specimen failure to reconfirm.

Subpart I—Problems in Drug Tests

§ 40.191 What is a refusal to take a DOT drug test, and what are the consequences?

(a) As an employee, you have refused to take a drug test if you:

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see §40.61(a));

(2) Fail to remain at the testing site until the testing process is complete; Provided, That an employee who leaves the testing site before the testing process commences (see §40.63 (c)) for a pre-employment test is not deemed to have refused to test;

(3) Fail to provide a urine specimen for any drug test required by this part or DOT agency regulations; Provided, That an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences (see §40.63 (c)) for a pre-employment test is not deemed to have refused to test;

(4) In the case of a directly observed or monitored collection in a drug test, fail to permit the observation or monitoring of your provision of a specimen (see §§40.67(l) and 40.69(g));

(5) Fail to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see §40.193(d)(2));

(6) Fail or decline to take an additional drug test the employer or collector has directed you to take (see, for instance, §40.197(b));

(7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under §40.193(d). In the case of a pre-employment drug test, the employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment. If there was no contingent offer of employment, the MRO will cancel the test; or

(8) Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when directed by the collector, behave in a confrontational way that disrupts the collection process, fail to wash hands after being directed to do so by the collector).

(9) For an observed collection, fail to follow the observer's instructions to raise your clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if you have any type of prosthetic or other device that could be used to interfere with the collection process.

(10) Possess or wear a prosthetic or other device that could be used to interfere with the collection process.

(11) Admit to the collector or MRO that you adulterated or substituted the specimen.

(b) As an employee, if the MRO reports that you have a verified adulterated or substituted test result, you have refused to take a drug test.

(c) As an employee, if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

(d) As a collector or an MRO, when an employee refuses to participate in the part of the testing process in which you are involved, you must terminate the portion of the testing process in which you are involved, document the refusal on the CCF (including, in the case of the collector, printing the employee's name on Copy 2 of the CCF), immediately notify the DER by any means (e.g., telephone or secure fax machine) that ensures that the refusal notification is immediately received. As a referral physician (e.g., physician evaluating a "shy bladder" condition or a claim of a legitimate medical explanation in a validity testing situation), you must notify the MRO, who in turn will notify the DER.

(1) As the collector, you must note the refusal in the "Remarks" line (Step 2), and sign and date the CCF.

(2) As the MRO, you must note the refusal by checking the "refused to test because" box (Step 6) on Copy 2 of the CCF, and add the reason on the "Remarks" line. You must then sign and date the CCF.

(e) As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have not refused to take a DOT test. There are no consequences under DOT agency regulations for refusing to take a non-DOT test.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41953, Aug. 9, 2001; 68 FR 31626, May 28, 2003; 71 FR 49384, Aug. 23, 2006; 73 FR 35974, June 25, 2008]

§ 40.193 What happens when an employee does not provide a sufficient amount of urine for a drug test?

(a) This section prescribes procedures for situations in which an employee does not provide a sufficient amount of urine to permit a drug test (i.e., 45 mL of urine).

(b) As the collector, you must do the following:

(1) Discard the insufficient specimen, except where the insufficient specimen was out of temperature range or showed evidence of adulteration or tampering (see §40.65(b) and (c)).

(2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink. Document on the Remarks line of the CCF (Step 2), and inform the employee of, the time at which the three-hour period begins and ends.

(3) If the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is complete, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER. This is a refusal to test.

(4) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER.

(5) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must send or fax these copies to the MRO and DER within 24 hours or the next business day.

(c) As the DER, when the collector informs you that the employee has not provided a sufficient amount of urine (see paragraph (b)(4) of this section), you must, after consulting with the MRO, direct the employee to obtain, within five days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. (The MRO may perform this evaluation if the MRO has appropriate expertise.)

(1) As the MRO, if another physician will perform the evaluation, you must provide the other physician with the following information and instructions:

(i) That the employee was required to take a DOT drug test, but was unable to provide a sufficient amount of urine to complete the test;

(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required drug test;

(iii) That the referral physician must agree to follow the requirements of paragraphs (d) through (g) of this section.

(2) [Reserved]

(d) As the referral physician conducting this evaluation, you must recommend that the MRO make one of the following determinations:

(1) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(i) Check "Test Cancelled" (Step 6) on the CCF; and

(ii) Sign and date the CCF.

(2) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. As the MRO, if you accept this recommendation, you must:

(i) Check “Refusal to test because” (Step 6) on the CCF and enter reason in the remarks line; and

(ii) Sign and date the CCF.

(e) For purposes of this paragraph, a medical condition includes an ascertainable physiological condition (e.g., a urinary system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of “situational anxiety” or dehydration.

(f) As the referral physician making the evaluation, after completing your evaluation, you must provide a written statement of your recommendations and the basis for them to the MRO. You must not include in this statement detailed information on the employee's medical condition beyond what is necessary to explain your conclusion.

(g) If, as the referral physician making this evaluation in the case of a pre-employment test, you determine that the employee's medical condition is a serious and permanent or long-term disability that is highly likely to prevent the employee from providing a sufficient amount of urine for a very long or indefinite period of time, you must set forth your determination and the reasons for it in your written statement to the MRO. As the MRO, upon receiving such a report, you must follow the requirements of §40.195, where applicable.

(h) As the MRO, you must seriously consider and assess the referral physician's recommendations in making your determination about whether the employee has a medical condition that has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. You must report your determination to the DER in writing as soon as you make it.

(i) As the employer, when you receive a report from the MRO indicating that a test is cancelled as provided in paragraph (d)(1) of this section, you take no further action with respect to the employee. The employee remains in the random testing pool.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41953, Aug. 9, 2001]

§ 40.195 What happens when an individual is unable to provide a sufficient amount of urine for a pre-employment follow-up or return-to-duty test because of a permanent or long-term medical condition?

(a) This section concerns a situation in which an employee has a medical condition that precludes him or her from providing a sufficient specimen for a pre-employment follow-up or return-to-duty test and the condition involves a permanent or long-term disability. As the MRO in this situation, you must do the following:

(1) You must determine if there is clinical evidence that the individual is an illicit drug user. You must make this determination by personally conducting, or causing to be conducted, a medical evaluation and through consultation with the employee's physician and/or the physician who conducted the evaluation under §40.193(d).

(2) If you do not personally conduct the medical evaluation, you must ensure that one is conducted by a licensed physician acceptable to you.

(3) For purposes of this section, the MRO or the physician conducting the evaluation may conduct an alternative test (e.g., blood) as part of the medically appropriate procedures in determining clinical evidence of drug use.

(b) If the medical evaluation reveals no clinical evidence of drug use, as the MRO, you must report the result to the employer as a negative test with written notations regarding results of both the evaluation conducted under §40.193(d) and any further medical examination. This report must state the basis for the determination that a permanent or long-term medical condition exists, making provision of a sufficient urine specimen impossible, and for the determination that no signs and symptoms of drug use exist.

(1) Check “Negative” (Step 6) on the CCF.

(2) Sign and date the CCF.

(c) If the medical evaluation reveals clinical evidence of drug use, as the MRO, you must report the result to the employer as a cancelled test with written notations regarding results of both the evaluation conducted under §40.193(d) and any further medical examination. This report must state that a permanent or long-term medical condition exists, making provision of a sufficient urine specimen impossible, and state the reason for the determination that signs and symptoms of drug use exist. Because this is a cancelled test, it does not serve the purposes of a negative test (i.e., the employer is not authorized to allow the employee to begin or resume performing safety-sensitive functions, because a negative test is needed for that purpose).

(d) For purposes of this section, permanent or long-term medical conditions are those physiological, anatomic, or psychological abnormalities documented as being present prior to the attempted collection, and considered not amenable to correction or cure for an extended period of time, if ever.

(1) Examples would include destruction (any cause) of the glomerular filtration system leading to renal failure; unrepaired traumatic disruption of the urinary tract; or a severe psychiatric disorder focused on genito-urinary matters.

(2) Acute or temporary medical conditions, such as cystitis, urethritis or prostatitis, though they might interfere with collection for a limited period of time, cannot receive the same exceptional consideration as the permanent or long-term conditions discussed in paragraph (d)(1) of this section.
[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41953, Aug. 9, 2001]

§ 40.197 What happens when an employer receives a report of a dilute specimen?

(a) As the employer, if the MRO informs you that a positive drug test was dilute, you simply treat the test as a verified positive test. You must not direct the employee to take another test based on the fact that the specimen was dilute.

(b) As an employer, if the MRO informs you that a negative test was dilute, take the following action:

(1) If the MRO directs you to conduct a recollection under direct observation (i.e., because the creatinine concentration of the specimen was equal to or greater than 2mg/dL, but less than or equal to 5 mg/dL (see §40.155(c)), you must do so immediately.

(2) Otherwise (i.e., if the creatinine concentration of the dilute specimen is greater than 5 mg/dL), you may, but are not required to, direct the employee to take another test immediately.

(i) Such recollections must not be collected under direct observation, unless there is another basis for use of direct observation (see §40.67 (b) and (c)).

(ii) You must treat all employees the same for this purpose. For example, you must not retest some employees and not others. You may, however, establish different policies for different types of tests (e.g., conduct retests in pre-employment situations, but not in random test situations). You must inform your employees in advance of your decisions on these matters.

(c) The following provisions apply to all tests you direct an employee to take under paragraph (b) of this section:

(1) You must ensure that the employee is given the minimum possible advance notice that he or she must go to the collection site;

(2) You must treat the result of the test you directed the employee to take under paragraph (b) of this section—and not a prior test—as the test result of record, on which you rely for purposes of this part;

(3) If the result of the test you directed the employee to take under paragraph (b)(1) of this section is also negative and dilute, you are not permitted to make the employee take an additional test because the result was dilute.

(4) If the result of the test you directed the employee to take under paragraph (b)(2) of this section is also negative and dilute, you are not permitted to make the employee take an additional test because the result was dilute. Provided, however, that if the MRO directs you to conduct a recollection under direct observation under paragraph (b)(1) of this section, you must immediately do so.

(5) If the employee declines to take a test you directed him or her to take under paragraph (b) of this section, the employee has refused the test for purposes of this part and DOT agency regulations.
[68 FR 31626, May 28, 2003; 69 FR 64867, Nov.9, 2004; 73 FR 35974, June 25, 2008]

§ 40.199 What problems always cause a drug test to be cancelled?

(a) As the MRO, when the laboratory discovers a “fatal flaw” during its processing of incoming specimens (see §40.83), the laboratory will report to you that the specimen has been “Rejected for Testing” (with the reason stated). You must always cancel such a test.

(b) The following are “fatal flaws”:

(1) There is no printed collector's name and no collector's signature;

(2) The specimen ID numbers on the specimen bottle and the CCF do not match;

(3) The specimen bottle seal is broken or shows evidence of tampering (and a split specimen cannot be redesignated, see §40.83(g)); and

(4) Because of leakage or other causes, there is an insufficient amount of urine in the primary specimen bottle for analysis and the specimens cannot be redesignated (see §40.83(g)).

(c) You must report the result as provided in §40.161 .

§ 40.201 What problems always cause a drug test to be cancelled and may result in a requirement for another collection?

As the MRO, you must cancel a drug test when a laboratory reports that any of the following problems have occurred. You must inform the DER that the test was cancelled. You must also direct the DER to ensure that an additional collection occurs immediately, if required by the applicable procedures specified in paragraphs (a) through (e) of this section.

(a) The laboratory reports an “Invalid Result.” You must follow applicable procedures in §40.159 (recollection under direct observation may be required).

(b) The laboratory reports the result as “Rejected for Testing.” You must follow applicable procedures in §40.161 (a recollection may be required).

(c) The laboratory reports that the split specimen failed to reconfirm all of the primary specimen results because the drug(s)/drug metabolite(s) were not detected; adulteration criteria were not met; and/ or substitution criteria were not met. You must follow the applicable procedures in § 40.187(b) – no recollection is required in this case, unless the split specimen creatinine concentration for a substituted primary specimen was greater than or equal to 2mg/dL but less than or equal to 5mg/ dL, or the primary specimen had an invalid result which was not reported to the DER. Both these cases require recollection under direct observation.

(d) The laboratory reports that the split specimen failed to reconfirm all of the primary specimen results, and that the split specimen was invalid. You must follow the procedures in § 40.187(c)(1) – recollection under direct observation is required in this case.

(e) The laboratory reports that the split specimen failed to reconfirm all of the primary specimen results because the split specimen was not available for testing or there was no split laboratory available to test the specimen. You must follow the applicable procedures in § 40.187(e) – recollection under direct observation is required in this case.

(f) The examining physician has determined that there is an acceptable medical explanation of the employee's failure to provide a sufficient amount of urine. You must follow applicable procedures in §40.193(d)(1) (no recollection is required in this case).

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35974, June 25, 2008]

§ 40.203 What problems cause a drug test to be cancelled unless they are corrected?

(a) As the MRO, when a laboratory discovers a “correctable flaw” during its processing of incoming specimens (see §40.83), the laboratory will attempt to correct it. If the laboratory is unsuccessful in this attempt, it will report to you that the specimen has been “Rejected for Testing” (with the reason stated).

(b) The following is a “correctable flaw” that laboratories must attempt to correct: The collector's signature is omitted on the certification statement on the CCF.

(c) As the MRO, when you discover a “correctable flaw” during your review of the CCF, you must cancel the test unless the flaw is corrected.

(d) The following are correctable flaws that you must attempt to correct:

(1) The employee's signature is omitted from the certification statement, unless the employee's failure or refusal to sign is noted on the “Remarks” line of the CCF.

(2) The certifying scientist's signature is omitted on the laboratory copy of the CCF for a positive, adulterated, substituted, or invalid test result.

(3) The collector uses a non-Federal form or an expired Federal form for the test. This flaw may be corrected through the procedure set forth in §40.205(b)(2), provided that the collection testing process has been conducted in accordance with the procedures of this part in an HHS-certified laboratory. During the period August 1–October 31, 2001, you are not required to cancel a test because of the use of an expired Federal form. Beginning November 1, 2001, if the problem is not corrected, you must cancel the test.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

§ 40.205 How are drug test problems corrected?

(a) As a collector, you have the responsibility of trying to successfully complete a collection procedure for each employee.

(1) If, during or shortly after the collection process, you become aware of any event that prevents the completion of a valid test or collection (e.g., a procedural or paperwork error), you must try to correct the problem promptly, if doing so is practicable. You may conduct another collection as part of this effort.

(2) If another collection is necessary, you must begin the new collection procedure as soon as possible, using a new CCF and a new collection kit.

(b) If, as a collector, laboratory, MRO, employer, or other person implementing these drug testing regulations, you become aware of a problem that can be corrected (see §40.203), but which has not already been corrected under paragraph (a) of this section, you must take all practicable action to correct the problem so that the test is not cancelled.

(1) If the problem resulted from the omission of required information, you must, as the person responsible for providing that information, supply in writing the missing information and a statement that it is true and accurate. For example, suppose you are a collector, and you forgot to make a notation on the “Remarks” line of the CCF that the employee did not sign the certification. You would, when the problem is called to your attention, supply a signed statement that the employee failed or refused to sign the certification and that your statement is true and accurate. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

(2) If the problem is the use of a non-Federal form or an expired Federal form, you must provide a signed statement (i.e., a memorandum for the record). It must state that the incorrect form contains all the information needed for a valid DOT drug test, and that the incorrect form was used inadvertently or as the only means of

conducting a test, in circumstances beyond your control. The statement must also list the steps you have taken to prevent future use of non-Federal forms or expired Federal forms for DOT tests. For this flaw to be corrected, the test of the specimen must have occurred at a HHS-certified laboratory where it was tested consistent with the requirements of this part. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

(3) You must maintain the written documentation of a correction with the CCF.

(4) You must mark the CCF in such a way (e.g., stamp noting correction) as to make it obvious on the face of the CCF that you corrected the flaw.

(c) If the correction does not take place, as the MRO you must cancel the test.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

§ 40.207 What is the effect of a cancelled drug test?

(a) A cancelled drug test is neither positive nor negative.

(1) As an employer, you must not attach to a cancelled test the consequences of a positive test or other violation of a DOT drug testing regulation (e.g., removal from a safety-sensitive position).

(2) As an employer, you must not use a cancelled test for the purposes of a negative test to authorize the employee to perform safety-sensitive functions (i.e., in the case of a pre-employment, return-to-duty, or follow-up test).

(3) However, as an employer, you must not direct a recollection for an employee because a test has been cancelled, except in the situations cited in paragraph (a)(2) of this section or other provisions of this part that require another test to be conducted (e.g., §§40.159(a)(5) and 40.187(b)(2), (c)(1), and (e)).

(b) A cancelled test does not count toward compliance with DOT requirements (e.g., being applied toward the number of tests needed to meet the employer's minimum random testing rate).

(c) A cancelled DOT test does not provide a valid basis for an employer to conduct a non-DOT test (i.e., a test under company authority).

[65 FR 79526, Dec. 19, 2000, as amended at 73 FR 35975, June 25, 2008]

§ 40.208 What problem requires corrective action but does not result in the cancellation of a test?

(a) If, as a laboratory, collector, employer, or other person implementing the DOT drug testing program, you become aware that the specimen temperature on the CCF was not checked and the “Remarks” line did not contain an entry regarding the temperature being out of range, you must take corrective action, including securing a memorandum for the record explaining the problem and taking appropriate action to ensure that the problem does not recur.

(b) This error does not result in the cancellation of the test.

(c) As an employer or service agent, this error, even though not sufficient to cancel a drug test result, may subject you to enforcement action under DOT agency regulations or Subpart R of this part.

[66 FR 41954, Aug. 9, 2001]

§ 40.209 What procedural problems do not result in the cancellation of a test and do not require corrective action?

(a) As a collector, laboratory, MRO, employer or other person administering the drug testing process, you must document any errors in the testing process of which you become aware, even if they are not considered problems that will cause a test to be cancelled as listed in this subpart. Decisions about the ultimate impact of these errors will be determined by other administrative or legal proceedings, subject to the limitations of paragraph (b) of this section.

(b) No person concerned with the testing process may declare a test cancelled based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test. Matters that do not result in the cancellation of a test include, but are not limited to, the following:

(1) A minor administrative mistake (e.g., the omission of the employee's middle initial, a transposition of numbers in the employee's social security number);

(2) An error that does not affect employee protections under this part (e.g., the collector's failure to add bluing agent to the toilet bowl, which adversely affects only the ability of the collector to detect tampering with the specimen by the employee);

(3) The collection of a specimen by a collector who is required to have been trained (see §40.33), but who has not met this requirement;

(4) A delay in the collection process (see §40.61(a));

(5) Verification of a test result by an MRO who has the basic credentials to be qualified as an MRO (see §40.121(a) through (b)) but who has not met training and/or documentation requirements (see §40.121(c) through (e));

(6) The failure to directly observe or monitor a collection that the rule requires or permits to be directly observed or monitored, or the unauthorized use of direct observation or monitoring for a collection;

(7) The fact that a test was conducted in a facility that does not meet the requirements of §40.41;

(8) If the specific name of the courier on the CCF is omitted or erroneous;

(9) Personal identifying information is inadvertently contained on the CCF (e.g., the employee signs his or her name on the laboratory copy); or

(10) Claims that the employee was improperly selected for testing.

(c) As an employer or service agent, these types of errors, even though not sufficient to cancel a drug test result, may subject you to enforcement action under DOT agency regulations or action under Subpart R of this part. [65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

Subpart J - Alcohol Testing Personnel

§ 40.211 Who conducts DOT alcohol tests?

(a) Screening test technicians (STTs) and breath alcohol technicians (BATs) meeting their respective requirements of this subpart are the only people authorized to conduct DOT alcohol tests.

(b) An STT can conduct only alcohol screening tests, but a BAT can conduct alcohol screening and confirmation tests.

(c) As a BAT- or STT-qualified immediate supervisor of a particular employee, you may not act as the STT or BAT when that employee is tested, unless no other STT or BAT is available and DOT agency regulations do not prohibit you from doing so.

§ 40.213 What training requirements must STTs and BATs meet?

To be permitted to act as a BAT or STT in the DOT alcohol testing program, you must meet each of the requirements of this section:

(a) Basic information. You must be knowledgeable about the alcohol testing procedures in this part and the current DOT guidance. These documents and information are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue, SE, Washington DC, 20590, 202–366–3784, or on the ODAPC web site (*http://www.dot.gov/ost/dapc*).

(b) Qualification training. You must receive qualification training meeting the requirements of this paragraph (b).

(1) Qualification training must be in accordance with the DOT Model BAT or STT Course, as applicable. The DOT Model Courses are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue, SE, Washington DC, 20590, 202–366–3784, or on the ODAPC web site (*http://www.dot.gov/ost/dapc).* The training can also be provided using a course of instruction equivalent to the DOT Model Courses. On request, ODAPC will review BAT and STT instruction courses for equivalency.

(2) Qualification training must include training to proficiency in using the alcohol testing procedures of this part and in the operation of the particular alcohol testing device(s) (i.e., the ASD(s) or EBT(s)) you will be using.

(3) The training must emphasize that you are responsible for maintaining the integrity of the testing process, ensuring the privacy of employees being tested, and avoiding conduct or statements that could be viewed as offensive or inappropriate.

(4) The instructor must be an individual who has demonstrated necessary knowledge, skills, and abilities by regularly conducting DOT alcohol tests as an STT or BAT, as applicable, for a period of at least a year, who has conducted STT or BAT training, as applicable, under this part for a year, or who has successfully completed a “train the trainer” course.

(c) Initial Proficiency Demonstration. Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in alcohol testing under this part by completing seven consecutive error-free mock tests (BATs) or five consecutive error-free tests (STTs).

(1) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between the instructor and trainee, and attest in writing that the mock collections are “error-free.” This person must be an individual who meets the requirements of paragraph (b)(4) of this section.

(2) These tests must use the alcohol testing devices (e.g., EBT(s) or ASD(s)) that you will use as a BAT or STT.

(3) If you are an STT who will be using an ASD that indicates readings by changes, contrasts, or other readings in color, you must demonstrate as part of the mock test that you are able to discern changes, contrasts, or readings correctly.

(d) Schedule for qualification training and initial proficiency demonstration. The following is the schedule for qualification training and the initial proficiency demonstration you must meet:

(1) If you became a BAT or STT before August 1, 2001, you were required to have met the requirements set forth in paragraphs (b) and (c) of this section, and you do not have to meet them again.

(2) If you become a BAT or STT on or after August 1, 2001, you must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform BAT or STT functions.

(e) Refresher training. No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c) of this section. If you are a BAT or STT who completed qualification training before January 1, 1998, you are not required to complete refresher training until January 1, 2003.

(f) Error Correction Training. If you make a mistake in the alcohol testing process that causes a test to be cancelled (i.e., a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining.

(1) Error correction training must be provided and your proficiency documented in writing by a person who meets the requirements of paragraph (b)(4) of this section.

(2) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(3) As part of the error correction training, you must demonstrate your proficiency in the alcohol testing procedures of this part by completing three consecutive error-free mock tests. The mock tests must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in writing that the mock tests were error-free.

(g) Documentation. You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are negotiating to use your services.

(h) Other persons who may serve as BATs or STTs. (1) Anyone meeting the requirements of this section to be a BAT may act as an STT, provided that the individual has demonstrated initial proficiency in the operation of the ASD that he or she is using, as provided in paragraph (c) of this section.

(2) Law enforcement officers who have been certified by state or local governments to conduct breath alcohol testing are deemed to be qualified as BATs. They are not required to also complete the training requirements of this section in order to act as BATs. In order for a test conducted by such an officer to be accepted under DOT alcohol testing requirements, the officer must have been certified by a state or local government to use the EBT or ASD that was used for the test.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001; 73 FR 33329, June 12, 2008]

§ 40.215 What information about the DER do employers have to provide to BATs and STTs?

As an employer, you must provide to the STTs and BATs the name and telephone number of the appropriate DER (and C/TPA, where applicable) to contact about any problems or issues that may arise during the testing process.

§ 40.217 Where is other information on the role of STTs and BATs found in this regulation?

You can find other information on the role and functions of STTs and BATs in the following sections of this part:

§40.3—Definitions.
§40.223—Responsibility for supervising employees being tested.
§§40.225–40.227—Use of the alcohol testing form.
§§40.241–40.245—Screening test procedures with ASDs and EBTs.
§§40.251–40.255—Confirmation test procedures.
§40.261—Refusals to test.
§§40.263–40.265—Insufficient saliva or breath.
§40.267—Problems requiring cancellation of tests.
§§40.269–40.271—Correcting problems in tests.

Subpart K - Testing Sites, Forms, Equipment and Supplies Used in Alcohol Testing

§ 40.221 Where does an alcohol test take place?

(a) A DOT alcohol test must take place at an alcohol testing site meeting the requirements of this section.

(b) If you are operating an alcohol testing site, you must ensure that it meets the security requirements of §40.223.

(c) If you are operating an alcohol testing site, you must ensure that it provides visual and aural privacy to the employee being tested, sufficient to prevent unauthorized persons from seeing or hearing test results.

(d) If you are operating an alcohol testing site, you must ensure that it has all needed personnel, materials, equipment, and facilities to provide for the collection and analysis of breath and/or saliva samples, and a suitable clean surface for writing.

(e) If an alcohol testing site fully meeting all the visual and aural privacy requirements of paragraph (c) is not readily available, this part allows a reasonable suspicion or post-accident test to be conducted at a site that

partially meets these requirements. In this case, the site must afford visual and aural privacy to the employee to the greatest extent practicable.

(f) An alcohol testing site can be in a medical facility, a mobile facility (e.g., a van), a dedicated collection facility, or any other location meeting the requirements of this section.

§ 40.223 What steps must be taken to protect the security of alcohol testing sites?

(a) If you are a BAT, STT, or other person operating an alcohol testing site, you must prevent unauthorized personnel from entering the testing site.

(1) The only people you are to treat as authorized persons are employees being tested, BATs, STTs, and other alcohol testing site workers, DERs, employee representatives authorized by the employer (e.g., on the basis of employer policy or labor-management agreement), and DOT agency representatives.

(2) You must ensure that all persons are under the supervision of a BAT or STT at all times when permitted into the site.

(3) You may remove any person who obstructs, interferes with, or causes unnecessary delay in the testing process.

(b) As the BAT or STT, you must not allow any person other than you, the employee, or a DOT agency representative to actually witness the testing process (see §§40.241–40.255).

(c) If you are operating an alcohol testing site, you must ensure that when an EBT or ASD is not being used for testing, you store it in a secure place.

(d) If you are operating an alcohol testing site, you must ensure that no one other than BATs or other employees of the site have access to the site when an EBT is unsecured.

(e) As a BAT or STT, to avoid distraction that could compromise security, you are limited to conducting an alcohol test for only one employee at a time.

(1) When an EBT screening test on an employee indicates an alcohol concentration of 0.02 or higher, and the same EBT will be used for the confirmation test, you are not allowed to use the EBT for a test on another employee before completing the confirmation test on the first employee.

(2) As a BAT who will conduct both the screening and the confirmation test, you are to complete the entire screening and confirmation process on one employee before starting the screening process on another employee.

(3) You are not allowed to leave the alcohol testing site while the testing process for a given employee is in progress, except to notify a supervisor or contact a DER for assistance in the case an employee or other person who obstructs, interferes with, or unnecessarily delays the testing process.

§ 40.225 What form is used for an alcohol test?

(a) The DOT Alcohol Testing Form (ATF) must be used for every DOT alcohol test beginning February 1, 2002. The ATF must be a three-part carbonless manifold form. The ATF is found in Appendix G to this part. You may view this form on the ODAPC web site (http://www.dot.gov/ost/dapc).

(b) As an employer in the DOT alcohol testing program, you are not permitted to modify or revise the ATF except as follows:

(1) You may include other information needed for billing purposes, outside the boundaries of the form.

(2) You may use a ATF directly generated by an EBT which omits the space for affixing a separate printed result to the ATF, provided the EBT prints the result directly on the ATF.

(3) You may use an ATF that has the employer's name, address, and telephone number preprinted. In addition, a C/TPA's name, address, and telephone number may be included, to assist with negative results.

(4) You may use an ATF in which all pages are printed on white paper. You may modify the ATF by using colored paper, or have clearly discernable borders or designation statements on Copy 2 and Copy 3. When colors are used, they must be green for Copy 2 and blue for Copy 3.

(5) As a BAT or STT, you may add, on the “Remarks” line of the ATF, the name of the DOT agency under whose authority the test occurred.

(6) As a BAT or STT, you may use a ATF that has your name, address, and telephone number preprinted, but under no circumstances can your signature be preprinted.

(c) As an employer, you may use an equivalent foreign-language version of the ATF approved by ODAPC. You may use such a non-English language form only in a situation where both the employee and BAT/STT understand and can use the form in that language.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

§ 40.227 May employers use the ATF for non-DOT tests, or non-DOT forms for DOT tests?

(a) No, as an employer, BAT, or STT, you are prohibited from using the ATF for non-DOT alcohol tests. You are also prohibited from using non-DOT forms for DOT alcohol tests. Doing either subjects you to enforcement action under DOT agency regulations.

(b) If the STT or BAT, either by mistake, or as the only means to conduct a test under difficult circumstances (e.g., post-accident test with insufficient time to obtain the ATF), uses a non-DOT form for a DOT test, the use of a non-DOT form does not, in and of itself, require the employer or service agent to cancel the test. However, in order for the test to be considered valid, a signed statement must be obtained from the STT or BAT in accordance with §40.271(b) .

§ 40.229 What devices are used to conduct alcohol screening tests?

EBTs and ASDs on the NHTSA conforming products lists (CPL) for evidential and non-evidential devices are the only devices you are allowed to use to conduct alcohol screening tests under this part. You may use an ASD that is on the NHTSA CPL for DOT alcohol tests only if there are instructions for its use in this part. An ASD can be used only for screening tests for alcohol, and may not be used for confirmation tests.
[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

§ 40.231 What devices are used to conduct alcohol confirmation tests?

(a) EBTs on the NHTSA CPL for evidential devices that meet the requirements of paragraph (b) of this section are the only devices you may use to conduct alcohol confirmation tests under this part. Note that, among devices on the CPL for EBTs, only those devices listed without an asterisk (*) are authorized for use in confirmation testing in the DOT alcohol testing program.

(b) To conduct a confirmation test, you must use an EBT that has the following capabilities:

(1) Provides a printed triplicate result (or three consecutive identical copies of a result) of each breath test;

(2) Assigns a unique number to each completed test, which the BAT and employee can read before each test and which is printed on each copy of the result;

(3) Prints, on each copy of the result, the manufacturer's name for the device, its serial number, and the time of the test;

(4) Distinguishes alcohol from acetone at the 0.02 alcohol concentration level;

(5) Tests an air blank; and

(6) Performs an external calibration check.

§ 40.233 What are the requirements for proper use and care of EBTs?

(a) As an EBT manufacturer, you must submit, for NHTSA approval, a quality assurance plan (QAP) for your EBT before NHTSA places the EBT on the CPL.

(1) Your QAP must specify the methods used to perform external calibration checks on the EBT, the tolerances within which the EBT is regarded as being in proper calibration, and the intervals at which these checks must be performed. In designating these intervals, your QAP must take into account factors like frequency of use, environmental conditions (e.g., temperature, humidity, altitude) and type of operation (e.g., stationary or mobile).

(2) Your QAP must also specify the inspection, maintenance, and calibration requirements and intervals for the EBT.

(b) As the manufacturer, you must include, with each EBT, instructions for its use and care consistent with the QAP.

(c) As the user of the EBT (e.g., employer, service agent), you must do the following:

(1) You must follow the manufacturer's instructions (see paragraph (b) of this section), including performance of external calibration checks at the intervals the instructions specify.

(2) In conducting external calibration checks, you must use only calibration devices appearing on NHTSA's CPL for “Calibrating Units for Breath Alcohol Tests.”

(3) If an EBT fails an external check of calibration, you must take the EBT out of service. You may not use the EBT again for DOT alcohol testing until it is repaired and passes an external calibration check.

(4) You must maintain records of the inspection, maintenance, and calibration of EBTs as provided in §40.333(a)(2) .

(5) You must ensure that inspection, maintenance, and calibration of the EBT are performed by its manufacturer or a maintenance representative certified either by the manufacturer or by a state health agency or other appropriate state agency.

§ 40.235 What are the requirements for proper use and care of ASDs?

(a) As an ASD manufacturer, you must submit, for NHTSA approval, a QAP for your ASD before NHTSA places the ASD on the CPL. Your QAP must specify the methods used for quality control checks, temperatures at which the ASD must be stored and used, the shelf life of the device, and environmental conditions (e.g., temperature, altitude, humidity) that may affect the ASD's performance.

(b) As a manufacturer, you must include with each ASD instructions for its use and care consistent with the QAP. The instructions must include directions on the proper use of the ASD, and, where applicable the time within which the device must be read, and the manner in which the reading is made.

(c) As the user of the ADS (e.g., employer, STT), you must follow the QAP instructions.

(d) You are not permitted to use an ASD that does not pass the specified quality control checks or that has passed its expiration date.

(e) As an employer, with respect to breath ASDs, you must also follow the device use and care requirements of §40.233.

Subpart L—Alcohol Screening Tests

§ 40.241 What are the first steps in any alcohol screening test?

As the BAT or STT you will take the following steps to begin all alcohol screening tests, regardless of the type of testing device you are using:

(a) When a specific time for an employee's test has been scheduled, or the collection site is at the employee's worksite, and the employee does not appear at the collection site at the scheduled time, contact the DER to determine the appropriate interval within which the DER has determined the employee is authorized to arrive. If the employee's arrival is delayed beyond that time, you must notify the DER that the employee has not reported for testing. In a situation where a C/TPA has notified an owner/operator or other individual employee to report for testing and the employee does not appear, the C/TPA must notify the employee that he or she has refused to test.

(b) Ensure that, when the employee enters the alcohol testing site, you begin the alcohol testing process without undue delay. For example, you must not wait because the employee says he or she is not ready or because an authorized employer or employee representative is delayed in arriving.

(1) If the employee is also going to take a DOT drug test, you must, to the greatest extent practicable, ensure that the alcohol test is completed before the urine collection process begins.

(2) If the employee needs medical attention (e.g., an injured employee in an emergency medical facility who is required to have a post-accident test), do not delay this treatment to conduct a test.

(c) Require the employee to provide positive identification. You must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employer individual) or a Federal, state, or local government (e.g., a driver's license). You may not accept faxes or photocopies of identification. Positive identification by an employer representative (not a co-worker or another employee being tested) is also acceptable. If the employee cannot produce positive identification, you must contact a DER to verify the identity of the employee.

(d) If the employee asks, provide your identification to the employee. Your identification must include your name and your employer's name but is not required to include your picture, address, or telephone number.

(e) Explain the testing procedure to the employee, including showing the employee the instructions on the back of the ATF.

(f) Complete Step 1 of the ATF.

(g) Direct the employee to complete Step 2 on the ATF and sign the certification. If the employee refuses to sign this certification, you must document this refusal on the “Remarks” line of the ATF and immediately notify the DER. This is a refusal to test.

§ 40.243 What is the procedure for an alcohol screening test using an EBT or non-evidential breath ASD?

As the BAT or STT, you must take the following steps:

(a) Select, or allow the employee to select, an individually wrapped or sealed mouthpiece from the testing materials.

(b) Open the individually wrapped or sealed mouthpiece in view of the employee and insert it into the device in accordance with the manufacturer's instructions.

(c) Instruct the employee to blow steadily and forcefully into the mouthpiece for at least six seconds or until the device indicates that an adequate amount of breath has been obtained.

(d) Show the employee the displayed test result.

(e) If the device is one that prints the test number, testing device name and serial number, time, and result directly onto the ATF, you must check to ensure that the information has been printed correctly onto the ATF.

(f) If the device is one that prints the test number, testing device name and serial number, time and result, but on a separate printout rather than directly onto the ATF, you must affix the printout of the information to the designated space on the ATF with tamper-evident tape or use a self-adhesive label that is tamper-evident.

(g) If the device is one that does not print the test number, testing device name and serial number, time, and result, or it is a device not being used with a printer, you must record this information in Step 3 of the ATF.

§ 40.245 What is the procedure for an alcohol screening test using a saliva ASD or a breath tube ASD?

(a) As the STT or BAT, you must take the following steps when using the saliva ASD:

(1) Check the expiration date on the device or on the package containing the device and show it to the employee. You may not use the device after its expiration date.

(2) Open an individually wrapped or sealed package containing the device in the presence of the employee.

(3) Offer the employee the opportunity to use the device. If the employee uses it, you must instruct the employee to insert it into his or her mouth and use it in a manner described by the device's manufacturer.

(4) If the employee chooses not to use the device, or in all cases in which a new test is necessary because the device did not activate (see paragraph (a)(7) of this section), you must insert the device into the employee's mouth and gather saliva in the manner described by the device's manufacturer. You must wear single-use examination or similar gloves while doing so and change them following each test.

(5) When the device is removed from the employee's mouth, you must follow the manufacturer's instructions regarding necessary next steps in ensuring that the device has activated.

(6)(i) If you were unable to successfully follow the procedures of paragraphs (a)(3) through (a)(5) of this section (e.g., the device breaks, you drop the device on the floor), you must discard the device and conduct a new test using a new device.

(ii) The new device you use must be one that has been under your control or that of the employee before the test.

(iii) You must note on the “Remarks” line of the ATF the reason for the new test. (Note: You may continue using the same ATF with which you began the test.)

(iv) You must offer the employee the choice of using the device or having you use it unless the employee, in the opinion of the STT or BAT, was responsible (e.g., the employee dropped the device) for the new test needing to be conducted.

(v) If you are unable to successfully follow the procedures of paragraphs (a)(3) through (a)(5) of this section on the new test, you must end the collection and put an explanation on the “Remarks” line of the ATF.

(vi) You must then direct the employee to take a new test immediately, using an EBT for the screening test.

(7) If you are able to successfully follow the procedures of paragraphs (a)(3)—(a)(5) of this section, but the device does not activate, you must discard the device and conduct a new test, in the same manner as provided in paragraph (a)(6) of this section. In this case, you must place the device into the employee's mouth to collect saliva for the new test.

(8) You must read the result displayed on the device no sooner than the device's manufacturer instructs. In all cases the result displayed must be read within 15 minutes of the test. You must then show the device and it's reading to the employee and enter the result on the ATF.

(9) You must never re-use devices, swabs, gloves or other materials used in saliva testing.

(10) You must note the fact that you used a saliva ASD in Step 3 of the ATF.

(b) As the STT or BAT, you must take the following steps when using the breath tube ASD:

(1) Check the expiration date on the detector device and the electronic analyzer or on the package containing the device and the analyzer and show it to the employee. You must not use the device or the analyzer after their expiration date. You must not use an analyzer which is not specifically pre-calibrated for the device being used in the collection.

(2) Remove the device from the package and secure an inflation bag onto the appropriate end of the device, as directed by the manufacturer on the device's instructions.

(3) Break the tube's ampoule in the presence of the employee.

(4) Offer the employee the opportunity to use the device. If the employee chooses to use (e.g. hold) the device, instruct the employee to blow forcefully and steadily into the blowing end of device until the inflation bag fills with air (approximately 12 seconds).

(5) If the employee chooses not to hold the device, you must hold it and provide the use instructions in paragraph (b)(4) of this section.

(6) When the employee completes the breath process, take the device from the employee (or if you were holding it, remove it from the employee's mouth), remove the inflation bag, and prepare the device to be read by the analyzer in accordance with the manufacturer's directions.

(7)(i) If you were unable to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section (e.g., the device breaks apart, the employee did not fill the inflation bag), you must discard the device and conduct a new test using a new one.

(ii) The new device you use must be one that has been under your control or that of the employer before the test.

(iii) You must note on the “Remarks” line of the ATF the reason for the new test. (Note: You may continue using the same ATF with which you began the test.)

(iv) You must offer the employee the choice of holding the device or having you hold it unless the employee, in the your opinion, was responsible (e.g., the employee failed to fill the inflation bag) for the new test needing to be conducted.

(v) If you are unable to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section on the new test, you must end the collection and put an explanation on the “Remarks” line of the ATF.

(vi) You must then direct the employee to take a new test immediately, using another type of ASD (e.g., saliva device) or an EBT.

(8) If you were able to successfully follow the procedures of paragraphs (b)(4) through (b)(6) of this section and after having waited the required amount of time directed by the manufacturer for the detector device to incubate, you must place the device in the analyzer in accordance with the manufacturer's directions. The result must be read from the analyzer no earlier then the required incubation time of the device. In all cases, the result must be read within 15 minutes of the test.

(9) You must follow the manufacturer's instructions for determining the result of the test. You must show the analyzer result to the employee and record the result on Step 3 of the ATF.

(10) You must never re-use detector devices or any gloves used in breath tube testing. The inflation bag must be voided of air following removal from a device. Inflation bags and electronic analyzers may be re-used but only in accordance with the manufacturer's directions.

(11) You must note the fact that you used a breath tube device in Step 3 of the ATF.

[67 FR 61522, Oct. 1, 2002, as amended at 72 FR 1299, Jan. 11, 2007]

§ 40.247 What procedures does the BAT or STT follow after a screening test result?

(a) If the test result is an alcohol concentration of less than 0.02, as the BAT or STT, you must do the following:

(1) Sign and date Step 3 of the ATF; and

(2) Transmit the result to the DER in a confidential manner, as provided in §40.255 .

(b) If the test result is an alcohol concentration of 0.02 or higher, as the BAT or STT, you must direct the employee to take a confirmation test.

(1) If you are the BAT who will conduct the confirmation test, you must then conduct the test using the procedures beginning at §40.251 .

(2) If you are not the BAT who will conduct the confirmation test, direct the employee to take a confirmation test, sign and date Step 3 of the ATF, and give the employee Copy 2 of the ATF.

(3) If the confirmation test will be performed at a different site from the screening test, you must take the following additional steps:

(i) Advise the employee not to eat, drink, put anything (e.g., cigarette, chewing gum) into his or her mouth, or belch;

(ii) Tell the employee the reason for the waiting period required by §40.251(a) (i.e., to prevent an accumulation of mouth alcohol from leading to an artificially high reading);

(iii) Explain that following your instructions concerning the waiting period is to the employee's benefit;

(iv) Explain that the confirmation test will be conducted at the end of the waiting period, even if the instructions have not been followed;

(v) Note on the “Remarks” line of the ATF that the waiting period instructions were provided;

(vi) Instruct the person accompanying the employee to carry a copy of the ATF to the BAT who will perform the confirmation test; and

(vii) Ensure that you or another BAT, STT, or employer representative observe the employee as he or she is transported to the confirmation testing site. You must direct the employee not to attempt to drive a motor vehicle to the confirmation testing site.

(c) If the screening test is invalid, you must, as the BAT or STT, tell the employee the test is cancelled and note the problem on the “Remarks” line of the ATF. If practicable, repeat the testing process (see §40. 271).

Subpart M - Alcohol Confirmation Tests

§ 40.251 What are the first steps in an alcohol confirmation test?

As the BAT for an alcohol confirmation test, you must follow these steps to begin the confirmation test process:

(a) You must carry out a requirement for a waiting period before the confirmation test, by taking the following steps:

(1) You must ensure that the waiting period lasts at least 15 minutes, starting with the completion of the screening test. After the waiting period has elapsed, you should begin the confirmation test as soon as possible, but not more than 30 minutes after the completion of the screening test.

(i) If the confirmation test is taking place at a different location from the screening test (see §40.247(b)(3)) the time of transit between sites counts toward the waiting period if the STT or BAT who conducted the screening test provided the waiting period instructions.

(ii) If you cannot verify, through review of the ATF, that waiting period instructions were provided, then you must carry out the waiting period requirement.

(iii) You or another BAT or STT, or an employer representative, must observe the employee during the waiting period.

(2) Concerning the waiting period, you must tell the employee:

(i) Not to eat, drink, put anything (e.g., cigarette, chewing gum) into his or her mouth, or belch;

(ii) The reason for the waiting period (i.e., to prevent an accumulation of mouth alcohol from leading to an artificially high reading);

(iii) That following your instructions concerning the waiting period is to the employee's benefit; and

(iv) That the confirmation test will be conducted at the end of the waiting period, even if the instructions have not been followed.

(3) If you become aware that the employee has not followed the instructions, you must note this on the "Remarks" line of the ATF.

(b) If you did not conduct the screening test for the employee, you must require positive identification of the employee, explain the confirmation procedures, and use a new ATF. You must note on the "Remarks" line of the ATF that a different BAT or STT conducted the screening test.

(c) Complete Step 1 of the ATF.

(d) Direct the employee to complete Step 2 on the ATF and sign the certification. If the employee refuses to sign this certification, you must document this refusal on the "Remarks" line of the ATF and immediately notify the DER. This is a refusal to test.

(e) Even if more than 30 minutes have passed since the screening test result was obtained, you must begin the confirmation test procedures in §40.253, not another screening test.

(f) You must note on the "Remarks" line of the ATF the time that elapsed between the two events, and if the confirmation test could not begin within 30 minutes of the screening test, the reason why.

(g) Beginning the confirmation test procedures after the 30 minutes have elapsed does not invalidate the screening or confirmation tests, but it may constitute a regulatory violation subject to DOT agency sanction.

§ 40.253 What are the procedures for conducting an alcohol confirmation test?

As the BAT conducting an alcohol confirmation test, you must follow these steps in order to complete the confirmation test process:

(a) In the presence of the employee, you must conduct an air blank on the EBT you are using before beginning the confirmation test and show the reading to the employee.

(1) If the reading is 0.00, the test may proceed. If the reading is greater than 0.00, you must conduct another air blank.

(2) If the reading on the second air blank is 0.00, the test may proceed. If the reading is greater than 0.00, you must take the EBT out of service.

(3) If you take an EBT out of service for this reason, no one may use it for testing until the EBT is found to be within tolerance limits on an external check of calibration.

(4) You must proceed with the test of the employee using another EBT, if one is available.

(b) You must open a new individually wrapped or sealed mouthpiece in view of the employee and insert it into the device in accordance with the manufacturer's instructions.

(c) You must ensure that you and the employee read the unique test number displayed on the EBT.

(d) You must instruct the employee to blow steadily and forcefully into the mouthpiece for at least six seconds or until the device indicates that an adequate amount of breath has been obtained.

(e) You must show the employee the result displayed on the EBT.

(f) You must show the employee the result and unique test number that the EBT prints out either directly onto the ATF or onto a separate printout.

(g) If the EBT provides a separate printout of the result, you must attach the printout to the designated space on the ATF with tamper-evident tape, or use a self-adhesive label that is tamper-evident.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

§ 40.255 What happens next after the alcohol confirmation test result?

(a) After the EBT has printed the result of an alcohol confirmation test, you must, as the BAT, take the following additional steps:

(1) Sign and date Step 3 of the ATF.

(2) If the alcohol confirmation test result is lower than 0.02, nothing further is required of the employee. As the BAT, you must sign and date Step 3 of the ATF.

(3) If the alcohol confirmation test result is 0.02 or higher, direct the employee to sign and date Step 4 of the ATF. If the employee does not do so, you must note this on the "Remarks" line of the ATF. However, this is not considered a refusal to test.

(4) If the test is invalid, tell the employee the test is cancelled and note the problem on the "Remarks" line of the ATF. If practicable, conduct a re-test. (see §40.271).

(5) Immediately transmit the result directly to the DER in a confidential manner.

(i) You may transmit the results using Copy 1 of the ATF, in person, by telephone, or by electronic means. In any case, you must immediately notify the DER of any result of 0.02 or greater by any means (e.g., telephone or secure fax machine) that ensures the result is immediately received by the DER. You must not transmit these results through C/TPAs or other service agents.

(ii) If you do not make the initial transmission in writing, you must follow up the initial transmission with Copy 1 of the ATF.

(b) As an employer, you must take the following steps with respect to the receipt and storage of alcohol test result information:

(1) If you receive any test results that are not in writing (e.g., by telephone or electronic means), you must establish a mechanism to establish the identity of the BAT sending you the results.

(2) You must store all test result information in a way that protects confidentiality.

Subpart N - Problems in Alcohol Testing

§ 40.261 What is a refusal to take an alcohol test, and what are the consequences?

(a) As an employee, you are considered to have refused to take an alcohol test if you:

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see §40.241(a));

(2) Fail to remain at the testing site until the testing process is complete; Provided, That an employee who leaves the testing site before the testing process commences (see §40.243(a)) for a pre-employment test is not deemed to have refused to test;

(3) Fail to provide an adequate amount of saliva or breath for any alcohol test required by this part or DOT agency regulations; Provided, That an employee who does not provide an adequate amount of breath or saliva because he or she has left the testing site before the testing process commences (see §40.243(a)) for a pre-employment test is not deemed to have refused to test;

(4) Fail to provide a sufficient breath specimen, and the physician has determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see §40.265(c));

(5) Fail to undergo a medical examination or evaluation, as directed by the employer as part of the insufficient breath procedures outlined at §40.265(c);

(6) Fail to sign the certification at Step 2 of the ATF (see §§40.241(g) and 40.251(d)); or

(7) Fail to cooperate with any part of the testing process.

(b) As an employee, if you refuse to take an alcohol test, you incur the same consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

(c) As a BAT or an STT, or as the physician evaluating a “shy lung” situation, when an employee refuses to test as provided in paragraph (a) of this section, you must terminate the portion of the testing process in which you are involved, document the refusal on the ATF (or in a separate document which you cause to be attached to the form), immediately notify the DER by any means (e.g., telephone or secure fax machine) that ensures the refusal notification is immediately received. You must make this notification directly to the DER (not using a C/TPA as an intermediary).

(d) As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have not refused to take a DOT test. There are no consequences under DOT agency regulations for such a refusal.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

§ 40.263 What happens when an employee is unable to provide a sufficient amount of saliva for an alcohol screening test?

(a) As the STT, you must take the following steps if an employee is unable to provide sufficient saliva to complete a test on a saliva screening device (e.g., the employee does not provide sufficient saliva to activate the device).

(1) You must conduct a new screening test using a new screening device.

(2) If the employee refuses to make the attempt to complete the new test, you must discontinue testing, note the fact on the “Remarks” line of the ATF, and immediately notify the DER. This is a refusal to test.

(3) If the employee has not provided a sufficient amount of saliva to complete the new test, you must note the fact on the “Remarks” line of the ATF and immediately notify the DER.

(b) As the DER, when the STT informs you that the employee has not provided a sufficient amount of saliva (see paragraph (a)(3) of this section), you must immediately arrange to administer an alcohol test to the employee using an EBT or other breath testing device.

§ 40.265 What happens when an employee is unable to provide a sufficient amount of breath for an alcohol test?

(a) If an employee does not provide a sufficient amount of breath to permit a valid breath test, you must take the steps listed in this section.

(b) As the BAT or STT, you must instruct the employee to attempt again to provide a sufficient amount of breath and about the proper way to do so.

(1) If the employee refuses to make the attempt, you must discontinue the test, note the fact on the "Remarks" line of the ATF, and immediately notify the DER. This is a refusal to test.

(2) If the employee again attempts and fails to provide a sufficient amount of breath, you may provide another opportunity to the employee to do so if you believe that there is a strong likelihood that it could result in providing a sufficient amount of breath.

(3) When the employee's attempts under paragraph (b)(2) of this section have failed to produce a sufficient amount of breath, you must note the fact on the "Remarks" line of the ATF and immediately notify the DER.

(4) If you are using an EBT that has the capability of operating manually, you may attempt to conduct the test in manual mode.

(5) If you are qualified to use a saliva ASD and you are in the screening test stage, you may change to a saliva ASD only to complete the screening test.

(c) As the employer, when the BAT or STT informs you that the employee has not provided a sufficient amount of breath, you must direct the employee to obtain, within five days, an evaluation from a licensed physician who is acceptable to you and who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen.

(1) You are required to provide the physician who will conduct the evaluation with the following information and instructions:

(i) That the employee was required to take a DOT breath alcohol test, but was unable to provide a sufficient amount of breath to complete the test;

(ii) The consequences of the appropriate DOT agency regulation for refusing to take the required alcohol test;

(iii) That the physician must provide you with a signed statement of his or her conclusions; and

(iv) That the physician, in his or her reasonable medical judgment, must base those conclusions on one of the following determinations:

(A) A medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of breath. The physician must not include in the signed statement detailed information on the employee's medical condition. In this case, the test is cancelled.

(B) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of breath. This constitutes a refusal to test.

(C) For purposes of paragraphs (c)(1)(iv)(A) and (B) of this section, a medical condition includes an ascertainable physiological condition (e.g., a respiratory system dysfunction) or a medically documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or hyperventilation.

(2) As the physician making the evaluation, after making your determination, you must provide a written statement of your conclusions and the basis for them to the DER directly (and not through a C/TPA acting as an intermediary). You must not include in this statement detailed information on the employee's medical condition beyond what is necessary to explain your conclusion.

(3) Upon receipt of the report from the examining physician, as the DER you must immediately inform the employee and take appropriate action based upon your DOT agency regulations.

§ 40.267 What problems always cause an alcohol test to be cancelled?

As an employer, a BAT, or an STT, you must cancel an alcohol test if any of the following problems occur. These are "fatal flaws." You must inform the DER that the test was cancelled and must be treated as if the test never occurred. These problems are:

(a) In the case of a screening test conducted on a saliva ASD or a breath tube ASD:

(1) The STT or BAT reads the result either sooner than or later than the time allotted by the manufacturer and this Part (see §40.245(a)(8) for the saliva ASD and §40.245(b)(8) for the breath tube ASD).

(2) The saliva ASD does not activate (see §40.245(a)(7); or

(3) The device is used for a test after the expiration date printed on the device or on its package (see §40.245(a)(1) for the saliva ASD and §40.245(b)(1) for the breath tube ASD).

(4) The breath tube ASD is tested with an analyzer which has not been pre-calibrated for that device's specific lot (see §40.245(b)(1)).

(b) In the case of a screening or confirmation test conducted on an EBT, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result (see §40.253(c), (e) and (f)).

(c) In the case of a confirmation test:

(1) The BAT conducts the confirmation test before the end of the minimum 15-minute waiting period (see §40.251(a)(1));

(2) The BAT does not conduct an air blank before the confirmation test (see §40.253(a));

(3) There is not a 0.00 result on the air blank conducted before the confirmation test (see §40.253(a)(1) and (2));

(4) The EBT does not print the result (see §40.253(f)); or

(5) The next external calibration check of the EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this case, every result of 0.02 or above obtained on the EBT since the last valid external calibration check is cancelled (see §40.233(a)(1) and (c)(3)).

[65 FR 79526, Dec. 19, 2000, as amended at 67 FR 61522, Oct. 1, 2002; 71 FR 49384. Aug. 23, 2006; 72 FR 1299, Jan. 11, 2007]

§ 40.269 What problems cause an alcohol test to be cancelled unless they are corrected?

As a BAT or STT, or employer, you must cancel an alcohol test if any of the following problems occur, unless they are corrected. These are "correctable flaws." These problems are:

(a) The BAT or STT does not sign the ATF (see §§40.247(a)(1) and 40.255(a)(1)).

(b) The BAT or STT fails to note on the "Remarks" line of the ATF that the employee has not signed the ATF after the result is obtained (see §40.255(a)(3)).

(c) The BAT or STT uses a non-DOT form for the test (see §40.225(a)).

[65 FR 79526, Dec. 19, 2000, amended at 71 FR 49384, Aug. 23, 2006]

§ 40.271 How are alcohol testing problems corrected?

(a) As a BAT or STT, you have the responsibility of trying to complete successfully an alcohol test for each employee.

(1) If, during or shortly after the testing process, you become aware of any event that will cause the test to be cancelled (see §40.267), you must try to correct the problem promptly, if practicable. You may repeat the testing process as part of this effort.

(2) If repeating the testing process is necessary, you must begin a new test as soon as possible. You must use a new ATF, a new sequential test number, and, if needed, a new ASD and/or a new EBT. It is permissible to use additional technical capabilities of the EBT (e.g., manual operation) if you have been trained to do so in accordance with §40.213(c) .

(3) If repeating the testing process is necessary, you are not limited in the number of attempts to complete the test, provided that the employee is making a good faith effort to comply with the testing process.

(4) If another testing device is not available for the new test at the testing site, you must immediately notify the DER and advise the DER that the test could not be completed. As the DER who receives this information, you must make all reasonable efforts to ensure that the test is conducted at another testing site as soon as possible.

(b) If, as an STT, BAT, employer or other service agent administering the testing process, you become aware of a "correctable flaw" (see §40.269) that has not already been corrected, you must take all practicable action to correct the problem so that the test is not cancelled.

(1) If the problem resulted from the omission of required information, you must, as the person responsible for providing that information, supply in writing the missing information and a signed statement that it is true and accurate. For example, suppose you are a BAT and you forgot to make a notation on the "Remarks" line of the ATF that the employee did not sign the certification. You would, when the problem is called to your attention, supply a signed statement that the employee failed or refused to sign the certification after the result was obtained, and that your signed statement is true and accurate.

(2) If the problem is the use of a non-DOT form, you must, as the person responsible for the use of the incorrect form, certify in writing that the incorrect form contains all the information needed for a valid DOT alcohol test. You must also provide a signed statement that the incorrect form was used inadvertently or as the only means of conducting a test, in circumstances beyond your control, and the steps you have taken to prevent future use of non-DOT forms for DOT tests. You must supply this information on the same business day on which you are notified of the problem, transmitting it by fax or courier.

(c) If you cannot correct the problem, you must cancel the test.

§ 40.273 What is the effect of a cancelled alcohol test?

(a) A cancelled alcohol test is neither positive nor negative.

(1) As an employer, you must not attach to a cancelled test the consequences of a test result that is 0.02 or greater (e.g., removal from a safety-sensitive position).

(2) As an employer, you must not use a cancelled test in a situation where an employee needs a test result that is below 0.02 (e.g., in the case of a return-to-duty or follow-up test to authorize the employee to perform safety-sensitive functions).

(3) As an employer, you must not direct a recollection for an employee because a test has been cancelled, except in the situations cited in paragraph (a)(2) of this section or other provisions of this part.

(b) A cancelled test does not count toward compliance with DOT requirements, such as a minimum random testing rate.

(c) When a test must be cancelled, if you are the BAT, STT, or other person who determines that the cancellation is necessary, you must inform the affected DER within 48 hours of the cancellation.

(d) A cancelled DOT test does not provide a valid basis for an employer to conduct a non-DOT test (i.e., a test under company authority).

§ 40.275 What is the effect of procedural problems that are not sufficient to cancel an alcohol test?

(a) As an STT, BAT, employer, or a service agent administering the testing process, you must document any errors in the testing process of which you become aware, even if they are not “fatal flaws” or “correctable flaws” listed in this subpart. Decisions about the ultimate impact of these errors will be determined by administrative or legal proceedings, subject to the limitation of paragraph (b) of this section.

(b) No person concerned with the testing process may declare a test cancelled based on a mistake in the process that does not have a significant adverse effect on the right of the employee to a fair and accurate test. For example, it is inconsistent with this part to cancel a test based on a minor administrative mistake (e.g., the omission of the employee's middle initial) or an error that does not affect employee protections under this part. Nor does the failure of an employee to sign in Step 4 of the ATF result in the cancellation of the test. Nor is a test to be cancelled on the basis of a claim by an employee that he or she was improperly selected for testing.

(c) As an employer, these errors, even though not sufficient to cancel an alcohol test result, may subject you to enforcement action under DOT agency regulations.

§ 40.277 Are alcohol tests other than saliva or breath permitted under these regulations?

No, other types of alcohol tests (e,g., blood and urine) are not authorized for testing done under this part. Only saliva or breath for screening tests and breath for confirmation tests using approved devices are permitted.

Subpart O - Substance Abuse Professionals and the Return-to-Duty Process

§ 40.281 Who is qualified to act as a SAP?

To be permitted to act as a SAP in the DOT drug and alcohol testing program, you must meet each of the requirements of this section:

(a) Credentials. You must have one of the following credentials:

(1) You are a licensed physician (Doctor of Medicine or Osteopathy);

(2) You are a licensed or certified social worker;

(3) You are a licensed or certified psychologist;

(4) You are a licensed or certified employee assistance professional;

(5) You are a state-licensed or certified marriage and family therapist; or

(6) You are a drug and alcohol counselor certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission (NAADAC); or by the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse (ICRC); or by the National Board for Certified Counselors, Inc. and Affiliates/Master Addictions Counselor (NBCC).

(b) Basic knowledge. You must be knowledgeable in the following areas:

(1) You must be knowledgeable about and have clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders.

(2) You must be knowledgeable about the SAP function as it relates to employer interests in safety-sensitive duties.

(3) You must be knowledgeable about this part, the DOT agency regulations applicable to the employers for whom you evaluate employees, and the DOT SAP Guidelines, and you keep current on any changes to these materials. These documents are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue, SE, Washington DC, 20590, 202–366–3784, or on the ODAPC web site (*http://www.dot.gov/ost/dapc*).

(c) Qualification training. You must receive qualification training meeting the requirements of this paragraph (c).

(1) Qualification training must provide instruction on the following subjects:

(i) Background, rationale, and coverage of the Department's drug and alcohol testing program;

(ii) 49 CFR Part 40 and DOT agency drug and alcohol testing rules;

(iii) Key DOT drug testing requirements, including collections, laboratory testing, MRO review, and problems in drug testing;

(iv) Key DOT alcohol testing requirements, including the testing process, the role of BATs and STTs, and problems in alcohol tests;

(v) SAP qualifications and prohibitions;

(vi) The role of the SAP in the return-to-duty process, including the initial employee evaluation, referrals for education and/or treatment, the follow-up evaluation, continuing treatment recommendations, and the follow-up testing plan;

(vii) SAP consultation and communication with employers, MROs, and treatment providers;

(viii) Reporting and recordkeeping requirements;

(ix) Issues that SAPs confront in carrying out their duties under the program.

(2) Following your completion of qualification training under paragraph (c)(1) of this section, you must satisfactorily complete an examination administered by a nationally-recognized professional or training organization. The examination must comprehensively cover all the elements of qualification training listed in paragraph (c)(1) of this section.

(3) The following is the schedule for qualification training you must meet:

(i) If you became a SAP before August 1, 2001, you must meet the qualification training requirement no later than December 31, 2003.

(ii) If you become a SAP between August 1, 2001, and December 31, 2003, you must meet the qualification training requirement no later than December 31, 2003.

(iii) If you become a SAP on or after January 1, 2004, you must meet the qualification training requirement before you begin to perform SAP functions.

(d) Continuing education. During each three-year period from the date on which you satisfactorily complete the examination under paragraph (c)(2) of this section, you must complete continuing education consisting of at least 12 professional development hours (e.g., CEUs) relevant to performing SAP functions.

(1) This continuing education must include material concerning new technologies, interpretations, recent guidance, rule changes, and other information about developments in SAP practice, pertaining to the DOT program, since the time you met the qualification training requirements of this section.

(2) Your continuing education activities must include documentable assessment tools to assist you in determining whether you have adequately learned the material.

(e) Documentation. You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or contemplating using your services.

[65 FR 79526, Dec. 19, 2000, as amended at 69 FR 3022, Jan. 22, 2004; 71 FR 49384, Aug. 23, 2006; 71 FR 55347, Sept. 22, 2006; 73 FR 33329, June 12, 2008]

§ 40.283 How does a certification organization obtain recognition for its members as SAPs?

(a) If you represent a certification organization that wants DOT to authorize its certified drug and alcohol counselors to be added to §40.281(a)(6), you may submit a written petition to DOT requesting a review of your petition for inclusion.

(b) You must obtain the National Commission for Certifying Agencies (NCCA) accreditation before DOT will act on your petition.

(c) You must also meet the minimum requirements of Appendix E to this part before DOT will act on your petition.

[65 FR 79526, Dec. 19, 2000, as amended at 71 FR 49384, Aug. 23, 2006]

§ 40.285 When is a SAP evaluation required?

(a) As an employee, when you have violated DOT drug and alcohol regulations, you cannot again perform any DOT safety-sensitive duties for any employer until and unless you complete the SAP evaluation, referral, and education/treatment process set forth in this subpart and in applicable DOT agency regulations. The first step in this process is a SAP evaluation.

(b) For purposes of this subpart, a verified positive DOT drug test result, a DOT alcohol test with a result indicating an alcohol concentration of 0.04 or greater, a refusal to test (including by adulterating or substituting a urine specimen) or any other violation of the prohibition on the use of alcohol or drugs under a DOT agency regulation constitutes a DOT drug and alcohol regulation violation.

§ 40.287 What information is an employer required to provide concerning SAP services to an employee who has a DOT drug and alcohol regulation violation?

As an employer, you must provide to each employee (including an applicant or new employee) who violates a DOT drug and alcohol regulation a listing of SAPs readily available to the employee and acceptable to

you, with names, addresses, and telephone numbers. You cannot charge the employee any fee for compiling or providing this list. You may provide this list yourself or through a C/TPA or other service agent.

§ 40.289 Are employers required to provide SAP and treatment services to employees?

(a) As an employer, you are not required to provide a SAP evaluation or any subsequent recommended education or treatment for an employee who has violated a DOT drug and alcohol regulation.

(b) However, if you offer that employee an opportunity to return to a DOT safety-sensitive duty following a violation, you must, before the employee again performs that duty, ensure that the employee receives an evaluation by a SAP meeting the requirements of §40.281 and that the employee successfully complies with the SAP's evaluation recommendations.

(c) Payment for SAP evaluations and services is left for employers and employees to decide and may be governed by existing management-labor agreements and health care benefits.

§ 40.291 What is the role of the SAP in the evaluation, referral, and treatment process of an employee who has violated DOT agency drug and alcohol testing regulations?

(a) As a SAP, you are charged with:

(1) Making a face-to-face clinical assessment and evaluation to determine what assistance is needed by the employee to resolve problems associated with alcohol and/or drug use;

(2) Referring the employee to an appropriate education and/or treatment program;

(3) Conducting a face-to-face follow-up evaluation to determine if the employee has actively participated in the education and/or treatment program and has demonstrated successful compliance with the initial assessment and evaluation recommendations;

(4) Providing the DER with a follow-up drug and/or alcohol testing plan for the employee; and

(5) Providing the employee and employer with recommendations for continuing education and/or treatment.

(b) As a SAP, you are not an advocate for the employer or employee. Your function is to protect the public interest in safety by professionally evaluating the employee and recommending appropriate education/treatment, follow-up tests, and aftercare.

§ 40.293 What is the SAP's function in conducting the initial evaluation of an employee?

As a SAP, for every employee who comes to you following a DOT drug and alcohol regulation violation, you must accomplish the following:

(a) Provide a comprehensive face-to-face assessment and clinical evaluation.

(b) Recommend a course of education and/or treatment with which the employee must demonstrate successful compliance prior to returning to DOT safety-sensitive duty.

(1) You must make such a recommendation for every individual who has violated a DOT drug and alcohol regulation.

(2) You must make a recommendation for education and/or treatment that will, to the greatest extent possible, protect public safety in the event that the employee returns to the performance of safety-sensitive functions.

(c) Appropriate education may include, but is not limited to, self-help groups (e.g., Alcoholics Anonymous) and community lectures, where attendance can be independently verified, and bona fide drug and alcohol education courses.

(d) Appropriate treatment may include, but is not limited to, in-patient hospitalization, partial in-patient treatment, out-patient counseling programs, and aftercare.

(e) You must provide a written report directly to the DER highlighting your specific recommendations for assistance (see §40.311(c)).

(f) 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 regulation 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.

(g) In the course of gathering information for purposes of your evaluation in the case of a drug-related violation, you may consult with the MRO. As the MRO, you are required to cooperate with the SAP and provide available information the SAP requests. It is not necessary to obtain the consent of the employee to provide this information.

§ 40.295 May employees or employers seek a second SAP evaluation if they disagree with the first SAP's recommendations?

(a) As an employee with a DOT drug and alcohol regulation violation, when you have been evaluated by a SAP, you must not seek a second SAP's evaluation in order to obtain another recommendation.

(b) As an employer, you must not seek a second SAP's evaluation if the employee has already been evaluated by a qualified SAP. If the employee, contrary to paragraph (a) of this section, has obtained a second SAP evaluation, as an employer you may not rely on it for any purpose under this part.

§ 40.297 Does anyone have the authority to change a SAP's initial evaluation?

(a) Except as provided in paragraph (b) of this section, no one (e.g., an employer, employee, a managed-care provider, any service agent) may change in any way the SAP's evaluation or recommendations for assistance. For example, a third party is not permitted to make more or less stringent a SAP's recommendation by changing the SAP's evaluation or seeking another SAP's evaluation.

(b) The SAP who made the initial evaluation may modify his or her initial evaluation and recommendations based on new or additional information (e.g., from an education or treatment program).

§ 40.299 What is the SAP's role and what are the limits on a SAP's discretion in referring employees for education and treatment?

(a) As a SAP, upon your determination of the best recommendation for assistance, you will serve as a referral source to assist the employee's entry into a education and/or treatment program.

(b) To prevent the appearance of a conflict of interest, you must not refer an employee requiring assistance to your private practice or to a person or organization from which you receive payment or to a person or organization in which you have a financial interest. You are precluded from making referrals to entities with which you are financially associated.

(c) There are four exceptions to the prohibitions contained in paragraph (b) of this section. You may refer an employee to any of the following providers of assistance, regardless of your relationship with them:

(1) A public agency (e.g., treatment facility) operated by a state, county, or municipality;

(2) The employer or a person or organization under contract to the employer to provide alcohol or drug treatment and/or education services (e.g., the employer's contracted treatment provider);

(3) The sole source of therapeutically appropriate treatment under the employee's health insurance program (e.g., the single substance abuse in-patient treatment program made available by the employee's insurance coverage plan); or

(4) The sole source of therapeutically appropriate treatment reasonably available to the employee (e.g., the only treatment facility or education program reasonably located within the general commuting area).

§ 40.301 What is the SAP's function in the follow-up evaluation of an employee?

(a) As a SAP, after you have prescribed assistance under §40.293, you must re-evaluate the employee to determine if the employee has successfully carried out your education and/or treatment recommendations.

(1) This is your way to gauge for the employer the employee's ability to demonstrate successful compliance with the education and/or treatment plan.

(2) Your evaluation may serve as one of the reasons the employer decides to return the employee to safety-sensitive duty.

(b) As the SAP making the follow-up evaluation determination, you must:

(1) Confer with or obtain appropriate documentation from the appropriate education and/or treatment program professionals where the employee was referred; and

(2) Conduct a face-to-face clinical interview with the employee to determine if the employee demonstrates successful compliance with your initial evaluation recommendations.

(c) (1) If the employee has demonstrated successful compliance, you must provide a written report directly to the DER highlighting your clinical determination that the employee has done so with your initial evaluation recommendation (see §40.311(d)).

(2) You may determine that an employee has successfully demonstrated compliance even though the employee has not yet completed the full regimen of education and/or treatment you recommended or needs additional assistance. For example, if the employee has successfully completed the 30-day in-patient program you prescribed, you may make a “successful compliance” determination even though you conclude that the employee has not yet completed the out-patient counseling you recommended or should continue in an aftercare program.

(d)(1) As the SAP, if you believe, as a result of the follow-up evaluation, that the employee has not demonstrated successful compliance with your recommendations, you must provide written notice directly to the DER (see §40.311(e)).

(2) As an employer who receives the SAP's written notice that the employee has not successfully complied with the SAP's recommendations, you must not return the employee to the performance of safety-sensitive duties.

(3) As the SAP, you may conduct additional follow-up evaluation(s) if the employer determines that doing so is consistent with the employee's progress as you have reported it and with the employer's policy and/or labor-management agreements.

(4) As the employer, following a SAP report that the employee has not demonstrated successful compliance, you may take personnel action consistent with your policy and/or labor-management agreements.

§ 40.303 What happens if the SAP believes the employee needs additional treatment, aftercare, or support group services even after the employee returns to safety-sensitive duties?

(a) As a SAP, if you believe that ongoing services (in addition to follow-up tests) are needed to assist an employee to maintain sobriety or abstinence from drug use after the employee resumes the performance of safety-sensitive duties, you must provide recommendations for these services in your follow-up evaluation report (see §40.311(d)(10)).

(b) As an employer receiving a recommendation for these services from a SAP, you may, as part of a return-to-duty agreement with the employee, require the employee to participate in the recommended services. You may monitor and document the employee's participation in the recommended services. You may also make use of SAP and employee assistance program (EAP) services in assisting and monitoring employees' compliance with SAP recommendations. Nothing in this section permits an employer to fail to carry out its obligations with respect to follow-up testing (see §40.309).

(c) As an employee, you are obligated to comply with the SAP's recommendations for these services. If you fail or refuse to do so, you may be subject to disciplinary action by your employer.

§ 40.305 How does the return-to-duty process conclude?

(a) As the employer, if you decide that you want to permit the employee to return to the performance of safety-sensitive functions, you must ensure that the employee takes a return-to-duty test. This test cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment. The employee must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties.

(b) As an employer, you must not return an employee to safety-sensitive duties until the employee meets the conditions of paragraph (a) of this section. However, you are not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that you have the discretion to make, subject to collective bargaining agreements or other legal requirements.

(c) As a SAP or MRO, you must not make a “fitness for duty” determination as part of this re-evaluation unless required to do so under an applicable DOT agency regulation. It is the employer, rather than you, who must decide whether to put the employee back to work in a safety-sensitive position.

§ 40.307 What is the SAP's function in prescribing the employee's follow-up tests?

(a) As a SAP, for each employee who has committed a DOT drug or alcohol regulation violation, and who seeks to resume the performance of safety-sensitive functions, you must establish a written follow-up testing plan. You do not establish this plan until after you determine that the employee has successfully complied with your recommendations for education and/or treatment.

(b) You must present a copy of this plan directly to the DER (see §40.311(d)(9)).

(c) You are the sole determiner of the number and frequency of follow-up tests and whether these tests will be for drugs, alcohol, or both, unless otherwise directed by the appropriate DOT agency regulation. For example, if the employee had a positive drug test, but your evaluation or the treatment program professionals determined that the employee had an alcohol problem as well, you should require that the employee have follow-up tests for both drugs and alcohol.

(d) However, you must, at a minimum, direct that the employee be subject to six unannounced follow-up tests in the first 12 months of safety-sensitive duty following the employee's return to safety-sensitive functions.

(1) You may require a greater number of follow-up tests during the first 12-month period of safety-sensitive duty (e.g., you may require one test a month during the 12-month period; you may require two tests per month during the first 6-month period and one test per month during the final 6-month period).

(2) You may also require follow-up tests during the 48 months of safety-sensitive duty following this first 12-month period.

(3) You are not to establish the actual dates for the follow-up tests you prescribe. The decision on specific dates to test is the employer's.

(4) As the employer, you must not impose additional testing requirements (e.g., under company authority) on the employee that go beyond the SAP's follow-up testing plan.

(e) The requirements of the SAP's follow-up testing plan “follow the employee” to subsequent employers or through breaks in service.

Example 1 to Paragraph (e): The employee returns to duty with Employer A. Two months afterward, after completing the first two of six follow-up tests required by the SAP's plan, the employee quits his job with Employer A and begins to work in a similar position for Employer B. The employee remains obligated to complete the four additional tests during the next 10 months of safety-sensitive duty, and Employer B is responsible for ensuring that the employee does so. Employer B learns of this obligation through the inquiry it makes under §40.25.

Example 2 to Paragraph (e): The employee returns to duty with Employer A. Three months later, after the employee completes the first two of six follow-up tests required by the SAP's plan, Employer A lays the employee off for economic or seasonal employment reasons. Four months later, Employer A recalls the employee. Employer A must ensure that the employee completes the remaining four follow-up tests during the next nine months.

(f) As the SAP, you may modify the determinations you have made concerning follow-up tests. For example, even if you recommended follow-up testing beyond the first 12-months, you can terminate the testing requirement at any time after the first year of testing. You must not, however, modify the requirement that the employee take at least six follow-up tests within the first 12 months after returning to the performance of safety-sensitive functions.

§ 40.309 What are the employer's responsibilities with respect to the SAP's directions for follow-up tests?

(a) As the employer, you must carry out the SAP's follow-up testing requirements. You may not allow the employee to continue to perform safety-sensitive functions unless follow-up testing is conducted as directed by the SAP.

(b) You should schedule follow-up tests on dates of your own choosing, but you must ensure that the tests are unannounced with no discernable pattern as to their timing, and that the employee is given no advance notice.

(c) You cannot substitute any other tests (e.g., those carried out under the random testing program) conducted on the employee for this follow-up testing requirement.

(d) You cannot count a follow-up test that has been cancelled as a completed test. A cancelled follow-up test must be recollected.

§ 40.311 What are the requirements concerning SAP reports?

(a) As the SAP conducting the required evaluations, you must send the written reports required by this section in writing directly to the DER and not to a third party or entity for forwarding to the DER (except as provided in §40.355(e)). You may, however, forward the document simultaneously to the DER and to a C/TPA.

(b) As an employer, you must ensure that you receive SAP written reports directly from the SAP performing the evaluation and that no third party or entity changed the SAP's report in any way.

(c) The SAP's written report, following an initial evaluation that determines what level of assistance is needed to address the employee's drug and/or alcohol problems, must be on the SAP's own letterhead (and not the letterhead of another service agent) signed and dated by the SAP, and must contain the following delineated items:

(1) Employee's name and SSN;

(2) Employer's name and address;

(3) Reason for the assessment (specific violation of DOT regulations and violation date);

(4) Date(s) of the assessment;

(5) SAP's education and/or treatment recommendation; and

(6) SAP's telephone number.

(d) The SAP's written report concerning a follow-up evaluation that determines the employee has demonstrated successful compliance must be on the SAP's own letterhead (and not the letterhead of another service agent), signed by the SAP and dated, and must contain the following items:

(1) Employee's name and SSN;

(2) Employer's name and address;

(3) Reason for the initial assessment (specific violation of DOT regulations and violation date);

(4) Date(s) of the initial assessment and synopsis of the treatment plan;

(5) Name of practice(s) or service(s) providing the recommended education and/or treatment;

(6) Inclusive dates of employee's program participation;

(7) Clinical characterization of employee's program participation;

(8) SAP's clinical determination as to whether the employee has demonstrated successful compliance;

(9) Follow-up testing plan;

(10) Employee's continuing care needs with specific treatment, aftercare, and/or support group services recommendations; and

(11) SAP's telephone number.

(e) The SAP's written report concerning a follow-up evaluation that determines the employee has not demonstrated successful compliance must be on the SAP's own letterhead (and not the letterhead of another service agent), signed by the SAP and dated, and must contain the following items:

(1) Employee's name and SSN;

(2) Employer's name and address;

(3) Reason for the initial assessment (specific DOT violation and date);

(4) Date(s) of initial assessment and synopsis of treatment plan;

(5) Name of practice(s) or service(s) providing the recommended education and/or treatment;

(6) Inclusive dates of employee's program participation;

(7) Clinical characterization of employee's program participation;

(8) Date(s) of the first follow-up evaluation;

(9) Date(s) of any further follow-up evaluation the SAP has scheduled;

(10) SAP's clinical reasons for determining that the employee has not demonstrated successful compliance; and

(11) SAP's telephone number.

(f) As a SAP, you must also provide these written reports directly to the employee if the employee has no current employer and to the gaining DOT regulated employer in the event the employee obtains another transportation industry safety-sensitive position.

(g) As a SAP, you are to maintain copies of your reports to employers for 5 years, and your employee clinical records in accordance with Federal, state, and local laws regarding record maintenance, confidentiality, and release of information. You must make these records available, on request, to DOT agency representatives (e.g., inspectors conducting an audit or safety investigation) and representatives of the NTSB in an accident investigation.

(h) As an employer, you must maintain your reports from SAPs for 5 years from the date you received them.

§ 40.313 Where is other information on SAP functions and the return-to-duty process found in this regulation?

You can find other information on the role and functions of SAPs in the following sections of this part:

§40.3—Definition.

§40.347—Service agent assistance with SAP-required follow-up testing.

§40.355—Transmission of SAP reports.

§40.329(c)—Making SAP reports available to employees on request.

Appendix E to Part 40—SAP Equivalency Requirements for Certification Organizations.

Subpart P - Confidentiality and Release of Information

§ 40.321 What is the general confidentiality rule for drug and alcohol test information?

Except as otherwise provided in this subpart, as a service agent or employer participating in the DOT drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third parties without the employee's specific written consent.

(a) A “third party” is any person or organization to whom other subparts of this regulation do not explicitly authorize or require the transmission of information in the course of the drug or alcohol testing process.

(b) “Specific written consent” means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. “Blanket releases,” in which an employee agrees to a release of a category of information (e.g., all test results) or to release information to a category of parties (e.g., other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part.

§ 40.323 May program participants release drug or alcohol test information in connection with legal proceedings?

(a) As an employer, you may release information pertaining to an employee's drug or alcohol test without the employee's consent in certain legal proceedings.

(1) These proceedings include a lawsuit (e.g., a wrongful discharge action), grievance (e.g., an arbitration concerning disciplinary action taken by the employer), or administrative proceeding (e.g., an unemployment compensation hearing) brought by, or on behalf of, an employee and resulting from a positive DOT drug or alcohol test or a refusal to test (including, but not limited to, adulterated or substituted test results).

(2) These proceedings also include a criminal or civil action resulting from an employee's performance of safety-sensitive duties, in which a court of competent jurisdiction determines that the drug or alcohol test information sought is relevant to the case and issues an order directing the employer to produce the information. For example, in personal injury litigation following a truck or bus collision, the court could determine that a post-

accident drug test result of an employee is relevant to determining whether the driver or the driver's employer was negligent. The employer is authorized to respond to the court's order to produce the records.

(b) In such a proceeding, you may release the information to the decisionmaker in the proceeding (e.g., the court in a lawsuit). You may release the information only with a binding stipulation that the decisionmaker to whom it is released will make it available only to parties to the proceeding.

(c) If you are a service agent, and the employer requests its employee's drug or alcohol testing information from you to use in a legal proceeding as authorized in paragraph (a) of this section (e.g., the laboratory's data package), you must provide the requested information to the employer.

(d) As an employer or service agent, you must immediately notify the employee in writing of any information you release under this section.

§ 40.325 [Reserved]

§ 40.327 When must the MRO report medical information gathered in the verification process?

(a) As the MRO, you must, except as provided in paragraph (c) of this section, report drug test results and medical information you learned as part of the verification process to third parties without the employee's consent if you determine, in your reasonable medical judgment, that:

(1) The information is likely to result in the employee being determined to be medically unqualified under an applicable DOT agency regulation; or

(2) The information indicates that continued performance by the employee of his or her safety-sensitive function is likely to pose a significant safety risk.

(b) The third parties to whom you are authorized to provide information by this section include the employer, a physician or other health care provider responsible for determining the medical qualifications of the employee under an applicable DOT agency safety regulation, a SAP evaluating the employee as part of the return to duty process (see §40.293(g)), a DOT agency, or the National Transportation Safety Board in the course of an accident investigation.

(c) If the law of a foreign country (e.g., Canada) prohibits you from providing medical information to the employer, you may comply with that prohibition.

§ 40.329 What information must laboratories, MROs, and other service agents release to employees?

(a) As an MRO or service agent you must provide, within 10 business days of receiving a written request from an employee, copies of any records pertaining to the employee's use of alcohol and/or drugs, including records of the employee's DOT-mandated drug and/or alcohol tests. You may charge no more than the cost of preparation and reproduction for copies of these records.

(b) As a laboratory, you must provide, within 10 business days of receiving a written request from an employee, and made through the MRO, the records relating to the results of the employee's drug test (i.e., laboratory report and data package). You may charge no more than the cost of preparation and reproduction for copies of these records.

(c) As a SAP, you must make available to an employee, on request, a copy of all SAP reports (see §40.311). However, you must redact follow-up testing information from the report before providing it to the employee.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41954, Aug. 9, 2001]

§ 40.331 To what additional parties must employers and service agents release information?

As an employer or service agent you must release information under the following circumstances:

(a) If you receive a specific, written consent from an employee authorizing the release of information about that employee's drug or alcohol tests to an identified person, you must provide the information to the identified person. For example, as an employer, when you receive a written request from a former employee to provide information to a subsequent employer, you must do so. In providing the information, you must comply with the terms of the employee's consent.

(b) If you are an employer, you must, upon request of DOT agency representatives, provide the following:

(1) Access to your facilities used for this part and DOT agency drug and alcohol program functions.

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files, materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations. You must provide this information at your principal place of business in the time required by the DOT agency.

(3) All items in paragraph (b)(2) of this section must be easily accessible, legible, and provided in an organized manner. If electronic records do not meet these standards, they must be converted to printed documentation that meets these standards.

(c) If you are a service agent, you must, upon request of DOT agency representatives, provide the following:

(1) Access to your facilities used for this part and DOT agency drug and alcohol program functions.

(2) All written, printed, and computer-based drug and alcohol program records and reports (including copies of name-specific records or reports), files, materials, data, documents/documentation, agreements, contracts, policies, and statements that are required by this part and DOT agency regulations. You must provide this information at your principal place of business in the time required by the DOT agency.

(3) All items in paragraph (c)(2) of this section must be easily accessible, legible, and provided in an organized manner. If electronic records do not meet these standards, they must be converted to printed documentation that meets these standards.

(d) If requested by the National Transportation Safety Board as part of an accident investigation, you must provide information concerning post-accident tests administered after the accident.

(e) If requested by a Federal, state or local safety agency with regulatory authority over you or the employee, you must provide drug and alcohol test records concerning the employee.

(f) Except as otherwise provided in this part, as a laboratory you must not release or provide a specimen or a part of a specimen to a requesting party, without first obtaining written consent from ODAPC. If a party seeks a court order directing you to release a specimen or part of a specimen contrary to any provision of this part, you must take necessary legal steps to contest the issuance of the order (e.g., seek to quash a subpoena, citing the requirements of §40.13). This part does not require you to disobey a court order, however.

(g) Notwithstanding any other provision of this Part, as an employer of Commercial Motor Vehicle (CMV) drivers holding commercial driving licenses (CDLs) or as a third party administrator for owner-operator CMV drivers with CDLs, you are authorized to comply with State laws requiring you to provide to State CDL licensing authorities information about all violations of DOT drug and alcohol testing rules (including positive tests and refusals) by any CMV driver holding a CDL.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001; 73 FR 33737, June 13, 2008]

§ 40.333 What records must employers keep?

(a) As an employer, you must keep the following records for the following periods of time:

(1) You must keep the following records for five years:

(i) Records of alcohol test results indicating an alcohol concentration of 0.02 or greater;

(ii) Records of verified positive drug test results;

(iii) Documentation of refusals to take required alcohol and/or drug tests (including substituted or adulterated drug test results);

(iv) SAP reports; and

(v) All follow-up tests and schedules for follow-up tests.

(2) You must keep records for three years of information obtained from previous employers under §40.25 concerning drug and alcohol test results of employees.

(3) You must keep records of the inspection, maintenance, and calibration of EBTs, for two years.

(4) You must keep records of negative and cancelled drug test results and alcohol test results with a concentration of less than 0.02 for one year.

(b) You do not have to keep records related to a program requirement that does not apply to you (e.g., a maritime employer who does not have a DOT-mandated random alcohol testing program need not maintain random alcohol testing records).

(c) You must maintain the records in a location with controlled access.

(d) A service agent may maintain these records for you. However, you must ensure that you can produce these records at your principal place of business in the time required by the DOT agency. For example, as a motor carrier, when an FMCSA inspector requests your records, you must ensure that you can provide them within two business days.

(e) If you store records electronically, where permitted by this part, you must ensure that the records are easily accessible, legible, and formatted and stored in an organized manner. If electronic records do not meet these criteria, you must convert them to printed documentation in a rapid and readily auditable manner, at the request of DOT agency personnel.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001]

Subpart Q - Roles and Responsibilities of Service Agents

§ 40.341 Must service agents comply with DOT drug and alcohol testing requirements?

(a) As a service agent, the services you provide to transportation employers must meet the requirements of this part and the DOT agency drug and alcohol testing regulations.

(b) If you do not comply, DOT may take action under the Public Interest Exclusions procedures of this part (see Subpart R of this part) or applicable provisions of other DOT agency regulations.

§ 40.343 What tasks may a service agent perform for an employer?

As a service agent, you may perform for employers the tasks needed to comply with DOT agency drug and alcohol testing regulations, subject to the requirements and limitations of this part.

§ 40.345 In what circumstances may a C/TPA act as an intermediary in the transmission of drug and alcohol testing information to employers?

(a) As a C/TPA or other service agent, you may act as an intermediary in the transmission of drug and alcohol testing information in the circumstances specified in this section only if the employer chooses to have you do so. Each employer makes the decision about whether to receive some or all of this information from you, acting as an intermediary, rather than directly from the service agent who originates the information (e.g., an MRO or BAT).

(b) The specific provisions of this part concerning which you may act as an intermediary are listed in Appendix F to this part. These are the only situations in which you may act as an intermediary. You are prohibited from doing so in all other situations.

(c) In every case, you must ensure that, in transmitting information to employers, you meet all requirements (e.g., concerning confidentiality and timing) that would apply if the service agent originating the information (e.g., an MRO or collector) sent the information directly to the employer. For example, if you transmit drug testing results from MROs to DERs, you must transmit each drug test result to the DER in compliance with the MRO requirements set forth in §40.167 .

§ 40.347 What functions may C/TPAs perform with respect to administering testing?

As a C/TPA, except as otherwise specified in this part, you may perform the following functions for employers concerning random selection and other selections for testing.

(a) You may operate random testing programs for employers and may assist (i.e., through contracting with laboratories or collection sites, conducting collections) employers with other types of testing (e.g., pre-employment, post-accident, reasonable suspicion, return-to-duty, and follow-up).

(b) You may combine employees from more than one employer or one transportation industry in a random pool if permitted by all the DOT agency drug and alcohol testing regulations involved.

(1) 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.

(2) Employees not covered by DOT agency regulations may not be part of the same random pool with DOT covered employees.

(c) You may assist employers in ensuring that follow-up testing is conducted in accordance with the plan established by the SAP. However, neither you nor the employer are permitted to randomly select employees from a “follow-up pool” for follow-up testing.

§ 40.349 What records may a service agent receive and maintain?

(a) Except where otherwise specified in this part, as a service agent you may receive and maintain all records concerning DOT drug and alcohol testing programs, including positive, negative, and refusal to test individual test results. You do not need the employee's consent to receive and maintain these records.

(b) You may maintain all information needed for operating a drug/alcohol program (e.g., CCFs, ATFs, names of employees in random pools, random selection lists, copies of notices to employers of selected employees) on behalf of an employer.

(c) If a service agent originating drug or alcohol testing information, such as an MRO or BAT, sends the information directly to the DER, he or she may also provide the information simultaneously to you, as a C/TPA or other service agent who maintains this information for the employer.

(d) If you are serving as an intermediary in transmitting information that is required to be provided to the employer, you must ensure that it reaches the employer in the same time periods required elsewhere in this part.

(e) You must ensure that you can make available to the employer within two business days any information the employer is asked to produce by a DOT agency representative.

(f) On request of an employer, you must, at any time on the request of an employer, transfer immediately all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates. You must carry out this transfer as soon as the employer requests it. You are not required to obtain employee consent for this transfer. You must not charge more than your reasonable administrative costs for conducting this transfer. You may not charge a fee for the release of these records.

(g) If you are planning to go out of business or your organization will be bought by or merged with another organization, you must immediately notify all employers and offer to transfer all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates. You must carry out this transfer as soon as the employer requests it. You are not required to obtain employee consent for this transfer. You

must not charge more than your reasonable administrative costs for conducting this transfer. You may not charge a fee for the release of these records.
[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001]

§ 40.351 What confidentiality requirements apply to service agents?

Except where otherwise specified in this part, as a service agent the following confidentiality requirements apply to you:

(a) When you receive or maintain confidential information about employees (e.g., individual test results), you must follow the same confidentiality regulations as the employer with respect to the use and release of this information.

(b) You must follow all confidentiality and records retention requirements applicable to employers.

(c) You may not provide individual test results or other confidential information to another employer without a specific, written consent from the employee. For example, suppose you are a C/TPA that has employers X and Y as clients. Employee Jones works for X, and you maintain Jones' drug and alcohol test for X. Jones wants to change jobs and work for Y. You may not inform Y of the result of a test conducted for X without having a specific, written consent from Jones. Likewise, you may not provide this information to employer Z, who is not a C/TPA member, without this consent.

(d) You must not use blanket consent forms authorizing the release of employee testing information.

(e) You must establish adequate confidentiality and security measures to ensure that confidential employee records are not available to unauthorized persons. This includes protecting the physical security of records, access controls, and computer security measures to safeguard confidential data in electronic data bases.

§ 40.353 What principles govern the interaction between MROs and other service agents?

As a service agent other than an MRO (e.g., a C/TPA), the following principles govern your interaction with MROs:

(a) You may provide MRO services to employers, directly or through contract, if you meet all applicable provisions of this part.

(b) If you employ or contract for an MRO, the MRO must perform duties independently and confidentially. When you have a relationship with an MRO, you must structure the relationship to ensure that this independence and confidentiality are not compromised. Specific means (including both physical and operational measures, as appropriate) to separate MRO functions and other service agent functions are essential.

(c) Only your staff who are actually under the day-to-day supervision and control of an MRO with respect to MRO functions may perform these functions. This does not mean that those staff may not perform other functions at other times. However, the designation of your staff to perform MRO functions under MRO supervision must be limited and not used as a subterfuge to circumvent confidentiality and other requirements of this part and DOT agency regulations. You must ensure that MRO staff operate under controls sufficient to ensure that the independence and confidentiality of the MRO process are not compromised.

(d) Like other MROs, an MRO you employ or contract with must personally conduct verification interviews with employees and must personally make all verification decisions. Consequently, your staff cannot perform these functions.

§ 40.355 What limitations apply to the activities of service agents?

As a service agent, you are subject to the following limitations concerning your activities in the DOT drug and alcohol testing program.

(a) You must not require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by this part (including, but not limited to, collections, laboratory testing, MRO, and SAP services). No one may do so on behalf of a service agent.

(b) You must not act as an intermediary in the transmission of drug test results from the laboratory to the MRO. That is, the laboratory may not send results to you, with you in turn sending them to the MRO for verification. For example, a practice in which the laboratory transmits results to your computer system, and you then assign the results to a particular MRO, is not permitted.

(c) You must not transmit drug test results directly from the laboratory to the employer (by electronic or other means) or to a service agent who forwards them to the employer. All confirmed laboratory results must be processed by the MRO before they are released to any other party.

(d) You must not act as an intermediary in the transmission of alcohol test results of 0.02 or higher from the STT or BAT to the DER.

(e) Except as provided in paragraph (f) of this section, you must not act as an intermediary in the transmission of individual SAP reports to the actual employer. That is, the SAP may not send such reports to you, with you in turn sending them to the actual employer. However, you may maintain individual SAP summary reports

and follow-up testing plans after they are sent to the DER, and the SAP may transmit such reports to you simultaneously with sending them to the DER.

(f) As an exception to paragraph (e) of this section, you may act as an intermediary in the transmission of SAP report from the SAP to an owner-operator or other self-employed individual.

(g) Except as provided in paragraph (h) of this section, you must not make decisions to test an employee based upon reasonable suspicion, post-accident, return-to-duty, and follow-up determination criteria. These are duties the actual employer cannot delegate to a C/TPA. You may, however, provide advice and information to employers regarding these testing issues and how the employer should schedule required testing.

(h) As an exception to paragraph (g) of this section, you may make decisions to test an employee based upon reasonable suspicion, post-accident, return-to-duty, and follow-up determination criteria with respect to an owner-operator or other self-employed individual.

(i) Except as provided in paragraph (j) of this section, you must not make a determination that an employee has refused a drug or alcohol test. This is a non-delegable duty of the actual employer. You may, however, provide advice and information to employers regarding refusal-to-test issues.

(j) As an exception to paragraph (i) of this section, you may make a determination that an employee has refused a drug or alcohol test, if:

(1) You schedule a required test for an owner-operator or other self-employed individual, and the individual fails to appear for the test without a legitimate reason; or

(2) As an MRO, you determine that an individual has refused to test on the basis of adulteration or substitution.

(k) You must not act as a DER. For example, while you may be responsible for transmitting information to the employer about test results, you must not act on behalf of the employer in actions to remove employees from safety-sensitive duties.

(l) In transmitting documents to laboratories, you must ensure that you send to the laboratory that conducts testing only the laboratory copy of the CCF. You must not transmit other copies of the CCF or any ATFs to the laboratory.

(m) You must not impose conditions or requirements on employers that DOT regulations do not authorize. For example, as a C/TPA serving employers in the pipeline or motor carrier industry, you must not require employers to have provisions in their DOT plans that PHMSA or FMCSA regulations do not require.

(n) You must not intentionally delay the transmission of drug or alcohol testing-related documents concerning actions you have performed, because of a payment dispute or other reasons.

Example 1 to Paragraph (n): A laboratory that has tested a specimen must not delay transmitting the documentation of the test result to an MRO because of a billing or payment dispute with the MRO or a C/TPA.

Example 2 to Paragraph (n): An MRO or SAP who has interviewed an employee must not delay sending a verified test result or SAP report to the employer because of such a dispute with the employer or employee.

Example 3 to Paragraph (n): A collector who has performed a urine specimen collection must not delay sending the drug specimen and CCF to the laboratory because of a payment or other dispute with the laboratory or a C/TPA.

Example 4 to Paragraph (n): A BAT who has conducted an alcohol test must not delay sending test result information to an employer or C/TPA because of a payment or other dispute with the employer or C/TPA.

(o) While you must follow the DOT agency regulations, the actual employer remains accountable to DOT for compliance, and your failure to implement any aspect of the program as required in this part and other applicable DOT agency regulations makes the employer subject to enforcement action by the Department.

[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001]

Subpart R - Public Interest Exclusions

§ 40.361 What is the purpose of a public interest exclusion (PIE)?

(a) To protect the public interest, including protecting transportation employers and employees from serious noncompliance with DOT drug and alcohol testing rules, the Department's policy is to ensure that employers conduct business only with responsible service agents.

(b) The Department therefore uses PIEs to exclude from participation in DOT's drug and alcohol testing program any service agent who, by serious noncompliance with this part or other DOT agency drug and alcohol testing regulations, has shown that it is not currently acting in a responsible manner.

(c) A PIE is a serious action that the Department takes only to protect the public interest. We intend to use PIEs only to remedy situations of serious noncompliance. PIEs are not used for the purpose of punishment.

(d) Nothing in this subpart precludes a DOT agency or the Inspector General from taking other action authorized by its regulations with respect to service agents or employers that violate its regulations.

§ 40.363 On what basis may the Department issue a PIE?

(a) If you are a service agent, the Department may issue a PIE concerning you if we determine that you have failed or refused to provide drug or alcohol testing services consistent with the requirements of this part or a DOT agency drug and alcohol regulation.

(b) The Department also may issue a PIE if you have failed to cooperate with DOT agency representatives concerning inspections, complaint investigations, compliance and enforcement reviews, or requests for documents and other information about compliance with this part or DOT agency drug and alcohol regulations.

§ 40.365 What is the Department's policy concerning starting a PIE proceeding?

(a) It is the Department's policy to start a PIE proceeding only in cases of serious, uncorrected noncompliance with the provisions of this part, affecting such matters as safety, the outcomes of test results, privacy and confidentiality, due process and fairness for employees, the honesty and integrity of the testing program, and cooperation with or provision of information to DOT agency representatives.

(b) The following are examples of the kinds of serious noncompliance that, as a matter of policy, the Department views as appropriate grounds for starting a PIE proceeding. These examples are not intended to be an exhaustive or exclusive list of the grounds for starting a PIE proceeding. We intend them to illustrate the level of seriousness that the Department believes supports starting a PIE proceeding. The examples follow:

(1) For an MRO, verifying tests positive without interviewing the employees as required by this part or providing MRO services without meeting the qualifications for an MRO required by this part;

(2) For a laboratory, refusing to provide information to the Department, an employer, or an employee as required by this part; failing or refusing to conduct a validity testing program when required by this part; or a pattern or practice of testing errors that result in the cancellation of tests. (As a general matter of policy, the Department does not intend to initiate a PIE proceeding concerning a laboratory with respect to matters on which HHS initiates certification actions under its laboratory guidelines.);

(3) For a collector, a pattern or practice of directly observing collections when doing so is unauthorized, or failing or refusing to directly observe collections when doing so is mandatory;

(4) For collectors, BATs, or STTs, a pattern or practice of using forms, testing equipment, or collection kits that do not meet the standards in this part;

(5) For a collector, BAT, or STT, a pattern or practice of “fatal flaws” or other significant uncorrected errors in the collection process;

(6) For a laboratory, MRO or C/TPA, failing or refusing to report tests results as required by this part or DOT agency regulations;

(7) For a laboratory, falsifying, concealing, or destroying documentation concerning any part of the drug testing process, including, but not limited to, documents in a “litigation package”;

(8) For SAPs, providing SAP services while not meeting SAP qualifications required by this part or performing evaluations without face-to-face interviews;

(9) For any service agent, maintaining a relationship with another party that constitutes a conflict of interest under this part (e.g., a laboratory that derives a financial benefit from having an employer use a specific MRO);

(10) For any service agent, representing falsely that the service agent or its activities is approved or certified by the Department or a DOT agency;

(11) For any service agent, disclosing an employee's test result information to any party this part or a DOT agency regulation does not authorize, including by obtaining a “blanket” consent from employees or by creating a data base from which employers or others can retrieve an employee's DOT test results without the specific consent of the employee;

(12) For any service agent, interfering or attempting to interfere with the ability of an MRO to communicate with the Department, or retaliating against an MRO for communicating with the Department;

(13) For any service agent, directing or recommending that an employer fail or refuse to implement any provision of this part; or

(14) With respect to noncompliance with a DOT agency regulation, conduct that affects important provisions of Department-wide concern (e.g., failure to properly conduct the selection process for random testing).

§ 40.367 Who initiates a PIE proceeding?

The following DOT officials may initiate a PIE proceeding:

(a) The drug and alcohol program manager of a DOT agency;

(b) An official of ODAPC, other than the Director; or

(c) The designee of any of these officials.

§ 40.369 What is the discretion of an initiating official in starting a PIE proceeding?

(a) Initiating officials have broad discretion in deciding whether to start a PIE proceeding.

(b) In exercising this discretion, the initiating official must consider the Department's policy regarding the seriousness of the service agent's conduct (see §40.365) and all information he or she has obtained to this point concerning the facts of the case. The initiating official may also consider the availability of the resources needed to pursue a PIE proceeding.

(c) A decision not to initiate a PIE proceeding does not necessarily mean that the Department regards a service agent as being in compliance or that the Department may not use other applicable remedies in a situation of noncompliance.

§ 40.371 On what information does an initiating official rely in deciding whether to start a PIE proceeding?

(a) An initiating official may rely on credible information from any source as the basis for starting a PIE proceeding.

(b) Before sending a correction notice (see §40.373), the initiating official informally contacts the service agent to determine if there is any information that may affect the initiating official's determination about whether it is necessary to send a correction notice. The initiating official may take any information resulting from this contact into account in determining whether to proceed under this subpart.

§ 40.373 Before starting a PIE proceeding, does the initiating official give the service agent an opportunity to correct problems?

(a) If you are a service agent, the initiating official must send you a correction notice before starting a PIE proceeding.

(b) The correction notice identifies the specific areas in which you must come into compliance in order to avoid being subject to a PIE proceeding.

(c) If you make and document changes needed to come into compliance in the areas listed in the correction notice to the satisfaction of the initiating official within 60 days of the date you receive the notice, the initiating official does not start a PIE proceeding. The initiating official may conduct appropriate fact finding to verify that you have made and maintained satisfactory corrections. When he or she is satisfied that you are in compliance, the initiating official sends you a notice that the matter is concluded.

§ 40.375 How does the initiating official start a PIE proceeding?

(a) As a service agent, if your compliance matter is not correctable (see §40.373(a)), or if have not resolved compliance matters as provided in §40.373(c), the initiating official starts a PIE proceeding by sending you a notice of proposed exclusion (NOPE). The NOPE contains the initiating official's recommendations concerning the issuance of a PIE, but it is not a decision by the Department to issue a PIE.

(b) The NOPE includes the following information:

(1) A statement that the initiating official is recommending that the Department issue a PIE concerning you;

(2) The factual basis for the initiating official's belief that you are not providing drug and/or alcohol testing services to DOT-regulated employers consistent with the requirements of this part or are in serious noncompliance with a DOT agency drug and alcohol regulation;

(3) The factual basis for the initiating official's belief that your noncompliance has not been or cannot be corrected;

(4) The initiating official's recommendation for the scope of the PIE;

(5) The initiating official's recommendation for the duration of the PIE; and

(6) A statement that you may contest the issuance of the proposed PIE, as provided in §40.379.

(c) The initiating official sends a copy of the NOPE to the ODAPC Director at the same time he or she sends the NOPE to you.

§ 40.377 Who decides whether to issue a PIE?

(a) The ODAPC Director, or his or her designee, decides whether to issue a PIE. If a designee is acting as the decisionmaker, all references in this subpart to the Director refer to the designee.

(b) To ensure his or her impartiality, the Director plays no role in the initiating official's determination about whether to start a PIE proceeding.

(c) There is a “firewall” between the initiating official and the Director. This means that the initiating official and the Director are prohibited from having any discussion, contact, or exchange of information with one another about the matter, except for documents and discussions that are part of the record of the proceeding.

§ 40.379 How do you contest the issuance of a PIE?

(a) If you receive a NOPE, you may contest the issuance of the PIE.

(b) If you want to contest the proposed PIE, you must provide the Director information and argument in opposition to the proposed PIE in writing, in person, and/or through a representative. To contest the proposed PIE, you must take one or more of the steps listed in this paragraph (b) within 30 days after you receive the NOPE.

(1) You may request that the Director dismiss the proposed PIE without further proceedings, on the basis that it does not concern serious noncompliance with this part or DOT agency regulations, consistent with the Department's policy as stated in §40.365.

(2) You may present written information and arguments, consistent with the provisions of §40.381, contesting the proposed PIE.

(3) You may arrange with the Director for an informal meeting to present your information and arguments.

(c) If you do not take any of the actions listed in paragraph (b) of this section within 30 days after you receive the NOPE, the matter proceeds as an uncontested case. In this event, the Director makes his or her decision based on the record provided by the initiating official (i.e., the NOPE and any supporting information or testimony) and any additional information the Director obtains.

§ 40.381 What information do you present to contest the proposed issuance of a PIE?

(a) As a service agent who wants to contest a proposed PIE, you must present at least the following information to the Director:

(1) Specific facts that contradict the statements contained in the NOPE (see §40.375(b)(2) and (3)). A general denial is insufficient to raise a genuine dispute over facts material to the issuance of a PIE;

(2) Identification of any existing, proposed or prior PIE; and

(3) Identification of your affiliates, if any.

(b) You may provide any information and arguments you wish concerning the proposed issuance, scope and duration of the PIE (see §40.375(b)(4) and (5)).

(c) You may provide any additional relevant information or arguments concerning any of the issues in the matter.

§ 40.383 What procedures apply if you contest the issuance of a PIE?

(a) DOT conducts PIE proceedings in a fair and informal manner. The Director may use flexible procedures to allow you to present matters in opposition. The Director is not required to follow formal rules of evidence or procedure in creating the record of the proceeding.

(b) The Director will consider any information or argument he or she determines to be relevant to the decision on the matter.

(c) You may submit any documentary evidence you want the Director to consider. In addition, if you have arranged an informal meeting with the Director, you may present witnesses and confront any person the initiating official presents as a witness against you.

(d) In cases where there are material factual issues in dispute, the Director or his or her designee may conduct additional fact-finding.

(e) If you have arranged a meeting with the Director, the Director will make a transcribed record of the meeting available to you on your request. You must pay the cost of transcribing and copying the meeting record.

§ 40.385 Who bears the burden of proof in a PIE proceeding?

(a) As the proponent of issuing a PIE, the initiating official bears the burden of proof.

(b) This burden is to demonstrate, by a preponderance of the evidence, that the service agent was in serious noncompliance with the requirements of this part for drug and/or alcohol testing-related services or with the requirements of another DOT agency drug and alcohol testing regulation.

§ 40.387 What matters does the Director decide concerning a proposed PIE?

(a) Following the service agent's response (see §40.379(b)) or, if no response is received, after 30 days have passed from the date on which the service agent received the NOPE, the Director may take one of the following steps:

(1) In response to a request from the service agent (see §40.379(b)(1)) or on his or her own motion, the Director may dismiss a PIE proceeding if he or she determines that it does not concern serious noncompliance with this part or DOT agency regulations, consistent with the Department's policy as stated in §40.365.

(i) If the Director dismisses a proposed PIE under this paragraph (a), the action is closed with respect to the noncompliance alleged in the NOPE.

(ii) The Department may initiate a new PIE proceeding against you on the basis of different or subsequent conduct that is in noncompliance with this part or other DOT drug and alcohol testing rules.

(2) If the Director determines that the initiating official's submission does not have complete information needed for a decision, the Director may remand the matter to the initiating official. The initiating official may

resubmit the matter to the Director when the needed information is complete. If the basis for the proposed PIE has changed, the initiating official must send an amended NOPE to the service agent.

(b) The Director makes determinations concerning the following matters in any PIE proceeding that he or she decides on the merits:

(1) Any material facts that are in dispute;

(2) Whether the facts support issuing a PIE;

(3) The scope of any PIE that is issued; and

(4) The duration of any PIE that is issued.

§ 40.389 What factors may the Director consider?

This section lists examples of the kind of mitigating and aggravating factors that the Director may consider in determining whether to issue a PIE concerning you, as well as the scope and duration of a PIE. This list is not exhaustive or exclusive. The Director may consider other factors if appropriate in the circumstances of a particular case. The list of examples follows:

(a) The actual or potential harm that results or may result from your noncompliance;

(b) The frequency of incidents and/or duration of the noncompliance;

(c) Whether there is a pattern or prior history of noncompliance;

(d) Whether the noncompliance was pervasive within your organization, including such factors as the following:

(1) Whether and to what extent your organization planned, initiated, or carried out the noncompliance;

(2) The positions held by individuals involved in the noncompliance, and whether your principals tolerated their noncompliance; and

(3) Whether you had effective standards of conduct and control systems (both with respect to your own organization and any contractors or affiliates) at the time the noncompliance occurred;

(e) Whether you have demonstrated an appropriate compliance disposition, including such factors as the following:

(1) Whether you have accepted responsibility for the noncompliance and recognize the seriousness of the conduct that led to the cause for issuance of the PIE;

(2) Whether you have cooperated fully with the Department during the investigation. The Director may consider when the cooperation began and whether you disclosed all pertinent information known to you;

(3) Whether you have fully investigated the circumstances of the noncompliance forming the basis for the PIE and, if so, have made the result of the investigation available to the Director;

(4) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity that constitutes the grounds for issuance of the PIE; and

(5) Whether your organization has taken appropriate corrective actions or remedial measures, including implementing actions to prevent recurrence;

(f) With respect to noncompliance with a DOT agency regulation, the degree to which the noncompliance affects matters common to the DOT drug and alcohol testing program;

(g) Other factors appropriate to the circumstances of the case.

§ 40.391 What is the scope of a PIE?

(a) The scope of a PIE is the Department's determination about the divisions, organizational elements, types of services, affiliates, and/or individuals (including direct employees of a service agent and its contractors) to which a PIE applies.

(b) If, as a service agent, the Department issues a PIE concerning you, the PIE applies to all your divisions, organizational elements, and types of services that are involved with or affected by the noncompliance that forms the factual basis for issuing the PIE.

(c) In the NOPE (see §40.375(b)(4)), the initiating official sets forth his or her recommendation for the scope of the PIE. The proposed scope of the PIE is one of the elements of the proceeding that the service agent may contest (see §40.381(b)) and about which the Director makes a decision (see §40.387(b)(3)).

(d) In recommending and deciding the scope of the PIE, the initiating official and Director, respectively, must take into account the provisions of paragraphs (e) through (j) of this section.

(e) The pervasiveness of the noncompliance within a service agent's organization (see §40.389(d)) is an important consideration in determining the scope of a PIE. The appropriate scope of a PIE grows broader as the pervasiveness of the noncompliance increases.

(f) The application of a PIE is not limited to the specific location or employer at which the conduct that forms the factual basis for issuing the PIE was discovered.

(g) A PIE applies to your affiliates, if the affiliate is involved with or affected by the conduct that forms the factual basis for issuing the PIE.

(h) A PIE applies to individuals who are officers, employees, directors, shareholders, partners, or other individuals associated with your organization in the following circumstances:

(1) Conduct forming any part of the factual basis of the PIE occurred in connection with the individual's performance of duties by or on behalf of your organization; or

(2) The individual knew of, had reason to know of, approved, or acquiesced in such conduct. The individual's acceptance of benefits derived from such conduct is evidence of such knowledge, acquiescence, or approval.

(i) If a contractor to your organization is solely responsible for the conduct that forms the factual basis for a PIE, the PIE does not apply to the service agent itself unless the service agent knew or should have known about the conduct and did not take action to correct it.

(j) PIEs do not apply to drug and alcohol testing that DOT does not regulate.

(k) The following examples illustrate how the Department intends the provisions of this section to work:

Example 1 to §40.391. Service Agent P provides a variety of drug testing services. P's SAP services are involved in a serious violation of this Part 40. However, P's other services fully comply with this part, and P's overall management did not plan or concur in the noncompliance, which in fact was contrary to P's articulated standards. Because the noncompliance was isolated in one area of the organization's activities, and did not pervade the entire organization, the scope of the PIE could be limited to SAP services.

Example 2 to §40.391. Service Agent Q provides a similar variety of services. The conduct forming the factual basis for a PIE concerns collections for a transit authority. As in Example 1, the noncompliance is not pervasive throughout Q's organization. The PIE would apply to collections at all locations served by Q, not just the particular transit authority or not just in the state in which the transit authority is located.

Example 3 to §40.391. Service Agent R provides a similar array of services. One or more of the following problems exists: R's activities in several areas—collections, MROs, SAPs, protecting the confidentiality of information—are involved in serious noncompliance; DOT determines that R's management knew or should have known about serious noncompliance in one or more areas, but management did not take timely corrective action; or, in response to an inquiry from DOT personnel, R's management refuses to provide information about its operations. In each of these three cases, the scope of the PIE would include all aspects of R's services.

Example 4 to §40.391. Service Agent W provides only one kind of service (e.g., laboratory or MRO services). The Department issues a PIE concerning these services. Because W only provides this one kind of service, the PIE necessarily applies to all its operations.

Example 5 to §40.391. Service Agent X, by exercising reasonably prudent oversight of its collection contractor, should have known that the contractor was making numerous “fatal flaws” in tests. Alternatively, X received a correction notice pointing out these problems in its contractor's collections. In neither case did X take action to correct the problem. X, as well as the contractor, would be subject to a PIE with respect to collections.

Example 6 to §40.391. Service Agent Y could not reasonably have known that one of its MROs was regularly failing to interview employees before verifying tests positive. When it received a correction notice, Y immediately dismissed the erring MRO. In this case, the MRO would be subject to a PIE but Y would not.

Example 7 to §40.391. The Department issues a PIE with respect to Service Agent Z. Z provides services for DOT-regulated transportation employers, a Federal agency under the HHS-regulated Federal employee testing program, and various private businesses and public agencies that DOT does not regulate. The PIE applies only to the DOT-regulated transportation employers with respect to their DOT-mandated testing, not to the Federal agency or the other public agencies and private businesses. The PIE does not prevent the non-DOT regulated entities from continuing to use Z's services.

§ 40.393 How long does a PIE stay in effect?

(a) In the NOPE (see §40.375(b)(5)), the initiating official proposes the duration of the PIE. The duration of the PIE is one of the elements of the proceeding that the service agent may contest (see §40.381(b)) and about which the Director makes a decision (see §40.387(b)(4)).

(b) In deciding upon the duration of the PIE, the Director considers the seriousness of the conduct on which the PIE is based and the continued need to protect employers and employees from the service agent's noncompliance. The Director considers factors such as those listed in §40.389 in making this decision.

c) The duration of a PIE will be between one and five years, unless the Director reduces its duration under §40.407.

§ 40.395 Can you settle a PIE proceeding?

any time before the Director's decision, you and the initiating official can, with the Director's concurrence, settle a PIE proceeding.

§ 40.397 When does the Director make a PIE decision?

Director makes his or her decision within 60 days of the date when the record of a PIE proceeding is complete (including any meeting with the Director and any additional fact-finding that is necessary). The Director may extend this period for good cause for additional periods of up to 30 days.

§ 40.399 How does the Department notify service agents of its decision?

you are a service agent involved in a PIE proceeding, the Director provides you written notice as soon as he or she makes a PIE decision. The notice includes the following elements:

(a) If the decision is not to issue a PIE, a statement of the reasons for the decision, including findings of fact with respect to any material factual issues that were in dispute.

(b) If the decision is to issue a PIE—

(1) A reference to the NOPE;

(2) A statement of the reasons for the decision, including findings of fact with respect to any material factual issues that were in dispute;

(3) A statement of the scope of the PIE; and

(4) A statement of the duration of the PIE.

§ 40.401 How does the Department notify employers and the public about a PIE?

(a) The Department maintains a document called the “List of Excluded Drug and Alcohol Service Agents.” This document may be found on the Department's web site (http://www.dot.gov/ost/dapc). You may also request a copy of the document from ODAPC.

(b) When the Director issues a PIE, he or she adds to the List the name and address of the service agent, and any other persons or organizations, to whom the PIE applies and information about the scope and duration of the PIE.

(c) When a service agent ceases to be subject to a PIE, the Director removes this information from the List.

(d) The Department also publishes a Federal Register notice to inform the public on any occasion on which a service agent is added to or taken off the List.

§ 40.403 Must a service agent notify its clients when the Department issues a PIE?

(a) As a service agent, if the Department issues a PIE concerning you, you must notify each of your DOT-regulated employer clients, in writing, about the issuance, scope, duration, and effect of the PIE. You may meet this requirement by sending a copy of the Director's PIE decision or by a separate notice. You must send this notice to each client within three business days of receiving from the Department the notice provided for in §40.399(b).

(b) As part of the notice you send under paragraph (a) of this section, you must offer to transfer immediately all records pertaining to the employer and its employees to the employer or to any other service agent the employer designates. You must carry out this transfer as soon as the employer requests it.

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§ 40.405 May the Federal courts review PIE decisions?

Director's decision is a final administrative action of the Department. Like all final administrative actions of Federal agencies, the Director's decision is subject to judicial review under the Administrative Procedure Act (5 U.S.C. 551 et. seq).

§ 40.407 May a service agent ask to have a PIE reduced or terminated?

(a) Yes, as a service agent concerning whom the Department has issued a PIE, you may request that the Director terminate a PIE or reduce its duration and/or scope. This process is limited to the issues of duration and scope. It is not an appeal or reconsideration of the decision to issue the PIE.

(b) Your request must be in writing and supported with documentation.

(c) You must wait at least nine months from the date on which the Director issued the PIE to make this request.

(d) The initiating official who was the proponent of the PIE may provide information and arguments concerning your request to the Director.

(e) If the Director verifies that the sources of your noncompliance have been eliminated and that all drug or alcohol testing-related services you would provide to DOT-regulated employers will be consistent with the requirements of this part, the Director may issue a notice terminating or reducing the PIE.

§ 40.409 What does the issuance of a PIE mean to transportation employers?

(a) As an employer, you are deemed to have notice of the issuance of a PIE when it appears on the List mentioned in §40.401(a) or the notice of the PIE appears in the Federal Register as provided in §40.401(d). You should check this List to ensure that any service agents you are using or planning to use are not subject to a PIE.

(b) As an employer who is using a service agent concerning whom a PIE is issued, you must s using the services of the service agent no later than 90 days after the Department has published the decision in the Federal Register or posted it on its web site. You may apply to the ODAPC Director for an extension of 30 days if you demonstrate that you cannot find a substitute service agent within 90 days.

(c) Except during the period provided in paragraph (b) of this section, you must not, as an employer, use the services of a service agent that are covered by a PIE that the Director has issued under this subpart. If you do so, you are in violation of the Department's regulations and subject to applicable DOT agency sanctions (e.g., civil penalties, withholding of Federal financial assistance).

(d) You also must not obtain drug or alcohol testing services through a contractor or affiliate of the service agent to whom the PIE applies.

Example to Paragraph (d): Service Agent R was subject to a PIE with respect to SAP services. As an employer, not only must you not use R's own SAP services, but you also must not use SAP services you arrange through R, such as services provided by a subcontractor or affiliate of R or a person or organization that receives financial gain from its relationship with R.

(e) This section's prohibition on using the services of a service agent concerning which the Director has issued a PIE applies to employers in all industries subject to DOT drug and alcohol testing regulations.

Example to Paragraph (e): The initiating official for a PIE was the FAA drug and alcohol program manager, and the conduct forming the basis of the PIE pertained to the aviation industry. As a motor carrier, transit authority, pipeline, railroad, or maritime employer, you are also prohibited from using the services of the service agent involved in connection with the DOT drug and alcohol testing program.

(f) The issuance of a PIE does not result in the cancellation of drug or alcohol tests conducted using the service agent involved before the issuance of the Director's decision or up to 90 days following its publication in the Federal Register or posting on the Department's web site, unless otherwise specified in the Director's PIE decision or the Director grants an extension as provided in paragraph (b) of this section.

Example to Paragraph (f): The Department issues a PIE concerning Service Agent N on September 1. All tests conducted using N's services before September 1, and through November 30, are valid for all purposes under DOT drug and alcohol testing regulations, assuming they meet all other regulatory requirements.

§ 40.411 What is the role of the DOT Inspector General's office?

(a) Any person may bring concerns about waste, fraud, or abuse on the part of a service agent to the attention of the DOT Office of Inspector General.

(b) In appropriate cases, the Office of Inspector General may pursue criminal or civil remedies against a service agent.

(c) The Office of Inspector General may provide factual information to other DOT officials for use in a PIE proceeding.

§ 40.413 How are notices sent to service agents?

(a) If you are a service agent, DOT sends notices to you, including correction notices, notices of proposed exclusion, decision notices, and other notices, in any of the ways mentioned in paragraph (b) or (c) of this section.

(b) DOT may send a notice to you, your identified counsel, your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers to the last known street address, fax number, or e-mail address. DOT deems the notice to have been received by you if sent to any of these persons.

(c) DOT considers notices to be received by you—

(1) When delivered, if DOT mails the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if DOT sends the notice by fax or five days after we send it if the fax is undeliverable; or

(3) When delivered, if DOT sends the notice by e-mail or five days after DOT sends it if the e-mail is undeliverable.

Appendix A to Part 40 - DOT Standards for Urine Collection Kits

The Collection Kit Contents

1. Collection Container

a. Single-use container, made of plastic, large enough to easily catch and hold at least 55 mL of urine voided from the body.

b. Must have graduated volume markings clearly noting levels of 45 mL and above.

c. Must have a temperature strip providing graduated temperature readings 32–38 °C/90–100 °F, that is affixed or can be affixed at a proper level on the outside of the collection container. Other methodologies (e.g., temperature device built into the wall of the container) are acceptable provided the temperature measurement is accurate and such that there is no potential for contamination of the specimen.

d. Must be individually wrapped in a sealed plastic bag or shrink wrapping; or must have a peelable, sealed lid or other easily visible tamper-evident system.

e. May be made available separately at collection sites to address shy bladder situations when several voids may be required to complete the testing process.

2. Plastic Specimen Bottles

a. Each bottle must be large enough to hold at least 35 mL; or alternatively, they may be two distinct sizes of specimen bottles provided that the bottle designed to hold the primary specimen holds at least 35 mL of urine and the bottle designed to hold the split specimen holds at least 20 mL.

b. Must have screw-on or snap-on caps that prevent seepage of the urine from the bottles during shipment.

c. Must have markings clearly indicating the appropriate levels (30 mL for the primary specimen and 15 mL for the split) of urine that must be poured into the bottles.

d. Must be designed so that the required tamper-evident bottle seals made available on the CCF fit with no damage to the seal when the employee initials it nor with the chance that the seal overlap would conceal printed information.

e. Must be wrapped (with caps) together in a sealed plastic bag or shrink wrapping separate from the collection container; or must be wrapped (with cap) individually in sealed plastic bags or shrink wrapping; or must have peelable, sealed lid or other easily visible tamper-evident system.

f. Plastic material must be leach resistant.

3. Leak-Resistant Plastic Bag

a. Must have two sealable compartments or pouches which are leak-resistant; one large enough to hold two specimen bottles and the other large enough to hold the CCF paperwork.

b. The sealing methodology must be such that once the compartments are sealed, any tampering or attempts to open either compartment will be evident.

4. Absorbent material

Each kit must contain enough absorbent material to absorb the entire contents of both specimen bottles. Absorbent material must be designed to fit inside the leak-resistant plastic bag pouch into which the specimen bottles are placed.

5. Shipping Container

a. Must be designed to adequately protect the specimen bottles from shipment damage in the transport of specimens from the collection site to the laboratory (e.g., standard courier box, small cardboard box, plastic container).

b. May be made available separately at collection sites rather than being part of an actual kit sent to collection sites.

c. A shipping container is not necessary if a laboratory courier hand-delivers the specimen bottles in the plastic leak-proof bags from the collection site to the laboratory.

Appendix B to Part 40 - DOT Drug Testing Semi-Annual Laboratory Report to Employers

The following items are required on each report:

Reporting Period: (inclusive dates)
Laboratory Identification: (name and address)
Employer Identification: (name; may include Billing Code or ID code)
C/TPA Identification: (where applicable; name and address)

1. Specimen Results Reported (total number)
By Type of Test
- (a) Pre-employment (number)
- (b) Post-Accident (number)
- (c) Random (number)
- (d) Reasonable Suspicion/Cause (number)
- (e) Return-to-Duty (number)
- (f) Follow-up (number)
- (g) Type of Test Not Noted on CCF (number)

2. Specimens Reported
- (a) Negative (number)
- (b) Negative and Dilute (number)

3. Specimens Reported as Rejected for Testing (total number)
By Reason
- (a) Fatal flaw (number)
- (b) Uncorrected Flaw (number)

4. Specimens Reported as Positive (total number) By Drug
- (a) Marijuana Metabolite (number)
- (b) Cocaine Metabolite (number)
- (c) Opiates (number)
  - (1) Codeine (number)
  - (2) Morphine (number)
  - (3) 6-AM (number)
- (d) Phencyclidine (number)
- (e) Amphetamines (number)
  - (1) Amphetamine (number)
  - (2) Methamphetamine (number)

5. Adulterated (number)

6. Substituted (number)

7. Invalid Result (number)

[65 FR 79526, Dec. 19, 2000, as amended 73 FR 35975, June 25, 2008]

Appendix C to Part 40-DOT Drug Testing Semi-Annual Laboratory Report to DOT

Mail, fax, or email to:

U.S. Department of Transportation
Office of Drug and Alcohol Policy and Compliance
W62-300
1200 New Jersey Avenue, S.E.
Washington, DC 20590
Fax: (202) 366-3897
Email: ODAPCWebMail@dot.gov

The following items are required on each report:

Reporting Period: (inclusive dates)
Laboratory Identification: (name and address)

1. DOT Specimen Results Reported (number)

2. Negative Results Reported (number)

3. Rejected for Testing Reported (number)
   By Reason (number)

4. Positive Results Reported (number)
   By Drug (number)

5. Adulterated Results Reported (number)
   By Reason (number)

6. Substituted Results Reported (number)

7. Invalid Results Reported (number)
   By Reason (number)

[73 FR 35975, June 25, 2008]

Appendix D to Part 40 - Report Format: Split Specimen Failure to Reconfirm

Mail, fax, or submit electronically to:

U.S. Department of Transportation
Office of Drug and Alcohol Policy and Compliance
W62-300
1200 New Jersey Avenue, S.E.
Washington, DC 20590
Fax: (202) 366-3897

Submit Electronically: http://www.dot.gov/ost/dapc/mro_split.html

The following items are required on each report:

1. MRO name, address, phone number, and fax number.

2. Collection site name, address, and phone number.

3. Date of collection.

4. Specimen I.D. number.

5. Laboratory accession number.

6. Primary specimen laboratory name, address, and phone number.

7. Date result reported or certified by primary laboratory.

8. Split specimen laboratory name, address, and phone number.

9. Date split specimen result reported or certified by split specimen laboratory.

10. Primary specimen results (e.g., name of drug, adulterant) in the primary specimen.

11. Reason for split specimen failure-to-reconfirm result (e.g., drug or adulterant not present, specimen invalid, split not collected, insufficient volume).

12. Actions taken by the MRO (e.g., notified employer of failure to reconfirm and requirement for recollection).

13. Additional information explaining the reason for cancellation.

14. Name of individual submitting the report (if not the MRO).

[65 FR 79526, Dec. 19, 2000, as amended 73 FR 35975, June 25, 2008]

Appendix E to Part 40 - SAP Equivalency Requirements for Certification Organizations

1. Experience: Minimum requirements are for three years of full-time supervised experience or 6,000 hours of supervised experience as an alcoholism and/or drug abuse counselor. The supervision must be provided by a licensed or certified practitioner. Supervised experience is important if the individual is to be considered a professional in the field of alcohol and drug abuse evaluation and counseling.

2. Education: There exists a requirement of 270 contact hours of education and training in alcoholism and/or drug abuse or related training. These hours can take the form of formal education, in-service training, and professional development courses. Part of any professional counselor's development is participation in formal and non-formal education opportunities within the field.

3. Continuing Education: The certified counselor must receive at least 40–60 hours of continuing education units (CEU) during each two year period. These CEUs are important to the counselor's keeping abreast of changes and improvements in the field.

4. Testing: A passing score on a national test is a requirement. The test must accurately measure the application of the knowledge, skills, and abilities possessed by the counselor. The test establishes a national standard that must be met to practice.

5. Testing Validity: The certification examination must be reviewed by an independent authority for validity (examination reliability and relationship to the knowledge, skills, and abilities required by the counseling field). The reliability of the exam is paramount if counselor attributes are to be accurately measured. The examination passing score point must be placed at an appropriate minimal level score as gauged by statistically reliable methodology.

6. Measurable Knowledge Base: The certification process must be based upon measurable knowledge possessed by the applicant and verified through collateral data and testing. That level of knowledge must be of sufficient quantity to ensure a high quality of SAP evaluation and referral services.

7. Measurable Skills Base: The certification process must be based upon measurable skills possessed by the applicant and verified through collateral data and testing. That level of skills must be of sufficient quality to ensure a high quality of SAP evaluation and referral services.

8. Quality Assurance Plan: The certification agency must ensure that a means exists to determine that applicant records are verified as being true by the certification staff. This is an important check to ensure that true information is being accepted by the certifying agency.

9. Code of Ethics: Certified counselors must pledge to adhere to an ethical standard for practice. It must be understood that code violations could result in de-certification. These standards are vital in maintaining the integrity of practitioners. High ethical standards are required to ensure quality of client care and confidentiality of client information as well as to guard against inappropriate referral practices.

10. Re-certification Program: Certification is not just a one-time event. It is a continuing privilege with continuing requirements. Among these are continuing education, continuing state certification, and concomitant adherence to the code of ethics. Re-certification serves as a protector of client interests by removing poor performers from the certified practice.

11. Fifty State Coverage: Certification must be available to qualified counselors in all 50 states and, therefore, the test must be available to qualified applicants in all 50 states. Because many companies are multi-state operators, consistency in SAP evaluation quality and opportunities is paramount. The test need not be given in all 50 states but should be accessible to candidates from all states.

12. National Commission for Certifying Agencies (NCCA) Accreditation: Having NCCA accreditation is a means of demonstrating to the Department of Transportation that your certification has been reviewed by a panel of impartial experts that have determined that your examination(s) has met stringent and appropriate testing standards.

Appendix F to Part 40 - Drug and Alcohol Testing Information that C/TPAs May Transmit to Employers

1. If you are a C/TPA, you may, acting as an intermediary, transmit the information in the following sections of this part to the DER for an employer, if the employer chooses to have you do so. These are the only items that you are permitted to transmit to the employer as an intermediary. The use of C/TPA intermediaries is prohibited in all other cases, such as transmission of laboratory drug test results to MROs, the transmission of medical information from MROs to employers, the transmission of SAP reports to employers, the transmission of positive alcohol test results, and the transmission of medical information from MROs to employers.

2. In every case, you must ensure that, in transmitting the information, you meet all requirements (e.g., concerning confidentiality and timing) that would apply if the party originating the information (e.g., an MRO or collector) sent the information directly to the employer. For example, if you transmit MROs' drug testing results to DERs, you must transmit each drug test result to the DER in compliance with the requirements for MROs set forth in §40.167.

Drug Testing Information

§40.25: Previous two years' test results
§40.35: Notice to collectors of contact information for DER
§40.61(a): Notification to DER that an employee is a “no show” for a drug test
§40.63(e): Notification to DER of a collection under direct observation
§40.65(b)(6) and (7) and (c)(2) and (3): Notification to DER of a refusal to provide a specimen or an insufficient specimen
§40.73(a)(9): Transmission of CCF copies to DER (However, MRO copy of CCF must be sent by collector directly to the MRO, not through the C/TPA.)
§40.111(a): Transmission of laboratory statistical report to employer
§40.127(f): Report of test results to DER
§§40.127(g), 40.129(d), 40.159(a)(4)(ii); 40.161(b): Reports to DER that test is cancelled
§40.129 (d): Report of test results to DER
§40.129(g)(1): Report to DER of confirmed positive test in stand-down situation
§§40.149(b): Report to DER of changed test result
§40.155(a): Report to DER of dilute specimen
§40.167(b) and (c): Reports of test results to DER
§40.187(a) through (e): Reports to DER concerning the reconfirmation of tests
§40.191(d): Notice to DER concerning refusals to test
§40.193(b)(3): Notification to DER of refusal in shy bladder situation
§40.193(b)(4): Notification to DER of insufficient specimen
§40.193(b)(5): Transmission of CCF copies to DER (not to MRO)
§40.199: Report to DER of cancelled test and direction to DER for additional collection
§40.201: Report to DER of cancelled test

Alcohol Testing Information

§40.215: Notice to BATs and STTs of contact information for DER
§40.241(b)(1): Notification to DER that an employee is a “no show” for an alcohol test
§40.247(a)(2): Transmission of alcohol screening test results only when the test result is less than 0.02
§40.255(a)(4): Transmission of alcohol confirmation test results only when the test result is less than 0.02
§40.263(a)(3) and 263(b)(3): Notification of insufficient saliva and failure to provide sufficient amount of breath
[65 FR 79526, Dec. 19, 2000, as amended at 66 FR 41955, Aug. 9, 2001; 73 FR 35975, June 25, 2008]

Appendix G to Part 40—Alcohol Testing Form

The following form is the alcohol testing form required for use in the DOT alcohol testing program beginning August 1, 2001. Use of the form is authorized beginning January 18, 2001.

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street _____
City, ST ZIP _____

_____

DER Name and Telephone No. _____ (____) _____
DER Name DER Phone Number

D: Reason for Test: ☐Random ☐Reasonable Susp ☐Post-Accident ☐Return to Duty ☐Follow-up ☐Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ ____/____/____
Signature of Employee Date Month Day Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐BAT ☐STT DEVICE: ☐SALIVA ☐BREATH* 15-Minute Wait: ☐Yes ☐No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

_____

_____

_____

_____ _____
Alcohol Technician's Company Company Street Address

_____ _____ (____) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip Phone Number

_____ ____/____/____
Signature of Alcohol Technician Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ ____/____/____
Signature of Employee Date Month Day Year

COPY 1 – ORIGINAL – FORWARD TO THE EMPLOYER

Affix Or Print Screening Results Here

Affix With Tamper Evident Tap

Affix Or Print Confirmation Result Here

Affix With Tamper Evident Tape

Affix Or Print Additional Results Here

Affix With Tamper Evident Tape

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street
City, ST ZIP _____

_____

DER Name and Telephone No. _____ (____) _____
DER Name DER Phone Number

D: Reason for Test: ☐Random ☐Reasonable Susp ☐Post-Accident ☐Return to Duty ☐Follow-up ☐Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ _____/____/____
Signature of Employee Date Month Day Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐BAT ☐STT DEVICE: ☐SALIVA ☐BREATH* 15-Minute Wait: ☐Yes ☐No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

_____
_____
_____

_____ _____
Alcohol Technician's Company Company Street Address

_____ _____ (____) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip Phone Number

_____ _____/____/____
Signature of Alcohol Technician Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ _____/____/____
Signature of Employee Date Month Day Year

Affix Or Print Screening Results Here

Affix With Tamper Evident Tap

Affix Or Print Confirmation Result Here

Affix With Tamper Evident Tape

Affix Or Print Additional Results Here

Affix With Tamper Evident Tape

COPY 2 – EMPLOYEE RETAINS

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug and alcohol Policy and Compliance, Room 10403, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

BACK OF PAGES 1 and 2

U.S. Department of Transportation (DOT)
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

B: SSN or Employee ID No. _____

C: Employer Name _____
Street
City, ST ZIP _____

_____

DER Name and Telephone No. _____ (___) _____
DER Name DER Phone Number

D: Reason for Test: ☐Random ☐Reasonable Susp ☐Post-Accident ☐Return to Duty ☐Follow-up ☐Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

_____ ___/___/___
Signature of Employee Date Month Day Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐BAT ☐STT DEVICE: ☐SALIVA ☐BREATH* 15-Minute Wait: ☐Yes ☐No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

_____

_____

_____

_____ _____
Alcohol Technician's Company Company Street Address

_____ _____ (___) _____
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip Phone Number

_____ ___/___/___
Signature of Alcohol Technician Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

_____ ___/___/___
Signature of Employee Date Month Day Year

Affix Or Print Screening Results Here

Affix With Tamper Evident Tap

Affix Or Print Confirmation Results Here

Affix With Tamper Evident Tape

Affix Or Print Additional Results Here

Affix With Tamper Evident Tape

COPY 3 – ALCOHOL TECHNICIAN RETAINS

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug and alcohol Policy and Compliance, Room 10403, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

BACK OF PAGES 1 and 2

INSTRUCTIONS FOR COMPLETING THE U.S. DEPARTMENT OF TRANSPORTATION ALCOHOL TESTING FORM

NOTE: Use a ballpoint pen, press hard, and check all copies for legibility.

STEP 1 The Breath Alcohol Technician (BAT) or Screening Test Technician (STT) completes the information required in this step. Be sure to print the employee's name and check the box identifying the reason for the test.

NOTE: If the employee refuses to provide SSN or I.D. number, be sure to indicate this in the remarks section in STEP 3. Proceed with STEP 2.

STEP 2 Instruct the employee to read, sign, and date the employee certification statement in STEP 2.

NOTE: If the employee refuses to sign the certification statement, do not proceed with the alcohol test. Contact the designated employer representative.

STEP 3 The BAT or STT completes the information required in this step and checks the type of device (saliva or breath) being used. After conducting the alcohol screening test, do the following (as appropriate):

Enter the information for the screening test (test number, testing device name, testing device serial number or lot number and expiration date, time of test with any device-dependent activation times, and the results), on the front of the AFT. For a breath testing device capable of printing, the information may be part of the printed record.

NOTE: Be sure to enter the result of the test exactly as it is indicated on the breath testing device, e.g., 0.00, 0.02, 0.04, etc.

Affix the printed information in the space provided, in a tamper-evident manner (e.g., tape), or the device may print the results directly on the ATF. If the results of the screening test are less than 0.02, print, sign your name, and enter today's date in the space provided. The test process is complete.

If the results of the screening test are 0.02 or greater, a confirmation test must be administered in accordance with DOT regulations. An EVIDENTIAL BREATH TESTING device that is capable of printing confirmation test information must be used in conducting this test.

After conducting the alcohol confirmation test, affix the printed information in the space provided, in a tamper-evident manner (e.g., tape), or the device may print the results directly on the ATF. Print, sign your name, and enter the date in the space provided. Go to STEP 4.

STEP 4 If the employee has a breath alcohol confirmation test result of 0.02 or higher, instruct the employee to read, sign, and date the employee certification statement in STEP 4.

NOTE: If the employee refuses to sign the certification statement in STEP 4, be sure to indicate this in the remarks line in STEP 3.

Immediately notify the DER if the employee has a breath alcohol confirmation test result of 0.02 or higher.

Forward **Copy 1** to the employer. Give **Copy 2** to the employee. Retain **Copy 3** for BAT/STT records.

BACK OF PAGE 3

Appendix H to Part 40 - DOT Drug and Alcohol Testing Management Information System (MIS) Data Collection Form

U.S. DEPARTMENT OF TRANSPORTATION DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

Calendar Year Covered by this Report: _____ OMB No. 2105-0529

I. Employer:

Company Name:_____

Doing Business As (DBA) Name (if applicable):_____

Address:_____ E-mail: _____

Name of Certifying Official: _____ Signature: _____

Telephone: (_____)_____ Date Certified: _____

Prepared by (if different): _____ Telephone: (_____)_____

C/TPA Name and Telephone (if applicable): _____ (_____)_____

Check the DOT agency for which you are reporting MIS data; and complete the information on that same line as appropriate:

___ FMCSA – Motor Carrier: DOT #: _____ Owner-operator: (circle one) YES or NO Exempt (Circle One) YES or NO

___ FAA – Aviation: Certificate # (if applicable): _____ Plan / Registration # (if applicable):_____

___ PHMSA – Pipeline: (Check) Gas Gathering__ Gas Transmission__ Gas Distribution__ Transport Hazardous Liquids__ Transport Carbon Dioxide__

___ FRA – Railroad: Total Number of observed/documented Part 219 "Rule G" Observations for covered employees: _____

___ USCG – Maritime: Vessel ID # (USCG- or State-Issued): _____ (If more than one vessel, list separately.)

___ FTA – Transit

II. Covered Employees: **(A) Enter Total Number Safety-Sensitive Employees In All Employee Categories:**

(B) Enter Total Number of Employee Categories:

(C)

Employee Category	Total Number of Employees in this Category

If you have multiple employee categories, complete Sections I and II (A) & (B). Take that filled-in form and make one copy for each employee category and complete Sections II (C), III, and IV for each separate employee category.

III. Drug Testing Data:

	1	2	3	4	5	6	7	8	9	10	11	12	13
									Refusal Results				
Type of Test	Total Number Of Test Results [Should equal the sum of Columns 2, 3, 9, 10, 11, and 12]	Verified Negative Results	Verified Positive Results ~ For One Or More Drugs	Positive For Marijuana	Positive For Cocaine	Positive For PCP	Positive For Opiates	Positive For Amphetamines	Adulterated	Substituted	"Shy Bladder" ~ With No Medical Explanation	Other Refusals To Submit To Testing	Cancelled Results
Pre-Employment													
Random													
Post-Accident													
Reasonable Susp./Cause													
Return-to-Duty													
Follow-Up													
TOTAL													

IV. Alcohol Testing Data:

	1	2	3	4	5	6	7	8	9
							Refusal Results		
Type of Test	Total Number Of Screening Test Results [Should equal the sum of Columns 2, 3, 7, and 8]	Screening Tests With Results Below 0.02	Screening Tests With Results 0.02 Or Greater	Number Of Confirmation Tests Results	Confirmation Tests With Results 0.02 Through 0.039	Confirmation Tests With Results 0.04 Or Greater	"Shy Lung" ~ With No Medical Explanation	Other Refusals To Submit To Testing	Cancelled Results
Pre-Employment									
Random									
Post-Accident									
Reasonable Susp./Cause									
Return-to-Duty									
Follow-Up									
TOTAL									

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 2105-0529. The Department of Transportation estimates that the average burden for this report form is 1.5 hours. You may send comments regarding this burden estimate or any suggestions for reducing the burden to: U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, Room 10403, 400 Seventh Street, SW, Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project, 725 Seventeenth Street, NW, Washington, D.C. 20503.

Title 18, USC Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements of representations in any matter within the jurisdiction of any agency of the United States.

The following form and instructions must be used when an employer is required to report MIS data to a DOT agency.

U.S. DEPARTMENT OF TRANSPORTATION
DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM
INSTRUCTION SHEET

This Management Information System (MIS) form is made-up of four sections: employer information; covered employees (i.e., employees performing DOT regulated safety-sensitive duties) information; drug testing data; and alcohol testing data. The employer information needs only to be provided once per submission. However, you must submit a separate page of data for each employee category for which you report testing data. If you are preparing reports for more than one DOT agency then you must submit DOT agency-specific forms.

Please type or print entries legibly in black ink.

TIP *~ Read the entire instructions before starting. Please note that USCG-regulated employers do not report alcohol test results on the MIS form.*

Calendar Year Covered by this Report: Enter the appropriate year.

Section I. Employer

1. Enter your company's name, to include when applicable, your "doing business as" name; current address, city, state, and zip code; and an e-mail address, if available.
2. Enter the printed name, signature, and complete telephone number of the company official certifying the accuracy of the report and the date that person certified the report as complete.
3. If someone other than the certifying official completed the MIS form, enter that person's name and phone number on the appropriate lines provided.
4. If a Consortium/Third Party Administrator (C/TPA) performs administrative services for your drug and alcohol program operation, enter its name and phone number on the appropriate lines provided.
5. DOT Agency Information: Check the box next to the DOT agency for which you are completing this MIS form. Again, if you are submitting to multiple DOT agencies, you must use separate forms for each DOT agency.
a. If you are completing the form for FMCSA, enter your FMCSA DOT Number, as appropriate. In addition, you must indicate whether you are an owner-operator (i.e., an employer who employs only himself or herself as a driver) and whether you are exempt from providing MIS data. Exemptions are noted in the FMCSA regulation at 382.103(d).
b. If you are completing the form for FAA, enter your FAA Certificate Number and FAA Antidrug Plan / Registration Number, when applicable.
c. If you are completing the form for PHMSA, check the additional box(s) indicating your type of operation.
d. If you are completing the form for FRA, enter the number of observed/documented Part 219 "Rule G" Observations for covered employees.
e. If you are submitting the form for USCG, enter the vessel ID number. If there is more than one number, enter the numbers separately.

Section II. Covered Employees

1. In Box II-A, enter the total number of covered employees (i.e., employees performing DOT regulated safety-sensitive duties) who work for your company. Then enter, in Box II-B, the total number of employee categories that number represents. If you have employees, some of whom perform duties under one DOT agency and others of whom perform duties under another DOT agency, enter only the number of those employees performing duties under the DOT agency for whom you are submitting the form. If you have covered employees who perform multi-DOT agency functions (e.g., an employee drives a commercial motor vehicle and performs pipeline maintenance duties for you), count the employee only on the MIS report for the DOT agency regulating more than 50 percent of the employee's safety sensitive function.

[Example: If you are submitting the information for the FRA and you have 2000 covered employees performing duties in all FRA-covered service categories – you would enter "2000" in the first box (II-A) and "5" in the second box (II-B), because FRA has five safety-sensitive employee categories and you have employees in all of these groups. If you have 1000 employees performing safety-sensitive duties in three FRA-covered service categories (e.g., engine service, train service, and dispatcher/operation), you would enter "1000" in the first box (II-A) and "3" in the second box (II-B).]

TIP *~ To calculate the total number of covered employees, add the total number of covered employees eligible for testing during each random testing selection period for the year and divide that total by the number of random testing periods. (However, no company will need to factor the average number of employees more often than once per month). For instance, a company conducting random testing quarterly needs to add the total of covered employees they had in the random pool when each selection was made; then divide this number by 4 to obtain the yearly average number of covered employees. It is extremely important that you place all eligible employees into these random pools. [As an example, if Company A had 1500 employees in the first quarter random pool, 2250 in the second quarter, 2750 in the third quarter; and 1500 in the fourth quarter; 1500 + 2250 + 2750 + 1500 = 8000; 8000 / 4 = 2000; the total number of covered employees for the year would be reported as,"2000".*

If you conduct random selections more often than once per month (e.g., you select daily, weekly, bi-weekly), you do not need to compute this total number of covered employees rate more than on a once per month basis. Therefore, employers need not compute the covered employees rate more than 12 times per year.]

2. If you are reporting multiple employee categories, enter the specific employee category in box II-C; and provide the number of employees performing safety-sensitive duties in that specific category.

[Example: You are submitting data to the FTA and you have 2000 covered employees. You have 1750 personnel performing revenue vehicle operation and the remaining 250 are performing revenue vehicle and equipment maintenance. When you provide vehicle operation information, you would enter "Revenue Vehicle Operation" in the first II-C box and "1750" in the second II-C box. When you provide data on the maintenance personnel, you would enter "Revenue Vehicle and Equipment Maintenance" in the first II-C box and "250" in the second II-C box.]

TIP *~ A separate form for each employee category must be submitted. You may do this by filling out a single MIS form through Section II-B and then make one copy for each additional employee category you are reporting. [For instance, if you are submitting the MIS form for the FMCSA, you need only submit one form for all FMCSA covered employees working for you – your only category of employees is "driver." If you are reporting testing data to the FAA and you employ only flight crewmembers, flight attendants, and aircraft maintenance workers, you need to complete one form each for category – three forms in all. If you are reporting to FAA and have all FAA categories of covered employees, you must submit eight forms.]*

Here is a full listing of covered-employee categories:

***FMCSA* (one category): Driver**

FAA *(eight categories): Flight Crewmember; Flight Attendant; Flight Instructor; Aircraft Dispatcher; Aircraft Maintenance; Ground Security Coordinator; Aviation Screener; Air Traffic Controller*
PHMSA *(one category): Operation/Maintenance/Emergency Response*
FRA *(five categories): Engine Service; Train Service; Dispatcher/Operation; Signal Service; Other [Includes yardmasters, hostlers (non-engineer craft), bridge tenders; switch tenders, and other miscellaneous employees performing 49 CFR 228.5 (c) defined covered service.]*
USCG *(one category): Crewmember*
FTA *(five categories): Revenue Vehicle Operation; Revenue Vehicle and Equipment Maintenance; Revenue Vehicle Control/Dispatch; CDL/Non-Revenue Vehicle; Armed Security Personnel*

Section III. Drug Testing Data

This section summarizes the drug testing results for all covered employees (to include applicants). The table in this section requires drug test data by test type and by result. The categories of test types are: Pre-Employment; Random; Post-Accident; Reasonable Suspicion / Reasonable Cause; Return-to-Duty, and Follow-Up.
The categories of type of results are: Total Number of Test Results [excluding cancelled tests and blind specimens]; Verified Negative; Verified Positive; Positive for Marijuana; Positive for Cocaine; Positive for PCP; Positive for Opiates; Positive for Amphetamines; Refusals due to Adulterated, Substituted, "Shy Bladder" with No Medical Explanation, and Other Refusals to Submit to Testing; and Cancelled Results.

TIP *~ Do not enter data on blind specimens submitted to laboratories. Be sure to enter all pre-employment testing data regardless of whether an applicant was hired or not. You do not need to separate reasonable suspicion and reasonable cause drug testing data on the MIS form. [Therefore, if you conducted only reasonable suspicion drug testing (i.e., FMCSA and FTA), enter that data; if you conducted only reasonable cause drug testing (i.e., FAA, PHMSA, and USCG); or if you conducted both under FRA drug testing rules, simply enter the data with no differentiation.] For USCG, enter any "Serious Marine Incident" testing in the Post-Accident row. For FRA, do not enter post accident data (the FRA does not collect this data on the MIS form). Finally, you may leave blank any row or column in which there were no results, or you may enter "0" (zero) instead. Please note that cancelled tests are not included in the "total number of test results" column.*

Section III, Column 1. Total Number of Test Results ~ This column requires a count of the total number of test results in each testing category during the entire reporting year. Count the number of test results as the number of testing events resulting in negative, positive, and refusal results. Do not count cancelled tests and blind specimens in this total.

[Example: A company that conducted fifty pre-employment tests would enter "50" on the Pre-Employment row. If it conducted one hundred random tests, "100' would be entered on the Random row. If that company did no post-accident, reasonable suspicion, reasonable cause, return-to-duty, or follow-up tests, those categories will be left blank or zeros entered.]

Section III, Column 2. Verified Negative Results ~ This column requires a count of the number of tests in each testing category that the Medical Review Officer (MRO) reported as negative. Do not count a negative-dilute result if, subsequently, the employee underwent a second collection; the second test is the test of record.

[Example: If forty-seven of the company's fifty pre-employment tests were reported negative, "47" would be entered in Column 2 on the Pre-Employment row. If ninety of the company's one hundred random test results were reported negative, "90" would be entered in Column 2 on the Random row. Because the company did no other testing, those other categories would be left blank or zeros entered.]

Section III, Column 3. Verified Positive Results ~ For One Or More Drugs ~ This column requires a count of the number of tests in each testing category that the MRO reported as positive for one or more drugs. When the MRO reports a test positive for two drugs, it would count as one positive test.

[Example: If one of the fifty pre-employment tests was positive for two drugs, "1" would be entered in Column 3 on the Pre-Employment row. If four of the company's one hundred random test results were reported positive (three for one drug and one for two drugs), "4" would be entered in Column 3 on the Random row.]

■ **Section III, Columns 4 through 8. Positive** (for specific drugs) ~ These columns require entry of the by-drug data for which specimens were reported positive by the MRO.

[Example: The pre-employment positive test reported by the MRO was positive for marijuana, "1" would be entered in Column 4 on the Pre-Employment row. If three of the four positive results for random testing were reported by the MRO to be positive for marijuana, "3" would be entered in Column 4 on the Random row. If one of the four positive results for random testing was reported positive for both PCP and opiates, "1" would be entered in Column 6 on the Random row and "1" would be entered in Column 7 of the Random row.]

TIP *~ Column 1 should equal the sum of Columns 2, 3, 9, 10, 11, and 12. Remember you have not counted specimen results that were ultimately cancelled or were from blind specimens. So, Column 1 = Column 2 + Column 3 + Column 9 + Column 10 + Column 11 + Column 12. Certainly, double check your records to determine if your actual results count is reflective of all negative, positive, and refusal counts.*

An MRO may report that a specimen is positive for more than one drug. When that happens, to use the company example above (i.e., one random test was positive for both PCP and opiates), the positive results should be recorded in the appropriate columns – PCP and opiates in this case. There is no expectation for Columns 4 through 8 numbers to add up to the numbers in Column 3 when you report multiple positives.

Section III, Columns 9 through 12. Refusal Results ~ The refusal section is divided into four refusal groups – they are: Adulterated; Substituted; "Shy Bladder" ~ With No Medical Explanation; and Other Refusals To Submit to Testing. The MRO reports two of these refusal types – adulterated and substituted specimen results – because of laboratory test findings.

When an individual does not provide enough urine at the collection site, the MRO conducts or causes to have conducted a medical evaluation to determine if there exists a medical reason for the person's inability to provide the appropriate amount of urine. If there is no medical reason to support the inability, the MRO reports the result to the employer as a refusal to test: Refusals of this type are reported in the "Shy Bladder" ~ With No Medical Explanation category.

Finally, additional reasons exist for a test to be considered a refusal. Some examples are: the employee fails to report to the collection site as directed by the employer; the employee leaves the collection site without permission; the employee fails to empty his or her pockets at the collection site; the employee refuses to have a required shy bladder evaluation. Again, these are only four examples: there are more.

■ **Section III, Column 9. Adulterated** ~ This column requires the count of the number of tests reported by the MRO as refusals because the specimens were adulterated.

[Example: If one of the fifty pre-employment tests was adulterated, "1" would be entered in Column 9 of the Pre-Employment row.]

■ **Section III, Column 10. Substituted** ~ This column requires the count of the number of tests reported by the MRO as refusals because the specimens were substituted.

[Example: If one of the 100 random tests was substituted, "1" would be entered in Column 10 of the Random row.]

■ **Section III, Column 11. "Shy Bladder" ~ With No Medical Explanation** ~ This column requires the count of the number of tests reported by the MRO as being a refusal because there was no legitimate medical reason for an insufficient amount of urine.

[Example: If one of the 100 random tests was a refusal because of shy bladder, "1" would be entered in Column 11 of the Random row.]

■ **Section III, Column 12. Other Refusals To Submit To Testing** ~ This column requires the count of refusals other than those already entered in Columns 9 through 11.

[Example: If the company entered "100" as the number of random specimens collected, however it had five employees who refused to be tested without submitting specimens: two did not show up at the collection site as directed; one refused to empty his pockets at the collection site; and two left the collection site rather than submit to a required directly observed collection. Because of these five refusal events, "5" would be entered in Column 11 of the Random row.]

TIP *~ Even though some testing events result in a refusal in which no urine was collected and sent to the laboratory, a "refusal" is still a final test result. Therefore, your overall numbers for test results (in Column 1) will equal the total number of negative tests (Column 2); positives (Column 3); and refusals (Columns 9, 10, 11, and 12). Do not worry that no urine was processed at the laboratory for some refusals; all refusals are counted as a testing event for MIS purposes and for establishing random rates.*

Section III, Column 13. Cancelled Tests ~ This column requires a count of the number of tests in each testing category that the MRO reported as cancelled. You must not count any cancelled tests in Column 1 or in any other column. For instance, you must not count a positive result (in Column 3) if it had ultimately been cancelled for any reason (e.g., specimen was initially reported positive, but the split failed to reconfirm).

[Example: If a pre-employment test was reported cancelled, "1" would be entered in Column 13 on the Pre-Employment row. If three of the company's random test results were reported cancelled, "3" would be entered in Column 13 on the Random row.]

TOTAL Line. Columns 1 through 13 ~ This line requires you to add the numbers in each column and provide the totals.

Section IV. Alcohol Testing Data

This section summarizes the alcohol testing conducted for all covered employees (to include applicants). The table in this section requires alcohol test data by test type and by result. The categories of test types are: Pre-Employment; Random; Post-Accident; Reasonable Suspicion / Reasonable Cause; Return-to-Duty, and Follow-Up.

The categories of results are: Number of Screening Test Results; Screening Tests with Results Below 0.02; Screening Tests with Results 0.02 Or Greater; Number of Confirmation Test Results; Confirmation Tests with Results 0.02 through 0.039; Confirmation Tests with Results 0.04 Or Greater; Refusals due to "Shy Lung" with No Medical Explanation, and Other Refusals to Submit to Testing; and Cancelled Results.

TIP *~ Be sure to enter all pre-employment testing data regardless of whether an applicant was hired or not. Of course, for most employers pre-employment alcohol testing is optional, so you may not have conducted this type of testing. You do not need to separate "reasonable suspicion" and "reasonable cause" alcohol testing data on the MIS form. [Therefore, if you conducted only reasonable suspicion alcohol testing (i.e., FMCSA, FAA, FTA, and PHMSA), enter that data; if you conducted both reasonable suspicion and reasonable cause alcohol testing (i.e.., FRA), simply enter the data with no differentiation.] PHMSA does not authorize "random" testing for alcohol. Finally, you may leave blank any row or column in which there were no results, or you may enter "0" (zero) instead. Please note that USCG-regulated employers do not report alcohol test results on the MIS form: Do not fill-out Section IV if you are a USCG-regulated employer.*

Section IV, Column 1. Total Number of Screening Test Results ~ This column requires a count of the total number of screening test results in each testing category during the entire reporting year. Count the number of screening tests as the number of screening test events with final screening results of below 0.02, of 0.02 through 0.039, of 0.04 or greater, and all refusals. Do not count cancelled tests in this total.

[Example: A company that conducted twenty pre-employment tests would enter "20" on the Pre-Employment row. If it conducted fifty random tests, "50' would be entered. If that company did no post-accident, reasonable suspicion, reasonable cause, return-to-duty, or follow-up tests, those categories will be left blank or zeros entered.]

Section IV, Column 2. Screening Tests With Results Below 0.02 ~ This column requires a count of the number of tests in each testing category that the BAT or STT reported as being below 0.02 on the screening test.

[Example: If seventeen of the company's twenty pre-employment screening tests were reported as being below 0.02, "17" would be entered in Column 2 on the Pre-Employment row. If forty-four of the company's fifty random screening test results were reported as being below 0.02, "44" would be entered in Column 2 on the Random row. Because the company did no other testing, those other categories would be left blank or zeros entered.]

Section IV, Column 3. Screening Tests With Results 0.02 Or Greater ~ This column requires a count of the number of screening tests in each testing category that BAT or STT reported as being 0.02 or greater on the screening test.

[Example: If one of the twenty pre-employment tests was reported as being 0.02 or greater, "1" would be entered in Column 3 on the Pre-Employment row. If four of the company's fifty random test results were reported as being 0.02 or greater, "4" would be entered in Column 3 on the Random row.]

Section IV, Column 4. Number of Confirmation Test Results ~ This column requires entry of the number of confirmation tests that were conducted by a BAT as a result of the screening tests that were found to be 0.02 or greater. In effect, all screening tests of 0.02 or greater should have resulted in confirmation tests. Ideally the number of tests in Column 3 and Column 4 should be the same. However, we know that this required confirmation test sometimes does not occur. In any case, the number of confirmation tests that were actually performed should be entered in Column 4.

[Example: If the one pre-employment screening test reported as 0.02 or greater had a subsequent confirmation test performed by a BAT, "1" would be entered in Column 4 on the Pre-Employment row. If three of the four random screening tests that were found to be 0.02 or greater had a subsequent confirmation test performed by a BAT, "3" would be entered in Column 4 on the Random row.]

Section IV, Column 5. Confirmation Tests With Results 0.02 Through 0.039 ~ This column requires entry of the number of confirmation tests that were conducted by a BAT that led to results that were 0.02 through 0.039.

[Example: If the one pre-employment confirmation test yielded a result of 0.042, Column 5 of the Pre-Employment row would be left blank or zeros entered. If two of the random confirmation tests yielded results of 0.03 and 0.032, "2" would be entered in Column 5 of the Random row.]

Section IV, Column 6. Confirmation Tests With Results 0.04 Or Greater ~ This column requires entry of the number of confirmation tests that were conducted by a BAT that led to results that were 0.04 or greater.

[Example: Because the one pre-employment confirmation test yielded a result of 0.042, "1" would be entered in Column 6 of the Pre-Employment row. If one of the random confirmation tests yielded a result of 0.04, "1" would be entered in Column 6 of the Random row.]

TIP *~ Column 1 should equal the sum of Columns 2, 3, 7, and 8. The number of screening tests results should reflect the number of screening tests you have no matter the result (below 0.02 or at or above 0.02, plus refusals to test), unless of course, the tests were ultimately cancelled. So, Column 1 = Column 2 + Column 3 + Column 7 + Column 8. Certainly, double check your records to determine if your actual screening results count is reflective of all these counts.*

There is no need to record MIS confirmation tests results below 0.02: That is why we have no column for it on the form. [If the random test that screened 0.02 went to a confirmation test, and that confirmation test yielded a result below 0.02, there is no place for that confirmed result to be entered.] We assume that if a confirmation test was completed but not listed in either Column 5 or Column 6, the result was below 0.02. In addition, if the confirmation test ended up being cancelled, it should not have been included in Columns 1, 3, or 4 in the first place.

Section IV, Columns 7 and 8. Refusal Results ~ The refusal section is divided into two refusal groups – they are: Shy Lung ~ With No Medical Explanation; and Other Refusals To Submit to Testing. When an individual does not provide enough breath at the test site, the company requires the employee to have a medical evaluation to determine if there exists a medical reason for the person's inability to provide the appropriate amount of breath. If there is no medical reason to support the inability as reported by the examining physician, the employer calls the result a refusal to test: Refusals of this type are reported in the "Shy Lung ~ With No Medical Explanation" category.

Finally, additional reasons exist for a test to be considered a refusal. Some examples are: the employee fails to report to the test site as directed by the employer; the employee leaves the test site without permission; the employee fails to sign the certification at Step 2 of the ATF; the employee refuses to have a required shy lung evaluation. Again, these are only four examples; there are more.

■ **Section IV, Column 7. "Shy Lung" ~ With No Medical Explanation** ~ This column requires the count of the number of tests in which there is no medical reason to support the employee's inability to provide an adequate breath as reported by the examining physician; subsequently, the employer called the result a refusal to test.

[Example: If one of the 50 random tests was a refusal because of shy lung, "1" would be entered in Column 7 of the Random row.]

■ **Section IV, Column 8. Other Refusals To Submit To Testing** ~ This column requires the count of refusals other than those already entered in Columns 7.

[Example: The company entered "50" as the number of random specimens collected, however it had one employee who did not show up at the testing site as directed. Because of this one refusal event, "1" would be entered in Column 8 of the Random row.]

TIP *~ Even though some testing events result in a refusal in which no breath (or saliva) was tested, there is an expectation that your overall numbers for screening tests (in Column 1) will equal the total number of screening tests with results below 0.02 (Column 2); screening tests with results 0.02 or greater (Column 3); and refusals (Columns 7 and 8). Do not worry that no breath (or saliva) was tested for some refusals; all refusals are counted as a screening test event for MIS purposes and for establishing random rates.*

Section IV, Column 9. Cancelled Tests ~ This column requires a count of the number of tests in each testing category that the BAT or STT reported as cancelled. Do not count any cancelled tests in Column 1 or in any other column other than Column 9. For instance, you must not count a 0.04 screening result or confirmation result in any column, other than Column 9, if the test was ultimately cancelled for some reason (e.g., a required air blank was not performed).

[Example: If a pre-employment test was reported cancelled, "1" would be entered in Column 9 on the Pre-Employment row. If three of the company's random test results were reported cancelled, "3" would be entered in Column 13 on the Random row.]

TOTAL Line. Columns 1 through 9 ~ This line requires you to add the numbers in each column and provide the totals.

49 CFR Part 40
July 25, 2003

■ 3. Section 25.146 is amended by redesignating paragraphs (g) through (m) as paragraphs (h) through (n) and by adding a new paragraph (g) to read as follows.

§ 25.146 Licensing and operating authorization provisions for the non-geostationary satellite orbit fixed-satellite service (NGSO FSS) in the bands 10.7 GHz to 14.5 GHz.

* * * * *

(g) *Operational power flux density, space-to-Earth direction, limits.* Ninety days prior to the initiation of service to the public, the NGSO FSS system licensee shall submit a technical showing for the NGSO FSS system in the band 12.2–12.7 GHz. The technical information shall demonstrate that the NGSO FSS system is capable of meeting the limits as specified in § 25.208(o). Licensees may not provide service to the public if they fail to demonstrate compliance with the PFD limits.

* * * * *

■ 4. In § 25.208, paragraph (n), which was added at 67 FR 43037, June 26, 2002, is correctly designated as paragraph (o) and revised to read as follows:

§ 25.208 Power flux density limits.

* * * * *

(o) In the band 12.2–12.7 GHz, for NGSO FSS space stations, the specified low-angle power flux-density at the Earth's surface produced by emissions from a space station shall not be exceeded into an operational MVDDS receiver:

(1) 158 dB(W/m^2) in any 4 kHz band for angles of arrival between 0 and 2 degrees above the horizontal plane; and

(2) 158 + 3.33(δ − 2) dB(W/m^2) in any 4 kHz band for angles of arrival (δ) (in degrees) between 2 and 5 degrees above the horizontal plane.

Note to paragraph (o):

These limits relate to the power flux density, which would be obtained under assumed free-space propagation conditions.

PART 101—FIXED MICROWAVE SERVICES

■ 5. The authority citation for part 101 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

■ 6. Section 101.111 is amended by revising paragraph (a)(2)(i) to read as follows:

§ 101.111 Emission limitations.

(a) * * *

(2) * * *

(i) For operating frequencies below 15 GHz, in any 4 KHz band, the center frequency of which is removed from the assigned frequency by more than 50 percent up to and including 250 percent of the authorized bandwidth: As specified by the following equation but in no event less than 50 decibels:

$A = 35 + 0.8(P - 50) + 10 \text{ Log}_{10} B.$

(Attenuation greater than 80 decibels is not required.)

where:

A = Attenuation (in decibels) below the mean output power level.

P = Percent removed from the carrier frequency.

B = Authorized bandwidth in MHz. MVDDS operations in the 12.2–12.7 GHz band shall use 24 megahertz for the value of B in the emission mask equation set forth in this section. MVDDS operations in the 12.2–12.7 GHz bands shall use 24 megahertz for the value of B in the emission mask equation set forth in this section. The emission mask limitation shall only apply at the 12.2–12.7 GHz band edges and does not restrict MVDDS channelization bandwidth within the band.

* * * * *

■ 8. Section 101.1440 is amended by revising paragraph (d)(2) and (e) to read as follows.

§ 101.1440 MVDDS protection of DBS.

* * * * *

(d) * * *

(2) No later than forty-five days after receipt of the MVDDS system information in paragraph (d)(1) of this section, the DBS licensee(s) shall provide the MVDDS licensee with a list of only those new DBS customer locations that have been installed in the 30-day period following the MVDDS notification and that the DBS licensee believes may receive harmful interference or where the prescribed EPFD limits may be exceeded. In addition, the DBS licensee(s) could indicate agreement with the MVDDS licensee's technical assessment, or identify DBS customer locations that the MVDDS licensee failed to consider or DBS customer locations where they believe the MVDDS licensee erred in its analysis and could exceed the prescribed EPFD limit.

* * * * *

(e) Beginning thirty days after the DBS licensees are notified of a potential MVDDS site in paragraph (d)(1) of this section, the DBS licensees are responsible for providing information they deem necessary for those entities who install all future DBS receive antennas on its system to take into account the presence of MVDDS operations so that these DBS receive antennas can be located in such a way as to avoid the MVDDS signal. These later installed DBS receive antennas shall have no further rights of complaint against the notified MVDDS transmitting antenna(s).

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST–2003–15676]

RIN 2105–AD14

Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Drug and Alcohol Management Information System Reporting

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Department of Transportation's Office of Drug and Alcohol Policy and Compliance (ODAPC) is revising the Management Information System (MIS) forms currently used within five U.S. Department of Transportation (DOT) agencies and the United States Coast Guard (USCG) for submission of annual drug and alcohol program data. The DOT agencies are: Federal Motor Carrier Safety Administration (FMCSA); Federal Aviation Administration (FAA); Federal Transit Administration (FTA); Federal Railroad Administration (FRA); and Research and Special Programs Administration (RSPA). The Department is streamlining the annual reporting of drug and alcohol program data to DOT agencies through use of a one-page MIS data collection form. The Department is standardizing across the DOT agencies the information collected and reducing the amount of data reported by transportation employers. If a DOT agency requires supplemental data, the DOT agency will address those issues separately.

DATES: Effective July 25, 2003.

FOR FURTHER INFORMATION CONTACT: Jim L. Swart, Drug and Alcohol Policy Advisor at 202–366–3784 (voice) 202–366–3897 (fax) or at: *jim.swart@ost.dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background and Purpose

Five DOT agencies and the USCG collect drug and alcohol program data from their regulated employers on an

annual basis. Employers compile this data on MIS forms and each form is DOT-agency specific. In fact, twenty-one MIS data collection forms will be replaced within the DOT agencies by the new single-format form. The Department believes that data collection and entry will be greatly simplified for transportation employers and the Department if a single form is utilized throughout the transportation industries and the DOT agencies.

All drug and alcohol testing conducted under DOT authority uses a standard form for drug testing—Federal Drug Testing Custody and Control Form—and a standard form for alcohol testing—DOT Alcohol Testing Form. In essence, use of standard testing forms serves to limit MIS reporting to a finite number of data elements. Therefore, a core set of data elements will make up the new MIS form which all transportation employers will complete, as appropriate, for their companies and the DOT agencies regulating them.

This MIS form will simplify and streamline data recording for transportation employers and will require employers to enter less data. In addition, because the form contains fewer data elements and is on a one-page format, it can be more easily entered and processed via electronically-based systems. As an added benefit, there is a single set of MIS instructions for all transportation employers, regardless of DOT agency.

However, not every DOT agency expects information for all potential data elements (*e.g.*, RSPA does not conduct random alcohol testing), and some data elements may be collected through some means other than MIS (*e.g.*, USCG receives alcohol data immediately following each post-accident testing event). The form's instructions highlight some of those peculiar testing differences, and companies not required to conduct or report certain types of tests will simply leave those sections blank or may enter zeros. For instance, because USCG wants no alcohol testing data on the MIS form, USCG-regulated employers will leave blank (or enter zeros in) Section IV of the form. In addition, when no testing was done or no results were received for particular data elements, employers may leave those items blank or insert zeros.

The Department issued a notice of proposed rulemaking (NPRM) on September 30, 2002 (67 FR 61306), asking for comments and suggestions for changes to the MIS form and process. In response to the NPRM, we received a modest amount of comments from a dozen or so individuals, groups, and associations. The final rule responds to all those comments. The final rule also makes significant modifications to the previous DOT agency MIS forms.

Additional Background Issue

In the NPRM we said, ''On June 6, 2002, President Bush announced his proposal to create a Cabinet-level homeland security department. Inside this new department, the President proposes to put several agencies, including the USCG. The President urged Congress to pass legislation to create the new Department of Homeland Security. This process may take some time. As a result, if you have USCG ties and MIS interests, please submit your comments to this NPRM. We will consider congressional and presidential action regarding the USCG and homeland security in the final rule.''

The Department of Homeland Security (DHS) has been established and the USCG's being part of that cabinet agency is reality. However, the USCG intends to keep 49 CFR part 40 as an incorporated part of its regulated industry testing rules—46 CFR part 16. Consequently, the USCG intends to follow part 40 regulations applicable (*e.g.*, part 40 alcohol rules do not apply) to the marine industry until such time as resources permit them to create their own rules, should that become necessary in the future. The USCG intends to rely upon 49 CFR part 40 for testing procedures, guidance, and interpretations. They also intend to remain a part of the MIS form, its process, and its related regulation section in part 40. Therefore, USCG-regulated employers will continue to report on this MIS form until further notice.

ODAPC desires to support the USCG efforts to facilitate a seamless transition from DOT to DHS. In this light, we will support the USCG's use of 49 CFR part 40 in their regulated industry testing program. [We view USCG's use of part 40 as being similar to DOT's required incorporation of Department of Health and Human Services (HHS) laboratory regulations and guidance into part 40.] In this light, the MIS regulation, form, and instructions will continue to reference the USCG as a DOT agency even though it became part of DHS on March 1, 2003.

Effective Dates

The Department has decided that use of the new MIS form will be required for employer MIS submissions in CY 2004 documenting CY 2003 data. Therefore, employers must immediately adopt provisions in the rule which will permit them to start, as appropriate, collection of the required data and which establish how companies are to determine the number of employees upon which 2003 random testing is based.

Discussion of Significant Comments to the Docket

Comment: The vast majority of commenters supported the Department's decision to streamline and simplify the various MIS forms currently in use into one form that will be used across all DOT agencies. Most expressed the belief that doing so will enhance accuracy of data being reported and the efficiency of those employers and service agents who will be tasked with providing the reports. A few commenters suggested that the new form will also be more easily processed through electronic means (when those are up and running) than would the variety of past MIS iterations.

Two commenters believed the new form did not effectively address the needs of data collection. One of these commenters expressed the belief that much more information needed to be collected and needed to be collected on a more frequent than once per year basis. The other commenter indicated that use of one specific DOT agency's MIS forms should not be changed because those forms best fit, the commenter asserts, the needs of a particular industry which the commenter represents (and because companies do not wish to change established reporting programs which are geared to provide the information required on current forms).

DOT Response: We agree with the preponderance of commenters who supported use of a single form across all modes of transportation. We agree with the majority of commenters who supported use of a trimmed-down version of the form. We agree with commenters who believed the new form readily lends itself to electronic transfer of items and data. In this light, it is important to note that the new form represents an all important first step in the Department's desire to have this form on-line and to permit electronic transmission of data. The fact that one form will be used throughout the transportation industry makes the difficult task of designing the system much simpler (to say nothing of our being able to obtain accurate data in consistent fields across all DOT agencies).

The Department, after reaching a self-imposed deadline date for the publication of the NPRM, did not intend for the new form to be used to collect 2002 MIS information. To do so would have meant a change in the way

companies that had already collected 2002 data would have had to download that information. In addition, many companies had not been collecting vital data regarding refusals to test. Therefore, use of the new form will be required in CY 2004 for collecting data representing CY 2003 testing.

During 2003, the Federal Transit Administration (FTA) has agreed to field-test an electronic data collection system using data elements of the new form. The FTA will select transit systems for reporting MIS data as part of this field-test. FTA's Volpe Center resources will coordinate the data collection. Through field-testing we can expose the Volpe-developed system software to a wide range of equipment and real-world usage. This field test will be accomplished with an eye toward full implementation across all DOT agencies as soon as possible. We believe the revised MIS form and its data format represent the best way to accomplish the Department's ultimate goal of having full automation for MIS submissions. Early demonstrations of FTA's system have shown the design to be very user-friendly and uncomplicated for the input required data.

Comment: Several commenters expressed the concern that employers could believe the data requirements no longer reflected on MIS forms are being de-emphasized by the DOT agencies. Most of these commenters wished us to reiterate the importance of training information that will no longer be asked for on the MIS form.

DOT Response: As we stated in the NPRM, the items for which we are no longer asking are items that DOT agencies can obtain in a variety of other ways and in other venues and formats. It is worth reiterating that the vast majority of items removed from the MIS form remain important. Employers would be remiss, to say nothing about being in violation of part 40 and DOT agency regulations, if they chose not to obtain, maintain, and furnish information required by regulations. Employers and service agents will be in clear violation of regulations and subject to sanctions if the DOT agency requirements (*e.g.*, for supervisory training, for recordkeeping) are now ignored simply because the data generated by those requirements are no longer being recorded on the MIS form.

Comment: The bulk of commenters supported how the Department proposed to count the number of covered employees (*i.e.*, employees subject to testing because they perform DOT safety-sensitive duties) using the averaging formula. Some commenters, while supporting the averaging formula method, expressed concern for companies that make random selections on a daily or weekly basis (as opposed to those selecting monthly or quarterly). Only one commenter expressed the desire to use a number determined at the start of the year believing it simpler than factoring-in employee census fluctuations. This commenter believed that doing so would be better than having an employer determine the average number of employees at year's end—which was not an idea proposed by the Department in the NPRM. In addition, this commenter indicated that employers represented by the commenter did not know how many safety-sensitive employees they actually employ throughout the year.

DOT Response: The Department believes the calculation of the employee average will be the best way for employers to determine the number of covered employees eligible for DOT testing throughout the year. This process will more readily enable employers to take into account employment of seasonal workers; periods of downsizing; and business start-ups and other increases in employee numbers. To fix the number of covered employees at the start of a year does not take those important factors into consideration. For some employers, establishing the number at the start of the year may lead to their conducting much more random testing than required, and for others, far too little random testing.

Companies that do not know how many employees they employ and release from employment; do not know how many eligible employees are in each random selection pool; and do not know if eligible employees are placed into and taken out of random selection pools have problems irrespective of how the MIS form is completed.

In any case, the Department believes the best way for the random testing pools to be kept current and for the random testing rate to reflect the number of employees actually performing safety sensitive duties is the proposed averaging formula, and we have adopted it in this regulation. It is imperative that companies not wait until the end of the year to make this calculation. Companies must place all covered employees into the pool, know how many are in the pool, and select and test the appropriate percentages.

While we believe that companies conducting their random testing draws on a daily or weekly basis have computer systems sophisticated enough to factor the average on a daily or weekly basis, the Department will not require those companies to do so. However, those companies conducting random draws more frequently than monthly (*e.g.*, daily, weekly, bi-weekly) will not be required to do the averaging more than once each month. And, for example, companies selecting monthly, must calculate monthly; and companies selecting quarterly, must calculate quarterly.

Comment: One commenter believed the requirement to capture ''refusal to test'' data would be too complex for employers. This commenter also stated that counting the number of cancelled tests would also add a burden to employers, although the commenter wished to have cancelled tests counted toward satisfaction of the random testing rate. In short, this commenter did not favor changes to the old single-industry-specific forms.

DOT Response: The Department believes that the testing panorama has changed considerably since the inception of the DOT testing program. Other program forms, such as the Breath Alcohol Testing Form and the Federal Drug Testing Custody and Control Form, have changed to reflect program changes. We believe it is important that the MIS form transform accordingly. At one time the Department did not envision that specific reasons for refusals would become important enough to track. However, a troubling industry has risen whose primary goal is to ''beat the drug test.'' Adulterated and substituted test results have increased considerably: when we speak of refusals, no longer are we simply talking about employees failing to appear for tests. Times change and this refusal delineation is now important for the Department, the DOT agencies, and employers to have.

As proposed in the NPRM, we have determined that refusals to test should count as a test result—one that goes toward satisfaction of a company's random testing rate. However, we do not believe that cancelled tests should count toward satisfaction of the rate. We continue to support part 40's contention that a cancelled test does not count toward compliance with DOT's testing requirements.

Again, we believe a single MIS format is the most appropriate approach. We believe that the many items we no longer desire to capture on the form more than offset the few new collection requirements for refusals and cancellations.

Comment: Two commenters believed the collection of data on separate sheets for each employee category would present too much work for those charged with completing the form. One commenter supported the one-page

concept while recognizing that some companies may have to enter data on additional sheets.

DOT Response: The Department gave a lot of thought to this issue, but did not see a valid way around separate pages for different employee categories, at least in the short term. Again, it is important to note that the Department views the use of this standard format, one-page MIS form to be a logical first step in providing an automated system for future MIS data entry. A ''must'' for the automated system will be the ability of the employer to view entry options only for eligible categories of employees. For instance, an employer entering MIS data online for the FTA will see only employee categories corresponding to the FTA rules. For an employer entering MIS data for the FAA, only those FAA employee categories will appear.

Interestingly, even if an employer has multiple employee categories, the amount of information collected equates to far less than if the employer used the old forms. There is no more actual work involved in entering the employee testing data even if using separate sheets. In fact, our test runs of the form (*e.g.*, to obtain industry estimates on the amount of time to fully complete the form) with companies having multiple employee categories were met with positive feedback. From those estimates, we concluded that completion of the form—even with multiple sheets—will take between 45 minutes and 1.5 hours. For the old MIS forms, estimates showed that the ''EZ'' forms took between 30 minutes and 1 hour to complete; and the long forms took 2.5 hours each (alcohol and drug) to complete. Again, we hold that the time savings is substantial using the new form rather than the multitude of old forms.

Comment: Two commenters asked us to clarify MIS requirements for companies reporting MIS data to more than one DOT agency—companies that, for instance, may have full-time drivers and full-time pipeline workers. In addition, they asked us to resolve confusion over how to record testing data for employees who perform duties that are regulated by more than one DOT agency—for example, a company's employees drive trucks sometimes and perform safety-sensitive railroad duties at other times.

DOT response: In its first paragraph, the NPRM's MIS instruction form provided guidance for companies regulated by more than one DOT agency. It said, ''If you are preparing reports for more than one DOT Operating Administration (OA), then you must submit OA-specific forms.'' We have maintained that text requirement intact. Therefore, if a company has drivers and pipeline workers covered under FMCSA and RSPA regulations respectively, and the company is asked by FMCSA and by RSPA to submit MIS data, the company should send an MIS report on its drivers to the FMCSA and an MIS report on its pipeline workers to RSPA.

The second scenario the commenters brought up, how to record MIS data for employees who perform cross-modal safety sensitive duties where an employee performs duties regulated by two or more DOT agencies (*e.g.*, the employee is a truck driver and a pipeline maintenance worker), is more complex. For a number of years, DOT agency rules have stipulated that a covered employee, subject to testing under more than one DOT agency rule for the same employer, would be subject to random testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's safety-sensitive duties.

Further complicating the issue becomes the fact that some DOT agencies (*i.e.*, RSPA and USCG) do not authorize random alcohol testing for employees. So while an employee who drives a truck and performs pipeline maintenance for a company may carry out more than 50% of his or her duties under RSPA rules and be in a RSPA random pool for drug testing, that employee must still be in an FMCSA pool for random alcohol testing. Or, the company can choose to place all these employees in the same random drug testing pool if they test at or above the highest random rates established by the DOT agency under whose jurisdiction they fall.

The Department is settling the issue by stating that for purposes of the MIS form, employees covered under more than one DOT agency rule need only be reported on the MIS form for the DOT agency under which they are randomly tested.

For example, an employee conducting 51% of her safety-sensitive work under FMCSA rules will be randomly tested under those rules rather than under the rules of another DOT agency under which she performs the other 49% of her DOT safety sensitive duties. For MIS purposes, therefore, she will be counted and her tests reported only under the MIS submission to the FMCSA. If 49% of her duties are under FTA, for instance, she will not appear on the FTA MIS submission even though she would continue to be eligible for testing under the FTA rule for post accident and reasonable suspicion, and perhaps for return-to-duty and follow-up testing. Employers may have to explain her testing data to FMCSA and FTA agency representatives during an inspection or audit.

Additional Discussion of Rule

The ODAPC and the DOT agencies have revised the MIS reporting requirements to standardize the collection of data for the agencies. The proposed rulemaking will impose a few new requirements for data collection; specifically, data related to information associated with the revised (65 FR 122, June 23, 2000) Federal Drug Testing Custody and Control Form. However, the overall amount of required data is less than that required currently. The Department has also placed the MIS form and instructions for completing it into part 40. The forms and instructions will be removed from all DOT agency regulations.

As stated earlier, many data elements are no longer part of the MIS form. DOT agencies have decided that some information items required on previous MIS forms are available in other formats or are items obtainable during inspections, reviews and audits. The following represents a listing for each DOT agency of most of the data elements we are eliminating from reporting on the MIS form:

FMCSA

1. Number of persons denied a position following a positive drug test.
2. Number of employees returned to duty following a refusal or positive drug test.
3. Supervisor initial drug training data.
4. Number of employees denied a position following an alcohol test of 0.04 or greater.
5. Number of employees returned to duty after engaging in alcohol misuse.
6. Number of employees having both a positive drug test and an alcohol test of 0.04 or greater when both tests were administered at the same time.
7. Actions taken for alcohol violations other than alcohol testing.
8. Supervisor initial alcohol training data.

FAA

1. Number of employees returned to duty after having failed or refused a drug test.
2. Actions taken for drug test refusals.
3. Number of persons denied employment for a positive drug test.
4. Actions taken for positive drug results.
5. Employee initial drug training data.
6. Supervisor initial drug training data.
7. Supervisor recurrent drug training data.
8. Number of persons denied a position for an alcohol test 0.04 or greater.
9. Number of employees returned to duty after engaging in alcohol misuse.

10. Actions taken for alcohol regulation violations.
11. Number of employees having both a positive drug test and an alcohol test of 0.04 or greater when both tests were administered at the same time.
12. Number of other violations of the alcohol regulation.
13. Actions taken for refusals to take an alcohol test.
14. Supervisor alcohol training data.

FTA

1. Number of persons denied a position for alcohol results 0.04 or greater.
2. Number of accidents (noted as fatal and non-fatal) with alcohol results 0.04 or greater.
3. Number of fatalities from accidents resulting in alcohol results 0.04 or greater.
4. Number of employees returned to duty following an alcohol violation.
5. Number of employees having both a positive drug test and an alcohol test of 0.04 or greater when both tests were administered at the same time.
6. Actions taken for other alcohol rule violations.
7. Supervisor alcohol training data.
8. Number of persons denied a position for positive drug test results.
9. Number of accidents (noted as fatal and non-fatal) with positive drug test results.
10. Number of fatalities from accidents resulting in positive drug tests results.
11. Number of persons returned to duty following a positive drug test or refusal result.
12. Employee drug education data.
13. Supervisor drug training data.
14. Funding source information.

FRA

1. Number of applicants/transfers denied employment/transfer for a positive drug test.
2. Number of employees returned to duty after having failed or refused a drug test.
3. Detailed breakouts of for-cause drug and alcohol testing.
4. Non-qualifying accident drug testing data.
5. Supervisor drug training data.
6. Number of applicants/transfers denied employment/transfer for alcohol results 0.04 or greater.
7. Number of employees returned to duty after engaging in alcohol misuse.
8. Supervisor alcohol training data.

USCG

1. Number of persons denied a position for a positive drug test.
2. Number of employees returned to duty following a drug violation.
3. Employee drug and alcohol training data.
4. Supervisor drug and alcohol training data.
5. Post-accident alcohol testing data.
6. Reasonable cause alcohol testing data.

RSPA

1. Number of employees returned to duty after engaging in alcohol misuse.
2. Actions taken for alcohol test results equal to or greater than 0.04.
3. Number of other alcohol rule violations and actions taken for them.
4. Actions taken for alcohol test refusals.
5. Supervisor initial alcohol training data.
6. Number of persons denied a position following a positive drug test.
7. Number of employees returned to duty following a positive or refusal drug test.
8. Actions taken for positive drug tests.
9. Actions taken for drug test refusals.
10. Supervisor initial drug training data.

The Department will also count collections differently than under the old MIS regimen. Under the old MIS counting method a drug collection was considered to be a testing event that resulted in a negative, positive, or cancellation. Refusals to test—no matter the reason for the refusal—were not considered appropriate for inclusion. Despite the instruction to include no refusals, we know that many companies included those that were the result of adulterated or substituted results that were verified by the MRO as refusals. Still other companies counted these types of refusals as well as refusal events for which no urine was sent to laboratories for testing (*e.g.*, employee failed to show-up at the collection site; employee left the collection site before urine had been collected).

Similarly, in determining if companies were conducting random testing at the appropriate established annual rates, some DOT agencies did not count refusals; some counted all refusals; and still others counted only refusals reported by the MRO (as a result of adulteration or substitution) toward satisfaction of the random testing rate requirement. Furthermore, in calculating the annual random rates for testing, all DOT agency rules said the following will be factored for the positive rate: number of random positives plus number of random refusals divided by the number of random tests plus the number of random refusals. This means that some cancelled random tests and random refusals were already in the random test numbers before the number of random refusals had been added to the total.

To clear up these discrepancies, the Department will count the number of specimens collected as the number of testing events resulting in negative, positive, and refusal to test results no matter the reason for the refusal. We have added all refusals to the number of tests because DOT agencies factor refusals into determining whether or not employers have met annual random testing rate requirements. We will not add cancelled test results to the mix because part 40.207(b) says, ''. . . a cancelled test does not count toward compliance with DOT requirements (*e.g.*, being applied toward the number of tests needed to meet the employer's minimum random testing rate).''

Invalid test results are always cancelled and will not be included. However, those invalid results requiring a subsequent directly observed collection will simply be considered another collection that will have a final result. In addition, blind testing will not be counted as a testing event. Counting in this manner will enable many of the columns and rows of the MIS form to total up.

In addition, annual random testing rates will be determined using more accurate counts because no cancelled test will be mistakenly included and no refusals will be factored twice in the total. DOT agency inspectors, reviewers, and auditors will count all refusals (*e.g.*, be they from an adulterated specimen result or from ''shy bladder'' evaluation with no medical condition) as satisfying a company's meeting its random testing rate.

For cancellations requiring the employee to take a second test, the test that is cancelled will not count. However, the result of the subsequent recollection will count, provided that it too is not cancelled. These situations include: invalid test cancellations requiring the employee to go in for an observed collection; split specimen cancellations requiring the employee to go in for an observed collection; and cancellations requiring the employee to go in for another collection because a negative result is needed (for pre-employment; return to duty; and follow-up testing).

In addition, if more than one set of specimens is sent to the lab during one testing event, they will count together as one collection: These include: negative-dilute specimens when the employee goes in for a second collection per employee policy [the result of the second test is the result of record]; and observed collections requiring both the

original collection and the observed collection be sent to the laboratory (*e.g.*, specimen out of temperature range) [the result requiring the most stringent consequence will ultimately be the result of record].

The Department is also clarifying and making uniform among DOT agencies how employers determine the total number of employees against which the annual random rate applies. Some DOT agencies have told employers to count the number of covered employees working at the start of the calendar year; some DOT agencies have directed employers to count the total number of covered employees that worked for the company within the year; and still others have advised employers to count the average number of employees on a monthly or quarterly basis.

This rule directs employers to add the total number of covered employees eligible for random testing in each random testing selection period for the year and divide that total by the number of random testing periods. For instance, a company conducting random testing quarterly will add the total of safety-sensitive employees they had in the random pool when each selection was made; then divide this number by 4 to obtain the yearly average number of covered employees. [As an example, if Company A had 1500 employees in the first quarter random pool, 2250 in the second quarter, 2750 in the third quarter; and 1500 in the fourth quarter; 1500 + 2250 + 2750 + 1500 = 8000; 8000 / 4 = 2000; the total number of employees subject to testing for the year would be reported as ''2000''. (Note: This number, ''2000'', would also be the number on which an employer would base the random testing rate.)]

As stated earlier, no company will be required to factor the average number of employees more often than once per month: No more than 12 times per year.

Companies (and their contractors, as applicable) will continue to submit the MIS reports in accordance with requirements (*e.g.*, dates for submission; selection of companies required to submit, etc.) that will continue to be in each DOT agency regulation. Likewise, DOT agency regulations will continue to address the manner (*e.g.*, mail; CD; electronic transmission) and locations for submitting the forms. Responding to a commenter, we have added a reference to this in rule text.

It is important to note that MIS alcohol testing data reflects all these proposals made for MIS drug testing data. Refusals will count as testing events; cancelled tests will not; and random pool averages will determine the number of employees against which the annual testing rate applies.

The Department is currently working toward an electronic MIS form capable of Internet submission. Each form would be DOT agency specific and would not have extraneous items showing (for example, the USCG-specific form would not include an alcohol testing section; the RSPA-specific form would not show an alcohol random testing category). Additionally, the system would bring to the attention of the person completing the form any items that did not accurately compute mathematically. Finally, employee categories listed would only be those for the specific DOT agency.

The Department recognizes that Consortia/Third Party Administrators (C/TPAs) are responsible for administering a large number of transportation industry drug and alcohol testing programs. For this reason, the MIS form will contain a space for the employer to note the name of the C/TPA the company uses, if any. Finally, we have made some of the minor, but useful changes recommended by several commenters and DOT agency representatives. These include typographical, counting, and example errors; and the option to use zeros instead of leaving testing data items blank.

Finally, the Department wants reasonable suspicion and reasonable cause testing to be counted together on the MIS form with no differentiation between the two. The issue of how to count these two types of tests has been complicated by the fact that neither the CCF nor the BATF distinguish between the two even though the DOT agencies do. For instance, FMCSA and FTA authorize reasonable suspicion drug testing; FAA, RSPA, and USCG authorize reasonable cause drug testing; and FRA authorizes both. FMCSA, FAA, FTA, and RSPA authorize reasonable suspicion alcohol testing; and FRA authorizes both reasonable suspicion and reasonable cause alcohol testing. Sufficient documentation should exist with employers for DOT agency representatives to tell the difference between the two during inspections and audits.

Regulatory Analyses and Notices

This rule is not a significant rule for purposes of Executive Order 12866 or the DOT's regulatory policies and procedures. Nor is the rule an economically significant regulation. It is a reworking of existing requirements; it imposes no new mandates; and it will not create any new costs. In fact, the rule will serve to reduce requirements and costs. The Department realizes that some companies maintain their current MIS data items on basic computer spreadsheets. However, we are requiring only a minimal number of additions to the format while removing a larger number of items.

This final rule does not have sufficient Federalism impact to warrant a Federalism assessment under Executive Order 13132. With respect to the Regulatory Flexibility Act, the certifies that, if adopted, this rule would not have a significant economic impact on a substantial number of small entities, so a Regulatory Flexibility analysis has not been prepared. Even though this rule might affect a large number of small entities, we do not expect the new MIS requirements to have a significant economic impact on anyone.

The rule also contains information collection requirements. As required by the Paperwork Reduction Act of 1995, (the PRA, 44 U.S.C. 3507(d)), the Department is submitting these requirements to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB) for review, as required under the PRA. For informational purposes, the Department will place its entire PRA package for the MIS form on the Internet when that submission is approved.

As noted elsewhere in this preamble, the proposal would amend part 40 to include a new format and a new set of instructions for the MIS form. This single form would be used across DOT agencies rather than the multiple forms with multiple instructions currently in use. The form's data elements would be reduced significantly as well.

Completing an MIS report requires a company to collect and compile drug and alcohol testing data generated throughout the year by that company's drug and alcohol testing program and placing some of that data onto the form. Certainly, the more complex a company's testing program set-up, the more complex assembling needed data becomes. Companies having decentralized program locations may have to draw information from a variety of localized programs. Companies with a number of subsidiaries may have large amounts of data to compile and authenticate. In addition, companies failing to regularly update and bring together their testing data may find themselves in positions of having to do so in a hurried manner at the end of the year. Also, companies lacking computerization of data capabilities may have to rely on manual methods.

Because MIS reporting has been part of the DOT testing equation for several years, many companies have become experienced in and have applied sound business sense to putting the report together. Many companies update their drug and alcohol program data on a regular, throughout-the-year basis rather than doing so at the last minute. Most companies require their localized programs, subsidiaries, and contractors to regularly provide program updates rather than authenticate data at the end of the year. Many companies utilize computer databases rather than ''pen-and-ink'' data entries. Still other companies prefer to have data entry provided as part of their C/TPA's contracted services.

Whatever the case, the Department does not require any particular management approach to compiling program data: We simply require that the data be accurate; that it be in a system that has controlled access; that it be readily auditable; and that specific data be included in MIS reports when they are required or requested by DOT agencies. The Department would prefer that companies update their drug and alcohol program data throughout the year; require their divisions, subsidiaries, and contractors to report their data regularly to them; and computerize their data-entry methodologies. However, we do not mandate these actions even though we think they are all preferable to end-of-the-year company scrambles to complete MIS forms.

The Department believes that requiring less data entry on MIS forms and having only one form throughout the transportation industries will make data gathering and compilation simpler. For instance, no longer will employers need to provide employee and supervisor training data, violation consequence data, and non-Part 40 violation data (among other entries). Furthermore, the single-format MIS form replaces the ''EZ'' drug form, the ''EZ'' alcohol form, the long drug form, and the long alcohol form, the formats of which were different for each DOT agency. Therefore, employers subject to more than one DOT agency rule will not have to navigate their ways through multiple MIS formats.

These represent important steps in reducing the amount of time needed to compile data for MIS purposes—no matter how a company chooses to manage their drug and alcohol testing data. The Department believes the simplicity of the form will result in another significant time saving action for employers.

DOT agency MIS PRA submissions for the old MIS forms reveal that nearly 6,800 companies submit 13,541 MIS forms annually to DOT; and the time it takes to fill out the forms is 18,406 hours. Estimates for the new MIS form indicate that these companies will send 7,186 MIS reports to DOT and the time to complete them will be 10,779 hours. Therefore, we foresee over 7,500 hours saved per year in filling out the new MIS form as opposed to completing the old multiple MIS forms. [Based upon industry and DOT agency estimates, we have concluded that the new MIS report will take between 45 minutes and 1.5 hours to complete. We have chosen, for this paragraph and for our OMB PRA submission, to use the highest industry and DOT agency estimate —1.5 hours. We estimate that slightly over 300 companies report to more than one DOT agency.]

According to OMB's regulations implementing the PRA (5 CFR 1320.8(b)(2)(vi)), an agency may not conduct or sponsor, and a person need not respond to a collection of information unless it displays a currently valid OMB control number. The OMB control number for this information will be published in the **Federal Register** after OMB approves it.

A number of other Executive Orders can affect rulemakings. These include Executive Orders 13084 (Consultation and Coordination with Indian Tribal Governments), 12988 (Civil Justice Reform), 12875 (Enhancing the Intergovernmental Partnership), 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights), 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 13045 (Protection of Children from Environmental Health Risks and Safety Risks), and 12889 (Implementation of North American Free Trade Agreement). We have considered these Executive Orders in the context of this rule, and we believe that the rule does not directly affect matters that the Executive Orders cover.

We have prepared this rulemaking in accordance with the Presidential Directive on Plain Language.

List of Subjects in 49 CFR Part 40

Administrative practice and procedure, Alcohol abuse, Alcohol testing, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

Issued this 9th day of July, 2003, at Washington, DC.

Norman Y. Mineta,

Secretary of Transportation.

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

■ For reasons set forth in the preamble, the Department of Transportation amends Part 40 of Title 49, Code of Federal Regulations, as follows:

■ 1. The authority citation for 49 CFR Part 40 continues to read as follows:

Authority: 49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 *et seq.*

■ 2. Add a new § 40.26 to read as follows:

§ 40.26 What form must an employer use to report Management Information System (MIS) data to a DOT agency?

As an employer, when you are required to report MIS data to a DOT agency, you must use the form and instructions at appendix H to part 40. You must submit the MIS report in accordance with rule requirements (*e.g.*, dates for submission; selection of companies required to submit, and method of reporting) established by the DOT agency regulating your operation.

■ 3. Add a new Appendix H to read as follows:

Appendix H to Part 40—DOT Drug and Alcohol Testing Management Information System (MIS) Data Collection Form

The following form and instructions must be used when an employer is required to report MIS data to a DOT agency.

BILLING CODE 4910–62–P

U.S. DEPARTMENT OF TRANSPORTATION DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

Calendar Year Covered by this Report: _____

I. Employer:

Company Name: _____

Doing Business As (DBA) Name (if applicable): _____

Address: _____ E-mail: _____

Name of Certifying Official: _____ Signature: _____

Telephone: (_____) _____ Date Certified: _____

Prepared by (if different): _____ Telephone: (_____) _____

C/TPA Name and Telephone (if applicable): _____ (_____) _____

Check the DOT agency for which you are reporting MIS data; and complete the information on that same line as appropriate:

___ FMSCA – Motor Carrier: DOT #: _____ Owner-operator: (circle one) YES or NO Exempt (Circle One) YES or NO

___ FAA – Aviation: Certificate # (if applicable): _____ Plan / Registration # (if applicable): _____

___ RSPA – Pipeline: (Check) Gas Gathering__ Gas Transmission__ Gas Distribution__ Transport Hazardous Liquids__ Transport Carbon Dioxide__

___ FRA – Railroad: Total Number of observed/documented Part 219 "Rule G" Observations for covered employees: _____

___ USCG – Maritime: Vessel ID # (USCG- or State-Issued): _____ (If more than one vessel, list separately.)

___ FTA – Transit

II. Covered Employees: (A) Enter Total Number Safety-Sensitive Employees In All Employee Categories: _____

(B) Enter Total Number of Employee Categories: _____

(C)

Employee Category	Total Number of Employees in this Category

If you have multiple employee categories, complete Sections I and II (A) & (B). Take that filled-in form and make one copy for each employee category and complete Sections II (C), III, and IV for each separate employee category.

III. Drug Testing Data:

	1	2	3	4	5	6	7	8	9	10	11	12	13
									Refusal Results				
Type of Test	Total Number Of Test Results [Should equal the sum of Columns 2, 3, 9, 10, 11, and 12]	Verified Negative Results	Verified Positive Results ~ For One Or More Drugs	Positive For Marijuana	Positive For Cocaine	Positive For PCP	Positive For Opiates	Positive For Amphetamines	Adulterated	Substituted	"Shy Bladder" ~ With No Medical Explanation	Other Refusals To Submit To Testing	Cancelled Results
Pre-Employment													
Random													
Post-Accident													
Reasonable Susp./Cause													
Return-to-Duty													
Follow-Up													
TOTAL													

IV. Alcohol Testing Data:

	1	2	3	4	5	6	7	8	9
							Refusal Results		
Type of Test	Total Number Of Screening Test Results [Should equal the sum of Columns 2, 3, 7, and 8]	Screening Tests With Results Below 0.02	Screening Tests With Results 0.02 Or Greater	Number Of Confirmation Tests Results	Confirmation Tests With Results 0.02 Through 0.039	Confirmation Tests With Results 0.04 Or Greater	"Shy Lung" ~ With No Medical Explanation	Other Refusals To Submit To Testing	Cancelled Results
Pre-Employment									
Random									
Post-Accident									
Reasonable Susp./Cause									
Return-to-Duty									
Follow-Up									
TOTAL									

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 2105-0529. The Department of Transportation estimates that the average burden for this report form is 1.5 hours. You may send comments regarding this burden estimate or any suggestions for reducing the burden to: U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, Room 10403, 400 Seventh Street, SW, Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project, 725 Seventeenth Street, NW, Washington, D.C. 20503.

Title 18, USC Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements of representations in any matter within the jurisdiction of any agency of the United States.

U.S. DEPARTMENT OF TRANSPORTATION
DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM
INSTRUCTION SHEET

This Management Information System (MIS) form is made-up of four sections: employer information; covered employees (i.e., employees performing DOT regulated safety-sensitive duties) information; drug testing data; and alcohol testing data. The employer information needs only to be provided once per submission. However, you must submit a separate page of data for each employee category for which you report testing data. If you are preparing reports for more than one DOT agency then you must submit DOT agency-specific forms.

Please type or print entries legibly in black ink.

TIP *~ Read the entire instructions before starting. Please note that USCG-regulated employers do not report alcohol test results on the MIS form.*

Calendar Year Covered by this Report: Enter the appropriate year.

Section I. Employer

1. Enter your company's name, to include when applicable, your "doing business as" name; current address, city, state, and zip code; and an e-mail address, if available.
2. Enter the printed name, signature, and complete telephone number of the company official certifying the accuracy of the report and the date that person certified the report as complete.
3. If someone other than the certifying official completed the MIS form, enter that person's name and phone number on the appropriate lines provided.
4. If a Consortium/Third Party Administrator (C/TPA) performs administrative services for your drug and alcohol program operation, enter its name and phone number on the appropriate lines provided.
5. DOT Agency Information: Check the box next to the DOT agency for which you are completing this MIS form. Again, if you are submitting to multiple DOT agencies, you must use separate forms for each DOT agency.

a. If you are completing the form for FMCSA, enter your FMCSA DOT Number, as appropriate. In addition, you must indicate whether you are an owner-operator (i.e., an employer who employs only himself or herself as a driver) and whether you are exempt from providing MIS data. Exemptions are noted in the FMCSA regulation at 382.103(d).

b. If you are completing the form for FAA, enter your FAA Certificate Number and FAA Antidrug Plan / Registration Number, when applicable.

c. If you are completing the form for RSPA, check the additional box(s) indicating your type of operation.

d. If you are completing the form for FRA, enter the number of observed/documented Part 219 "Rule G" Observations for covered employees.

e. If you are submitting the form for USCG, enter the vessel ID number. If there is more than one number, enter the numbers separately.

Section II. Covered Employees

1. In Box II-A, enter the total number of covered employees (i.e., employees performing DOT regulated safety-sensitive duties) who work for your company. Then enter, in Box II-B, the total number of employee categories that number represents. If you have employees, some of whom perform duties under one DOT agency and others of whom perform duties under another DOT agency, enter only the number of those employees performing duties under the DOT agency for whom you are submitting the form. If you have covered employees who perform multi-DOT agency functions (e.g., an employee drives a commercial motor vehicle and performs pipeline maintenance duties for you), count the employee only on the MIS report for the DOT agency regulating more than 50 percent of the employee's safety sensitive function.

[Example: If you are submitting the information for the FRA and you have 2000 covered employees performing duties in all FRA-covered service categories – you would enter "2000" in the first box (II-A) and "5" in the second box (II-B), because FRA has five safety-sensitive employee categories and you have employees in all of these groups. If you have 1000 employees performing safety-sensitive duties in three FRA-covered service categories (e.g., engine service, train service, and dispatcher/operation), you would enter "1000" in the first box (II-A) and "3" in the second box (II-B).]

TIP *~ To calculate the total number of covered employees, add the total number of covered employees eligible for testing during each random testing selection period for the year and divide that total by the number of random testing periods. (However, no company will need to factor the average number of employees more often than once per month). For instance, a company conducting random testing quarterly needs to add the total of covered employees they had in the random pool when each selection was made; then divide this number by 4 to obtain the yearly average number of covered employees. It is extremely important that you place all eligible employees into these random pools. [As an example, if Company A had 1500 employees in the first quarter random pool, 2250 in the second quarter, 2750 in the third quarter; and 1500 in the fourth quarter; 1500 + 2250 + 2750 + 1500 = 8000; 8000 / 4 = 2000; the total number of covered employees for the year would be reported as, "2000".*

If you conduct random selections more often than once per month (e.g., you select daily, weekly, bi-weekly), you do not need to compute this total number of covered employees rate more than on a once per month basis. Therefore, employers need not compute the covered employees rate more than 12 times per year.]

2. If you are reporting multiple employee categories, enter the specific employee category in box II-C; and provide the number of employees performing safety-sensitive duties in that specific category.

[Example: You are submitting data to the FTA and you have 2000 covered employees. You have 1750 personnel performing revenue vehicle operation and the remaining 250 are performing revenue vehicle and equipment maintenance. When you provide vehicle operation information, you would enter "Revenue Vehicle Operation" in the first II-C box and "1750" in the second II-C box. When you provide data on the maintenance personnel, you would enter "Revenue Vehicle and Equipment Maintenance" in the first II-C box and "250" in the second II-C box.]

TIP *~ A separate form for each employee category must be submitted. You may do this by filling out a single MIS form through Section II-B and then make one copy for each additional employee category you are reporting. [For instance, if you are submitting the MIS form for the FMCSA, you need only submit one form for all FMCSA covered employees working for you – your only category of employees is "driver." If you are reporting testing data to the FAA and you employ only flight crewmembers, flight attendants, and aircraft maintenance workers, you need to complete one form each for category – three forms in all. If you are reporting to FAA and have all FAA categories of covered employees, you must submit eight forms.]*

Here is a full listing of covered-employee categories:

FMCSA *(one category): Driver*
FAA *(eight categories): Flight Crewmember; Flight Attendant; Flight Instructor; Aircraft Dispatcher; Aircraft Maintenance; Ground Security Coordinator; Aviation Screener; Air Traffic Controller*
RSPA *(one category): Operation/Maintenance/Emergency Response*
FRA *(five categories): Engine Service; Train Service; Dispatcher/Operation; Signal Service; Other [Includes yardmasters, hostlers (non-engineer craft), bridge tenders; switch tenders, and other miscellaneous employees performing 49 CFR 228.5 (c) defined covered service.]*
USCG *(one category): Crewmember*
FTA *(five categories): Revenue Vehicle Operation; Revenue Vehicle and Equipment Maintenance; Revenue Vehicle Control/Dispatch; CDL/Non-Revenue Vehicle; Armed Security Personnel*

Section III. Drug Testing Data

This section summarizes the drug testing results for all covered employees (to include applicants). The table in this section requires drug test data by test type and by result. The categories of test types are: Pre-Employment; Random; Post-Accident; Reasonable Suspicion / Reasonable Cause; Return-to-Duty, and Follow-Up.

The categories of type of results are: Total Number of Test Results [excluding cancelled tests and blind specimens]; Verified Negative; Verified Positive; Positive for Marijuana; Positive for Cocaine; Positive for PCP; Positive for Opiates; Positive for Amphetamines; Refusals due to Adulterated, Substituted, "Shy Bladder" with No Medical Explanation, and Other Refusals to Submit to Testing; and Cancelled Results.

TIP *~ Do not enter data on blind specimens submitted to laboratories. Be sure to enter all pre-employment testing data regardless of whether an applicant was hired or not. You do not need to separate reasonable suspicion and reasonable cause drug testing data on the MIS form. [Therefore, if you conducted only reasonable suspicion drug testing (i.e., FMCSA and FTA), enter that data; if you conducted only reasonable cause drug testing (i.e., FAA, RSPA, and USCG); or if you conducted both under FRA drug testing rules, simply enter the data with no differentiation.] For USCG, enter any "Serious Marine Incident" testing in the Post-Accident row. For FRA, do not enter post accident data (the FRA does not collect this data on the MIS form). Finally, you may leave blank any row or column in which there were no results, or you may enter "0" (zero) instead. Please note that cancelled tests are not included in the "total number of test results" column.*

Section III, Column 1. Total Number of Test Results ~ This column requires a count of the total number of test results in each testing category during the entire reporting year. Count the number of test results as the number of testing events resulting in negative, positive, and refusal results. Do not count cancelled tests and blind specimens in this total.

[Example: A company that conducted fifty pre-employment tests would enter "50" on the Pre-Employment row. If it conducted one hundred random tests, "100' would be entered on the Random row. If that company did no post-accident, reasonable suspicion, reasonable cause, return-to-duty, or follow-up tests, those categories will be left blank or zeros entered.]

Section III, Column 2. Verified Negative Results ~ This column requires a count of the number of tests in each testing category that the Medical Review Officer (MRO) reported as negative. Do not count a negative-dilute result if, subsequently, the employee underwent a second collection; the second test is the test of record.

[Example: If forty-seven of the company's fifty pre-employment tests were reported negative, "47" would be entered in Column 2 on the Pre-Employment row. If ninety of the company's one hundred random test results were reported negative, "90" would be entered in Column 2 on the Random row. Because the company did no other testing, those other categories would be left blank or zeros entered.]

Section III, Column 3. Verified Positive Results ~ For One Or More Drugs ~ This column requires a count of the number of tests in each testing category that the MRO reported as positive for one or more drugs. When the MRO reports a test positive for two drugs, it would count as one positive test.

[Example: If one of the fifty pre-employment tests was positive for two drugs, "1" would be entered in Column 3 on the Pre-Employment row. If four of the company's one hundred random test results were reported positive (three for one drug and one for two drugs), "4" would be entered in Column 3 on the Random row.]

■ **Section III, Columns 4 through 8. Positive** (for specific drugs) ~ These columns require entry of the by-drug data for which specimens were reported positive by the MRO.

[Example: The pre-employment positive test reported by the MRO was positive for marijuana, "1" would be entered in Column 4 on the Pre-Employment row. If three of the four positive results for random testing were reported by the MRO to be positive for marijuana, "3" would be entered in Column 4 on the Random row. If one of the four positive results for random testing was reported positive for both PCP and opiates, "1" would be entered in Column 6 on the Random row and "1" would be entered in Column 7 of the Random row.]

TIP *~ Column 1 should equal the sum of Columns 2, 3, 9, 10, 11, and 12. Remember you have not counted specimen results that were ultimately cancelled or were from blind specimens. So, Column 1 = Column 2 + Column 3 + Column 9 + Column 10 + Column 11 + Column 12. Certainly, double check your records to determine if your actual results count is reflective of all negative, positive, and refusal counts.*

An MRO may report that a specimen is positive for more than one drug. When that happens, to use the company example above (i.e., one random test was positive for both PCP and opiates), the positive results should be recorded in the appropriate columns – PCP and opiates in this case. There is no expectation for Columns 4 through 8 numbers to add up to the numbers in Column 3 when you report multiple positives.

Section III, Columns 9 through 12. Refusal Results ~ The refusal section is divided into four refusal groups – they are: Adulterated; Substituted; "Shy Bladder" ~ With No Medical Explanation; and Other Refusals To Submit to Testing. The MRO reports two of these refusal types – adulterated and substituted specimen results – because of laboratory test findings.

When an individual does not provide enough urine at the collection site, the MRO conducts or causes to have conducted a medical evaluation to determine if there exists a medical reason for the person's inability to provide the appropriate amount of urine. If there is no medical reason to support the inability, the MRO reports the result to the employer as a refusal to test: Refusals of this type are reported in the "Shy Bladder" ~ With No Medical Explanation category.

Finally, additional reasons exist for a test to be considered a refusal. Some examples are: the employee fails to report to the collection site as directed by the employer; the employee leaves the collection site without permission; the employee fails to empty his or her pockets at the collection site; the employee refuses to have a required shy bladder evaluation. Again, these are only four examples: there are more.

■ **Section III, Column 9. Adulterated** ~ This column requires the count of the number of tests reported by the MRO as refusals because the specimens were adulterated.

[Example: If one of the fifty pre-employment tests was adulterated, "1" would be entered in Column 9 of the Pre-Employment row.]

■ **Section III, Column 10. Substituted** ~ This column requires the count of the number of tests reported by the MRO as refusals because the specimens were substituted.

[Example: If one of the 100 random tests was substituted, "1" would be entered in Column 10 of the Random row.]

■ **Section III, Column 11. "Shy Bladder" ~ With No Medical Explanation** ~ This column requires the count of the number of tests reported by the MRO as being a refusal because there was no legitimate medical reason for an insufficient amount of urine.

[Example: If one of the 100 random tests was a refusal because of shy bladder, "1" would be entered in Column 11 of the Random row.]

■ **Section III, Column 12. Other Refusals To Submit To Testing** ~ This column requires the count of refusals other than those already entered in Columns 9 through 11.

[Example: If the company entered "100" as the number of random specimens collected, however it had five employees who refused to be tested without submitting specimens: two did not show up at the collection site as directed; one refused to empty his pockets at the collection site; and two left the collection site rather than submit to a required directly observed collection. Because of these five refusal events, "5" would be entered in Column 11 of the Random row.]

TIP *~ Even though some testing events result in a refusal in which no urine was collected and sent to the laboratory, a "refusal" is still a final test result. Therefore, your overall numbers for test results (in Column 1) will equal the total number of negative tests (Column 2); positives (Column 3); and refusals (Columns 9, 10, 11, and 12). Do not worry that no urine was processed at the laboratory for some refusals; all refusals are counted as a testing event for MIS purposes and for establishing random rates.*

Section III, Column 13. Cancelled Tests ~ This column requires a count of the number of tests in each testing category that the MRO reported as cancelled. You must not count any cancelled tests in Column 1 or in any other column. For instance, you must not count a positive result (in Column 3) if it had ultimately been cancelled for any reason (e.g., specimen was initially reported positive, but the split failed to reconfirm).

[Example: If a pre-employment test was reported cancelled, "1" would be entered in Column 13 on the Pre-Employment row. If three of the company's random test results were reported cancelled, "3" would be entered in Column 13 on the Random row.]

TOTAL Line. Columns 1 through 13 ~ This line requires you to add the numbers in each column and provide the totals.

Section IV. Alcohol Testing Data

This section summarizes the alcohol testing conducted for all covered employees (to include applicants). The table in this section requires alcohol test data by test type and by result. The categories of test types are: Pre-Employment; Random; Post-Accident; Reasonable Suspicion / Reasonable Cause; Return-to-Duty, and Follow-Up.

The categories of results are: Number of Screening Test Results; Screening Tests with Results Below 0.02; Screening Tests with Results 0.02 Or Greater; Number of Confirmation Test Results; Confirmation Tests with Results 0.02 through 0.039; Confirmation Tests with Results 0.04 Or Greater; Refusals due to "Shy Lung" with No Medical Explanation, and Other Refusals to Submit to Testing; and Cancelled Results.

TIP *~ Be sure to enter all pre-employment testing data regardless of whether an applicant was hired or not. Of course, for most employers pre-employment alcohol testing is optional, so you may not have conducted this type of testing. You do not need to separate "reasonable suspicion" and "reasonable cause" alcohol testing data on the MIS form. [Therefore, if you conducted only reasonable suspicion alcohol testing (i.e., FMCSA, FAA, FTA, and RSPA), enter that data; if you conducted both reasonable suspicion and reasonable cause alcohol testing (i.e.., FRA), simply enter the data with no differentiation.] RSPA does not authorize "random" testing for alcohol. Finally, you may leave blank any row or column in which there were no results, or you may enter "0" (zero) instead. Please note that USCG-regulated employers do not report alcohol test results on the MIS form: Do not fill-out Section IV if you are a USCG-regulated employer.*

Section IV, Column 1. Total Number of Screening Test Results ~ This column requires a count of the total number of screening test results in each testing category during the entire reporting year. Count the number of screening tests as the number of screening test events with final screening results of below 0.02, of 0.02 through 0.039, of 0.04 or greater, and all refusals. Do not count cancelled tests in this total.

[Example: A company that conducted twenty pre-employment tests would enter "20" on the Pre-Employment row. If it conducted fifty random tests, "50' would be entered. If that company did no post-accident, reasonable suspicion, reasonable cause, return-to-duty, or follow-up tests, those categories will be left blank or zeros entered.]

Section IV, Column 2. Screening Tests With Results Below 0.02 ~ This column requires a count of the number of tests in each testing category that the BAT or STT reported as being below 0.02 on the screening test.

[Example: If seventeen of the company's twenty pre-employment screening tests were reported as being below 0.02, "17" would be entered in Column 2 on the Pre-Employment row. If forty-four of the company's fifty random screening test results were reported as being below 0.02, "44" would be entered in Column 2 on the Random row. Because the company did no other testing, those other categories would be left blank or zeros entered.]

Section IV, Column 3. Screening Tests With Results 0.02 Or Greater ~ This column requires a count of the number of screening tests in each testing category that BAT or STT reported as being 0.02 or greater on the screening test.

[Example: If one of the twenty pre-employment tests was reported as being 0.02 or greater, "1" would be entered in Column 3 on the Pre-Employment row. If four of the company's fifty random test results were reported as being 0.02 or greater, "4" would be entered in Column 3 on the Random row.]

Section IV, Column 4. Number of Confirmation Test Results ~ This column requires entry of the number of confirmation tests that were conducted by a BAT as a result of the screening tests that were found to be 0.02 or greater. In effect, all screening tests of 0.02 or greater should have resulted in confirmation tests. Ideally the number of tests in Column 3 and Column 4 should be the same. However, we know that this required confirmation test sometimes does not occur. In any case, the number of confirmation tests that were actually performed should be entered in Column 4.

[Example: If the one pre-employment screening test reported as 0.02 or greater had a subsequent confirmation test performed by a BAT, "1" would be entered in Column 4 on the Pre-Employment row. If three of the four random screening tests that were found to be 0.02 or greater had a subsequent confirmation test performed by a BAT, "3" would be entered in Column 4 on the Random row.]

Section IV, Column 5. Confirmation Tests With Results 0.02 Through 0.039 ~ This column requires entry of the number of confirmation tests that were conducted by a BAT that led to results that were 0.02 through 0.039.

[Example: If the one pre-employment confirmation test yielded a result of 0.042, Column 5 of the Pre-Employment row would be left blank or zeros entered. If two of the random confirmation tests yielded results of 0.03 and 0.032, "2" would be entered in Column 5 of the Random row.]

Section IV, Column 6. Confirmation Tests With Results 0.04 Or Greater ~ This column requires entry of the number of confirmation tests that were conducted by a BAT that led to results that were 0.04 or greater.

[Example: Because the one pre-employment confirmation test yielded a result of 0.042, "1" would be entered in Column 6 of the Pre-Employment row. If one of the random confirmation tests yielded a result of 0.04, "1" would be entered in Column 6 of the Random row.]

TIP *~ Column 1 should equal the sum of Columns 2, 3, 7, and 8. The number of screening tests results should reflect the number of screening tests you have no matter the result (below 0.02 or at or above 0.02, plus refusals to test), unless of course, the tests were ultimately cancelled. So, Column 1 = Column 2 + Column 3 + Column 7 + Column 8. Certainly, double check your records to determine if your actual screening results count is reflective of all these counts.*

There is no need to record MIS confirmation tests results below 0.02: That is why we have no column for it on the form. [If the random test that screened 0.02 went to a confirmation test, and that confirmation test yielded a result below 0.02, there is no place for that confirmed result to be entered.] We assume that if a confirmation test was completed but not listed in either Column 5 or Column 6, the result was below 0.02. In addition, if the confirmation test ended up being cancelled, it should not have been included in Columns 1, 3, or 4 in the first place.

Section IV, Columns 7 and 8. Refusal Results ~ The refusal section is divided into two refusal groups – they are: Shy Lung ~ With No Medical Explanation; and Other Refusals To Submit to Testing. When an individual does not provide enough breath at the test site, the company requires the employee to have a medical evaluation to determine if there exists a medical reason for the person's inability to provide the appropriate amount of breath. If there is no medical reason to support the inability as reported by the examining physician, the employer calls the result a refusal to test: Refusals of this type are reported in the "Shy Lung ~ With No Medical Explanation" category.

Finally, additional reasons exist for a test to be considered a refusal. Some examples are: the employee fails to report to the test site as directed by the employer; the employee leaves the test site without permission; the employee fails to sign the certification at Step 2 of the ATF; the employee refuses to have a required shy lung evaluation. Again, these are only four examples; there are more.

■ **Section IV, Column 7. "Shy Lung" ~ With No Medical Explanation** ~ This column requires the count of the number of tests in which there is no medical reason to support the employee's inability to provide an adequate breath as reported by the examining physician; subsequently, the employer called the result a refusal to test.

[Example: If one of the 50 random tests was a refusal because of shy lung, "1" would be entered in Column 7 of the Random row.]

■ **Section IV, Column 8. Other Refusals To Submit To Testing** ~ This column requires the count of refusals other than those already entered in Columns 7.

[Example: The company entered "50" as the number of random specimens collected, however it had one employee who did not show up at the testing site as directed. Because of this one refusal event, "1" would be entered in Column 8 of the Random row.]

TIP *~ Even though some testing events result in a refusal in which no breath (or saliva) was tested, there is an expectation that your overall numbers for screening tests (in Column 1) will equal the total number of screening tests with results below 0.02 (Column 2); screening tests with results 0.02 or greater (Column 3); and refusals (Columns 7 and 8). Do not worry that no breath (or saliva) was tested for some refusals; all refusals are counted as a screening test event for MIS purposes and for establishing random rates.*

Section IV, Column 9. Cancelled Tests ~ This column requires a count of the number of tests in each testing category that the BAT or STT reported as cancelled. Do not count any cancelled tests in Column 1 or in any other column other than Column 9. For instance, you must not count a 0.04 screening result or confirmation result in any column, other than Column 9, if the test was ultimately cancelled for some reason (e.g., a required air blank was not performed).

[Example: If a pre-employment test was reported cancelled, "1" would be entered in Column 9 on the Pre-Employment row. If three of the company's random test results were reported cancelled, "3" would be entered in Column 13 on the Random row.]

TOTAL Line. Columns 1 through 9 ~ This line requires you to add the numbers in each column and provide the totals.

[FR Doc. 03–18378 Filed 7–24–03; 8:45 am]
BILLING CODE 4910–62–C

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–03–15712]

RIN 2127–AH08

Federal Motor Vehicle Safety Standards; Glazing Materials; Low Speed Vehicles

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Final rule.

SUMMARY: This rule updates the Federal motor vehicle safety standard on glazing materials so that it incorporates by reference the 1996 version of the industry standard on motor vehicle glazing. Currently, the Federal standard references the 1977 version of the industry standard and the 1980 supplement to that standard.

Today's final rule also simplifies understanding the Federal glazing performance requirements. The amendments of the past 20 years have resulted in a patchwork of requirements in the Federal standard that must be read alongside the industry standard in order to gain a comprehensive understanding of the overall requirements of the Federal standard. The incorporation by reference of the 1996 version of the industry standard permits the deletion of most of the existing text of the Federal standard. This change to the Federal standard means that the industry standard will henceforth provide a single source of Federal glazing performance requirements for most purposes.

In addition, this final rule addresses several issues not covered by the 1996 American National Standards Institute (ANSI) standard. For example, this action limits the size of the shade band that glazing manufacturers place at the top of windshields and clarifies the meaning of the phrase ''the most difficult part or pattern'' for the fracture test in the 1996 ANSI standard. This action also makes minor conforming amendments to the standard on low speed vehicles.

DATES: Effective date: This final rule is effective September 23, 2003. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of September 23, 2003. If you wish to submit a petition for reconsideration of this rule, your petition must be received by September 8, 2003.

ADDRESSES: Petitions for reconsideration should refer to the docket number and be submitted to: Administrator, Room 5220, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: For technical and policy issues: Mr. John Lee, Office of Crashworthiness Standards, NVS–112, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 366–4924. Fax: (202) 366–4329.

For legal issues: Nancy Bell, Attorney Advisor, Office of the Chief Counsel, NCC–112, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 366–2992. Fax: (202) 366–3820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

By letter dated August 12, 1997, the American Automobile Manufacturers Association (AAMA) (which has since evolved into the Alliance of Automobile Manufacturers) petitioned us to amend Federal Motor Vehicle Safety Standard (FMVSS) No. 205, ''Glazing Materials'' (49 CFR 571.205), to incorporate the most recent update of the American National Standards Institute (ANSI)

49 CFR Part 382
Federal Motor Carrier Safety Administration

14 CFR Part 121
Federal Aviation Administration

49 CFR Part 655
Federal Transit Administration

49 CFR Part 219
Federal Railroad Administration

49 CFR Part 199
Research and Special Programs Administration

Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Drug and Alcohol Management Information System Reporting

December 31, 2003

Appendix A to Part 62—Federal Emergency Management Agency, Federal Insurance Administration, Financial Assistance/Subsidy Arrangement

Article V * * *

A. This Arrangement shall be effective for the period October 1, 2002 through May 1, 2004. * * *

* * * * *

Dated: December 23, 2003.

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 03–32198 Filed 12–30–03; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 32

[WC Docket No. 02–269; CC Docket No. 00–199; CC Docket No. 80–286; CC Docket No. 99–301; FCC 03–325]

Federal-State Joint Conference on Accounting Issues

AGENCY: Federal Communications Commission.

ACTION: Final rule; delay of effective date.

SUMMARY: This document further delays the implementation of four previously adopted accounting and reporting rule changes from January 1, 2004 through June 30, 2004. The Commission extends the delay of implementation in order to allow time for receipt and consideration of comments in response to recommendations by the Federal-State Joint Conference on Accounting Issues (Joint Conference).

DATES: The effective date for amendments to 47 CFR 32.5200, 32.6562 and 32.6620 published at 67 FR 5670, February 6, 2002, and delayed at 68 FR 38641, June 30, 2003, is further delayed through June 30, 2004.

FOR FURTHER INFORMATION CONTACT: Jane E. Jackson, Associate Chief, Wireline Competition Bureau, (202) 418–1500.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order adopted on December 17, 2003, and released on December 23, 2003. The full text of the document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, e-mail *qualexint@aol.com*.

Synopsis of Order

On November 12, 2002, the Commission released an order, 67 FR 77432, December 18, 2002, delaying until July 1, 2003 the implementation of four accounting and reporting requirement rule modifications previously adopted by the Commission as part of its biennial review of accounting requirements and Automated Reporting Management System (ARMIS) reporting requirements, Report and Order, 67 FR 5670, February 6, 2002. On June 24, 2003, the Commission released another order, 68 FR 38641, June 30, 2003, further delaying implementation until January 1, 2004. The Commission deferred the implementation of these four accounting and reporting requirement rule modifications in order to allow the Federal-State Joint Conference on Accounting Issues time to consider these and other accounting issues in formulating their recommendations to the Commission. These accounting and reporting rule changes are as follows: (1) Consolidation of Accounts 6621 through 6623 into Account 6620, with sub-accounts for wholesale and retail; (2) consolidation of Account 5230, Directory revenue, into Account 5200, Miscellaneous revenue; (3) consolidation of the depreciation and amortization expense accounts (Accounts 6561 through 6565) into Account 6562, Depreciation and amortization expenses; and (4) revised ''Loop Sheath Kilometers'' data collection in Table II of ARMIS Report 43–07.

On October 9, 2003, the Joint Conference submitted the result of a year-long study of the Commission's accounting rules and on-going proceedings related to the Commission's accounting requirements. The Joint Conference makes several recommendations that directly relate to the four accounting rule modifications that are scheduled to go into effect on January 1, 2004. Here, the Commission extends through June 30, 2004 the Commission's current delay of the effective date of four accounting rule modifications, to allow time for receipt and consideration of comments in response to the Joint Conference's recommendations.

Federal Communications Commission

William F. Caton,

Deputy Secretary.

[FR Doc. 03–32149 Filed 12–30–03; 8:45 am]

BILLING CODE 6712–07–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 382

Federal Aviation Administration

14 CFR Part 121

Federal Transit Administration

49 CFR Part 655

Federal Railroad Administration

49 CFR Part 219

Research and Special Programs Administration

49 CFR Part 199

[Docket OST–2002–13435]

RIN 2105–AD35

Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Drug and Alcohol Management Information System Reporting

AGENCIES: Federal Motor Carrier Safety Administration, Federal Aviation Administration, Federal Transit Administration, Federal Railroad Administration, and Research and Special Programs Administration, Department of Transportation.

ACTION: Final rule.

SUMMARY: Each of the Department of Transportation's drug and alcohol testing rules include requirements for select employers to submit drug and alcohol testing data to five Department of Transportation (DOT) agencies. In the past, these employers have been required to use agency-specific Management Information System (MIS) forms for this purpose, twenty-one different forms in all. The Department recently published a final rule revising these DOT agency MIS forms and transforming them into a single one-page form for use throughout all the DOT agencies. The requirement for use of the form is now in 49 CFR part 40. By this action, the DOT agencies endorse the use of this single form within their regulated industries,

provide their regulated employers with guidance for submission of the form, and amend their rules accordingly. The DOT agencies are: Federal Motor Carrier Safety Administration (FMCSA); Federal Aviation Administration (FAA); Federal Transit Administration (FTA); Federal Railroad Administration (FRA); and Research and Special Programs Administration (RSPA).

DATES: Effective December 31, 2003.

FOR FURTHER INFORMATION CONTACT:

Jim L. Swart, Drug and Alcohol Policy Advisor (S–1), Office of Drug and Alcohol Policy and Compliance, 400 Seventh Street, SW., Washington, DC 20590; telephone number (202) 366–3784 (voice), (202) 366–3897 (fax), or *jim.swart@ost.dot.gov* (e-mail).

Jerry Fulnecky, Office of Enforcement and Compliance (MC–EC), Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington, DC 20590; telephone number (202) 366–2096, or *jerry.fulnecky@fmsca.dot.gov* (e-mail).

Diane J. Wood, Drug Abatement Division, AAM–800, Office of Aerospace Medicine, Federal Aviation Administration, Washington, DC 20591, telephone number (202) 267–8442.

Harry Saporta, Office of Safety and Security (TPM–30), Federal Transit Administration, 400 Seventh Street, SW., Washington, DC 20590; telephone number (202) 366–2233, or *harry.saporta@fta.dot.gov.*

Lamar Allen, Alcohol and Drug Program Manager (RRS–11), Office of Safety, FRA, 1120 Vermont Avenue, NW., Washington, DC 20590; telephone number (202) 493–6313, or *lamar.allen@fra.dot.gov* (e-mail); or Kathy Schnakenberg, Drug and Alcohol Program Specialist, Office of Safety, FRA, telephone number (202) 262–4998, or *kathy.schnakenberg@fra.dot.gov* (e-mail).

Sheila Wright, Office of Pipeline Safety (DPS–2), Research and Special Programs Administration, 400 Seventh Street, S.W., Washington, DC 20590, telephone number (202) 366–4554, or *sheila.wright@rspa.dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION

Background and Purpose

The Department published a final rule on July 25, 2003 (68 FR 43946) regarding a single one-page MIS form for use throughout all DOT. The Department had issued a notice of proposed rulemaking (NPRM) on September 30, 2002 (67 FR 61306), asking for comments and suggestions for changes to the MIS form and process. In response to the NPRM, we received numerous comments from individuals, groups, and associations. The final rule responded to all those comments. The final rule also made significant modifications to the previous DOT agency MIS forms.

In the final rule, the Department stated that use of the new MIS form will be required for employer MIS submissions in 2004, which will document 2003 data. Therefore, employers must adopt provisions of the rule which will permit them to start, as appropriate, collection of the required data and which establish how companies are to determine the number of employees upon which 2003 random testing is based.

The Department also indicated that the new MIS form represents a reduction in the data elements for which an employer must account. The following is a listing for each DOT agency of most of the data elements that have been eliminated as reporting elements on the new MIS form:

FMCSA

1. Number of persons denied a position following a positive drug test.
2. Number of employees returned to duty following a refusal or positive drug test.
3. Supervisor initial drug training data.
4. Number of employees denied a position following an alcohol test of 0.04 or greater.
5. Number of employees returned to duty after engaging in alcohol misuse.
6. Number of employees having both a positive drug test and an alcohol test of 0.04 or greater when both tests were administered at the same time.
7. Actions taken for alcohol violations other than alcohol testing.
8. Supervisor initial alcohol training data.

FAA

1. Number of employees returned to duty after having failed or refused a drug test.
2. Actions taken for drug test refusals.
3. Number of persons denied employment for a positive drug test.
4. Actions taken for positive drug results.
5. Employee initial drug training data.
6. Supervisor initial drug training data.
7. Supervisor recurrent drug training data.
8. Number of persons denied a position for an alcohol test 0.04 or greater.
9. Number of employees returned to duty after engaging in alcohol misuse.
10. Actions taken for alcohol regulation violations.
11. Number of employees having both a positive drug test and an alcohol test of 0.04 or greater when both tests were administered at the same time.
12. Number of other violations of the alcohol regulation.
13. Actions taken for refusals to take an alcohol test.
14. Supervisor alcohol training data.
15. Periodic testing data.

FTA

1. Number of persons denied a position for alcohol results 0.04 or greater.
2. Number of accidents (noted as fatal and non-fatal) with alcohol results 0.04 or greater.
3. Number of fatalities from accidents resulting in alcohol results 0.04 or greater.
4. Number of employees returned to duty following an alcohol violation.
5. Number of employees having both a positive drug test and an alcohol test of 0.04 or greater when both tests were administered at the same time.
6. Actions taken for other alcohol rule violations.
7. Supervisor alcohol training data.
8. Number of persons denied a position for positive drug test results.
9. Number of accidents (noted as fatal and non-fatal) with positive drug test results.
10. Number of fatalities from accidents resulting in positive drug tests results.
11. Number of persons returned to duty following a positive drug test or refusal result.
12. Employee drug education data.
13. Supervisor drug training data.
14. Funding source information.

FRA

1. Number of applicants/transfers denied employment/transfer for a positive drug test.
2. Number of employees returned to duty after having failed or refused a drug test.
3. Detailed breakouts of for-cause drug and alcohol testing.
4. Non-qualifying accident drug testing data.
5. Supervisor drug training data.
6. Number of applicants/transfers denied employment/transfer for alcohol results 0.04 or greater.
7. Number of employees returned to duty after engaging in alcohol misuse.
8. Supervisor alcohol training data.

RSPA

1. Number of employees returned to duty after engaging in alcohol misuse.
2. Actions taken for alcohol test results equal to or greater than 0.04.

3. Number of other alcohol rule violations and actions taken for them.

4. Actions taken for alcohol test refusals.

5. Supervisor initial alcohol training data.

6. Number of persons denied a position following a positive drug test.

7. Number of employees returned to duty following a positive or refusal drug test.

8. Actions taken for positive drug tests.

9. Actions taken for drug test refusals.

10. Supervisor initial drug training data.

Finally, the Department stated that the DOT agencies would continue, in their regulations, to provide direction to their regulated employers regarding when, where, and how to report MIS data. The DOT agency final rules published today are designed to amend their rules so that regulated industries will report MIS data in accordance with 49 CFR part 40. In addition, the DOT agency final rules are designed so that no conflicts exist between them and part 40 regarding how the MIS form is to be completed and how the instructions are to be followed.

General Discussion of Rule Changes

The DOT agencies are amending several sections of their drug and alcohol testing regulations to incorporate references to the new one-page MIS form and its instructions found in 49 CFR part 40. In addition, other revisions are being made in an effort to conform MIS-related regulatory text used by the DOT agencies. Specifically, the items reflecting use of conforming language are as follows:

1. Definitions of ''positive rate for random drug testing'' and ''violation rate for random alcohol testing'' will conform throughout the regulations and will replace ''annualized rate,'' ''positive rate,'' and ''violation rate,'' as appropriate. Both definitions will reflect how the DOT agencies will determine whether the random rates of testing within their regulated industries will rise, lower, or stay the same from year to year. It is important to note that RSPA has no random alcohol testing requirement and will, therefore, not include a definition for the ''violation rate for random alcohol testing.''

2. 49 CFR part 40 also clarified and made uniform among DOT agencies how employers determine the total number of employees to which the annual random rate applies. The averaging method highlighted in part 40 has been adopted in DOT agency rule text. The rules direct employers to add the number of covered employees eligible for random testing in each random testing selection period for the year and divide that total by the number of random testing periods. The rules also reference employers' use of service agents (*e.g.*, Consortium/Third-Party Administrators) in their random testing programs.

3. Each DOT agency rule incorporates common language requiring use of the MIS form and the instructions found in 49 CFR part 40. The rules also permit employers to use the electronic version of the MIS form as designated by DOT agency administrators and furnished by DOT. Specific internet addresses are provided in DOT agency rules. As referenced in the preamble to 49 CFR part 40, the Department's ultimate goal of having full automation for MIS submissions has been accomplished. Through Volpe Center development and field-testing, the automated system will be fully operational across all DOT agencies at the end of 2003.

4. DOT agency rules also include conforming language regarding how employers, with covered employees performing duties under more than one DOT agency rule, are to enter testing data for those employees. In short, the employee needs to be counted only on the MIS report for the DOT agency under which he or she is random tested. It is important to note, that the FAA requires all employees performing FAA safety-sensitive duties to be tested (including random) under FAA regulations. Otherwise, this will be the DOT agency under which the employee performs more than 50% of his or her duties.

5. Finally, the conforming language addresses the preparation of the MIS form and who must attest to its accuracy. The regulations give employers the ability to have service agents (*e.g.*, Consortium/Third-Party Administrators) prepare the report on their behalf. However, no matter who prepares the report, a company official (*e.g.*, Designated Employer Representative as defined in 49 CFR part 40) must certify the accuracy and completeness of the form.

Other Significant Issues

Regarding 49 CFR part 40 and the MIS form, the OMB number assigned to the form is 2105–0529. This number was issued by OMB on October 28, 2003.

The Docket number assigned to the part 40 MIS final rule was OST–2003–15676. It should have been, OST–2002–13433. This will serve to correct that error.

DOT has been asked how specimen results are to be counted if the verified result is a refusal because the specimen was found to be both adulterated and substituted. While these types of results rarely occur, they do nonetheless exist. Such a specimen result is to be counted as one test result. If this type of result is present in an employer's testing program, the data should be entered as ''1'' for the test result and as ''.5'' for the adulterated result and as''.5'' for the substituted result.

In addition, it is possible for a positive test to also be identified as being a refusal because the specimen was either adulterated or substituted. If such a result is present in an employer's testing program, the data should be entered as ''1'' for the test result and as ''.5'' for the positive result and as ''.5'' for the adulterated result or the substituted result, as appropriate. The electronic MIS data entry system has been designed to accommodate these ''.5'' results, no matter how infrequently they occur.

Section 1, of the MIS form in 49 CFR part 40, references the ''FMSCA.'' That should read, ''FMCSA.'' MIS forms that appear on the DOT website reflect the appropriate change. Electronic formats designed for use by the FMCSA and their regulated industry also reflect the change.

Finally, the United States Coast Guard (USCG) will incorporate use of the new MIS form into their rules. Therefore, USCG-regulated employers will continue to report drug testing data on the new MIS form. The DOT supports the USCG in their desire to use and to incorporate use of DOT's MIS form into their regulation. Because the USCG is part of the Department of Homeland Security (DHS), their regulations must be published under the authority of DHS. Therefore, the USCG will publish a conforming amendment to 46 CFR part 16 incorporating use of the form.

Regulatory Analyses and Notices

These rules are not significant rules for purposes of Executive Order 12866 or the DOT's regulatory policies and procedures. Nor are the rules economically significant regulations. They represent a reworking of existing requirements, the economic burden of which are now incorporated into 49 CFR part 40; they impose no new mandates; and they will not create any new costs. In fact, use of the new MIS form has been shown to reduce requirements and costs. The DOT agencies will no longer account for the PRA cost associated with use of the form. These costs are now accounted for by the Office of the Secretary.

In addition, there is no need for the DOT agencies to publish an NPRM each regarding use of the new MIS form and

to make the conforming regulation changes necessitated by use of the new form. The Department issued an NPRM in the **Federal Register** on September 30, 2002 (Vol. 67, No. 189) proposing use of a new MIS form and asking for comments and suggestions for changes to the old DOT agency MIS forms and the process for completing and submitting them. The final rule designating use and appearance of and instructions for the new MIS form was published in the **Federal Register** on July 25, 2003 (Vol. 68, No. 143). These DOT agency final rules are essentially administrative fix-ups to align DOT agency rules with part 40 on important MIS issues. Therefore, these DOT agency amendments are being issued as final rules.

Under the Administrative Procedure Act (APA), an agency may, for good cause, immediately promulgate a final rule if it finds that prior notice and opportunity for comment ''are impracticable, unnecessary, or contrary to the public interest'' [5 U.S.C. 553(b)(3)(B)]. There exists good cause for the final rules to be effective immediately rather than 30 days from today's publication date. It is imperative that companies are prepared to implement the new MIS system and know the DOT agency requirements for form submission. That preparation should not be delayed for an additional 30 days. For these and the reasons highlighted in the previous paragraph, the rules are effective today.

These final rules do not have sufficient Federalism impact to warrant a Federalism assessment under Executive Order 13132. With respect to the Regulatory Flexibility Act, the DOT agencies certify that these rules would not have a significant economic impact on a substantial number of small entities, so a Regulatory Flexibility analysis has not been prepared. Even though these rules might affect a large number of small entities, we do not expect the use of a single MIS form throughout all DOT-regulated industries to have a significant economic impact on anyone.

The Department's final MIS rule contained information collection requirements that were submitted, as required by the Paperwork Reduction Act of 1995 (the PRA, 44 U.S.C. 3507(d)), to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB) for review. Therefore, the DOT agencies will remove PRA requirements for the MIS form from their next PRA submission packages. In addition, the Department will place its entire PRA package for the MIS form on the Internet when that submission is approved by OMB.

As stated in the Department's final MIS rule, according to OMB's regulations implementing the PRA (5 CFR 1320.8(b)(2)(vi)), an agency may not conduct or sponsor, and a person need not respond to a collection of information unless it displays a currently valid OMB number. As stated earlier, the OMB number issued to the form is 2105–0529.

A number of other Executive Orders can affect rulemakings. These include Executive Orders 13084 (Consultation and Coordination with Indian Tribal Governments), 12988 (Civil Justice Reform), 12875 (Enhancing the Intergovernmental Partnership), 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights), 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 13045 (Protection of Children from Environmental Health Risks and Safety Risks), and 12889 (Implementation of North American Free Trade Agreement). We have considered these Executive Orders in the context of these rules, and we believe that these rules do not directly affect matters that the Executive Orders cover.

We have prepared these rulemakings in accordance with the Presidential Directive on Plain Language.

Federal Motor Carrier Safety Administration

Summary of Changes in Part 382

FMCSA has made the following changes to the regulatory text in part 382:

Section 382.107 Definitions

We have revised the definitions for ''positive rate'' for random drug testing and ''violation rate'' for random alcohol testing, consistent with the definitions for those terms in part 40.

Section 382.305 Random Testing

We have revised § 382.305(j), concerning how employers determine the number of covered employees eligible for random testing, to conform with the methodology prescribed in part 40.

Section 382.401 Retention of Records

We have revised § 382.401(c)(1)(viii) to replace ''Consolidated annual calendar year summaries'' with ''Each annual calendar year summary.''

Section 382.403 Reporting of results in a management information system

Section 382.403 was amended to require use of the new Management Information System (MIS) form in part 40, in place of the old FMCSA forms. In subparagraph (b), the requirement that the form should be in ''the form and manner prescribed by the FMCSA'' was deleted. We now require employers to use either the paper form in part 40 or an electronic version of the form through the FMCSA web site. We deleted former subparagraphs (c) and (d) specifying the data elements that were required to be reported because the instructions for the MIS form in part 40 specify new data elements to be reported. The former subparagraph (e), which addresses employers subject to more than one DOT agency, has been redesignated as paragraph (c), and was amended to conform with part 40 agencies. The former subparagraph (f), which addresses employers who use service agents (*e.g.*, a Consortia/third party administrator (C/TPA)), has been redesignated as paragraph (d) and was also amended.

List of Subjects in 49 CFR Part 382

Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Penalties, Safety, Transportation.

49 CFR Chapter III

Authority and Issuance

■ For reasons discussed in the preamble, the Federal Motor Carrier Safety Administration amends part 382 of title 49, Code of Federal Regulations, as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

■ 1. The authority citation for 49 CFR part 382 continues to read as follows:

Authority: 49 U.S.C. 31133, 31136, 31301 *et seq.*, 31502; and 49 CFR 1.73.

■ 2. Amend § 382.107 by removing the definitions of ''positive rate'' and ''violation rate'' and adding the following definitions in their place to read as follows:

§ 382.107 Definitions.

* * * * *

Positive rate for random drug testing means the number of verified positive results for random drug tests conducted under this part plus the number of refusals of random drug tests required by this part, divided by the total number of random drug tests results (*i.e.*,

positives, negatives, and refusals) under this part.

* * * * *

Violation rate for random alcohol testing means the number of 0.04 and above random alcohol confirmation test results conducted under this part plus the number of refusals of random alcohol tests required by this part, divided by the total number of random alcohol screening tests (including refusals) conducted under this part.

■ 3. Amend § 382.305 by revising paragraph (j) to read as follows:

§ 382.305 Random testing.

* * * * *

(j)(1)To calculate the total number of covered drivers eligible for random testing throughout the year, as an employer, you must add the total number of covered drivers eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Covered employees, and only covered employees, are to be in an employer's random testing pool, and all covered drivers must be in the random pool. If you are an employer conducting random testing more often than once per month (*e.g.*, daily, weekly, bi-weekly) you do not need to compute this total number of covered drivers rate more than on a once per month basis.

(2) As an employer, you may use a service agent (*e.g.*, a C/TPA) to perform random selections for you, and your covered drivers may be part of a larger random testing pool of covered employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only covered employees are in the random testing pool.

* * * * *

■ 4. Amend § 382.401 by revising paragraph (c)(1)(viii) to read as follows:

§ 382.401 Retention of records.

* * * * *

(c) * * *

(1) * * *

(viii) A copy of each annual calendar year summary as required by § 382.403.

* * * * *

■ 5. Amend § 382.403 by revising paragraph (b), removing paragraphs (c) and (d), redesignating paragraphs (e) and (f) as (c) and (d), respectively, and revising them, and adding a new paragraph (e) to read as follows:

§ 382.403 Reporting of results in a management information system.

* * * * *

(b) If an employer is notified, during the month of January, of a request by the Federal Motor Carrier Safety Administration to report the employer's annual calendar year summary information, the employer shall prepare and submit the report to the FMCSA by March 15 of that year. The employer shall ensure that the annual summary report is accurate and received by March 15 at the location that the FMCSA specifies in its request. The employer must use the Management Information System (MIS) form and instructions as required by 49 CFR part 40 (at § 40.26 and appendix H to part 40). The employer may also use the electronic version of the MIS form provided by the DOT. The Administrator may designate means (*e.g.*, electronic program transmitted via the Internet), other than hard-copy, for MIS form submission. For information on the electronic version of the form, see: *http://www.fmcsa.dot.gov/safetyprogs/drugs/engtesting.htm.*

(c) When the report is submitted to the FMCSA by mail or electronic transmission, the information requested shall be typed, except for the signature of the certifying official. Each employer shall ensure the accuracy and timeliness of each report submitted by the employer or a consortium.

(d) If you have a covered employee who performs multi-DOT agency functions (*e.g.*, an employee drives a commercial motor vehicle and performs pipeline maintenance duties for the same employer), count the employee only on the MIS report for the DOT agency under which he or she is randomly tested. Normally, this will be the DOT agency under which the employee performs more than 50% of his or her duties. Employers may have to explain the testing data for these employees in the event of a DOT agency inspection or audit.

(e) A service agent (*e.g., Consortia/Third party administrator* as defined in 49 CFR 382.107) may prepare the MIS report on behalf of an employer. However, a company official (*e.g., Designated employer representative*) must certify the accuracy and completeness of the MIS report, no matter who prepares it.

Dated: November 25, 2003.

Annette M. Sandberg,

Administrator, Federal Motor Carrier Safety Administration.

Federal Aviation Administration

FAA's Section-by-Section Discussion

14 CFR Part 121, Appendix I

II. Definitions

The FAA has eliminated the definition for ''annualized rate'' because the definition is no longer necessary in light of the DOT's final rule. However, the definition for annualized rate had contained instructions to estimate the number of employees that must be tested during the calendar year based on the number of safety-sensitive employees as of the beginning of the calendar year. The DOT's final rule changed this method of calculation. Now, to determine how many employees to randomly test during the calendar year, the employer must use the average number of safety-sensitive employees instead of the number of employees as of the beginning of the calendar year. Because this change occurred during the 2003 calendar year, we recognize that employers may have difficulty estimating the number of safety-sensitive employees to be tested in 2003. Therefore, for the calendar year 2003 only, employers may use the number of employees as of the beginning of the calendar year to determine the total number of safety-sensitive employees to be tested or the employers may use the averaging method described in this regulation and 49 CFR part 40. Beginning in 2004, the new methodology must be used by all employers.

In addition, we have revised the definition of ''positive rate'' and changed the defined term to ''positive rate for random drug testing,'' for the reasons discussed in the DOT's General Discussion of Rule Changes.

V. Types of Drug Testing Required

C. Random Testing. We revised paragraph 6 under the random testing section to make it clear to employers how to calculate whether they have met the minimum annual percentage rate under 49 CFR part 40. For the reasons explained in the DOT's General Discussion of Rule Changes, we inserted paragraph 6(b) to address the use of service agents to conduct random testing for employers. We added paragraphs 6(b)(1)–(2) to explain what annual percentage rate applies to pools created by service agents.

VI. Administrative and Other Matters

F. DOT Management Information System Annual Reports. For consistency with 14 CFR part 121, appendix J, we have added this paragraph to make it clear that employers must keep copies of annual reports submitted to the FAA for a minimum of 5 years. This is not an additional record keeping requirement because the MIS reports were already required to be kept for 5 years under 14 CFR part 121, appendix J, section IV, A.2.(a)(1). Since the MIS reports for both drug and alcohol testing

have been combined, this addition is merely a reminder to employers of an existing obligation to retain the record.

X. Reporting of Antidrug Program Results

We changed the title of this section to ''Annual Reports'' because the DOT's revisions to the MIS forms no longer require separate reporting of antidrug program results. The combined MIS form is now submitted for both drug and alcohol testing results.

The basic requirements of when to submit annual reports and who must submit them remain unchanged in this section. However, most of section X has been eliminated because it prescribed the specifics of the contents of annual reports, all of which are now prescribed by 49 CFR 40.26 and appendix H to 49 CFR part 40. For the reasons explained in the DOT's General Discussion of Rule Changes, we have adopted the DOT's language for submitting MIS reports and the role of service agents in those submissions.

14 CFR Part 121, Appendix J

I. General

D. Definitions. We have revised the definition of ''violation rate'' and changed the defined term to ''violation rate for random alcohol testing,'' for the reasons discussed in the DOT's General Discussion of Rule Changes. Although there was no definition for ''annualized percentage rate'' under this appendix, the reasoning provided in the preamble to appendix I applies to calculating the number of employees to be tested in calendar year 2003 for appendix J also.

II. Covered Employees

In revising the annual reporting requirements of section IV.B., we decided to move former paragraph IV.B.2 to become a new paragraph under section II, which describes covered employees. Former paragraph IV.B.2 reminded employers to identify employees who are performing safety-sensitive functions under the regulations of more than one DOT agency. This is important because alcohol testing must be tied to the performance of safety-sensitive work. When the employer requires the employee to submit to an alcohol test, the employer must know what kind of safety-sensitive work the employee is performing and which DOT agency's testing regulations apply. In moving this paragraph to section II, we made minor editorial changes to the language and renumbered paragraphs accordingly.

III. Tests Required

C. Random Testing. We revised paragraph 2 under the random testing section to change the phrase ''alcohol MIS reports'' to ''MIS reports.'' We made this change because the DOT's revisions to 49 CFR part 40 eliminated separate forms for alcohol testing results. There is now a combined form for reporting both drug and alcohol testing results.

As we have done in appendix I, we revised paragraph 6 under this section to make it clear to employers how to calculate whether they have met the minimum annual percentage rate under the DOT's final rule. For the reasons explained in the DOT's General Discussion of Rule Changes, we inserted paragraph 6(b) to address the use of service agents to conduct random testing for employers. We added paragraphs 6(b)(1)–(2), as we have done in appendix I, to explain what annual percentage rate applies to pools created by service agents.

IV. Handling of Test Results, Record Retention and Confidentiality

B. Reporting of Results in a Management Information System. We changed the title of this section to ''Annual Reports'' for consistency with appendix I.

The basic requirements of when to submit annual reports and who must submit them remain unchanged in this section. However, most of section IV has been eliminated because it prescribed the specifics of the contents of annual reports, all of which are now prescribed by 49 CFR 40.26 and appendix H to 49 CFR part 40. For the reasons explained in the DOT's General Discussion of Rule Changes, we have adopted the DOT's language for submitting MIS reports and the role of service agents in those submissions.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Airmen, Alcohol abuse, Aviation safety, Charter flights, Drug abuse, Drug testing, Reporting and recordkeeping requirements, Safety, Transportation.

14 CFR Chapter I

Authority and Issuance

■ For reasons set forth in the preamble, the Federal Aviation Administration amends part 121 of title 14, Code of Federal Regulations, as follows:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 1. The authority citation for 14 CFR part 121 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 45101–45105, 46105, 46301.

■ 2. Amend appendix I to part 121 as follows:

■ A. In section II., remove the definition of Annualized rate; remove the definition of Positive rate and add a new definition in its place;

■ B. In section V., revise paragraph C.6;

■ C. In section VI., add paragraph F;

■ D. In section X., revise section heading, revise paragraphs A introductory text and A.2, revise paragraph B, remove paragraphs C, D, E, F, add new paragraph C.

The revisions and additions read as follows:

Appendix I to Part 121—Drug Testing Program

* * * * *

II. Definitions * * *

* * * * *

Positive rate for random drug testing means the number of verified positive results for random drug tests conducted under this appendix plus the number of refusals of random drug tests required by this appendix, divided by the total number of random drug test results (*i.e.*, positives, negatives, and refusals) under this appendix.

* * * * *

V. Types of Drug Testing Required * * *

* * * * *

C. Random Testing.

* * * * *

6. As an employer, you must select and test a percentage of employees at least equal to the minimum annual percentage rate each year.

(a) As an employer, to determine whether you have met the minimum annual percentage rate, you must divide the number of random testing results for safety-sensitive employees by the average number of safety-sensitive employees eligible for random testing.

(1) To calculate whether you have met the annual minimum percentage rate, count all random positives, random negatives, and random refusals as your ''random testing results.''

(2) To calculate the average number of safety-sensitive employees eligible for

random testing throughout the year, add the total number of safety-sensitive employees eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Only safety-sensitive employees are to be in an employer's random testing pool, and all safety-sensitive employees must be in the random pool. If you are an employer conducting random testing more often than once per month (*e.g.*, you select daily, weekly, bi-weekly) you do not need to compute this total number of safety-sensitive employees more than on a once per month basis.

(b) As an employer, you may use a service agent to perform random selections for you, and your safety-sensitive employees may be part of a larger random testing pool of safety-sensitive employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only safety-sensitive employees are in the random testing pool. For example:

(1) If the service agent has your employees in a random testing pool for your company alone, you must ensure that the testing is conducted at least at the minimum annual percentage rate under this part.

(2) If the service agent has your employees in a random testing pool combined with other FAA-regulated companies, you must ensure that the testing is conducted at least at the minimum annual percentage rate under this part.

(3) If the service agent has your employees in a random testing pool combined with other DOT-regulated companies, you must ensure that the testing is conducted at least at the highest rate required for any DOT-regulated company in the pool.

* * * * *

VI. Administrative and Other Matters * * *

* * * * *

F. *DOT Management Information System Annual Reports.* Copies of any annual reports submitted to the FAA under this appendix must be maintained by the employer for a minimum of 5 years.

* * * * *

X. Annual Reports.

A. Annual reports of testing results must be submitted to the FAA by March 15 of the succeeding calendar year for the prior calendar year (January 1 through December 31) in accordance with the provisions below.

* * * * *

2. Each entity conducting an antidrug program under this part, other than a part 121 certificate holder, that has 50 or more employees performing a safety-sensitive function on January 1 of any calendar year shall submit an annual report to the FAA for that calendar year.

* * * * *

B. As an employer, you must use the Management Information System (MIS) form and instructions as required by 49 CFR part 40 (at 49 CFR 40.26 and appendix H to 49 CFR part 40). You may also use the electronic version of the MIS form provided by DOT. The Administrator may designate means (*e.g.*, electronic program transmitted via the Internet) other than hard-copy, for MIS form submission. For information on where to submit MIS forms and for the electronic version of the form, see: *http://www.faa.gov/avr/aam/adap.*

C. A service agent may prepare the MIS report on behalf of an employer. However, a company official (*e.g.*, Designated Employer Representative as defined in 49 CFR part 40) must certify the accuracy and completeness of the MIS report, no matter who prepares it.

* * * * *

■ 3. Amend appendix J to part 121 as follows:

■ A. In section I.D, remove the definition of Violation rate and add a definition in its place;

■ B. Revise section II;

■ C. In section III.C, revise paragraphs C.2 and C.6;

■ D. Revise section IV.B.

The revisions and additions read as follows:

Appendix J to Part 121—Alcohol Misuse Prevention Program

* * * * *

I. General * * *

* * * * *

D. Definitions

* * * * *

Violation rate for random alcohol testing means the number of 0.04 and above random alcohol confirmation test results conducted under this appendix plus the number of refusals of random alcohol tests required by this appendix, divided by the total number of random alcohol screening tests (including refusals) conducted under this appendix.

* * * * *

II. Covered Employees

A. Each employee who performs a function listed in this section directly or by contract for an employer as defined in this appendix must be subject to alcohol testing under an FAA-approved alcohol misuse prevention program implemented in accordance with this appendix. The covered safety-sensitive functions are:

1. Flight crewmember duties.
2. Flight attendant duties.
3. Flight instruction duties.
4. Aircraft dispatcher duties.
5. Aircraft maintenance or preventive maintenance duties.
6. Ground security coordinator duties.
7. Aviation screening duties.
8. Air traffic control duties.

B. Each employer must identify any employee who is subject to the alcohol testing regulations of more than one DOT agency. Prior to conducting any alcohol test on a covered employee subject to the alcohol testing regulations of more than one DOT agency, the employer must determine which DOT agency authorizes or requires the test.

III. Tests Required * * *

* * * * *

C. Random Testing

* * * * *

2. The Administrator's decision to increase or decrease the minimum annual percentage rate for random alcohol testing is based on the violation rate for the entire industry. All information used for this determination is drawn from MIS reports required by this appendix. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the Administrator will publish in the **Federal Register** the minimum annual percentage rate for random alcohol testing of covered employees. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.

* * * * *

6. As an employer, you must select and test a percentage of employees at least equal to the minimum annual percentage rate each year.

(a) As an employer, to determine whether you have met the minimum annual percentage rate, you must divide the number of random alcohol screening test results for safety-sensitive employees by the average number of safety-sensitive employees eligible for random testing.

(1) To calculate whether you have met the annual minimum percentage rate, count all random screening test results below 0.02 breath alcohol concentration, random screening test results of 0.02 or greater breath alcohol concentration, and random refusals as your ''random alcohol screening test results.''

(2) To calculate the average number of safety-sensitive employees eligible for random testing throughout the year, add the total number of safety-sensitive employees eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Only safety-sensitive employees are to be in an employer's random testing pool, and all safety-sensitive employees must be in the random pool. If you are an employer conducting random testing more often than once per month (*e.g.*, you select daily, weekly, bi-weekly) you do not need to compute this total number of safety-sensitive employees more than on a once per month basis.

(b) As an employer, you may use a service agent to perform random selections for you, and your safety-sensitive employees may be part of a larger random testing pool of safety-sensitive employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only safety-sensitive employees are in the random testing pool. For example:

(1) If the service agent has your employees in a random testing pool for your company alone, you must ensure that the testing is conducted at least at the minimum annual percentage rate under this part.

(2) If the service agent has your employees in a random testing pool combined with other FAA-regulated companies, you must ensure that the testing is conducted at least

at the minimum annual percentage rate under this part.

(3) If the service agent has your employees in a random testing pool combined with other DOT-regulated companies, you must ensure that the testing is conducted at least at the highest rate required for any DOT-regulated company in the pool.

* * * * *

IV. Handling of Test Results, Record Retention, and Confidentiality * * *

* * * * *

B. Reporting of Results in a Management Information System

1. Annual reports of alcohol misuse prevention program results must be submitted to the FAA by March 15 of the succeeding calendar year for the prior calendar year (January 1 through December 31) in accordance with the provisions below.

(a) Each part 121 certificate holder shall submit an annual report each year.

(b) Each entity conducting an alcohol misuse prevention program under this part, other than a part 121 certificate holder, that has 50 or more employees performing a safety-sensitive function on January 1 of any calendar year shall submit an annual report to the FAA for that calendar year.

(c) The Administrator reserves the right to require that aviation employers not otherwise required to submit annual reports prepare and submit such reports to the FAA. Employers that will be required to submit annual reports under this provision will be notified in writing by the FAA.

2. As an employer, you must use the Management Information System (MIS) form and instructions as required by 49 CFR part 40 (at 49 CFR 40.26 and appendix H to 49 CFR part 40). You may also use the electronic version of the MIS form provided by the DOT. The Administrator may designate means (*e.g.*, electronic program transmitted via the Internet) other than hard-copy, for MIS form submission. For information on where to submit MIS forms and for the electronic version of the form, see: *http://www.faa.gov/avr/aam/adap.*

3. A service agent may prepare the MIS report on behalf of an employer. However, a company official (*e.g.*, Designated Employer Representative as defined in 49 CFR part 40) must certify the accuracy and completeness of the MIS report, no matter who prepares it.

* * * * *

Dated: November 25, 2003.

Marion C. Blakey,

Administrator, Federal Aviation Administration.

Federal Transit Administration

List of Subjects in 49 CFR Part 655

Alcohol abuse, Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Chapter VI

Authority and Issuance

■ For reasons set forth in the preamble, the Federal Transit Administration amends part 655 of title 49, Code of Federal Regulations, as follows:

PART 655—PREVENTION OF ALCOHOL MISUSE AND PROHIBITED DRUG USE IN TRANSIT OPERATIONS

■ 1. The authority citation for 49 CFR part 655 continues to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

■ 2. In § 655.4, remove the definitions of ''positive rate'' and ''violation rate'' and add the following definitions in their place to read as follows:

§ 655.4 Definitions.

* * * * *

Positive rate for random drug testing means the number of verified positive results for random drug tests conducted under this part plus the number of refusals of random drug tests required by this part, divided by the total number of random drug tests results (*i.e.*, positive, negative, and refusals) under this part.

* * * * *

Violation rate for random alcohol testing means the number of 0.04 and above random alcohol confirmation test results conducted under this part plus the number of refusals of random alcohol tests required by this part, divided by the total number of alcohol random screening tests (including refusals) conducted under this part.

* * * * *

■ 3. Revise § 655.72(d) through (g) to read as follows:

§ 655.72 Reporting of results in a Management Information System.

* * * * *

(d) As an employer, you must use the Management Information System (MIS) form and instructions as required by 49 CFR part 40, § 40.25 and appendix H. You may also use the electronic version of the MIS form provided by the DOT. The Administrator may designate means (*e.g.*, electronic program transmitted via the Internet), other than hard-copy, for MIS form submission. For information on where to submit MIS forms and for the electronic version of the form, see: *http://transit-safety.volpe.dot.gov\DAMIS.*

(e) To calculate the total number of covered employees eligible for random testing throughout the year, as an employer, you must add the total number of covered employees eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Covered employees, and only covered employees, are to be in an employer's random testing pool, and all covered employees must be in the random pool. If you are an employer conducting random testing more often than once per month (*e.g.*, you select daily, weekly, bi-weekly), you do not need to compute this total number of covered employees rate more than on a once per month basis. As an employer, you may use a service agent (*e.g.*, C/TPA) to perform random selections for you; and your covered employees may be part of a larger random testing pool of covered employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only covered employees are in the random testing pool.

(f) If you have a covered employee who performs multi-DOT agency functions (*e.g.*, an employee drives a paratransit vehicle and performs pipeline maintenance duties for you), count the employee only on the MIS report for the DOT agency under which he or she is random tested. Normally, this will be the DOT agency under which the employee performs more than 50% of his or her duties. Employers may have to explain the testing data for these employees in the event of a DOT agency inspection or audit.

(g) A service agent (*e.g.*, Consortia/Third Party Administrator as defined in 49 CFR part 40) may prepare the MIS report on behalf of an employer. However, a company official (*e.g.*, Designated Employer Representative as defined in 49 CFR part 40) must certify the accuracy and completeness of the MIS report, no matter who prepares it.

Appendices A Through D [Removed]

■ 4. Remove Appendices A through D to part 655.

Dated: November 21, 2003.

Jennifer L. Dorn,

Administrator, Federal Transit Administration.

Federal Railroad Administration

Section-by-Section Analysis

Section 219.5 Definitions

Positive rate for random drug testing. A standardized DOT definition replaces the previous FRA definition of ''positive rate.''

Violation rate for random testing. A standardized DOT definition replaces the previous FRA definition of ''violation rate.''

Section 219.601 Railroad Random Drug Testing Programs

Paragraph (b)(2)(ii) Form of Programs

FRA amends this paragraph to conform with the Department's new directions on how to calculate the number of covered employees eligible for random testing. An employer or service agent acting on the employer's behalf (*e.g.*, a consortium or third party administrator) must recalculate this number for each random testing period to take into account seasonal or other fluctuations in the number of employees it has throughout the year. An employer had previously been allowed to calculate this number only once per year based on the number of employees it had at the beginning of the year.

Section 219.602 Administrator's Determination of Railroad Drug Testing Rate

Paragraphs (c) and (d)

FRA is revising these paragraphs to replace the references to § 219.803, which contained agency-specific railroad reporting requirements, with references to new § 219.800, which incorporates by reference the standardized and simplified DOT reporting requirements found in § 40.25 and in appendix H to part 40. Section 219.803 is removed and reserved.

Section 219.607 Railroad Random Alcohol Testing Programs

Subparagraph (b)(1) Form of Programs

As with § 219.601 discussed above, FRA revises this subparagraph to conform with the Department's new directions on how to calculate the number of covered employees eligible for random testing.

Subparagraph (b)(1)(i)

As with § 219.601 discussed above, FRA adds this new subparagraph to address the increasing use of service agents to perform random drug testing selections.

Section 219.608 Administrator's Determination of Railroad Alcohol Testing Rate

Paragraphs (c) and (d)

FRA is revising these paragraphs to replace the references to § 219.801, which contained agency-specific railroad reporting requirements, with references to new § 219.800, which incorporates by reference the standardized and simplified DOT reporting requirements found in § 40.25 and in appendix H to part 40. Section 219.801 is removed and reserved.

Section 219.800 Annual Reports

Paragraph (a)

As explained above, FRA is streamlining its MIS system by combining the annual reporting requirements formerly contained in §§ 219.801 and 219.803 into one section. This paragraph, which defines who must file an annual report, adopts the language formerly found in paragraph (a) of each of those sections.

Paragraphs (b)–(e)

Paragraph (b) incorporates part 40's forms and instructions by reference. Paragraphs (c)–(e) add standardized instructions on electronic reporting, reporting of multi-modal employee results, and reporting by service agents.

Section 219.801 Reporting Alcohol Misuse Program Results in a Management Information System

As explained above, this section is removed and reserved. The FRA-specific reporting requirements formerly contained in this section are removed and replaced by those contained in new § 219.800.

Section 219.803 Reporting Alcohol Misuse Program Results in a Management Information System

As explained above, this section is removed and reserved. The FRA-specific reporting requirements formerly contained in this section are removed and replaced by those contained in new § 219.800.

Federal Railroad Administration

List of Subjects in 49 CFR Part 219

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Chapter II

Authority and Issuance

■ For reasons set forth in the preamble, the Federal Railroad Administration amends part 219 of title 49, Code of Federal Regulations, as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

■ 1. The authority citation for 49 CFR part 219 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311, 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

■ 2. In § 219.5, the definitions of ''positive rate'' and ''violation rate'' are removed and the following definitions are added in their place to read as follows:

§ 219.5 Definitions.

* * * * *

Positive rate for random drug testing means the number of verified positive results for random drug tests conducted under this part plus the number of refusals of random drug tests required by this part, divided by the total number of random drug tests results (*i.e.*, positives, negatives, and refusals) under this part.

* * * * *

Violation rate for random alcohol testing means the number of 0.04 and above random alcohol confirmation test results conducted under this part plus the number of refusals of random alcohol tests required by this part, divided by the total number of random alcohol screening tests (including refusals) conducted under this part.

* * * * *

■ 3. Section 219.601 is amended by revising paragraph (b)(2)(ii) and adding paragraph (b)(2)(iii) to read as follows:

§ 219.601 Railroad random drug testing programs.

* * * * *

(b) * * *

(2) * * *

(ii) To calculate the total number of covered employees eligible for random testing throughout the year, as a railroad, you must add the total number of covered employees eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Covered employees, and only covered employees, are to be in a railroad's random testing pool, and all covered employees must be in the random pool. If you are a railroad conducting random testing more often than once per month (*e.g.*, you select daily, weekly, bi-weekly), you do not need to compute this total number of covered employees rate more than on a once per month basis.

(iii) As a railroad, you may use a service agent (*e.g.*, C/TPA) to perform random selections for you, and your covered employees may be part of a larger random testing pool of covered employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only covered employees are in the random testing pool.

* * * * *

■ 4. Section 219.602 is amended by revising paragraphs (c) and (d) to read as follows:

§ 219.602 Administrator's determination of random drug testing rate.

* * * * *

(c) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.800 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(d) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 219.800 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

* * * * *

■ 5. Section 219.607 is amended by revising paragraph (b)(1) to read as follows:

§ 219.607 Railroad random alcohol testing programs.

* * * * *

(b) * * *

(1) As a railroad, to calculate the total number of covered employees eligible for random testing throughout the year, you must add the total number of covered employees eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Covered employees, and only covered employees, are to be in a railroad's random testing pool, and all covered employees must be in the random pool. If you are a railroad conducting random testing more often than once per month (*e.g.*, you select daily, weekly, bi-weekly), you do not need to compute this total number of covered employees rate more than on a once per month basis.

(i) As a railroad, you may use a service agent (*e.g.*, C/TPA) to perform random selections for you, and your covered employees may be part of a larger random testing pool of covered employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only covered employees are in the random testing pool.

(ii) [Reserved]

* * * * *

■ 6. Section 219.608 is amended by revising paragraphs (c) and (d) to read as follows:

§ 219.608 FRA Administrator's determination of random alcohol testing rate.

* * * * *

(c)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.800 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.800 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 219.800 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 219.800 for any calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

* * * * *

■ 7. Section 219.800 is added to subpart I to read as follows:

§ 219.800 Annual reports.

(a) Each railroad that has 400,000 or more total manhours shall submit to FRA by March 15 of each year a report covering the previous calendar year (January 1–December 31), summarizing the results of its alcohol and drug misuse prevention program. As used in this paragraph, the term ''employees of the railroad'' includes individuals who perform service for the railroad, including not only individuals who receive direct monetary compensation from the railroad for performing a service for the railroad, but also such individuals as employees of a contractor to the railroad who perform a service for the railroad.

(b) As a railroad, you must use the Management Information System (MIS) form and instructions as required by 49 CFR part 40 (at § 40.25 and appendix H to part 40). You may also use the electronic version of the MIS form provided by the DOT. The Administrator may designate means (*e.g.*, electronic program transmitted via the Internet), other than hard-copy, for MIS form submission to FRA. For information on where to submit MIS forms and for the electronic version of the form, see: *http://www.fra.dot.gov/Content3.asp?P=504*.

(c) Each railroad shall ensure the accuracy and timeliness of each report submitted.

(d) As a railroad, if you have a covered employee who performs multi-DOT agency functions (*e.g.*, an employee drives a commercial motor vehicle and performs switchman duties for you), count the employee only on the MIS report for the DOT agency under which he or she is random tested. Normally, this will be the DOT agency under which the employee performs more than 50% of his or her duties. Railroads may have to explain the testing data for these employees in the event of a DOT agency inspection or audit.

(e) A service agent (*e.g.*, a consortium/third party administrator) may prepare the MIS report on behalf of a railroad. However, a railroad official (*e.g.*, a designated employee representative) must certify the accuracy and completeness of the MIS report, no matter who prepares it.

§§ 219.801 and 219.803 [Removed and Reserved]

■ 8. Sections 219.801 and 219.803 are removed and reserved.

Dated: November 20, 2003.

Allan Rutter,

Federal Railroad Administration.

Research and Special Programs Administration

Section-by-Section Discussion of Rule Changes for RSPA

RSPA has amended several sections of 49 CFR part 199 to conform to 49 CFR part 40 Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Drug and Alcohol Management Information System Reporting final rule. The specific changes to the regulatory text in part 199 are described below.

Section 199.3 Definitions

The definition for ''positive rate'' for random drug testing is being modified in § 199.3 in order to be consistent with the standardized DOT definition.

Section 199.117 Recordkeeping

Subparagraph (a)(2) of § 199.117 has been revised to include a requirement to maintain MIS drug testing data for 5 years to parallel the requirement for maintaining MIS alcohol testing data at § 199.227(b)(1). Subparagraphs (a)(2)(i)(ii)(iii) and (4) of § 199.117 have been removed because the retention of the data previously required by these paragraphs will be captured in the MIS data retention requirement. Subparagraph (5) of § 199.117 has been redesignated as subparagraph (4).

Section 199.119 Reporting of Anti-Drug Testing Results

Paragraph (a) of § 199.119 has been revised to require use of the new Management Information System (MIS) form and instructions required by part 40. Paragraph (b) of § 199.119 has been revised to include electronic submission of drug testing MIS reports and correct the room number for submitting paper versions of these reports. Paragraph (c) of § 199.119 has been revised to be consistent with part 40 on how operators are to determine the number of covered employees eligible for random drug testing. Paragraph (d) of § 199.119 has been revised to specify an operator's responsibility when using a service agent to perform random selections. Paragraph (e) of § 199.119 has been revised to provide instructions on how to report random drug testing MIS data for employees covered by more than one DOT agency, consistent with part 40. Paragraph (f) of § 199.119 has been revised to specify who may prepare drug testing MIS reports.

Section 199.229—Reporting of Alcohol Testing Results

Paragraph (a) of § 199.229 has been revised to require use of the new Management Information System (MIS) form and instructions required by part 40. Paragraph (b) of § 199.229 has been revised to provide instructions on how to report alcohol testing MIS data for employees covered by more than one DOT agency, consistent with part 40. Paragraph (c) of § 199.229 has been revised to include electronic submission of alcohol testing MIS reports and correct the room number for submitting paper versions of these reports. Former paragraph (d) and subparagraphs (d)(1)(2)(3)(i)(ii)(4)(5)(6)(7)(8)(9)(10) of § 199.229 have been removed because RSPA now requires use of the part 40 MIS form and the instructions for this form specify the data elements to be reported. Former paragraph (e) and subparagraphs (e)(1)(2)(3)(4)(5) of § 199.229 have been removed because the instructions for the MIS form in part 40 specify the data elements to be reported. Former paragraph (f) of § 199.229 permitting consortium to prepare MIS reports has been re-designated as paragraph (d) and revised to include service agents and third party administrators as defined in part 40.

List of Subjects in 49 CFR Part 199

Alcohol testing, Drug testing, Operators, Pipeline safety, Recordkeeping and reporting.

49 CFR Chapter I

Authority and Issuance

■ For reasons discussed in the preamble, the Research and Special Programs Administration amends part 199 of title 49, Code of Federal Regulations, as follows:

PART 199—DRUG AND ALCOHOL TESTING

■ 1. The citation of authority for 49 CFR part 199 continues to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60117, and 60118; 49 CFR 1.53.

■ 2. Amend § 199.3 by removing the definition for ''positive rate'' and adding the following definition in its place to read as follows:

§ 199.3 Definitions.

* * * * *

Positive rate for random drug testing means the number of verified positive results for random drug tests conducted under this part plus the number of refusals of random drug tests required by this part, divided by the total number of random drug tests results (*i.e.*, positives, negatives, and refusals) under this part.

* * * * *

■ 3. Amend § 199.117 by revising paragraph (a)(2), removing paragraph (a)(4) and redesignating paragraph (a)(5) as paragraph (a)(4) and revising it to read as follows:

§ 199.117 Recordkeeping.

* * * * *

(a) * * *

(2) Records of employee drug test that indicate a verified positive result, records that demonstrate compliance with the recommendations of a substance abuse professional, and MIS annual report data shall be maintained for a minimum of five years.

* * * * *

(4) Records confirming that supervisors and employees have been trained as required by this part must be kept for at least 3 years.

* * * * *

■ 4. Revise § 199.119 to read as follows:

§ 199.119 Reporting of anti-drug testing results.

(a) Each large operator (having more than 50 covered employees) shall submit an annual MIS report to RSPA of its anti-drug testing using the Management Information System (MIS) form and instructions as required by 49 CFR part 40 (at § 40.25 and appendix H to Part 40), not later than March 15 of each year for the prior calendar year (January 1 through December 31). The Administrator shall require by written notice that small operators (50 or fewer covered employees) not otherwise required to submit annual MIS reports to prepare and submit such reports to RSPA.

(b) Each report, required under this section, shall be submitted to the Office of Pipeline Safety Compliance (OPS), Research and Special Programs Administration, Department of Transportation, room 2103, 400 Seventh Street, SW., Washington, DC 20590. The operator may submit a paper report or data electronically using the version of the MIS form provided by DOT. This electronic version of the form can be accessed via the Internet at the following Office of Pipeline Safety web address: *http://ops.dot.gov/drug.htm*.

(c) To calculate the total number of covered employees eligible for random testing throughout the year, as an operator, you must add the total number of covered employees eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Covered employees, and only covered employees, are to be in an employer's random testing pool, and all covered employees must be in the random pool. If you are an employer conducting random testing more often than once per month (*e.g.*, you select daily, weekly, bi-weekly), you do not need to compute this total number of covered employees rate more than on a once per month basis.

(d) As an employer, you may use a service agent (*e.g.*, C/TPA) to perform random selections for you; and your covered employees may be part of a larger random testing pool of covered employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only covered employees are in the random testing pool.

(e) Each operator that has a covered employee who performs multi-DOT agency functions (*e.g.*, an employee performs pipeline maintenance duties and drives a commercial motor vehicle), count the employee only on the MIS report for the DOT agency under which he or she is randomly tested. Normally, this will be the DOT agency under which the employee performs more than 50% of his or her duties. Operators may have to explain the testing data for these employees in the event of a DOT agency inspection or audit.

(f) A service agent (*e.g.*, Consortia/ Third Party Administrator as defined in 49 CFR part 40) may prepare the MIS report on behalf of an operator. However, each report shall be certified by the operator's anti-drug manager or designated representative for accuracy and completeness.

■ 5. Revise § 199.229 to read as follows:

§ 199.229 Reporting of alcohol testing results.

(a) Each large operator (having more than 50 covered employees) shall submit an annual MIS report to RSPA of its alcohol testing results using the Management Information System (MIS) form and instructions as required by 49 CFR part 40 (at § 40.25 and appendix H to part 40), not later than March 15 of each year for the previous calendar year (January 1 through December 31). The Administrator may require by written notice that small operators (50 or fewer covered employees) not otherwise required to submit annual MIS reports to prepare and submit such reports to RSPA.

(b) Each operator that has a covered employee who performs multi-DOT agency functions (*e.g.*, an employee performs pipeline maintenance duties and drives a commercial motor vehicle), count the employee only on the MIS report for the DOT agency under which he or she is tested. Normally, this will be the DOT agency under which the employee performs more than 50% of his or her duties. Operators may have to explain the testing data for these employees in the event of a DOT agency inspection or audit.

(c) Each report, required under this section, shall be submitted to the Office of Pipeline Safety Compliance (OPS), Research and Special Programs Administration, Department of Transportation, room 2103, 400 Seventh Street, SW., Washington, DC 20590. The operator may report data electronically using the version of the MIS form provided by DOT. This form can be accessed via the Internet at the following Office of Pipeline Safety web address: *http://ops.dot.gov/drug.htm.*

(d) A service agent (*e.g.*, Consortia/ Third Party Administrator as defined in part 40) may prepare the MIS report on behalf of an operator. However, each report shall be certified by the operator's anti-drug manager or designated representative for accuracy and completeness.

Dated: December 11, 2003.

Samuel G. Bonasso,

Acting Administrator, Research and Special Programs Administration.

[FR Doc. 03–31887 Filed 12–30–03; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[I.D.122303H]

Atlantic Highly Migratory Species; Bluefin Tuna Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Quota transfers; fishery reopening.

SUMMARY: NMFS adjusts the coastwide General category quota for the Atlantic bluefin tuna (BFT) fishery by transferring 15.0 metric tons (mt) from the Longline North subcategory quota, 12 mt from the Longline South subcategory quota and 3 mt from the Trap category to the coastwide General category for a revised quota of approximately 564.4 mt. NMFS reopens the coastwide BFT General category for the time period of 12:30 a.m. January 2 through 11:30 p.m. January 3, 2004 inclusive. These actions are being taken to allow for maximum utilization of the U.S. BFT landings quota while maintaining a fair distribution of fishing opportunities, preventing overharvest of the adjusted quotas for the affected fishing categories, helping to achieve optimum yield in the General category fishery, and allowing the collection of a broad range of data for stock monitoring purposes, consistent with the objectives of the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP).

DATES: The quota transfers are effective December 24, 2003, through May 31, 2004. The coastwide General category reopening is effective 12:30 a..m. January 2 through 11:30 p.m. January 3, 2004.

FOR FURTHER INFORMATION CONTACT: Brad McHale at 978–281–9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, and together with General category effort controls are specified annually as required under 50 CFR 635.23(a) and 635.27(a). The final initial 2003 BFT quota and General category effort controls were published on October 2, 2003 (68 FR 56783). A final rule to adjust certain size limits and commercial BFT seasons, including extending the General category through January 31 each year was published December 24, 2003 (68 FR 74504).

Quota Transfers

Under the implementing regulations at 50 CFR 635.27(a)(8), NMFS has the authority to transfer quotas among categories, or, as appropriate, subcategories, of the fishery, after considering the following factors: (1) The usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; (2) the catches of the particular category quota to date and the likelihood of closure of that segment of the fishery if no allocation is made; (3) the projected ability of the vessels fishing under the particular category quota to harvest the additional amount of BFT before the end of the fishing year; (4) the estimated amounts by which quotas established for other gear segments of the fishery might be exceeded; (5) the effects of the transfer on BFT rebuilding and overfishing; and (6) the effects of the transfer on accomplishing the objectives of the HMS FMP.

If it is determined, based on the factors listed here and the probability of exceeding the total quota, that vessels fishing under any category or subcategory quota are not likely to take that quota, NMFS may transfer inseason any portion of the remaining quota of that fishing category to any other fishing category or to the Reserve quota.

General Category End Date

During the development of the HMS FMP, the emergence of a General

49 CFR Part 655

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Parts 655

[Docket No. FTA-2000-8513]

RIN 2132-AA71

Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations

AGENCY: Federal Transit Administration, Department of Transportation

ACTION: Final rule.

SUMMARY: The Federal Transit Administration (FTA) has combined its drug and alcohol testing regulations. This final rule incorporates guidance that FTA has issued in the past several years in letters of interpretation, audit findings, newsletters, training classes, safety seminars, and public speaking engagements. In addition, this final rule conforms FTA's rule to the Department of Transportation's (DOT) revised drug and alcohol testing rule published on December 19, 2000.

EFFECTIVE DATE: The effective date of this final rule is [Insert date of publication in the Federal Register.]

FOR FURTHER INFORMATION CONTACT: For program issues, Mark Snider, Office of Safety and Security, FTA, (202) 366-2896 (telephone); (202) 366-7951 (fax); or mark.snider@fta.dot.gov (e-mail). For legal issues, Bruce Walker, Office of the Chief Counsel, FTA, (202) 366-4011 (telephone); (202) 366-3809 (fax); or Bruce.Walker@fta.dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

Electronic Access

Electronic access to this rule and other safety rules may be obtained through the FTA Office of Safety and Security home page at http://transit-safety.volpe.dot.gov.

An electronic copy of this document may be downloaded, using a modem and suitable communications software, from the Government Printing Office's (GPO) Electronic Bulletin Board Service at (202) 512-1661. Internet users may download this document from the Federal Register's homepage at http://www.nara.gov/fedreg and from the GPO database at http://www.access.gpo.gov/nara.

Internet users can access all comments received by the U.S. DOT Dockets, Room PL-401, via the Dockets Management System (DMS) on the DOT home page at http://dms.dot.gov. The DMS is available 24 hours each day, 365 days each year. Please follow the online instructions for more information and help.

Regulatory Information

On April 30, 2001, FTA published a notice of proposed rulemaking (NPRM) proposing changes to conform its drug and alcohol testing regulation (49 CFR Part 655) to the December 19, 2000 revision of DOT's transportation workplace testing procedures at 49 CFR Part 40. (66 FR 21551). While several of the amendments to Part 40 became effective on January 18, 2001, the entire revised Part 40 will become effective on August 1, 2001.

Generally, final rules must be published at least 30 days before their effective dates. However, the Administrative Procedure Act (5 U.S.C. sec. 553(d)(3)) creates an exception to this general rule on the basis of good cause found by the agency. FTA is making this conforming rule effective immediately upon publication, rather than 30 days from the date of publication in the Federal Register to ensure that FTA's drug and alcohol testing regulation is consistent with the Department's Part 40 testing procedures,

which are effective on August 1, 2001. This consistency is necessary in order to avoid overlap, conflict, duplication, or confusion among DOT drug and alcohol testing regulations. Unless this rule goes into effect immediately, there would be a 30-day period in which Part 40 would be in effect without FTA's conforming amended final rule. Since the new Part 40 was published over seven months ago, affected parties have had ample time to prepare to implement the changes in Part 40 to which this rule conforms.

I. Background

The Omnibus Transportation Employee Testing Act of 1991 (the Act) mandated the Secretary of Transportation to issue regulations to combat prohibited drug use and alcohol misuse in the transportation industry. (Public Law 102-143, October 28, 1991, FTA sections codified at 49 U.S.C. 5331). In December 1992, FTA issued two NPRMs to prevent prohibited drug use and alcohol misuse by "safety-sensitive" employees in the transit industry. In February 1994, FTA adopted drug and alcohol testing rules, which were promulgated at 49 CFR Parts 653 and 654.

Omnibus Transportation Employee Testing Act of 1991

The Act requires FTA to issue regulations requiring recipients of Federal transit funds under 49 U.S.C. 5307, 5309, and 5311, and 23 U.S.C. 103(e)(4) to test safety-sensitive employees for the use of alcohol or drugs in violation of law or federal regulation. With respect to railroad operations, the Act allows FTA to defer to regulations issued by the Federal Railroad Administration (FRA).

As a condition of FTA funding, the Act requires recipients to establish alcohol and drug testing programs. The Act mandates four types of testing: pre-employment, random, reasonable suspicion, and post-accident. In addition, the Act permits return-to-

duty and follow-up testing under specific circumstances. The Act requires that recipients follow the testing procedures set out by the Department of Health and Human Services (DHHS).

The Act does not require recipients to follow a particular course of action when they learn that a safety-sensitive employee has violated a law or Federal regulation concerning alcohol or drug use. Rather, the Act directs FTA to issue regulations establishing consequences for the use of alcohol or prohibited drugs by individuals performing safety-sensitive functions in the transit industry. Possible consequences include education, counseling, rehabilitation programs, and suspension or termination from employment.

In authorizing this regulatory scheme, the Act has pre-empted inconsistent State or local laws, rules, regulations, ordinances, standards, or orders. However, provisions of State criminal law, which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, are not pre-empted by the Act.

Previous Action by FTA

On December 15, 1992, FTA issued two notices of proposed rule making to prevent prohibited drug use and alcohol misuse (49 CFR Parts 653 and 654). (57 FR 59646 and 57 FR 59660). The rules established a process whereby safety-sensitive employees would be tested on a pre-employment, random, reasonable suspicion, post-accident, return-to-duty, and follow-up basis.

In the December 1992 Federal Register notice, FTA stated that it was "considering combining the final FTA alcohol and drug testing regulations into one part

in the Code of Federal Regulations." At that time, FTA noted that while the drug and alcohol testing rules shared many similarities, there were still enough differences to warrant two distinct CFR Parts. On February 15, 1994, FTA adopted two separate rules: the drug testing rule, 49 CFR Part 653, and the alcohol testing rule, 49 CFR Part 654. (59 FR 7549 and 59 FR 7572).

Since the rules were first published, there have been two notable amendments as well as several minor (technical) amendments. In December 1998, FTA amended its post-accident regulation to allow an employer to seek post-accident test results from law enforcement agencies where the employer has been unable to timely perform such a test. (63 FR 67612). FTA has stressed the limited applicability of this amendment.

In January 1999, FTA amended its definition of "[m]aintaining a revenue service vehicle or equipment," located under safety-sensitive function (§653.7 and §654.7). (64 FR 425). The amended definition included covered employees of both recipients and contractors performing overhaul and rebuilding services of engines, parts, and vehicles. Previously, employees of contractors who were performing safety-sensitive functions did not have to comply with FTA drug and alcohol testing.

In issuing the amended definition, FTA noted that it would be unduly burdensome to subject the covered employees of contractors to the drug and alcohol regulations if the overhaul/rebuilding work was done on an ad hoc or one-time basis where no long-term contract between the grantee and its contractor existed. (64 FR 426). FTA will continue to exclude the covered employees of contactors who perform safety-sensitive functions on an ad hoc or one-time basis.

When the drug and alcohol rules initially became effective, FTA began an aggressive outreach effort to assist affected entities in complying with the new rules. FTA offered numerous courses throughout the country on implementation. Additionally, in April 1994, FTA published Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit and made them available to anyone seeking help implementing the rules. The guidelines were published in the Federal Register several months prior to the effective date of the rules. They provided step-by-step instructions on how to most effectively comply with Parts 653 and 654. FTA will issue updated guidelines to assist with the implementation of Part 655.

Additionally, FTA has issued numerous letters of interpretation on the rules. Public response to these letters, especially since they became available on FTA's external Web page, has been highly favorable. Employers and employees found that the letters were very helpful in explaining the rules. FTA will continue to offer interpretive guidance with respect to Part 655.

To determine compliance with the rules, FTA's Office of Safety and Security began auditing grantee drug and alcohol testing programs in March 1997. The audits quickly evolved into opportunities for FTA to provide extensive technical assistance. Through the audits, FTA has gained a better understanding of the difficulties that grantees encounter when implementing the rules. In addition, audits have shown FTA where the rules can be strengthened and improved. The impetus to combine Parts 653 and 654 is

due, in no small part, to the audit program.

II. Overview of Rule

This rule combines the drug and alcohol testing rules, found at 49 CFR Parts 653 and 654, and conforms these rules to the Department's drug and alcohol testing procedures at 49 CFR Part 40. FTA believes this change will allow the program to be implemented more efficiently and will bring FTA into line with the other operating administrations that fall under the Omnibus Transportation Employee Testing Act of 1991, (Federal Aviation Administration, Federal Railroad Administration, and Federal Motor Carrier Safety Administration), as well as the two other operating administrations that have drug and alcohol testing regulations (Research and Special Programs Administration and U.S. Coast Guard).

The rule applies to direct and indirect recipients of funds under 49 U.S.C. 5307, 5309, 5311, and 23 U.S.C. 103(e)(4). It requires transit operators (employers) who receive these funds to establish and conduct a multifaceted anti-drug and alcohol misuse testing program. The regulation conditions financial assistance on the implementation of a program. Failure of an employer to develop and implement a program in compliance with this regulation may result in the suspension of Federal transit funding.

The regulation requires the testing of safety-sensitive employees for the use of controlled substances and the misuse of alcohol; however the regulation also requires education and awareness about the problems associated with prohibited drug use and alcohol misuse. In addition, the regulation mandates that each employer have a policy statement describing its program policies and procedures. The statement must include

the consequences for prohibited drug use and alcohol misuse.

The regulation specifies that safety-sensitive employees are prohibited from using five illegal substances (marijuana, cocaine, opiates, amphetamines, and phencyclidine). Safety-sensitive employees are also prohibited from misusing alcohol. The rule requires testing of safety-sensitive employees in five situations: (1) Pre-employment (including transfer to a safety-sensitive position within the organization; (2) Reasonable suspicion; (3) Random; (4) Post-accident; and (5) Return-to-duty/follow-up (periodic). Drug testing is required in all five situations. Alcohol testing is required for all situations except for pre-employment.

The rule requires the use of the Department-wide drug and alcohol testing procedures contained in 49 CFR Part 40. If a covered employee tests positive for illegal drug use or alcohol misuse or otherwise violates the rule, the employee must be removed from his or her safety-sensitive position. The employee must then be informed about education and rehabilitation programs. Should the employer decide to retain a covered employee whose test result has been verified positive, the employee must be evaluated by a substance abuse professional. Prior to returning an employee to a safety-sensitive function, the employer must ensure that the employee has successfully completed rehabilitation; the rule does not require the employer to pay for rehabilitation.

Any action on the part of FTA for noncompliance is against recipients of Federal transit funds, i.e., transit systems, metropolitan planning organizations (MPOs), states, and third party contractors that perform safety-sensitive functions. MPOs and states are affected by this regulation if they receive Federal transit funds and (1) they provide

transit service or they provide funding to a subrecipient. MPOs or states that fund or manage transit providers, but do not provide transit service, must ensure that transit provider employers provide a certification of compliance.

FTA's relationship is with its grantees. Many grantees that receive transit funds operate mass transit services. Typical among these are large transit entities that receive funds under sections 49 U.S.C. 5307, 5309, and 5311. In addition, some grantees (typically states) pass Federal transit funds to smaller subrecipients within the state.

This rule eliminates the distinction between large and small operators. The term "employer" is now used to include both small and large operators, as well as entities providing service under contract or other arrangement with the transit operator.

III. **Section-by-Section Discussion of the Comments**

In this section, FTA will discuss the differences between the rules in Parts 653 and 654 and the final rule in Part 655. The responses to comments on each section are also included herein. There is no discussion for sections that have remained substantially the same. FTA also did not discuss comments that addressed Department-wide issues, which are more properly addressed in Part 40, or issues that were beyond the scope of the NPRM.

FTA received 84 comments in response to the NPRM. The breakdown among commenter categories follows:

Nonprofits, and special transit providers: 10

City and County transit providers: 19

State agencies: 20

Labor unions:	3
Trade associations:	9
Individual citizens:	12
Private businesses:	11.

FTA considered all comments filed in a timely manner, as well as all statements and material presented at the public meetings on the NPRM.

Subpart A--General

A. Definitions. (§655.4)

Employer: In the NPRM, FTA proposed that, in addition to direct recipients of FTA funding, the term "employer" include state recipients that pass the money to subrecipients and grantees that have contractors performing transit operations. The definition change was proposed to provide states and grantees access to covered employees' drug and alcohol test records in order to certify compliance with FTA drug and alcohol testing rules by subrecipients and contractors.

FTA received a significant number of comments regarding the designation of states as employers. Several states were concerned that being named an employer in order to access drug and alcohol records would have legal and technical implications that may expose the state to potential litigation. States were also concerned that they may become the warehouse of records and be responsible for responding to potential employers requesting information that is required under 49 CFR 40.25. Grantees that utilize contractors to provide transit services offered similar concerns. Regardless, a significant number of commenters acknowledged the necessity of having access to test

results of covered employees since Subpart I requires recipients to certify that their contractors and/or subrecipients are complying with the drug and alcohol testing program. Numerous commenters stated that this objective could be accomplished by amending 49 CFR 655.73 – Access to Facilities and Records.

FTA Response. FTA agrees with the commenters and has remedied this situation with the addition of paragraph 49 CFR 655.73 (i). An employer may disclose drug and alcohol testing information required to be maintained under this part only to the state oversight agency or grantee required to certify to FTA compliance with the drug and alcohol testing procedures at 49 CFR Parts 40 and 655.

Although several commenters indicated that law enforcement agencies should have access to records maintained under this part upon request, FTA recognizes that individual privacy rights require limited dissemination of this information. This section does not authorize release of information maintained under this part to a law enforcement agency based solely on the request of the law enforcement agency.

Second chance policy: FTA proposed adding this definition to the rule with the understanding that grantees have the discretion to adopt a second chance policy, i.e., a policy allowing an employee (who has previously violated the Federal drug and/or alcohol regulations) to return to a safety-sensitive position after completing rehabilitation.

FTA received a limited number of comments on this subject. A few commenters expressed appreciation for the definition while most questioned the necessity for its inclusion since it is the employer's discretion to implement a "second chance policy".

FTA Response. FTA opts not to include "second chance policy" under definitions at this time. Since the decision to retain a covered employee is within the discretion of the employer, the phrase will not be defined in the final rule.

Taxi cab drivers and other transportation providers: FTA requested comments regarding its guidance and policy relating to this category of contractors. According to FTA policy, drug and alcohol testing rules do not apply to taxi cab drivers when patrons (using publicly subsidized vouchers) or transportation providers can choose from a variety of taxicab operators.

A number of commenters on this subject expressed concern that many rural and small urban communities have limited availability of taxi service. One commenter questioned FTA's regulatory authority to include taxi operators under the drug and alcohol testing rule. Other commenters indicated that a taxi operator is performing a safety-sensitive function whether the patron or the provider selects the taxi service and should be subject to the rule.

FTA Response. The intent of FTA's regulatory scheme is not to impose Federal regulations on the taxi industry; however, taxi companies that contract with transportation service providers receiving Federal transit funds are subject to compliance with the drug and alcohol rules. FTA policy continues to recognize the practical difficulty of administering a drug and alcohol testing program to taxi companies that only incidentally provide transit service. Therefore, the drug and alcohol testing rules apply when the transit provider enters into a contract with one or more entities to provide taxi service. The rules do not apply when the patron (using subsidized vouchers) selects the

taxi company that provides the transit service. This guidance reflects the FTA Master Agreement, which requires recipients to include appropriate clauses in third party contracts requiring contractors to comply with applicable Federal requirements. It also recognizes the practical difficulty of administering a drug and alcohol testing program to entities that only incidentally provide taxi service on behalf of a transportation service provider.

Dispatchers. FTA requested comments on the duties and responsibilities of dispatchers in the different transit systems. The objective was to determine whether the duties and responsibilities vary significantly enough to warrant modification of the current rule.

A significant number of commenters indicated that bus dispatchers whose duties are of an administrative nature and primarily communicate directions to a bus operator do not perform a safety-sensitive function. Other commenters indicated that their dispatchers did indeed perform safety-sensitive functions, including but not limited to responding to emergency situations and should remain subject to the rules. The majority of the commenters in rural and small urban areas indicated that their dispatchers did not perform safety-sensitive functions.

FTA Response. The comments confirm that bus dispatchers perform a myriad of duties depending on the employer. FTA's rules apply to anyone who performs a safety-sensitive function, which includes the control of the "dispatch or movement of a revenue service vehicle."

Since each employer uses its own terminology to describe job categories that involve safety-sensitive functions, each employer must continue to decide whether a particular employee performs any of the functions listed in the definition of "safety-sensitive function," including bus dispatchers. As noted in previous guidance, the key consideration remains the type of work performed rather than any particular job title. Based on the comments received, FTA will not attempt a universal definition of "dispatchers" at this time. Instead, FTA will allow each employer to determine whether a particular dispatcher performs or may perform a safety-sensitive function.

Maintenance contractors. In the NPRM, FTA reiterated that maintenance contractors that perform safety-sensitive functions are subject to the drug and alcohol testing rules, for the reasons noted in the preamble to the 1999 rule change, i.e., fairness and safety (64 FR 425, January 5, 1999). Most comments on this subject concerned the difficulty employers have in requiring maintenance contractors to implement a drug and alcohol program. Much of the discussion related to the difficulty in finding maintenance contractors willing to comply with the drug and alcohol testing requirements, particularly where the maintenance contractor provides service on an occasional basis. A number of commenters offered that maintenance shops cannot afford to implement an ongoing program for the amount of transit-related business generated. As a result, this would severely restrict the grantee/subrecipient's ability to properly maintain FTA-funded vehicles. The majority of comments urged the FTA to completely exempt maintenance contractors from the drug and alcohol testing regulations.

Several urban grantees commented on the fact that the type of work they are

contracting out is often performed by small shops focusing on a very narrow repair area. These maintenance contractors have limited administrative staff, which causes them difficulty in administering a drug and alcohol program.

FTA Response. FTA recognizes these concerns, but also recognizes the public safety interest inherent in testing safety-sensitive employees. FTA has developed a middle ground to alleviate some of the problems associated with this issue. FTA still recognizes that recipients funded with 49 U.S.C. 5311 funds and which contract out maintenance service are excluded from the drug and alcohol testing rules. In addition, recipients of Federal transit funds under 49 U.S.C. 5307 and 5309 in an area less than 200,000 in population and which contract out such services are no longer required to comply with Part 655. Also, maintenance providers of safety-sensitive functions for a grantee on an ad hoc or one-time basis are not required to comply.

Volunteers. FTA proposed to clarify when volunteers are covered employees subject to the drug and alcohol testing rules. Most commenters indicated that the proposed language needed further clarification.

FTA Response. FTA has reviewed the proposed language and amends the definition of covered employee by deleting reference to the volunteers' "expectation of in-kind or tangible benefits." Instead, a volunteer is deemed a covered employee when he or she receives remuneration in excess of their actual personal expenses incurred while performing the volunteer service.

B. Stand-down Waivers for Drug Testing (655.5)

FTA proposed procedures on stand-down waivers to conform with 49 CFR Part 40.

Most of the commenters to this section expressed support. However, one commenter expressed opposition to the provision claiming that it undercuts the confidentiality principles inherent in the FTA's drug and alcohol testing program. Another commenter indicated that FTA should provide additional criteria not identified in 49 CFR Part 40.

FTA Response. FTA is aware of the confidentiality concerns and will carefully review each petition to determine if the facts and justification warrant a waiver. The requirements for obtaining a waiver are provided in 49 CFR 40.21. The proposed rule will be incorporated in the final rule to conform with 49 CFR Part 40.

Subpart B—Program Requirements

A. Policy Statement Contents (§655.15)

FTA proposed limiting information required in a Policy Statement to that listed in section 655.15. FTA also clarified who must approve the policy. In most instances, a grantee will have a governing board that can adopt the policy. However, where there is no governing board or the governing board does not have approval authority, the highest-ranking official with authority to approve the policy may do so. FTA also noted that employers may incorporate by reference 49 CFR Part 40 in their Policy Statements, provided it is available for review by employees when requested.

Most commenters expressed support for the effort to simplify this requirement. However, one commenter noted that eliminating the requirement to address specific sections of 49 CFR Part 40 and making Part 40 available to the employee creates the potential for misunderstanding by the employee. Another commenter indicated that specific employee rights should be required in this section. A few commenters also

recommended that FTA impose schedules for when the employee and supervisor training requirement should occur and the frequency with which it should be scheduled.

FTA Response. FTA believes that simplifying the contents required in the Policy Statement reduces the administrative burden while maintaining an employer's discretion to craft a Policy Statement that includes additional requirements not mandated by FTA. FTA also believes that it would be an undue burden to mandate an industry-wide training schedule. The final rule recognizes the diversity of employee-management relationships within the transit industry and also strikes a reasonable balance with the requirement for employee and supervisor training. However, a grantee may choose to include additional requirements not mandated by FTA, i.e., recurring training and employee rights. If a grantee does so, the grantee's policy shall indicate that those additional requirements are the employer's, and not FTA's. FTA also believes that it is reasonable for employers to incorporate by reference 49 CFR Part 40 in their Policy Statements and make it available for review by employees when requested.

Subpart E – Types of Testing

A. Pre-employment Drug Testing (§655.41).

FTA notified the public of the intent to eliminate the phrase "hire" in this provision of the rule. Previously, employers were required to administer a drug test and receive a negative result before hiring an employee.

FTA also notified the public of its proposal to require a pre-employment test for covered employees who are away from work for more than 90 consecutive calendar days and plan to return to a safety-sensitive function. It is FTA's intent that employers assure

themselves that employees can successfully pass a drug test before returning them to safety-sensitive functions.

The majority of commenters support the change in the provision that allows a covered employee to be hired prior to receiving a negative drug test result. These comments indicated that the rule balances the employer's personnel concerns with the public safety interest by ensuring that the new covered employee is not permitted to perform a safety-sensitive function for the first time until a negative drug test result is received. However, one commenter stated that the public safety interest is better served by prohibiting the hiring of a covered employee prior to receiving a drug test result. Another comment indicated that FTA should adopt pre-employment provisions similar to the Federal Motor Carrier Safety Administration (FMCSA).

Many commenters supported clarification of the rule regarding the time required to elapse before an absent covered employee should take another pre-employment drug test. A majority of rural and small urban employers are in favor of this rule because they employ seasonal and temporary workers. A few comments indicated that there is no basis to retest a covered employee after a 90-day absence. However, one employer indicated that a pre-employment test should be administered after 90 days regardless of whether the employee was in the employer's random pool or not. Another commenter indicated that pre-employment testing should be administered following consecutive absences as short as 30 days.

FTA Response. FTA has reviewed the comments and will incorporate the NPRM language into the final rule. FTA believes that deleting the phrase "hire" in this section

provides an employer with the discretion to administer a pre-employment drug test anytime before the employee first performs a safety-sensitive function. FTA also believes the 90-day period is reasonable. It gives the employer the discretion to decide whether or not the covered employee is retained in the random pool during his or her absence. If the employee is retained in the random pool, then pre-employment testing is not required. In determining whether to retain the employee in the random pool, one consideration is the likelihood of the employee's return to perform safety-sensitive functions.

B. Pre-Employment Alcohol Testing (§655.42).

FTA noted in the NPRM that its pre-employment alcohol testing requirements were suspended due to a court decision and subsequent legislation. Most commenters indicated that FTA's new rule should also omit the pre-employment alcohol testing provisions, primarily because alcohol consumption is a legal activity. Others indicated that since pre-employment testing would not be conducted under FTA authority, this section should not be included in the final rule.

FTA Response. The NPRM language is included in the final rule to conform with the other DOT agency drug and alcohol testing programs. All six DOT agencies with testing programs are adding this section to their respective rules. This section allows, but does not require, employers to conduct pre-employment alcohol testing. If an employer chooses to conduct pre-employment alcohol testing, the employer must conduct the testing in accordance with all of the requirements of 49 CFR Part 40.

C. Reasonable Suspicion Testing (§ 655.43)

Several commenters responding to this section indicated that FTA should not interfere with an employer's ability to require two or more trained supervisors to participate and/or agree on referring an employee for reasonable suspicion testing. One commenter indicated that employers should be allowed to authorize other personnel to make reasonable suspicion testing observations similar to the FMCSA. Two commenters indicated that this testing requirement should not be required at all because the consumption of alcohol is legal. Other commenters indicated that provisions found in 49 CFR 654.37(c) and (d) should be incorporated in the final rule.

FTA Response. FTA believes that the public safety interest is furthered with the inclusion of this requirement and the final rule is amended to include the language of 49 CFR 654.37(c) and (d). FTA also notes that the proposed bar to an employer requiring two or more trained supervisors to make such referrals is not included in the final rule. FTA also agrees that an employer should be permitted to authorize and train other company officers to make reasonable suspicion observations; therefore this section and section 655.14 of subpart B are amended accordingly.

D. Post-Accident Testing (§ 655.44).

FTA noted in the NPRM that its post-accident testing regulation was previously amended to allow an employer, in extremely limited circumstances, to use the post-accident test results administered by local law enforcement only when the employer is unable to perform a post-accident test within the required time frame.

Of the few comments received on this section, most indicated support for the limited exception to use post-accident test results from local law enforcement. However,

a commenter indicated that the rule does not state that this provision is to be used in limited circumstances. Another commenter stated that the employer should not be permitted to use post-accident test results administered by local law enforcement because the standards for these tests may be less than those imposed by DOT. One commenter stated that FTA should not require post-accident testing when it is also required by FMCSA.

FTA Response. FTA noted that the proposed rule did not state the limited exception under which an employer may use the test results of a law enforcement agency. The final rule is amended to indicate that an employer may use the post-accident test results of a law enforcement agency when the employer is unable to test within the required time frame established by FTA and the test is performed to the applicable standards of the entity authorized to administer the drug or alcohol test. FTA and FMCSA are amending their respective post-accident testing rule to eliminate the requirement for duplicative post-accident testing of operators.

E. Random Testing (§ 655.45)

FTA reiterated in the NPRM that a primary purpose of random testing is deterrence. Deterrence is most effectively achieved with random, unpredictable drug and alcohol testing that is conducted throughout all workdays and hours of service.

Although the majority of commenters supported the concept of random drug testing, a significant number indicated that employers in rural areas have an increased burden complying with this provision. They have difficulty in obtaining testing services after normal business hours within their areas and/or because of distances between testing

service providers and the employer. Four commenters also noted that the NPRM incorrectly stated the current random alcohol testing rate.

FTA Response. The proposed language is incorporated in the final rule with some modification. The concern reflected by employers in rural areas is noted; however, FTA believes that the public safety interest is promoted with random testing that is truly random and unpredictable. However, FTA believes that requiring random testing to be conducted at least quarterly strikes a reasonable balance while considering the rule's impact on employers in rural areas. Additionally, FTA is reviewing the recommendation to allow individual rural transit systems to apply to have its random testing rate based on its individual performance and program instead of industry-wide data.

Paragraph (a) of this section is amended to read 10% instead of 25%. Paragraph (i) of this section is also amended to reflect that random testing for alcohol misuse is subject to safety-sensitive performance limitations while testing for drug use is permitted anytime during the workday.

Subpart H – Administrative Requirements

A. Retention of Records (§655.71) and Reporting Results In A Management Information System (§655.72)

The NPRM proposed changing FTA's Management Information System (MIS) reporting requirement from census reporting to stratified random sampling because it now has an accurate portrait of the current state of drug and alcohol testing (including positive rates) in the transit industry. Most commenters indicated that FTA's intent to reduce the paperwork requirement is better achieved by using technology (e.g., web

based/electronic submission). A few commenters stated that the proposed rule does not reduce their administrative burden. Most commenters indicated that sampling reduces some of the burden on rural transit systems; however, a commenter noted that states are still required to collect subrecipient's data. Other commenters indicated that FTA should have one uniform period for record retention.

FTA Response. FTA believes sampling will reduce the paperwork burden on a portion of the industry while still maintaining a high confidence level in the results. Transit employers are still required to prepare an MIS form annually; however, they will only be required to submit an MIS form when requested by FTA. However, FTA's record retention time periods reflect those of the other DOT modes for administrative uniformity. FTA will review the feasibility of web-based submission of data and will issue further guidance on this issue.

B. Access to Facilities And Records (§655.73)

As previously discussed in section 655.4 of subpart A, FTA received a number of comments indicating that states should not be included under the definition of "employer" in order to gain access to records. Many commenters also objected to state regulatory agencies and law enforcement agencies having independent access to employee records. The majority of comments indicated that only those state agencies and grantees with oversight responsibilities and which are required to certify compliance should have access to the employee's drug and alcohol testing information.

FTA Response. The final rule is amended by adding paragraph (i) to this section. An employer may release information to the state agency or grantee with oversight

responsibility of FTA transit funds which is required to certify compliance under this part.

IV. Effect of the Americans With Disabilities Act of 1990 on Alcohol Testing Programs

Title I of the Americans With Disabilities Act of 1990 (ADA) focuses on employers' responsibilities toward employees with disabilities. According to Title I, an employer must provide reasonable accommodations for work for persons with disabilities. Some covered workers are considered persons with disabilities for purposes of protection under the ADA. This issue was treated more fully in the 1994 DOT-wide preamble (59 FR 7302, 7311-14, February 15, 1994).

V. Regulatory Process Matters

A. <u>Executive Order 12866</u>

FTA has evaluated the industry costs and benefits of this rule, which require that transit industry personnel who perform safety-sensitive functions be covered by a program to control illegal drug abuse and alcohol misuse in mass transportation operations. This rule makes no noteworthy substantive changes. Any incremental costs are negligible, and the policy and economic impact will have no significant effect.

B. <u>Departmental Significance</u>

This rule is a "non-significant regulation" as defined by the Department's Regulatory Policies and Procedures because, while it involves an important Departmental policy that is likely to generate a great deal of public interest, in the larger scheme, it is simply a combination of two existing regulations (49 CFR Parts 653 and

654). It also conforms FTA's drug and alcohol testing regulations with the Department's drug and alcohol testing regulations (49 CFR Part 40), to which FTA grantees already are subject.

C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601-612), FTA has made a preliminary assessment of the possible effects of the rule on small businesses. To the extent possible, FTA has made efforts to acknowledge the differences between small and large entities, and has endeavored to make accommodations when possible. Experience with Parts 653 and 654 has shown that the rule has had a significant impact on a substantial number of small entities. FTA believes that this new rule will provide greater clarity and ease of implementation for small entities.

D. Paperwork Reduction Act

This rule includes information collection requirements subject to the Paperwork Reduction Act of 1995 (PWRA) (44 U.S.C. 3501, et. seq.) The Office of Management and Budget has approved FTA's PWRA request for Parts 653 and 654. This rule includes the same information collection devices; therefore, FTA believes it already has OMB approval. The Management Information System (MIS) forms currently required by Parts 653 and 654 may be modified in the future, but will continue to be required by FTA, without changes, under Part 655.

E. Executive Order 13132

This action has been reviewed under Executive Order 13132 on Federalism. FTA has determined that this action has significant Federalism implications to warrant a

Federalism assessment. However, FTA has limited discretion because this rulemaking is mandated by Congress in the Omnibus Transportation Employee Testing Act of 1991.

The 1991 legislation mandated FTA to issue regulations requiring grantees of funds under 49 U.S.C. 5307, 5309, and 5311, and 23 U.S.C. 103(e)(4) to test their safety-sensitive employees for the use of drugs and the misuse of alcohol in violation of law or Federal regulation.

Before passage of the Omnibus Transportation Employee Testing Act of 1991, safety issues were largely handled as a local matter. This Act clarifies the Federal role by including specific Federal pre-emption language. This Act also makes it clear that, in the area of substance abuse testing, Federal regulations are to take precedence over any inconsistent State or local specifications.

Although Congress has pre-empted State or local law, FTA has preserved the role of local entities in mass transit safety. This regulation does not disturb testing programs which were created by virtue of a grantee's own authority and which are not inconsistent with this regulation.

F. Other Executive Orders.

There are a number of other Executive Orders that can affect rulemakings. These include Executive Orders 13084 (Consultation and Coordination with Indian Tribal Governments), 12988 (Civil Justice Reform), 12875 (Enhancing the Intergovernmental Partnership), 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights), 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 13045 (Protection of Children from

Environmental Health Risks and Safety Risks), and 12889 (Implementation of North American Free Trade Agreement). We have considered these Executive Orders in the content of this rule, and we believe that the rule does not directly affect the matters covered by the Executive Orders.

List of Subjects in 49 CFR Part 655

49 CFR Part 653

Drug abuse, Drug testing, Grant programs – transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 654

Alcohol abuse, Drug testing, Grant programs – transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 655

Alcohol abuse, Drug abuse, Drug testing, Grant programs – transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set forth in the preamble and under the authority of 49 U.S.C. 5331, the agency amends Chapter VI of Title 49 of the Code of Federal Regulations as set forth below:

PART 653 – [REMOVED]

1. Remove part 653.

PART 654 – [REMOVED]

2. Remove part 654.

3. Add part 655 to read as follows:

Part 655 – Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations

Subpart A – General

Sec.

Subpart B – Program Requirements

Subpart C – Prohibited Drug Use

Data Collection Form

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

Subpart A- General

§655.1 Purpose.

The purpose of this part is to establish programs to be implemented by employers that receive financial assistance from the Federal Transit Administration (FTA) and by contractors of those employers, that are designed to help prevent accidents, injuries, and fatalities resulting from the misuse of alcohol and use of prohibited drugs by employees who perform safety-sensitive functions.

§655.2 Overview.

(a) This part includes nine subparts. Subpart A of this part covers the general requirements of FTA's drug and alcohol testing programs. Subpart B of this part specifies the basic requirements of each employer's alcohol misuse and prohibited drug use program, including the elements required to be in each employer's testing program. Subpart C of this part describes prohibited drug use. Subpart D of this part describes prohibited alcohol use. Subpart E of this part describes the types of alcohol and drug tests to be conducted. Subpart F of this part addresses the testing procedural requirements mandated by the Omnibus Transportation Employee Testing Act of 1991, and as required in 49 CFR Part 40. Subpart G of this part lists the consequences for covered employees who engage in alcohol misuse or prohibited drug use. Subpart H of this part contains administrative matters, such as reports and recordkeeping requirements. Subpart I of this part specifies how a recipient certifies compliance with the rule.

(b) This part must be read in conjunction with 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

§655.3 Applicability.

(a) Except as specifically excluded in paragraph (b) of this section, this part applies to:

(1) Each recipient and subrecipient receiving Federal assistance under:

(i) 49 U.S.C. 5307, 5309, or 5311; or

(ii) 23 U.S.C. 103(e)(4); and

(2) Any contractor of a recipient or subrecipient of Federal assistance under:

(i) 49 U.S.C. 5307, 5309, or 5311; or

(ii) 23 U.S.C. 103(e)(4).

(b) A recipient operating a railroad regulated by the Federal Railroad Administration (FRA) shall follow 49 CFR Part 219 and §655.83 for its railroad operations, and shall follow this part for its non-railroad operations, if any.

§655.4 Definitions.

For this part, the terms listed in this section have the following definitions. The definitions of additional terms used in this part but not listed in this section can be found in 49 CFR Part 40.

Accident means an occurrence associated with the operation of a vehicle, if as a result:

(1) An individual dies; or

(2) An individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident; or

(3) With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, one or more vehicles (including non-FTA funded vehicles) incurs disabling damage as the result of the occurrence and such vehicle or vehicles are transported away from the scene by a tow truck or other vehicle; or

(4) With respect to an occurrence in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from operation.

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Anti-drug program means a program to detect and deter the use of prohibited drugs as required by this part.

Certification means a recipient's written statement, authorized by the organization's governing board or other authorizing official that the recipient has complied with the provisions of this part. (See §655.82 and §655.83 for certification requirements.)

Contractor means a person or organization that provides a safety-sensitive service for a recipient, subrecipient, employer, or operator consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement that reflects an ongoing relationship between the parties.

Covered employee means a person, including an applicant or transferee, who performs or will perform a safety-sensitive function for an entity subject to this part. A volunteer is a covered employee if:

(1) The volunteer is required to hold a commercial driver's license to operate the vehicle; or

(2) The volunteer performs a safety-sensitive function for an entity subject to this part and receives remuneration in excess of his or her actual expenses incurred while engaged in the volunteer activity.

Disabling damage means damage that precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) Inclusion. Damage to a motor vehicle, where the vehicle could have been driven, but would have been further damaged if so driven.

(2) Exclusions. (i) Damage that can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlamp or tail light damage.

(iv) Damage to turn signals, horn, or windshield wipers, which makes the vehicle inoperable.

DOT or The Department means the United States Department of Transportation.

DOT agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring drug and alcohol testing. See 14 CFR part 121, appendices I and J; 33 CFR part 95; 46 CFR parts 4, 5, and 16; and 49 CFR parts 199, 219, 382, and 655.

Employer means a recipient or other entity that provides mass transportation service or which performs a safety-sensitive function for such recipient or other entity. This term includes subrecipients, operators, and contractors.

FTA means the Federal Transit Administration, an agency of the U.S. Department of

Transportation.

Performing (a safety-sensitive function) means a covered employee is considered to be performing a safety-sensitive function and includes any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

Positive rate means the sum of the annual number of positive results for random drug tests conducted under this part plus the annual number of refusals to submit to a random drug test authorized under this part divided by the sum of the annual number of random drug tests conducted under this part plus the annual number of refusals to submit to a random drug test authorized under this part.

Railroad means:

(1) All forms of non-highway ground transportation that run on rails or electromagnetic guideways, including:

(i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service that was operated by the Consolidated Rail Corporation as of January 1, 1979; and (ii) High speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads.

(2) Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Recipient means an entity receiving Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311; or under 23 U.S.C. 103(e)(4).

Refuse to submit means any circumstance outlined in 49 CFR 40.191 and 40.261.

Safety-sensitive function means any of the following duties, when performed by employees of recipients, subrecipients, operators, or contractors:

(1) Operating a revenue service vehicle, including when not in revenue service;

(2) Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;

(3) Controlling dispatch or movement of a revenue service vehicle;

(4) Maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service. This section does not apply to the following: an employer who receives funding under 49 U.S.C. 5307 or 5309, is in an area less than 200,000 in population, and contracts out such services; or an employer who receives funding under 49 U.S.C. 5311 and contracts out such services;

(5) Carrying a firearm for security purposes.

Vehicle means a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel. A mass transit vehicle is a vehicle used for mass transportation or for ancillary services.

Violation rate means the sum of the annual number of results from random alcohol tests conducted under this part that have alcohol concentrations of .04 or greater plus the annual number of refusals to submit to alcohol tests authorized under this part, divided by the sum of the annual number of random alcohol tests conducted under this part plus the annual number of refusals to submit to a drug test authorized under this part.

§655.5 Stand-down waivers for drug testing.

(a) An employer subject to this part may petition the FTA for a waiver allowing the employer to stand down, per 49 CFR Part 40, an employee following a report of a laboratory confirmed positive drug test or refusal, pending the outcome of the verification process.

(b) Each petition for a waiver must be in writing and include facts and justification to support the waiver. Each petition must satisfy the requirements for obtaining a waiver, as provided in 49 CFR 40.21.

(c) Each petition for a waiver must be submitted to the Office of Safety and Security, Federal Transit Administration, U.S. Department of Transportation, 400 Seventh Street, S.W. Washington, D.C. 20590.

(d) The Administrator may grant a waiver subject to 49 CFR 40.21(d).

§655.6 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any state or local law, rule, regulation, or order to the extent that: (1) Compliance with both the state or local requirement and any requirement in this part is not possible; or (2) Compliance with the state or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of state criminal laws that impose sanctions for reckless conduct attributed to prohibited drug use or alcohol misuse leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

§655.7 Starting date for testing programs.

An employer must have an anti-drug and alcohol misuse testing program in place by the date the employer begins operations.

Subpart B – Program Requirements

§655.11 Requirement to establish an anti-drug use and alcohol misuse program.

Each employer shall establish an anti-drug use and alcohol misuse program consistent with the requirements of this part.

§655.12 Required elements of an anti-drug use and alcohol misuse program.

An anti-drug use and alcohol misuse program shall include the following:

(a) A statement describing the employer's policy on prohibited drug use and alcohol misuse in the workplace, including the consequences associated with prohibited drug use and alcohol misuse. This policy statement shall include all of the elements specified in section 655.15 of this subpart. Each employer shall disseminate the policy consistent with the provisions of section 655.16 of this subpart.

(b) An education and training program which meets the requirements of section 655.14 of this subpart.

(c) A testing program, as described in Subparts C and D of this part, which meets the requirements of this part and 49 CFR Part 40.

(d) Procedures for referring a covered employee who has a verified positive drug test result or an alcohol concentration of 0.04 or greater to a Substance Abuse Professional, consistent with 49 CFR Part 40**.**

§655.13 [Reserved]

§655.14 Education and training programs.

Each employer shall establish an employee education and training program for all covered employees, including:

(a) Education. The education component shall include display and distribution to every covered employee of: informational material and a community service hot-line telephone number for employee assistance, if available.

(b) Training. (1) Covered employees. Covered employees must receive at least 60 minutes of training on 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.

(2) Supervisors. Supervisors and/or other company officers authorized by the employer to make reasonable suspicion determinations shall receive at least 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use and at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

§655.15 Policy Statement contents.

The local governing board of the employer or operator shall adopt an anti-drug and alcohol misuse policy statement. The statement must be made available to each covered employee, and shall include the following:

(a) The identity of the person, office, branch and/or position designated by the employer to answer employee questions about the employer's anti-drug use and alcohol misuse programs.

(b) The categories of employees who are subject to the provisions of this part.

(c) Specific information concerning the behavior and conduct prohibited by this part.

(d) The specific circumstances under which a covered employee will be tested for prohibited drugs or alcohol misuse under this part.

(e) The procedures that will be used to test for the presence of illegal drugs or alcohol misuse, protect the employee and the integrity of the drug and alcohol testing process, safeguard the validity of the test results, and ensure the test results are attributed to the correct covered employee.

(f) The requirement that a covered employee submit to drug and alcohol testing administered in accordance with this part.

(g) A description of the kind of behavior that constitutes a refusal to take a drug or alcohol test, and a statement that such a refusal constitutes a violation of the employer's policy.

(h) The consequences for a covered employee who has a verified positive drug or a confirmed alcohol test result with an alcohol concentration of 0.04 or greater, or who refuses to submit to a test under this part, including the mandatory requirements that the covered employee be removed immediately from his or her safety-sensitive function and be evaluated by a substance abuse professional, as required by 49 CFR Part 40.

(i) The consequences, as set forth in §655.35 of subpart D, for a covered employee who is found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(j) The employer shall inform each covered employee if it implements elements of an anti-drug use or alcohol misuse program that are not required by this part. An employer

may not impose requirements that are inconsistent with, contrary to, or frustrate the provisions of this part.

§655.16 Requirement to disseminate policy.

Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the employer's anti-drug and alcohol misuse policies and procedures.

§655.17 Notice requirement.

Before performing a drug or alcohol test under this part, each employer shall notify a covered employee that the test is required by this part. No employer shall falsely represent that a test is administered under this part.

§655.18 - §655.20 [Reserved]

Subpart C – Prohibited Drug Use

§655.21 Drug testing.

(a) An employer shall establish a program that provides testing for prohibited drugs and drug metabolites in the following circumstances: pre-employment, post-accident, reasonable suspicion, random, and return to duty/follow-up.

(b) When administering a drug test, an employer shall ensure that the following drugs are tested for:

(1) Marijuana;

(2) Cocaine;

(3) Opiates;

(4) Amphetamines; and

(5) Phencyclidine.

(c) Consumption of these products is prohibited at all times.

§655.22 – §655.30 [Reserved]

Subpart D – Prohibited Alcohol Use

§655.31 Alcohol testing.

(a) An employer shall establish a program that provides for testing for alcohol in the following circumstances: post-accident, reasonable suspicion, random, and return to duty/follow-up. An employer may also conduct pre-employment alcohol testing.

(b) Each employer shall prohibit a covered employee, while having an alcohol concentration of 0.04 or greater, from performing or continuing to perform a safety-sensitive function.

§655.32 On duty use.

Each employer shall prohibit a covered employee from using alcohol while performing safety-sensitive functions. No employer having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

§655.33 Pre-duty use.

(a) General. Each employer shall prohibit a covered employee from using alcohol within 4 hours prior to performing safety-sensitive functions. No employer having actual knowledge that a covered employee has used alcohol within four hours of performing a safety-sensitive function shall permit the employee to perform or continue to perform safety-sensitive functions.

(b) On-call employees. An employer shall prohibit the consumption of alcohol for the specified on-call hours of each covered employee who is on-call. The procedure shall include:

(1) The opportunity for the covered employee to acknowledge the use of alcohol at the time he or she is called to report to duty and the inability to perform his or her safety-sensitive function.

(2) The requirement that the covered employee take an alcohol test, if the covered employee has acknowledged the use of alcohol, but claims ability to perform his or her safety-sensitive function.

§655.34 Use following an accident.

Each employer shall prohibit alcohol use by any covered employee required to take a post-accident alcohol test under §655.44 of subpart E for eight hours following the accident or until he or she undergoes a post-accident alcohol test, whichever occurs first.

§655.35 Other alcohol-related conduct.

(a) No employer shall permit a covered employee tested under the provisions of subpart E of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 to perform or continue to perform safety-sensitive functions, until:

(1) The employee's alcohol concentration measures less than 0.02; or

(2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against an employee based solely on test results showing an alcohol

concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

Subpart E - Types of Testing

§655.41 Pre-employment drug testing

(a) (1) Before allowing a covered employee or applicant to perform a safety-sensitive function for the first time, the employer must ensure that the employee takes a pre-employment drug test administered under this part with a verified negative result. An employer may not allow a covered employee, including an applicant, to perform a safety-sensitive function unless the employee takes a drug test administered under this part with a verified negative result.

(2) When a covered employee or applicant has previously failed or refused a pre-employment drug test administered under this part, the employee must provide the employer proof of having successfully completed a referral, evaluation and treatment plan as described in section 655.62 of subpart G.

(b) An employer may not transfer an employee from a nonsafety-sensitive function to a safety-sensitive function until the employee takes a pre-employment drug test administered under this part with a verified negative result.

(c) If a pre-employment drug test is canceled, the employer shall require the covered employee or applicant to take another pre-employment drug test administered under this part with a verified negative result.

(d) When a covered employee or applicant has not performed a safety-sensitive function for 90 consecutive calendar days regardless of the reason, and the employee has

not been in the employer's random selection pool during that time, the employer shall ensure that the employee takes a pre-employment drug test with a verified negative result.

§655.42 Pre-employment alcohol testing.

An employer may, but is not required to, conduct pre-employment alcohol testing under this part. If an employer chooses to conduct pre-employment alcohol testing, the employer must comply with the following requirements:

(a) The employer must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(b) The employer must treat all covered employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., you must not test some covered employees and not others).

(c) The employer must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(d) The employer must conduct all pre-employment alcohol tests using the alcohol testing procedures set forth in 49 CFR Part 40.

(e) The employer must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.02.

§655.43 Reasonable suspicion testing.

(a) An employer shall conduct a drug and/or alcohol test when the employer has reasonable suspicion to believe that the covered employee has used a prohibited drug and/or engaged in alcohol misuse.

(b) An employer's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee. A supervisor(s), or other company official(s) who is trained in detecting the signs and symptoms of drug use and alcohol misuse must make the required observations.

(c) Alcohol testing is authorized under this section only if the observations required by paragraph (b) of this section are made during, just preceding, or just after the period of the workday that the covered employee is required to be in compliance with this part. An employer may direct a covered employee to undergo reasonable suspicion testing for alcohol only while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(d) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (b) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (b) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record

the reasons for not administering the test.

§655.44 Post-accident testing.

(a) Accidents. (1) Fatal accidents. (i) As soon as practicable following an accident involving the loss of human life, an employer shall conduct drug and alcohol tests on each surviving covered employee operating the mass transit vehicle at the time of the accident. Post-accident drug and alcohol testing of the operator is not required under this section if the covered employee is tested under the fatal accident testing requirements of the Federal Motor Carrier Safety Administration rule 49 CFR 389.303(a)(1) or (b)(1).

(ii) The employer shall also drug and alcohol test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(2) Nonfatal accidents. (i) As soon as practicable following an accident not involving the loss of human life in which a mass transit vehicle is involved, the employer shall drug and alcohol test each covered employee operating the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident. The employer shall also drug and alcohol test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision

(ii) If an alcohol test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating

the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and maintain the record. Records shall be submitted to FTA upon request of the Administrator.

(b) An employer shall ensure that a covered employee required to be drug tested under this section is tested as soon as practicable but within 32 hours of the accident.

(c) A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or the employer representative of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing.

(d) The decision not to administer a drug and/or alcohol test under this section shall be based on the employer's determination, using the best available information at the time of the determination that the employee's performance could not have contributed to the accident. Such a decision must be documented in detail, including the decision-making process used to reach the decision not to test.

(e) Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(f) The results of a blood, urine, or breath test for the use of prohibited drugs or alcohol misuse, conducted by Federal, State, or local officials having independent

authority for the test, shall be considered to meet the requirements of this section provided such test conforms to the applicable Federal, State, or local testing requirements, and that the test results are obtained by the employer. Such test results may be used only when the employer is unable to perform a post-accident test within the required period noted in paragraphs (a) and (b) of this section

§655.45 Random testing.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees; the random alcohol testing rate shall be 10 percent. As provided in paragraph (b) of this section, this rate is subject to annual review by the Administrator.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug and alcohol testing is based, respectively, on the reported positive drug and alcohol violation rates for the entire industry. All information used for this determination is drawn from the drug and alcohol Management Information System (MIS) reports required by this part. In order to ensure reliability of the data, the Administrator shall consider the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry's verified positive results and violation rates. Each year, the Administrator will publish in the Federal Register the minimum annual percentage rates for random drug and alcohol testing of covered employees. The new minimum annual percentage rate for random drug and alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c) Rates for drug testing. (1) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of section 655.72 of subpart H for the two preceding consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(2) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of section 655.72 of subpart H for the calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug or random alcohol testing to 50 percent of all covered employees.

(d) Rates for alcohol testing.

(1) (i) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of section 655.72 of subpart H for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(ii) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of section 655.72 of subpart H for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(2) (i) When the minimum annual percentage rate for random alcohol testing is

10 percent, and the data received under the reporting requirements of section 655.72 of subpart H for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(ii) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of section 655.72 of subpart H for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The selection of employees for random drug and alcohol testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

(f) The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rates for random drug and alcohol testing determined by the Administrator. If the employer conducts random drug and alcohol testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random drug and alcohol testing at the same minimum

annual percentage rate under this part.

(g) Each employer shall ensure that random drug and alcohol tests conducted under this part are unannounced and unpredictable, and that the dates for administering random tests are spread reasonably throughout the calendar year. Random testing must be conducted at all times of day when safety-sensitive functions are performed.

(h) Each employer shall require that each covered employee who is notified of selection for random drug or random alcohol testing proceed to the test site immediately. If the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site immediately.

(i) A covered employee shall only be randomly tested for alcohol misuse while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions. A covered employee may be randomly tested for prohibited drug use anytime while on duty.

(j) If a given covered employee is subject to random drug and alcohol testing under the testing rules of more than one DOT agency for the same employer, the employee shall be subject to random drug and alcohol testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(k) If an employer is required to conduct random drug and alcohol testing under the drug and alcohol testing rules of more than one DOT agency, the employer may--

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

§655.46 Return to duty testing following refusal to submit to a test, verified positive drug test result and/or breath alcohol test result of 0.04 or greater.

Where a covered employee refuses to submit to a test, has a verified positive drug test result, and/or has a confirmed alcohol test result of 0.04 or greater, the employer, before returning the employee to duty to perform a safety-sensitive function, shall follow the procedures outlined in 49 CFR Part 40.

§655.47 Follow-up testing after returning to duty.

An employer shall conduct follow-up testing of each employee who returns to duty, as specified in 49 CFR Part 40, subpart O.

§655.48 Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04.

If an employer chooses to permit a covered employee to perform a safety-sensitive function within 8 hours of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04, the employer shall retest the covered employee to ensure compliance with the provisions of section 655.35 of subpart D. The covered employee may not perform safety-sensitive functions unless the confirmation alcohol test result is less than 0.02.

§655.49 Refusal to submit to a drug or alcohol test.

(a) Each employer shall require a covered employee to submit to a post-accident drug and alcohol test required under section 655.44 of this subpart, a random drug and alcohol test required under section 655.45 of this subpart, a reasonable suspicion drug and alcohol test required under section 655.43 of this subpart, or a follow-up drug and alcohol test required under section 655.47 of this subpart. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

(b) When an employee refuses to submit to a drug or alcohol test, the employer shall follow the procedures outlined in 49 CFR Part 40.

§655.50 [Reserved]

Subpart F - Drug and Alcohol Testing Procedures

§655.51 Compliance with testing procedures requirements.

The drug and alcohol testing procedures in 49 CFR Part 40 apply to employers covered by this part, and must be read together with this part, unless expressly provided otherwise in this part.

§655.52 Substance abuse professional (SAP).

The SAP must perform the functions in 49 CFR Part 40.

§655.53 Supervisor acting as collection site personnel.

An employer shall not permit an employee with direct or immediate supervisory responsibility or authority over another employee to serve as the urine collection person, breath alcohol technician, or saliva-testing technician for a drug or alcohol test of the employee.

§655.54 – §655.60 [Reserved]

Subpart G – Consequences

§655.61 Action when an employee has a verified positive drug test result or has a confirmed alcohol test result of 0.04 or greater, or refuses to submit to a test.

(a) (1) Immediately after receiving notice from a medical review officer (MRO) or a consortium/third party administrator (C/TPA) that a covered employee has a verified positive drug test result, the employer shall require that the covered employee cease performing a safety-sensitive function.

(2) Immediately after receiving notice from a Breath Alcohol Technician (BAT) that a covered employee has a confirmed alcohol test result of 0.04 or greater, the employer shall require that the covered employee cease performing a safety-sensitive function.

(3) If an employee refuses to submit to a drug or alcohol test required by this part, the employer shall require that the covered employee cease performing a safety-sensitive function.

(b) Before allowing the covered employee to resume performing a safety-sensitive function, the employer shall ensure the employee meets the requirements of 49 CFR Part 40 for returning to duty, including taking a return to duty drug and/or alcohol test.

§655.62 Referral, evaluation, and treatment.

(a) If a covered employee has a verified positive drug test result, or has a confirmed alcohol test of 0.04 or greater, or refuses to submit to a drug or alcohol test required by this part, the employer shall advise the employee of the resources available

for evaluating and resolving problems associated with prohibited drug use and alcohol misuse, including the names, addresses, and telephone numbers of substance abuse professionals (SAPs) and counseling and treatment programs.

§655.63 – §655.70 [Reserved]

Subpart H - Administrative Requirements

§655. 71 Retention of records.

(a) General requirement. An employer shall maintain records of its anti-drug and alcohol misuse program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) Period of retention. In determining compliance with the retention period requirement, each record shall be maintained for the specified minimum period of time as measured from the date of the creation of the record. Each employer shall maintain the records in accordance with the following schedule:

(1) Five years. Records of covered employee verified positive drug or alcohol test results, documentation of refusals to take required drug or alcohol tests, and covered employee referrals to the substance abuse professional, and copies of annual MIS reports submitted to FTA.

(2) Two years. Records related to the collection process and employee training.

(3) One year. Records of negative drug or alcohol test results.

(c) Types of records. The following specific records must be maintained:

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion drug or alcohol tests.

(iv) Documents generated in connection with decisions on post-accident drug and alcohol testing.

(v) MRO documents verifying existence of a medical explanation of the inability of a covered employee to provide an adequate urine or breathe sample.

(2) Records related to test results:

(i) The employer's copy of the custody and control form.

(ii) Documents related to the refusal of any covered employee to submit to a test required by this part.

(iii) Documents presented by a covered employee to dispute the result of a test administered under this part.

(3) Records related to referral and return to duty and follow-up testing: Records concerning a covered employee's entry into and completion of the treatment program recommended by the substance abuse professional.

(4) Records related to employee training:

(i) Training materials on drug use awareness and alcohol misuse, including a copy of the employer's policy on prohibited drug use and alcohol misuse.

(ii) Names of covered employees attending training on prohibited drug use and alcohol misuse and the dates and times of such training.

(iii) Documentation of training provided to supervisors for the purpose of

qualifying the supervisors to make a determination concerning the need for drug and alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

(5) Copies of annual MIS reports submitted to FTA.

§655.72 Reporting of results in a management information system

(a) Each recipient shall annually prepare and maintain a summary of the results of its anti-drug and alcohol misuse testing programs performed under this part during the previous calendar year.

(b) When requested by FTA, each recipient shall submit to FTA's Office of Safety and Security, or its designated agent, by March 15, a report covering the previous calendar year (January 1 through December 31) summarizing the results of its anti-drug and alcohol misuse programs.

(c) Each recipient shall be responsible for ensuring the accuracy and timeliness of each report submitted by an employer, contractor, consortium or joint enterprise or by a third party service provider acting on the recipient's or employer's behalf.

(d) Drug use information: Long Form. Each report that contains information on verified positive drug test results shall be submitted on the FTA Drug Testing Management Information System (MIS) Data Collection Form (Appendix A of this part) and shall include the following informational elements:

(1) Number of FTA covered employees by employee category.

(2) Number of covered employees subject to testing under the anti-drug

regulations of the other DOT operating administrations subject to 49 CFR Part 40.

(3) Number of specimens collected by type of test (i.e., pre-employment, follow-up, random, etc.) and employee category.

(4) Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug, and employee category.

(5) Number of negatives verified by an MRO by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a verified positive drug test.

(7) Number of covered employees verified positive by an MRO or who refused to submit to a drug test, who were returned to duty in covered positions during the reporting period (having complied with the recommendations of a substance abuse professional as described in §655.61).

(8) Number of employees with tests verified positive by an MRO for multiple drugs.

(9) Number of covered employees who were administered drug and alcohol tests at the same time, with both a verified positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(10) Number of covered employees who refused to submit to a random drug test required under this part.

(11) Number of covered employees who refused to submit to a non-random drug test required under this part.

(12) Number of covered employees and supervisors who received training during the reporting period.

(13) Number of fatal and nonfatal accidents which resulted in a verified positive post-accident drug test.

(14) Number of fatalities resulting from accidents which resulted in a verified positive post-accident drug test.

(15) Identification of FTA funding source(s).

(e) Drug Use Information: Short Form. If all drug test results were negative during the reporting period, the employer must use the "EZ form" (Appendix B of this part). It shall contain:

(1) Number of FTA covered employees.

(2) Number of covered employees subject to testing under the anti-drug regulation of the other DOT operating administrations subject to 49 CFR Part 40.

(3) Number of specimens collected and verified negative by type of test and employee category.

(4) Number of covered employees verified positive by an MRO or who refused to submit to a drug test prior to the reporting period and who were returned to duty in covered positions during the reporting period (having complied with the recommendations of a substance abuse professional as described in §655.62).

(5) Number of covered employees who refused to submit to a non-random drug test required under this part.

(6) Number of covered employees and supervisors who received training during the reporting period.

(7) Identification of FTA funding source(s).

(f) Alcohol misuse information: Long Form. Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of this part shall be submitted on the FTA Alcohol Testing Management (MIS) Data Collection Form (Appendix C of this part) and shall include the following informational elements:

(1) Number of FTA covered employees by employee category.

(2) (i) Number of screening tests by type of test and employee category.

(ii) Number of confirmed tests, by type of test and employee category.

(3) Number of confirmed alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04, by type of test and employee category.

(4) Number of confirmed alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test and employee category.

(5) Number of covered employees with a confirmed alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in covered positions during the reporting period (having complied with the recommendation of a substance abuse professional as described in §655.61).

(6) Number of fatal and nonfatal accidents which resulted in a confirmed post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.

(7) Number of fatalities resulting from accidents which resulted in a confirmed

post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.

(8) Number of covered employees who were found to have violated other provisions of subpart B of this part and the action taken in response to the violation.

(9) Number of covered employees who were administered alcohol and drug tests at the same time, with a positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(10) Number of covered employees who refused to submit to a random alcohol test required under this part.

(11) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(12) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

(13) Identification of FTA funding source(s).

(g) Alcohol Misuse Information: Short Form. If an employer has no screening test results of 0.02 or greater and no violations of the alcohol misuse provisions of this part, the employer must use the "EZ" form (Appendix D of this part). It shall contain: (This report may only be submitted if the program results meet these criteria.)

(1) Number of FTA covered employees.

(2) Number of alcohol tests conducted with results less than 0.02 by type of test and employee category.

(3) Number of employees with confirmed alcohol test results indicating an alcohol concentration of 0.04 or greater prior to the reporting period and who were

returned to duty in a covered position during the reporting period.

(4) Number of covered employees who refused to submit to a random alcohol test required under this part.

(5) Number of supervisors who have received training in determining the existence of reasonable suspicion of alcohol misuse during the reporting period.

(6) Identification of FTA funding source(s).

§655.73 Access to facilities and records

(a) Except as required by law, or expressly authorized or required in this section, no employer may release information pertaining to a covered employee that is contained in records required to be maintained by §655.71 of this subpart.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the covered employee's use of prohibited drugs or misuse of alcohol, including any records pertaining to his or her drug or alcohol tests. The employer shall provide promptly the records requested by the employee. Access to a covered employee's records shall not be contingent upon the employer's receipt of payment for the production of those records.

(c) An employer shall permit access to all facilities utilized and records compiled in complying with the requirements of this part to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its employees or to a State oversight agency authorized to oversee rail fixed guideway systems.

(d) An employer shall disclose data for its drug and alcohol testing programs, and any other information pertaining to the employer's anti-drug and alcohol misuse programs

required to be maintained by this part, to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee or to a State oversight agency authorized to oversee rail fixed guideway systems, upon the Secretary's request or the respective agency's request.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's drug or alcohol testing related to the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of a written request from the covered employee. Subsequent disclosure by the employer is permitted only as expressly authorized by the terms of the covered employee's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of a drug or alcohol test under this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the covered employee.)

(h) An employer shall release information regarding a covered employee's record as directed by the specific, written consent of the employee authorizing release of the information to an identified person.

(i) An employer may disclose drug and alcohol testing information required to be maintained under this part, pertaining to a covered employee, to the State oversight agency or grantee required to certify to FTA compliance with the drug and alcohol

testing procedures of 49 CFR Parts 40 and 655.

Subpart I - Certifying Compliance

§655.81 Grantee oversight responsibility

A grantee shall ensure that the recipients of funds under 49 U.S.C. 5307, 5309, 5311 or 23 U.S.C. 103(e)(4) comply with this part.

§655.82 Compliance as a condition of financial assistance.

(a) General. A recipient may not be eligible for Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311 or under 23 U.S.C. 103(e)(4), if a recipient fails to establish and implement an anti-drug and alcohol misuse program as required by this part. Failure to certify compliance with these requirements, as specified in §655.83, may result in the suspension of a grantee's eligibility for Federal funding.

(b) Criminal violation. A recipient is subject to criminal sanctions and fines for false statements or misrepresentations under 18 U.S.C. 1001.

(c) State's role. Each State shall certify compliance on behalf of its 49 U.S.C. 5307, 5309, 5311 or 23 U.S.C. 103(e)(4) subrecipients, as applicable. In so certifying, the State shall ensure that each subrecipient is complying with the requirements of this part. A section 5307, 5309, 5311 or 103(e)(4) subrecipient, through the administering State, is subject to suspension of funding from the State if such subrecipient is not in compliance with this part.

§655.83 Requirement to certify compliance

(a) A recipient of FTA financial assistance shall annually certify compliance, as set forth in §655.82, to the applicable FTA Regional Office.

(b) A certification must be authorized by the organization's governing board or other authorizing official, and must be signed by a party specifically authorized to do so.

(c) A recipient will be ineligible for further FTA financial assistance if the recipient fails to establish and implement an anti-drug and alcohol misuse program in accordance with this part.

Issued on:

Jennifer L. Dorn
Administrator
Federal Transit Administration

Drug-Free Workplace Act

OFFICE OF MANAGEMENT AND BUDGET

Governmentwide Implementation of the Drug-Free Workplace Act of 1988

AGENCY: Office of Management and Budget.

ACTION: Notice.

SUMMARY: This Notice provides information, in the form of nonbinding questions and answers, to assist the public in meeting the requirements of the Drug-Free Workplace Act of 1988. The Office of Management and Budget (OMB) coordinated regulatory development with over 30 Federal agencies to ensure uniform, governmentwide implementation of this Act. As a consequence, OMB is offering this governmentwide non-regulatory guidance.

Part of the omnibus drug legislation enacted November 18, 1988 is the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, title V, subtitle D). This statute requires contractors and grantees of Federal agencies to certify that they will provide drug-free workplaces. Making the required certification is a precondition of receiving a contract or grant from a Federal agency after March 18, 1989.

Regulatory requirements pertaining to contractors are detailed in a final rule appearing in today's **Federal Register** This rule amends the Federal Acquisition Regulation (FAR). Regulatory requirements pertaining to grantees are detailed in a final common rule also appearing in today's **Federal Register**. The preamble to the grantee common rule answers questions pertaining to grants or to contracts-and-grants, but does not address questions pertaining only to contracts.

FOR FURTHER INFORMATION CONTACT: For grants, contact Barbara F. Kahlow, Financial Management Division, OMB, (telephone 202-395-3053). For contracts, contact Robert Neal, Office of Federal Procurement Policy, OMB, (telephone 202-395-6810).

SUPPLEMENTARY INFORMATION:

Response to Questions

See the common preamble to the grantee final common rule for detailed response to most questions on requirements on contractors and grantees.

1. Question—What is a minimum set of components for an employer program to meet the requirements of the Drug-Free Workplace Act?

Answer—Each employer must meet the specific requirements of the Act with a good faith effort, including having a policy statement and a drug awareness program. Neither the law nor the final rules require employers to establish an Employee Assistance Program (EAP), to conduct any drug testing, or to incorporate any particular component in an employer's program.

2. Question—What are examples of other possible components of an employer drug-free workplace program for contractors and grantees?

Answer—Here is a partial list of other possible components of an employer program. The list is provided for information only; there is no intention for the Federal Government to require any particular component.

Employee Education

- Conduct education/outreach of employees/families via:

—Discussion groups on drug abuse/company policy
—Videotapes/pamphlets on drugs in workplace
—Brown bag lunch discussions
—Communication of available employee assistance
—Communication of available health benefits for drug/alcohol treatment

Employee Assistance

- Establish an EAP
- Identify treatment resources
- Assemble resource file on providers of assistance
- Provide problem assessments
- Provide confidential counselling
- Provide referral to counselling and/or treatment
- Provide crisis intervention
- Establish hot-line
- Provide family support services
- Conduct followup during and after treatment
- Conduct evaluation of job performance pre- and post-program contact
- Review insurance coverage (to include outpatient as well as inpatient treatment)
- Institute mechanism to review employee complaints

Supervisory Training

- Conduct management/supervisory/union training on:

—Drug Abuse education
—Signs and symptoms of drug use
—Company policy on drug use
—Employee assistance resources
—How to deal with an employee suspected of drug use
—How and when to take disciplinary action

Drug Detection

- Institute a program of drug testing of:

—All employees—testing of applicants or pre-employment; testing of employees based on reasonable suspicion, post accident, during and after counselling and/or rehabilitation
—Employees in health and safety or national security sensitive positions—random unannounced testing

- Increase security

3. Question—What are examples of some model drug-free workplace programs?

Answer—Both the Department of Health and Human Services' National Institute on Drug Abuse (NIDA) and the U.S. Chamber of Commerce have identified several model programs. For further information on these or other models or on programs to combat drug abuse in the workplace, call the NIDA toll-free employer help-line on: 800-843-4971. NIDA also has a clearinghouse for general information on controlling alcohol and drug abuse. That number is 301-468-2600. The address of the National Clearinghouse for Alcohol and Drug Information is Box 2345, Rockville, MD 20852. Currently, the Federal Government does not have an example of a model program for a small employer.

Examples include the following:

A large chemical company—EAP contracted out, including: seminars, assessment, short-term counselling and referral, supervisory training, and followup monitoring; some local sites have drug testing for cause, post accident, and for safety-critical jobs.

A large automotive manufacturing company—EAP contracted out, including: crisis intervention and treatment for employees and immediate family, counselling, referral to counselors/therapists or inpatient/outpatient treatment; hotline; considering drug testing.

A major contractor—EAP for employees and their dependents, including: education, counselling, assessment, referral; hotline; management/supervisory training; alcohol/drug testing of applicants; alcohol/drug testing of employees based on reasonable suspicion or for cause; preventive alcohol/drug testing of corporate officers, employees in safety-sensitive or security-sensitive positions; inspections; trained dogs.

A mid-sized electrical company—EAP including counselling and management/supervisory training, drug testing of applicants and of employees for cause.

4. Question—Is the retail purchase of utility services by the Federal Government covered by the FAR and, therefore, subject to the Act?

Answer—Yes. Federal purchases of utility services are covered under subpart 8.3 of the FAR.

5. Question—Is an order issued pursuant to a basic ordering agreement covered by the FAR and, therefore, subject to the Act?

Answer—Yes. Basic ordering agreements are covered under subpart 16.7 of the FAR. Orders exceeding $25,000 issued under basic ordering agreements are subject to the Act.

6. Question—What are examples of Federal contracts that are not "procurement contracts"?

Answer—Contracts not covered by the FAR, e.g., any other acquisition contract for real or personal property or services not subject to the FAR. An example is contracts for obtaining goods and services for post exchanges on military bases.

7. Question—Are oil and gas leases with the Federal Government covered by the FAR?

Answer—No. These types of contracts are not covered under the FAR.

8. Question—Are contracts to buy timber from the Federal Government covered by the FAR?

Answer—No. These types of contracts are not covered by the FAR.

9. Question—Are FSLIC and FDIC contracts for deposit insurance covered by the FAR?

Answer—No. These types of contracts are not covered by the FAR.

10. Question—Does selling U.S. savings bonds or acting as a depository for the Department of the Treasury constitute a procurement contract?

Answer—No.

11. Question—Is the receipt of funds by an individual pursuant to an imprest fund transaction covered by the FAR?

Answer—Yes; however, the Act is not applicable because imprest fund transactions do not exceed the $25,000 threshold.

12. Question—Is an order issued against a requirements contract or an indefinite quantity contract covered by the Drug-Free Workplace Act when the order is reasonably expected to exceed $25,000?

Answer—Yes.

13. Question—If a single firm has several contracts that when added together total $25,000 or more, is the firm subject to the Act?

Answer—No. A firm would be subject to the Act only if the value of a single contract is $25,000 or more.

14. Question—Does the FAR, which is issued jointly by three agencies (the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration), apply to contract awards by other executive agencies?

Answer—Yes.

15. Question—Do Drug-Free Workplace Act requirements apply to subcontracts?

Answer—No.

16. Question—Under the Act, can an agency impose any additional requirements, beyond those in the common rule, on grantees?

Answer—No. Both the January 31, 1989, grantee interim final common rule and the grantee final common rule indicate that the grantee common rule is the sole authority for implementing the Act and that no separate agency guidance is authorized under the Act.

17. Question—What is section 5301 of the omnibus drug legislation and how will it be implemented?

Answer—Section 5301 of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4310 (codified at 21 U.S.C. section 853a) is another, separate part of the omnibus drug legislation that included the Drug-Free Workplace Act of 1988. Section 5301 deals with denial of certain Federal benefits for persons convicted of drug offenses. Denial decisions are made by Federal and State judges. The Department of Justice will be directing implementation. Questions should be addressed to: Director, Drug Offense/Denial of Federal Benefits Project, Office of Justice Programs, Department of Justice, 633 Indiana Avenue, NW., Washington, DC 20531; telephone: 202-307-0630.

18. Question—How will the Drug-Free Workplace Act be enforced?

Answer—Under the Act, certifications are required from contractors and grantees. Also, as part of normal Federal contract and grant administration, compliance will be checked. Additionally, as part of normal Federal auditing, compliance will be checked. And, lastly, as part of grantees' Single Audits, compliance checking will be required. OMB's compliance supplements for State and local governments and for other entities will include a requirement for such compliance checking.

Dated: May 20, 1990.

Frank Hodsoll,

Executive Associate Director.

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Department of Agriculture

7 CFR PART 3017

Department of Energy

10 CFR PART 1036

Small Business Administration

13 CFR PART 145

National Aeronautics and Space Administration

14 CFR PART 1265

Department of Commerce

15 CFR PART 26

Department of State

22 CFR PART 137

International Development Cooperation Agency

Agency for International Development

22 CFR PART 208

Peace Corps

22 CFR PART 310

United States Information Agency

22 CFR PART 513

Inter-American Foundation

22 CFR PART 1006

African Development Foundation

22 CFR PART 1508

Department of Housing and Urban Development

24 CFR PART 24

Department of Justice

28 CFR PART 67

Department of Labor

29 CFR PART 98

Federal Mediation and Conciliation Service

29 CFR PART 1471

Department of the Treasury

31 CFR PART 19

Department of Defense

32 CFR PART 280

Department of Education

34 CFR PART 85

National Archives and Records Administration

36 CFR PART 1209

Department of Veterans Affairs

38 CFR PART 44

Environmental Protection Agency

40 CFR PART 32

General Services Administration

41 CFR PART 105-68

Department of the Interior

43 CFR PART 12

Federal Emergency Management Agency

44 CFR PART 17

Department of Health and Human Services

45 CFR PART 76

National Science Foundation

45 CFR PART 620

National Foundation on the Arts and the Humanities

National Endowment for the Arts

45 CFR PART 1154

National Endowment for the Humanities

45 CFR PART 1169

Institute of Museum Services

45 CFR PART 1185

ACTION

45 CFR PART 1229

Commission on the Bicentennial of the United States Constitution

45 CFR PART 2016

Department of Transportation

49 CFR PART 29

Government-Wide Requirements for Drug-Free Workplace (Grants)

AGENCIES: Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of the Treasury, Department of Veterans Affairs, ACTION, African Development Foundation, Agency for International Development, Commission on the Bicentennial of the United States Constitution, Environmental Protection Agency, Federal Emergency Management Agency, Federal Mediation and Conciliation Service, General Services Administration, Institute of Museum Services, Inter-American Foundation, National Aeronautics and Space Administration, National Archives and Records Administration, National Endowment for the Arts, National Endowment for the Humanities, National Science Foundation, Peace Corps, Small Business Administration, United States Information Agency.

ACTION: Final rule.

SUMMARY: The Drug-Free Workplace Act of 1988 requires that all grantees receiving grants from any Federal agency certify to that agency that they will maintain a drug-free workplace, or, in the case of a grantee who is an individual, certify to the agency that his or her conduct of grant activity will be drug-free. This government-wide rule is for the purpose of implementing the statutory requirements. It directs that grantees take steps to provide a drug-free workplace in accordance with the Act. The rule amends an interim final rule published January 31, 1989, in response to public comment.

DATES: This rule is effective July 24, 1990, except for the certification requirement of § _____.630 (c) and (d) for States and State agencies which is effective June 25, 1990. Compliance is authorized immediately. However, the Department of Education is required to submit the final rule to Congress for review. See Education's agency-specific preamble below.

FOR FURTHER INFORMATION CONTACT: See agency-specific preambles for the contact person for each agency.

SUPPLEMENTARY INFORMATION: As part of the omnibus drug legislation enacted November 18, 1988, Congress passed the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 *et seq.*). This statute requires contractors and grantees of Federal agencies to certify that they will provide drug-free workplaces; or, in the case of a grantee who is an individual, certify to the agency that his or her conduct of the grant will be drug-free. Making the required certification is a precondition for receiving a contract or grant from a Federal agency.

The Federal agencies published an interim final rule on this subject January

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31, 1989 (53 FR 4946), requesting public comments on it. The requirements of the interim final rule became applicable on March 18, 1989. The agencies received 95 comments, which they have reviewed. The responses to the comments are discussed below.

Drug-free workplace requirements pertaining to contractors will be found in a separate final rule amending the Federal Acquisition Regulation (FAR; 48 CFR subparts 9.4, 23.5, and 52.2). This government-wide common rulemaking concerns only grants (including cooperative agreements). This common rule will be the sole authority for implementing the Act, i.e., there will be no separate agency guidance issued. Because the statute makes use of existing suspension and debarment remedies for noncompliance with drug-free workplace requirements, the agencies have determined to implement the statute through an amendment to the existing government-wide nonprocurement suspension and debarment common rule. Using this vehicle will allow the agencies to take advantage of existing administrative procedures and definitions, minimizing regulatory duplication.

Section-By-Section Analysis

This portion of the preamble discusses the amendments made by this rule to the interim final government-wide drug-free workplace common rule as published on January 31, 1989. This section-by-section analysis does not attempt to describe the entire drug-free workplace rule, only those portions added or changed by this final rule.

Section ____.605 Definitions

In the definition of "controlled substance," citations to regulations implementing the Controlled Substances Act have been corrected to refer to 21 CFR part 1308.

The definition of "employee" has been made more specific. An employee now includes all "direct charge" employees (i.e., those whose services are directly and explicitly paid for by grant funds) and "indirect charge" employees (i.e., those members of the grantee's organization who perform support or overhead functions related to the grant and for which the Federal Government pays its share of expenses under the grant program). (The terms "direct charge and indirect charge" come from cost principles in OMB Circular A-21, A-87, and A-122). Among indirect charge employees, those whose impact or involvement is insignificant to the performance of the grant are exempted from coverage.

Any other person who is on the grantee's payroll and works in any activity under the grant, even if not paid from grant funds, is also considered to be an employee. Temporary personnel and consultants who are on the grantee's payroll are covered. Similar workers who are not on the grantee's own payroll (e.g., who are on the payroll of contractors working for the grantee) are not covered, even if their physical place of employment is in the grantee's covered workplace. Likewise, volunteers, even if used to help meet a matching requirement, are not employees for purposes of this rule.

In the definition of "grant," editorial changes to the reference to the common rule on grants management were made. The definition of "grantee" specifies that a Federal agency that received a grant from another Federal agency is not considered a grantee for purposes of this rule. For convenience of parties that may use this rule but not the entire nonprocurement suspension and debarment rule, the definition of "State" from the suspension and debarment rule is repeated in this section. It emphasizes that State-supported institutions of higher education are not considered part of a "State" for purposes of the rule.

Section ____.610 Coverage

Paragraph (b) of this section now provides that the agency head or his/her designee can determine that the application of this rule should be negated on the basis of inconsistency with U.S. international obligations or foreign law.

Section ____.615 Grounds for Suspension of Payments, Suspension or Termination of Grants, or Suspension or Debarment

Since grants are often made to individuals (e.g., Pell Grants), a new paragraph (c) has been added to this section to specify the conduct by an individual grantee that constitutes a violation of the rule. (There is no similar provision in the drug-free workplace rule for contracting.) This conduct includes failing to carry out the requirements of the individual grantee's certification (e.g., by unlawful possession or use of a controlled substance during the conduct of any grant activity) or conviction of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity. The sanctions, set forth in § ____.620, are the same as for other grantees. Paragraph (a), now limited to making a false certification, applies both to individual and other grantees. The former subparagraphs (b) and (c), which concern grantees other than individuals, are now subparagraphs (1) and (2) of a new paragraph (b) concerning grantees other than individuals.

Section ____.630 Certification Requirements and Procedures

This new section replaces the former § ____.630 (Grantees' responsibilities) in its entirety. Paragraph (a) states the general rule that grantees must make the appropriate drug-free workplace certification as a prior condition to being awarded a grant. They need not do so, however, for a grant awarded before March 18, 1989, or under a no-cost time extension for such a grant. If there is a non-automatic continuation of such a grant that occurs after March 18, 1989, a one time certification is necessary. Non-automatic continuations are equivalent to competing continuations for many agencies.

As provided in paragraph (b), grantees must make the required certification for each grant as part of the grant application or if there is no application, prior to award. (For mandatory formula grants and entitlements with no application process, a one-time certification is needed to continue receiving awards.)

Paragraph (c) provides an opportunity for grantees that are States to make the certification to each Federal agency on an annual (Federal fiscal year) basis starting in Fiscal Year 1990, rather than on a grant-by-grant basis. Except as provided in paragraph (d), an annual State certification must cover all Federal agency grants to all State agencies. The original certification must be retained in the Governor's office. A copy must be sent with each grant to each Federal agency providing a grant to the State. A Federal agency may designate a central location for submission. For States that previously submitted an annual certification, statewide certification for Fiscal Year 1990 is required to be provided to Federal agencies no later than June 30, 1990.

Paragraph (d) establishes a variation on the statewide annual certification procedure of paragraph (c). Under this variation, the Governor may exclude certain State agencies from the statewide certification. Such certification would identify the excluded agencies. Each of the excluded agencies would then have the option to submit a single State agency certification to each Federal grant agency covering a Federal fiscal year. A State agency could also submit a single State agency certification in a case where there is no statewide certification. Otherwise, State

agencies will have to submit grant-by-grant certifications.

The original State agency certification is retained in the State agency's central office; a copy is submitted with each grant, unless the Federal agency has designated a central location for submission. The State agency certification is deemed to apply to all State agencies involved with the grant. If State agency X receives the grant, and part of the work is subgranted or subcontracted out to State agency Y, the workplaces and employees of the latter, as well as those of the former, are covered by the certification.

Paragraph (e) concerns the question of when the drug-free workplace policy statement and program promised in the certification must actually be in place. The certification promises that the policy statement and program will be in effect in the future; they do not need to be in place at the time of award. For a grant of 30 days or less in duration of performance, they must be in place as soon as possible, but in any case before performance is expected to be completed. For a grant of over 30 days in duration of performance, they must be in effect within 30 days of award. An agency may set a different compliance date where extraordinary circumstances warrant for a specific grant.

Section ____.635 Reporting and Employee Sanctions for Convictions of Criminal Drug Offenses

This new section concerns requirements of employers and grantees who are individuals to report criminal drug offense convictions and the actions that employers are required to take concerning employees who are convicted of a criminal drug offense occurring in the workplace.

When a grantee other than an individual is notified by an employee, or learns from another source, that the employee has been convicted of a criminal drug offense occurring in the workplace, the grantee must provide, within 10 calendar days, a written notice of the conviction (including the employee's position title and grant identification number(s)) to the appropriate person or office in the Federal agency for each grant on which the convicted employee was working.

As with certifications, it is up to each Federal agency whether such reports are made to each grant officer or other official or to a central point in the agency. A grantee who is an individual who is convicted of a criminal drug offense while conducting grant activity must also make a written report of the conviction within 10 calendar days to the appropriate Federal agency official or office. Sanctions for the individual grantee are as provided in § ____.620.

When a grantee is notified that an employee has been convicted of a criminal drug offense for a violation occurring in the workplace, the grantee has 30 calendar days to take appropriate action. One type of action would be to require the employee to participate satisfactorily in an approved drug abuse assistance or rehabilitation program. Alternatively, the employer would take appropriate personnel action against the employee, up to and including termination. Terminating the employee is not mandatory under the rule; less stringent disciplinary action is permitted.

Whatever personnel action is taken must be consistent with section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794). This statute prohibits discrimination on the basis of handicap in programs receiving Federal financial assistance. As a general matter, a person may be a handicapped person protected by the Act on the basis of a "physical or mental impairment" that substantially limits a major life activity, such as working, including drug addiction or alcoholism (*see* for example 43 Op. Atty. Gen. 12 (1977), Department of Transportation rules at 49 CFR 27.5).

Under case law interpreting the Rehabilitation Act, a recovering substance abuser who is rehabilitated or undergoing rehabilitation would fall within the definition of a handicapped individual. It should be pointed out, however, that under the Rehabilitation Act (29 U.S.C. 706(7)(B)), the definition of a handicapped individual, for purposes of employment, does not include someone

whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Appendix C

Instructions

This rule adds three new paragraphs to the instructions for the certification for grantees other than individuals. Paragraph eight repeats certain key definitions from the regulation (controlled substance, conviction, criminal drug statute, and employee) for the convenience of grantees. Paragraphs five, six and seven relate to the identification of workplaces. Federal agencies, in order to audit grantee compliance, must have access to the addresses or locations of workplaces to which drug-free workplace requirements apply. Consequently, grantees must identify workplaces in one of three ways: (1) On the certification document, (2) on the grant application or in signing the award if there is no application, or (3) in a document kept on file and available for inspection by Federal agencies. The choice among these options is the grantee's. The identifications must include the street address or location of the workplace, where work will take place at a specific site or sites. In other situations, it may be necessary to use a categorical identification instead. For example, a mass transit authority could identify covered workplaces as including all buses and subway trains while in operation.

Certification for Grantees Other Than Individuals

Paragraph A(b) of this certification has been amended to specify that the grantee's drug-free awareness program must be an "ongoing" program. This means that this program cannot be a one-time effort at the outset of the grant, but must continue throughout the life of the grant. In addition to editorial changes, paragraphs (A) (d), (e) and (f) have been amended to specify that notices must be provided in writing and that deadlines are determined in calendar days. Reference to the notification requirement of § ____.635(a)(1) has been added to paragraph A(e) and a reference to the Rehabilitation Act has been added to paragraph A(f)(1). Finally, paragraph B now says that the grantee "may" submit workplace identifications in the certification; the grantee, as explained in the instructions, may also do so at the time of grant application (or the time of award, if there is no application) or may keep the identifications on file.

Certification for Grantees Who Are Individuals

A new paragraph (b) has been added, incorporating the notice requirement of § ____.635(b).

Response to Comments

The following portion of the preamble lists the issues raised by public comments to the docket for the January 31, 1989, interim final rule. The statement of each issue is followed by the agencies' response.

The Certification Process

1. All grantees (not just States) should be allowed to certify on an annual basis, rather than on a grant-by-grant basis.

Response: Under principles of Federalism, States occupy a special

position in the Federal system. Moreover, States and State agencies receive substantial funding under many Federal programs, and have many continuing grant program relationships with Federal agencies. State governments are well situated to make comprehensive certifications for their State agencies. The Federal agencies have determined that annual certifications make sense as an option for the States. It is far less clear that such a system would be appropriate for other grantees. It should be noted that State-supported institutions of higher education are not considered to be "States" or State agencies for this or other purposes under the regulation. This means, for example, that a university could not submit a one-time certification for itself or for a particular agency or the entire State government.

2. The certification options available to grantees should be clarified.

Response: Section _____.630 of the common rule now provides that grantees shall make the required certification for each grant at the time of initial grant application or before award if there is no application. States may make a one-time annual certification; State agencies not covered by an annual statewide certification may make a one-time annual State agency-wide certification. However, a photocopy of the statewide or State agency-wide certification must accompany each grant, unless the Federal agency has established a central point for receiving certifications.

3. Add relevant definitions to the certification.

Response: Definitions of key terms, including controlled substance, conviction, criminal drug statute, and employee have been added to the certification. The definition of a controlled substance includes Schedule I-V substances under the Controlled Substances Act.

4. Work sites should not have to be identified in each certification, in order to reduce administrative burdens.

Response: The purpose of identification of work sites is to enable Federal agencies to determine whether grantees are complying with the regulation. To reduce administrative burdens, the revised rule allows grantees to choose whether to list work sites on the certification, in the grant application or award, or in a file maintained by the grantee available for Federal inspection.

5. Clarify that certification Alternate I is for grantees other than individuals and that Alternate II is for individuals.

Response: The titles of Alternates I and II now explicitly provide that they are for grantees other than individuals and for grantees who are individuals, respectively.

6. Conditional certifications should be allowed.

Response: The Drug-Free Workplace Act does not allow for conditional certification. All grantees must certify that they will have a drug-free workplace.

7. Certifications should not be required for students in general, and recipients of Pell Grants in particular.

Response: The statute does not provide a basis on which student grantees can be exempted from the requirement that all grantees, including individuals, make a drug-free workplace certification. Making this certification will not add a significant burden to the student grant application process, and it is consistent with the intent of Congress that students, like other grantees, maintain a drug-free workplace.

8. Clarify whether certifications are needed for changes or modifications to grants awarded before March 18, 1989.

Response: In the case of a grant awarded prior to March 18, 1989, a certification is required only when there is a nonautomatic continuation award made after that date. That certification will be in effect through the end of the project period.

Scope of the Regulation

1. Requirements should not apply to local school districts or other educational organizations.

Response: The statute does not provide a basis on which school districts or other education-related grantees can be exempted from the requirements of the regulations.

2. Clarify whether any type of entity (e.g., banks, hospitals, institutions of higher education, local governments, utilities) is exempt from drug-free workplace requirements. What kind of grants do banks get that would be subject to these requirements?

Response: There are no exemptions for any type of organization. Banks may be more likely to get contracts (e.g., for debt collection, tax collection, or financial management services) than grants. Nevertheless, should a bank receive a grant, it would be subject to grant-related drug-free workplace requirements, whether or not it was also subject to these requirements as the result of having a contract with a Federal agency.

3. Clarify whether grants from such agencies as the U.S. Postal Service (USPS), the Tennessee Valley Authority (TVA), and the Legal Services Corporation (LSC) trigger drug-free workplace requirements.

Response: Grants from TVA would do so; grants from USPS and LSC would not, because they are not executive branch agencies.

4. Clarify whether drug-free workplace requirements apply to subgrantees or contractors under grants, or to employees of contractors who work in a grantee's workplace.

Response: These requirements do not apply to subgrantees or contractors under grants, since the statute covers only parties who get grants directly from a Federal agency. For example, if a Federal agency provides grant funds to a State government, which in turn passes some of these funds to a local government, the State government is covered by these regulations and the local government is not. Employees of a subgrantee or contractor under a grant are not covered by the regulation, even if they work in a grantee's workplace. Of course, these rules do not preclude a grantee, acting on its own independent authority, from imposing additional requirements on subrecipients or contractors.

5. Clarify whether the receipt of free or subsidized space or utilities from a Federal agency is a grant subjecting the recipient to coverage under the regulation.

Response: Receipt of space or utilities (e.g., space used by enterprises operated by blind persons in Federal facilities) is not a grant subject to these regulations.

Drug-Free Policy Statement and Awareness Program

1. Grantees' drug-free awareness programs should be ongoing, not a one-time affair. Clarify whether employees need to be notified only once as part of the drug-free awareness program or with each grant.

Response: It is the intent of the regulations that the grantee's policy and program be a continuing effort. For clarity on this point, the regulation has been amended to specify that the grantee's program must be "ongoing." Consequently, while there is not a requirement that a grantee notify employees about their responsibilities each time a new grant is received, as such, the grantee's ongoing program must ensure that employees remain aware of their continuing responsibilities.

2. Clarify whether alcohol and nonprescription drug abuse must be a part of programs under this regulation.

Response: While grantees may include these subjects in their programs

at their own discretion, this regulation does not require their inclusion. For grantees' information, it is not essential to use the term "controlled substances" in the policy statement or program.

3. Clarify what responsibility employees or grantees have for reporting the use of controlled substances consistent with a legal prescription.

Response: Since the reporting requirements of the regulations pertain only to convictions for the unlawful use, possession, etc., of drugs occurring in the workplace, there is no reporting requirement in this situation.

4. The agencies should provide additional guidance or models for policy statements and drug awareness programs and sources of additional information about programs to combat drug abuse.

Response: The agencies believe that the requirements of the statute and regulation are very clear and explicit and that providing models is not necessary. It is preferable that individual grantees draft their own policies and create their own awareness programs, which can be better adapted to the needs of their workforces than any government-wide guidance. For grantees' information, the National Institute on Drug Abuse (NIDA) has a toll-free employer help-line for persons interested in programs to combat drug abuse in the workplace. The number is 800–843–4971. NIDA also has a clearinghouse for general information on controlling alcohol and drug abuse. That number is 301–468–2600. The address of the National Clearinghouse for Alcohol and Drug Information is Box 2345, Rockville, MD 20852.

5. Clarify whether grantees are required to establish an employee assistance program (EAP) or special training for supervisors.

Response: Nothing beyond the drug-free workplace policy statement and awareness program cited in the regulation is required. While grantees may voluntarily establish EAPs or special training for supervisors, doing so is not a requirement of this regulation.

6. The rules should define more specifically what constitutes a drug awareness program.

Response: The agencies believe that it is preferable to allow grantees to tailor programs to their needs. In addition, further specification could interfere with successful existing employer programs.

7. The regulation should allow the notice and policy statement to be given to a collective bargaining representative rather than to each employee individually.

Response: Under the statute and regulations, grantees are accountable for informing each employee of his or her responsibilities. This task cannot be delegated to a third party, such as a union. Nothing prevents the grantee from working cooperatively with a union to improve understanding of the grantee's policy and program among employees, however.

8. Clarify that employees are not required individually to verify receipt of the policy statement.

Response: We understand that some grantees have chosen to ask their employees to sign that they have received the statement. While grantees have the discretion to follow this practice, it is not required by the regulation.

9. Clarify whether drug testing is required or authorized under these regulations.

Response: The Act and these rules neither require nor authorize drug testing. The legislative history of the Drug-Free Workplace Act indicates that Congress did not intend to impose any additional requirements beyond those set forth in the Act. Specifically, the legislative history precludes the imposition of drug testing of employees as part of the implementation of the Act. At the same time, these rules in no way preclude employers from conducting drug testing programs in response to government requirements (e.g., Department of Transportation or Nuclear Regulatory Commission rules) or on their own independent legal authority.

10. Clarify when the drug-free awareness program required by the regulations must be in place.

Response: The statute and regulations do not require the program to be in place at the time of grant award. The certification is to the effect that such a program "will" be implemented (i.e., in the future). The agencies believe that grantees should have a reasonable time to get their program up and running. For a grant of 30 days or less duration, however, the program must be in place as soon as possible, but in any case before the performance of the grant is expected to be completed. To require less would be clearly contrary to the intent of Congress. Given that there is often some lag between the award of a grant and its performance, grantees for many short-duration grants should still have a reasonable amount of time after award to ensure that their program is in place. An agency may set a different compliance date where extraordinary circumstances warrant for a specific grant. For grants that will be performed during a period of over 30 days, the program must be in place within 30 days of award.

Employees

1. Clarify whether all employees of a grantee are covered if only a few of the grantee's several divisions are involved with the grant.

Response: As noted above, persons on the grantee's payroll who work on any activity under the grant are covered. This includes both so-called "direct charge" (i.e., those whose services are directly and explicitly paid for from grant funds) and "indirect charge" (i.e., those persons who perform support or overhead functions related to the grant and for which the Federal agency pays its share of expenses under the grant program) employees. If a grantee has four operating divisions and a headquarters unit, and one division receives a Federal grant, then the employees of the one division receiving the grant who are directly engaged in the performance of work under the grant are covered, as well as headquarters employees that support the division's operations. However, these rules in no way preclude a grantee from electing to cover employees of other divisions.

2. Clarify whether temporary employees or volunteers are covered.

Response: Any person who works on any activity under the grant, and who is on the grantee's payroll, is considered to be a covered employee (except for an indirect charge employee whose impact or involvement is insignificant to the performance of a grant), even if not paid from grant funds. A temporary employee is covered if he or she meets these criteria. A volunteer is someone who is not on the grantee's payroll, and hence is not covered under the rule, even if used to help meet a matching requirement.

3. If convicted of a criminal drug offense resulting from a violation occurring in the workplace, employees are obligated to report the conviction to the grantee. Clarify whether employees also have an obligation to report co-workers' convictions to the grantee.

Response: Employees are required to report only their own convictions. Reporting co-workers' convictions is not required.

4. Clarify whether a grantee is required to take action with respect to an employee who is convicted of a criminal drug offense resulting from a violation occurring in the workplace, even if the information about the conviction comes from a source other than the employee's self-report.

Response: Under § _____.635(a), the grantee's obligation to take action (either disciplinary action or referral for rehabilitation) arises when the grantee is "notified" of the conviction. This notification can come from any source (e.g., a newspaper report, contact from a probation officer, the employee's self-report).

5. The grantee's action with respect to a convicted employee should be determined on a case-by-case basis.

Response: The regulation requires only that, in case of a conviction for a criminal drug offense resulting from a violation occurring in the workplace, the grantee take one of two types of action. The grantee may take disciplinary action (which may be termination or a less severe sanction) or may refer the employee for a rehabilitation or drug abuse assistance program. The choice of which basic course to choose, as well as the specific discipline or treatment option, is left to the grantee's discretion and may be on a case-by-case basis.

6. Clarify that names of convicted employees need not be transmitted to the Federal agency.

Response: Notice is to be provided, including grant identification number(s) and position title, to the appropriate grant officer or office of the Federal agency. Language has been added to the certification for grantees other than individuals to make this point.

7. Clarify that employer obligations to inform employees of potential action against them include only those actions specified under this rule and not other Federal, State, or local laws.

Response: This statement is correct. While an employer may include other matters as part of the drug-free awareness policy, only the potential consequences of violations under this rule are required to be covered.

Enforcement and Sanctions

1. Clarify that agencies are not authorized to impose sanctions for employee convictions occurring before certifications are made.

Response: The grounds for sanctions under § _____.615 include false certification, violation of a certification, and failing to make a good faith effort to provide a drug-free workplace (i.e., in response to the certification). None of these grounds for a sanction arise in the absence of a certification. Consequently, convictions occurring before a grantee ever made a certification would not be relevant to a determination concerning sanctions.

2. Clarify whether, after closeout on a grant but before final audit resolution, grantees must report convictions of covered employees.

Response: Reporting of convictions is not required in this period.

3. The rule should allow reporting of convictions to a single agency to provide government-wide compliance with this requirement for all grants.

Response: If a given agency wishes to establish a central point for the reporting of convictions, it may do so. Requiring a central point for reporting to each agency, let alone the entire government, would be too cumbersome administratively and would not be consistent with the requirements of the Act. The same point applies to the submission of certifications to one government-wide point, which some commenters also requested.

4. Clarify to which Federal agencies grantees must report convictions of covered employees.

Response: Grantees (both individuals and others) must notify every grant officer on whose grant activity the convicted employee was working. If the employee was working on grants from more than one agency, then grant officers at all applicable agencies must be notified. Alternatively, if one or more of the agencies involved has designated a central point for the receipt of such notices, the grantee would notify the central point rather than the grant officer(s) in these agencies.

5. The rule should indicate the percentage of a grantee's employees that need to be convicted of criminal drug offenses for violations occurring in the workplace in order to trigger a finding that a grantee has failed to make a good faith effort to maintain a drug-free workplace. In any case, more guidance on what constitutes a good faith effort should be provided.

Response: The legislative history of the Act indicates that Congress did not believe that such a percentage trigger is appropriate. In determining whether the rule has been violated, an agency will look at the convictions and the efforts the grantee has made to maintain a drug-free workplace, deciding on a case-by-case basis whether the grantee has made a good faith effort. A numerical or percentage cutoff would not permit agencies to do justice to the variety of situations that may occur. Likewise, guidance on what constitutes a good faith effort would either be so general as to be of little use in particular situations or so specific as to unreasonably limit the necessary case-by-case judgments that agencies have the responsibility to make.

6. The evidentiary standard for imposing sanctions should be one of "substantial" evidence.

Response: The drug-free workplace requirements pertaining to grants do not independently state any such standard. Since the rules are part of the government-wide common rule for nonprocurement suspension and debarment, they use the same standards for imposing sanctions applicable to other nonprocurement suspension and debarment actions. The agencies do not believe that adopting a separate standard for drug-free workplace actions is appropriate or necessary.

7. Responsibility for making determinations about lack of good faith or other grounds for violations of the rule should be delegated to agency suspension and debarment officials.

Response: Section _____.615 authorizes agency heads or their official designees to make determinations of violations. This language permits agency heads to delegate this responsibility. The regulation should not constrain the discretion of agency heads by automatically designating certain officials to perform this task.

8. Sanctions should be limited only to the transgressing workplace, not to other parts of the grantee's organization.

Response: The agencies do not believe that the regulation should contain such a limitation. If the grantee falsely certifies, fails to carry out the requirements of the certification, or fails to make a good faith effort to maintain a drug-free workplace, the grantee's overall management could be faulted for the violation, not only lower-level management at a particular site or facility. Responsibility for compliance goes all the way up an organization's chain of command, and agencies need to be able to apply sanctions accordingly.

9. The rule should provide that sanctions, and waivers of sanctions under § _____.625, must be granted consistently and fairly by agencies.

Response: The agencies do not believe that there is a practical way of implementing this request. Agencies must deal with sanction and waiver issues on a case-by-case basis. Meaningful regulatory guidelines for agency action to this end would be very difficult to draft and implement, and could lead to unnecessary litigation.

10. Clarify whether benefits can be withheld from individual grantees.

Response: Section _____.615 now specifies that individuals can violate the rule by falsely certifying, failing to carry out the requirements of the certification, or being convicted of a criminal drug

offense resulting from a violation occurring during the conduct of any grant activity. Like other grantees, grantees who are individuals are subject to sanctions (e.g., suspension or termination of the grant, debarment) if they violate the rule. As discussed in §____.605(b), veterans' benefits are not subject to sanctions under this rule.

11. Clarify that a conviction includes acceptance of a guilty plea by a judicial body.

Response: It does.

12. The rule should make distinctions for severity of criminal statute violations.

Response: The Act, which speaks of convictions of a criminal drug offense, does not provide discretion to make such distinctions. However, grantees can take this information into account when developing their drug-free awareness programs or deciding on disciplinary actions.

13. Agencies should be permitted to grant a waiver of sanctions on the ground that sanctions would disrupt the operations of the agency.

Response: The rule permits waivers in the public interest, which is a sufficient basis for considering waivers. It is unlikely that there would be many circumstances in which sanctions to a grantee would disrupt the operations of the Federal agency making the grant, in any case.

14. The rule should delete the requirement to take corrective action for reported convictions within 30 days.

Response: This requirement is statutory and the rule cannot change it.

Relationship to Other Laws, Regulations and Agreements

1. Clarify whether the requirements of the Act and regulations preempt State and local laws.

Response: The requirements of the Act and regulations coexist with State and local law. We know of no conflicts with State or local law, so the question appears moot.

2. Clarify whether the requirements of the Act and regulations preempt collective bargaining agreements and inform grantees what to do about negotiations with unions about drug-free workplace requirements.

Response: These requirements coexist with the collective bargaining process. Compliance with the requirements of the Act and regulations is a condition of receiving a Federal grant. Preemption is not an issue. The Act and regulations do not purport to compel any change in existing labor-management agreements. Of course, labor and management cannot, via a collective bargaining agreement, nullify a grant condition based on Federal law. Federal agencies are not compelled to provide grants to organizations that fail to comply with a statutorily-imposed grant condition, for whatever reason. However, where the regulations provide discretion to grantees about the mode of compliance with the regulations (e.g., a grantee may either take disciplinary action against an employee convicted of a criminal drug offense resulting from a violation occurring in the workplace or refer the employee for rehabilitation), labor and management may determine the mode of compliance through collective bargaining.

3. Clarify the relationship of the Act and regulations to tenure policies of institutions of higher education.

Response: There is no relationship between university tenure policies and these requirements. If a tenured faculty member is convicted of a criminal drug offense resulting from a violation occurring in the workplace, the university would be required to take disciplinary action against the faculty member or refer her or him for rehabilitation. Given the range of choice which the university has under this provision, nothing in the rule requires the university to take action inconsistent with its tenure policies.

4. Either agency heads or their designees should be able to make the determination concerning whether application of these rules would be inconsistent with international law or the laws of a foreign nation.

Response: The rule has been changed so that the designee of an agency head, as well as the agency head, may make this determination.

5. Clarify whether the rule is intended to preempt laws of other nations or international law, including with respect to privacy and confidentiality matters. There should be prior consultation with foreign governments about any regulatory requirements before the rules are applied to grants that may be performed abroad.

Response: For this Act, it has been determined that Federal law does not preempt the laws of other nations or international law, including with respect to employee confidentiality. Concerning prior consultation, neither the Act nor the Administrative Procedure Act allows special treatment for foreign governments in rulemaking.

6. The rule should provide protection to grantees from employee lawsuits or provide for Federal reimbursement from costs incurred in defending against such litigation.

Response: The statute does not immunize grantees from employee litigation and the agencies could not effectually create such protection in a regulation. Nor does the statute authorize the expenditure of Federal funds to reimburse grantees for the cost of defending such lawsuits.

7. Clarify the relationship between this rule and drug testing programs of the Department of Defense, Department of Transportation, and the Nuclear Regulatory Commission.

Response: The Department of Defense requires drug testing for certain employees of some defense contractors. If such a defense contractor also receives a grant from the Department of Defense or another Federal agency, the contractor would have to comply with both the Department of Defense requirements and these drug-free workplace rules.

The Department of Transportation and the Nuclear Regulatory Commission require drug testing for certain employees of employers in the industries they regulate. If one of these employers is also a grantee of a Federal agency, the employer would have to comply with both the Department of Transportation or Nuclear Regulatory Commission requirements and these drug-free workplace rules. Finally, various Federal agencies, including the Departments of Defense, Treasury and Transportation, require some of their own Federal employees (e.g., air traffic controllers) to be tested for drug use. These requirements are unrelated to any requirements for grantees under the Drug-Free Workplace Act.

Other Issues

1. Clarify what the "place of performance" of a grant means, particularly for activities that have no fixed location e.g., buses in a mass transit system).

Response: The place of performance is wherever activity under a grant occurs. It can be in a fixed location, a variety of locations, or no fixed location. For mass transit buses, for instance, the place of performance may be the transit authority's buses, wherever they are in operation. For grants for the arts, the places of performance may be the various concert halls, theaters, galleries, etc. at which the public views the performance or art work. General categorical descriptions of such workplaces may be listed by grantees.

2. Clarify whether the number of days employees and grantees have to make various notifications are calendar days or working days.

Response: The certification now specifies calendar days.

3. The notice of conviction from an employee to a grantee and a grantee to an agency should be in writing.

Response: The certification now so specifies.

4. The regulation should have more specific language concerning which costs related to a drug-free awareness program are allowable under a grant.

Response: Grantees should refer to applicable OMB Circulars A-21, A-87, and A-122 and Federal agency regulations for information on the allowability of costs. Cost allowability principles are the same for activities under these regulations as they are for expenditures needed to meet other grant conditions.

5. Clarify whether the rehabilitation of employees is an allowable cost under grants.

Response: Only the fair Federal share of the reasonable and necessary expenses for the rehabilitation or other treatment for covered employees would be allowable, consistent with OMB Circulars A-21, A-87, and A-122 and Federal agency regulations.

6. There should be a second opportunity for public comments after more experience under the rules.

Response: This suggestion, essentially a recommendation that the agencies issue another interim final rule, has not been adopted. The comments received in response to the interim final rule covered virtually all aspects of the rule, and the agencies have considered them fully and carefully. A second round of public comment would be likely to generate little additional useful comment and would only prolong uncertainty about the final shape of the regulations.

Regulatory Process Matters

This rule is a non-major rule under Executive Order 12291. The agencies have evaluated the rule under Executive Order 12612, pertaining to Federalism. The statute requires drug-free workplace certifications to be made by all grantees, including State agencies. The rule does reduce burdens on State grantees by allowing State agencies to elect an annual certification to each Federal grantor agency in lieu of a certification for every grant. For these reasons, the agencies have determined that the rule will not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

As a statutory matter, this rule must apply to all grantees, regardless of size. (The statute does provide a shorter, less burdensome certification to be made by grantees who are individuals, however.) Costs incurred by grantees to implement drug-free workplace programs are directly mandated by statute; the agencies have minimal regulatory discretion in designing this regulation.

This rule contains information collection requirements subject to the Paperwork Reduction Act. The information collection requirements concern employees reporting drug offense convictions to grantees, grantees reporting these convictions to the agencies, and grantees listing the location(s) of their workplace(s) as part of the certification. These requirements have been reviewed and approved by the Office of Management and Budget, with OMB Control Number 0991-0002.

Text of the Common Rule

The text of the common rule, as adopted by the agencies in this document, appears below:

PART _____—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENT-WIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

* * * * *

Subpart F—Drug-Free Workplace Requirements (Grants)

Sec.

_____.600 Purpose.
_____.605 Definitions.
_____.610 Coverage.
_____.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.
_____.620 Effect of violation.
_____.625 Exception provision.
_____.630 Certification requirements and procedures.
_____.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

* * * *

Appendix C to Part _____ Certification Regarding Drug-Free Workplace Requirements

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Subpart F—Drug-Free Workplace Requirements (Grants)

§ _____.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ _____.605 Definitions.

(a) Except as amended in this section, the definitions of § _____.105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All "direct charge" employees;

(ii) All "indirect charge" employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ _____.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ _____.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under § _____.630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of subparagraphs (A.) (a)–(g) and/or (B.) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ _____.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § _____.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § _____.320(a)(2) of this part).

§ _____.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ _____.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the

certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(c)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§ ____.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(Approved by the Office of Management and Budget under control number 0991–0002.)

Appendix C to Part ____—Certification Regarding Drug-Free Workplace Requirements

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

"Controlled substance" means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

"Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

"Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

"Employee" means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All "direct charge" employees; (ii) all "indirect charge" employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall

include the identification number(s) of each affected grant:

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

Adoption of the Common Rule

The text of the common rule, as adopted by the agencies in this document, appears below.

DEPARTMENT OF TRANSPORTATION

49 CFR Part 29

RIN 2105-AB64

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, 202-366-9306.

List of Subjects in 49 CFR Part 29

Debarment and suspension (nonprocurement), Drug abuse, Grant programs.

Title 49 of the Code of Federal Regulations is amended as set forth below.

Samuel K. Skinner,

Secretary of Transportation.

Accordingly, the interim final rule amending 49 CFR part 29 which was published at 54 FR 4947 on January 31, 1989, is adopted as a final rule with the following changes:

PART 29—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENT-WIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority citation for part 29 continues to read as follows:

Authority: E.O. 12549; sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, title V, subtitle D; 41 U.S.C. 701 et seq.); 49 CFR part 322.

2. Subpart F and Appendix C to part 29 are revised to read as set forth at the end of the common preamble.

Subpart F—Drug-Free Workplace Requirements (Grants)

Sec.

Cross Reference: See also Office of Management and Budget notice published at 55 FR ———, May 25, 1990.

[FR Doc. 90-11589 Filed 5-24-90; 8:45 am]

BILLING CODES 3410-60-M; 6450-01-M; 8025-01-M; 7510-01-M; 3510-FE-M; 4710-24-M; 6116-01-M; 6061-01-M; 6230-01-M; 7025-01-M; 6117-01-M; 4210-32-M; 4410-18-M; 4510-23-M; 6372-01-M; 4810-29-M; 3810-01-M; 4000-01-M; 7515-01-M; 8032-01-M; 6560-50-M; 6820-61-M; 4310-RF-M; 6718-01-M; 4150-04-M; 7555-01-M; 7537-01-M; 7536-01-M; 7036-01-M; 6050-28-M; 6340-01-M; 4910-62-M

Appendix J

Self-assessment Checklist

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INTRODUCTION

In February 1994, the Federal Transit Administration (FTA) published regulations that prohibit illegal drug use and alcohol misuse by transit employees and require transit agencies to test for prohibited drug use and alcohol misuse. These regulations are 49 CFR Part 653, "Prevention of Prohibited Drug Use in Transit Operations," and 49 CFR Part 654, "Prevention of Alcohol Misuse in Transit Operations." In addition, the U.S. Department of Transportation (DOT) issued 49 CFR Part 40, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs," which describes the testing procedures to be followed.

On December 18, 2000 the DOT significantly revised the Part 40 regulations to update the rule and to address changes in technology, the testing industry, and the DOT's programs. Similarly, FTA updated, revised, and combined its drug and alcohol testing rules (Parts 653 and 654 respectively) into a new regulation, 49 CFR Part 655. The new Part 40 and Part 655 went into effect on August 1, 2001.

To accompany the testing regulations, the FTA published *Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit*. The guidelines were written to assist transit agencies to develop drug and alcohol testing programs that are based on the FTA and DOT rules. The guidelines contain copies of the regulations, a list of certified laboratories, a conforming products list, terms and definitions, frequently asked questions and answers, and other useful information.

The *Implementation Guidelines* will be revised to reflect the rule changes and a supplemental "Best Practices" manual will be published to assist transit systems in complying with the new rules. The FTA also publishes the *FTA Drug and Alcohol Regulation Updates* several times a year to inform the transit industry technical amendments, FTA interpretations, and clarifications to the rule.

In 1997, the FTA began auditing the drug and alcohol testing programs of transit systems and state departments of transportation. The audits seek to ensure that transit systems are complying with the drug and alcohol testing regulations and identify which program elements must be changed in order for the system to be in compliance.

The following checklist is designed to be used by transit agencies and state DOTs. It will help transit managers to conduct a self-assessment to determine if they are complying with the regulations, and it allows the system to identify problem areas and subsequently implement corrective actions as necessary. The information reflects modifications to the

regulations that have been made since the regulations were written and is current to the date of publication. The *Implementation Guidelines* and FTA *Updates* are referenced in several places where additional information may be needed.

POLICY DEVELOPMENT AND COMMUNICATION

Does Your Drug and Alcohol Policy Include.....?

DOES YOUR DRUG AND ALCOHOL POLICY INCLUDE:

☐ An overview of the policy describing the purpose and objective of the policy?

☐ A list of the safety-sensitive functions and corresponding position titles to clearly identify which employees and/or contractors are specifically covered? The definition of safety-sensitive employees and/or contractors includes those that perform any of the following (see Chapter 2 of the *Implementation Guidelines* for further explanation):

- — Operation of a revenue service vehicle, even if it is not in revenue service;
- — Operation of a non-revenue service vehicle that requires a CDL;
- — Dispatch or controlling movement of a revenue service vehicle (based on employer assessment of safety-sensitive functions);
- — Maintenance of a revenue service vehicle or equipment used in revenue service. Include all individuals engaged in engine, revenue service vehicle, and parts repair, rebuilding, and overhaul; or
- — Carrying a firearm for security reasons.

Maintenance contractors of systems that serve populations of ≤ 200,000 are exempt (Sections 5307, 5309, and 5311 recipients).

Volunteers are exempt unless they operate vehicles that require CDL holders to operate them or receive remuneration in excess of the actual expenses.

☐ A statement that indicates that participation in the agency's drug and alcohol testing program is a requirement of each safety-sensitive employee, and therefore, is a condition of employment?

☐ An explanation that an alcohol test must be conducted just before, during, and just after performing a safety-sensitive function?

☐ An explanation that the use and ingestion of illegal drugs is prohibited at all times and that employees can be tested for drugs anytime while on duty?

Does Your Drug and Alcohol Policy Include.....?

☐ The behaviors that are prohibited by FTA rules?
- — Consumption of alcohol:
  - Four hours prior to performing a safety-sensitive function
  - Eight hours following an accident
  - While on-call
  - Blood alcohol concentration of 0.04 or greater when performing a safety-sensitive function.
- — Ingestion of prohibited drugs at all times

☐ The actions that are prohibited by the Drug Free Workplace Act?
- — Unlawful manufacturing, distributing, dispensing, possessing, or using controlled substances in the workplace ; (Optional; Not required by 49 CFR Part 655)

☐ The circumstances when drug and alcohol testing takes place?
- — Pre-employment (drugs only)
- — Reasonable suspicion
- — Post-accident
- — Random
- — Return-to-duty
- — Follow-up

☐ A statement regarding the agency's stand-down policy, if applicable.
- — Have you received a waiver from the FTA allowing stand-downs?

☐ A list of drugs/drug metabolites that will be tested for (marijuana, cocaine, opiates, amphetamines, phencyclidine)?
- — List minimum thresholds for the initial screen and the confirmatory test (optional)

☐ The definition of the behaviors that constitute a refusal to submit to a test (all test categories except pre-employment)?
- — Refusal to provide a specimen (verbal refusal or physical absence);
- — Inability to provide sufficient quantities of breath or urine to be tested without a valid medical explanation;
- — Tampering, adulterating, or substituting a specimen;
- — Not reporting to the collection site in the time allotted;
- — Leaving the scene of an accident without a valid reason before the tests have been conducted;
- — Failure to sign DOT required testing forms for breath collection;
- — Leaving the collection site prior to test completion;

Does Your Drug and Alcohol Policy Include.....?

- — Failure to permit an observed or monitored collection when required;
- — Failure to take a second test when required;
- — Failure to undergo a medical examination when required; or
- — Failure to cooperate with any part of the testing process.

☐ A description of how drug and alcohol tests will be performed?
- — Consistent with 49 CFR Part 40
- — Urinalysis for drugs (detail optional)
  - — Split specimen collection method
  - — US DOT Chain of Custody and Control Form with unique identification number
  - — Initial screen
  - — Confirmatory test (GC/MS)
  - — Medical Review Officer responsibility
- — Breath analysis for alcohol (detail optional)
  - — Initial screen
  - — Confirmatory test using evidential breath testing device

☐ Define minimum qualifications of testing personnel/equipment (optional)?
- — Collection sites
- — DHHS certified labs
- — Medical Review Officer
- — Substance Abuse Professional
- — Evidential Breath Testing Device
- — Breath Alcohol Technician
- — Screen Test Technician

☐ Statements regarding integrity of the testing process?
- — How the privacy of the employee will be protected;
- — How the integrity and validity of the test process will be maintained; and
- — How the test results will be attributed to the correct safety-sensitive employee.

☐ A statement regarding information disclosure?
- — The policy should indicate that the employer will strictly adhere to all standards of confidentiality and assure all employees that testing records and results will be released only to those authorized by the FTA rules to receive such information.

☐ A description of the consequences for using drugs?

Does Your Drug and Alcohol Policy Include.....?

- — An individual who refuses to submit to a test or has a verified positive drug test will be removed immediately from the safety-sensitive function, referred to an SAP, and provided educational materials (regardless of whether the employee will be discharged or given a second chance).
- — Any further disciplinary action must be detailed in the policy and specified as being transit agency-mandated, not FTA-mandated.

☐ A description of the consequences for the misuse of alcohol?

- — An individual who refuses to submit to a test, or has an alcohol concentration of 0.04 or greater, will be removed immediately from the safety-sensitive function, provided educational material, and referred to an SAP regardless of whether they are discharged or given a second chance .
- — An individual who has an alcohol concentration of 0.02 or greater, but less than 0.04 will be removed from duty for at least 8 hours, unless a retest results in an alcohol concentration of less than 0.02.
- — Any further disciplinary action must be detailed in the policy and specified as being transit agency-mandated, not FTA-mandated.

☐ The identity of the contact person? The contact person (the drug and alcohol program manager) for drug and alcohol related questions is identified along with the individual's telephone number and office location.

☐ A description of the following?

- — The effects of alcohol misuse on an individual's health, work, and personal life;
- — The signs and symptoms of an alcohol problem; and
- — The available methods of intervening when an alcohol problem is suspected.

☐ A separate designation for additional provisions that exceed the FTA requirements? Those that are described in the policy must be identified as such and the policy must state that these provisions are those of the transit system and are not required by the FTA. Ensure that the policy distinguishes between provisions included under FTA authority, the transit agency's authority, or the authority of another agency.

REVIEW OF THE DRAFT POLICY

Review of the Draft Policy

☐ Did the agency's legal representative review the draft policy to ensure that there are no conflicts between the policy and the FTA requirements? (Optional—highly recommended)

☐ Did the labor relations or personnel officer review the policy to resolve any conflicts between existing labor agreements and personnel policies? (Optional—highly recommended)

FORMAL APPROVAL

Formal Approval

☐ Did the final policy statement receive formal approval by the governing board?

☐ Have any revisions of substantive nature been approved by the governing board? Transit agencies should update the policy to reflect all regulatory modifications, clarifications, and FTA interpretations that are relevant to the organization and have occurred since the policy was last revised. Is the last revision date on the policy?

POLICY COMMUNICATION

Policy Communication

Employee Communication

☐ Did the employer provide copies of the policy to all safety-sensitive employees and the representatives of employee organizations?

☐ Did the employees sign a Confirmation of Receipt form acknowledging that they received the policy (optional – highly recommended)?

☐ Did all safety-sensitive employees and contractors receive copies of revised policies? Did they sign a Confirmation of Receipt for the revised policy? (optional)

☐ Do all new hires get a copy of the most current policy? Do they sign a Confirmation of Receipt? (optional)

Job Applicant Communication

☐ Does the employer notify all applicants in writing that they will be required to undergo drug testing prior to employment and will be subject to drug and alcohol testing throughout their period of employment? Are these acknowledgements on file?

Policy Communication

☐ Have employees been notified that participation in the drug and alcohol-testing program is a condition of employment?

☐ Have current employees been made aware that if they choose to switch to a safety-sensitive function they must first have a negative pre-employment/pre-transfer drug test before they can be assigned safety-sensitive job duties?

Contract Service Provider Communication

☐ Are all appropriate safety-sensitive contractors identified?

☐ Are applicable contract service providers or maintenance providers notified (in writing) of the regulatory requirements and the need for them to comply with the minimum requirements? Note: Maintenance contractors are covered if they repair, rebuild, or overhaul engine parts, or revenue service vehicles.

- Maintenance contractors of systems that serve populations of ≤ 200,000 are exempt (Sections 5307, 5309, and 5311 recipients); and
- Second tier and beyond maintenance contractors are exempt.

☐ Did the transit agency provide a drug and alcohol policy orientation session for safety-sensitive contractors? At the orientation session (Optional—highly recommended)

- Did the contractors receive a copy of the policy and the regulatory requirements?
- Did the contractors sign a "Confirmation of Receipt" form acknowledging receipt of the policy and regulations? (optional)
- Was the contractor(s) invited to participate in the transit system's testing and training program or given information on participating in a testing consortia? (optional)
- Was the contractor(s) informed of the record keeping and reporting requirements and the transit agency's intent to monitor their compliance?

☐ Did the transit agency modify current (or future) contracts to incorporate the provision of the policy, and a statement regarding the required compliance with FTA regulations? (Optional—highly recommended)

DRUG TESTING PROCEDURES

☐ Are provisions made to conduct drug tests during all days and hours that the transit system employees perform safety-sensitive functions?

☐ Is the transit agency testing for the following drugs?
- — Marijuana
- — Cocaine
- — Opiates (e.g., heroin, morphine, codeine) Note: the opiate minimum threshold was raised to 2000 ng/ml.
- — Phencyclidine (PCP)
- — Amphetamines (e.g., racemic amphetamine, dextroamphetamine, and methamphetamine)

☐ If the transit agency is testing for additional drugs, is the testing being performed separately from the FTA test? Performing separate tests means that a separate urine specimen must be collected with their own non-DOT custody and control form. The employee must be notified whether he or she is being tested under FTA authority or the transit agency's authority.

☐ Do you prohibit the use of consent forms?

SPECIMEN COLLECTION

Specimen Collection

☐ Does the collection site(s) meet the Department of Transportation requirements published in "Procedures for Transportation Workplace Drug and Alcohol Testing Programs" (49 CFR Part 40)?

☐ Does the collection site check the donor's ID? Does the collection site have a procedure in place to confirm donor identity when no ID is presented (i.e., supervisor attests to identity)?

☐ Does the collection site:
- — Provide a privacy enclosure for urination, a void receptacle, a suitable clean writing surface, and a water source for hand washing, which if practicable, should be outside the privacy enclosure?
- — Secure the privacy enclosure when not in use, or if this is not possible (e.g., when a public restroom is used), visually inspect it prior to specimen collection to ensure that unauthorized persons are not present and that there are no unobserved entrance points?
- — Have restricted access during specimen collection?

- — Add a bluing agent to the toilet water to prevent dilution of the specimen?
- — Secure the toilet tank top or blue tank water?
- — Turn off, tape, or prevent the use of other sources of water (e.g., sink or shower) that are located in the privacy enclosure where urination occurs?
- — Remove all potential adulterants?
- — Secure areas suitable for concealing contaminants such as trash receptacles, paper towel holders, etc.?

☐ Does the collection site have a procedure in place for notifying the employer if the employee does not report for the test in the designated time frame?

☐ Do you have a procedure to notify the collection site of the identity and contact information of the Designated Employer Representative (DER)?

☐ Does the collection site use the correct US DOT Chain of Custody and Control forms for DOT/FTA tests (and only DOT tests)?

☐ Is the specimen and CCF under the control of the collector throughout the collection process? Is the collector the only person that handles the specimen before it is sealed?

☐ Are "limited access" signs posted in areas of public access?

☐ Does the collection site restrict access to specimens and specimen collection materials?

☐ Are collection sites available to perform collections during all days and hours that the transit system performs safety-sensitive job duties?

☐ Do collectors recheck the privacy enclosure following the collection process?

Collection Site Personnel

☐ Has the collection site staff received the following required initial training?

- — Basic information;
- — Qualification training; and
- — Trained to prepare the collection site, collect specimens, examine specimens for tampering or adulteration, observe collections, split the specimens, and properly label and preserve the chain of custody of specimens?

☐ Does each collector have a copy of the DOT Urine Specimen Collection Procedures Guideline?

☐ Have the collection site staff demonstrated proficiency?

☐ Have the collection site staff met the refresher training requirements?

☐ Has error correction training been provided?

☐ Are all Chain of Custody procedures followed?

Supplies

☐ Are the following supplies, equipment, and documents used at each collection site?

- **Single-use collection cups**: The plastic cups must be individually and securely wrapped. The cups are unwrapped in the presence of the employee at the time of the testing.
- **Single-use specimen bottles**: The bottles must be constructed of plastic with a screw-on or snap-on cap that prevents seepage. The bottles must be individually and securely wrapped and opened in the presence of the employee at the time of the collection. Each bottle must hold at least 35 ml of urine.
- **Single-use temperature measurement device**: The device must be capable of measuring temperatures within the range of 90.0 to 100.0 F.
- **Federal Drug Testing Custody and Control Form**: This form documents the exchanges of the specimen from the time of production by the donor until the test is completed. Only US DOT forms can be used for collections made under FTA authority (revised forms must be used after 8/1/01).
- **Tamper-evident sealing system**: Pre-printed seals should be provided to ensure that the specimen bottle has not been opened. The seals must have an identifying number that is identical to the number appearing on the Federal Drug Testing Custody and Control Form.
- **Leak-resistant Plastic Bag:** The plastic bag must have two sealable compartments or pouches that have a tamper-evident seal. The specimens are placed in one pouch, the CCF is placed in the other.
- **Shipping containers:** The shipping containers must be designed to adequately protect the specimen bottles from shipment damage.

☐ Are employees who are subject to testing provided with instructions explaining their responsibilities in specimen collection?

Split Sample

☐ Is the split specimen procedure being utilized at the collection site? After the specimen has been collected, it must be divided into two specimen bottles (30 ml of urine in one primary specimen bottle and 15 ml in the split specimen bottle) in the presence of the donor. If the primary test returns a positive test result, the employee can request that the split sample be tested at a separate DHHS laboratory.

☐ Are procedures in place to have a split sample transferred to a second DHHS lab for analysis? Have you established a business relationship with the second DHHS lab to ensure that split specimens will be processed in a timely manner and that the employer will provide payment for the split analysis (subject to reimbursement by the employee)?

Insufficient Volume of Specimen

☐ Is the collection site following the correct procedures if the employee being tested is unable to produce a sufficient amount of urine for the test?

- — Discard the original specimen.
- — Obtain another urine sample within 3 hours of the previous test. The employee cannot drink more than 40 ounces of fluid during the 3 hours.

☐ Does the employer direct the employee to have a medical examination within 5 days if 45 ml cannot be provided within 3 hours?

☐ Does the medical physician provide the MRO with a statement indicating whether or not the insufficient specimen was the result of a genuine medical condition?

☐ Does the MRO notify the employer in writing of the medical examination conclusion?

☐ If there is no medical explanation for the insufficient specimen, is the test regarded as a refusal to be tested?

☐ For a pre-employment test that results in insufficient volume, is a contingent offer of employment made prior to the medical evaluation?

☐ For a pre-employment insufficient volume test, does the medical evaluation determine if the shy bladder was due to a long-term or permanent disability? Does the medical examination look for signs of illegal drug use? If no signs of illegal drug use are found, does the MRO verify the test as negative?

Observed Collections

☐ Are procedures in place to require the collection site personnel to conduct a mandatory observed collection immediately after the first collection in the following circumstances?

- — The employee's urine sample is outside the normal temperature range;
- — The collection site person observes conduct that clearly and unequivocally indicates an attempt to adulterate or substitute the sample;
- — Following a positive, adulterated, or substituted test, the split sample is not available for testing; or
- — The specimen is invalid with no medical explanation.

☐ Does the transit system have mandatory procedures in place to conduct an observed collection in the following circumstances?

- — The employee has previously been determined to have used a controlled substance without medical authorization and the particular test is being conducted under the FTA regulation as a return-to-duty or follow-up test.

☐ Does the collection site have both genders available in case an observed collection is necessary?

☐ Is the employee told the reason for an observed collection if one is performed?

Privacy/Confidentiality

☐ Does the collection site have adequate measures in place to protect the privacy of the employee and the integrity of the collection process?

☐ Does the collection site and Medical Review Officer have adequate measures in place to communicate confidential matters to designated individuals at the employer agency?

LABORATORY TESTING

Laboratory Testing

- ☐ Are all drug test analyses that are completed in a laboratory certified by the Department of Health and Human Services (DHHS)? The list of DHHS-certified laboratories is updated monthly and is printed in the *Federal Register*.
- ☐ Has a second laboratory been selected to serve as a backup laboratory and to be used for split-sample analysis?
- ☐ Does the laboratory inspect specimens for fatal flaws?
- ☐ Does the laboratory inspect specimens for correctable flaws? Does the lab attempt to correct flaws?
- ☐ Does the lab conduct validity testing (currently allowed; will be required upon publication of DHHS Mandatory Guidelines) on both primary and split specimens?
  - — Creatinine level
  - — Specific gravity
  - — pH
  - — Adulterants
- ☐ Does the DHHS laboratory transmit test results to the Medical Review Officer the same day they are certified?
- ☐ Does the DHHS laboratory provide bi-annual statistical summaries to the employer? Starting January 20, 2002, does the lab supply reports to employers by January 20 and July 20?
- ☐ If the laboratory is unable to identify an adulterant, do they send the specimen to a second DHHS lab for analysis?

MEDICAL REVIEW OFFICER

Medical Review Officer

- ☐ Are all non-negative drug testing laboratory results reviewed by a qualified MRO to verify and validate test results?
- ☐ Are all negative results and fatal flaws reviewed for accuracy by the MRO or designated staff?
- ☐ If MRO review of negative test results is under the direct observation of the MRO, does the MRO review 5 percent of the tests to verify accuracy?

Medical Review Officer

☐ Is the MRO a licensed physician who has met the qualification training requirements of Part 40?

- — Basic knowledge
- — Qualification training and exam
- — Continuing education (12 professional hours every 3 years)
- — No conflicts of interest

☐ Does the MRO perform the following functions?

- — Receive the results of the drug tests from the laboratory.
- — Review documentation for fatal and correctable flaws.
- — Investigate and correct problems when possible.
- — Review lab reports for integrity, authenticity, false negatives, and false positives.
- — Review and interpret an individual's confirmed positive test by: 1) reviewing the individual's medical history, including any medical records and biomedical information provided; 2) affording the individual the opportunity to discuss the test result; and 3) deciding whether there is a legitimate medical explanation for the result, including legally prescribed medication.
- — Make at least 3 attempts in 24 hours to contact the employee. If unable to contact, notify the employer of the need to speak to the employee.
- — Interpret lab reports, including verification of lab positives.
- — If appropriate, request the laboratory to analyze the original specimen again to verify the accuracy of the reported test result.
- — Notify each employee that has a verified positive test result that he or she has 72 hours to request a split-sample analysis? If requested, does the MRO direct, in writing, the laboratory to ship the split specimen to another DHHS-certified laboratory for analysis.
- — Cancel the test and report the cancellation and reasons for cancellation to the DOT, the employer, and the employee if analysis of the split specimen fails to confirm the presence of drug(s) or drug metabolite(s) found in the primary specimen, or if the split specimen is unavailable or inadequate.
- — Notify the employer of when a retest is required – "Specimen unsuitable: cannot obtain a valid drug test result" and no suitable explanation or valid prescription provided by the donor or the split sample is not available for testing following a positive, adulterated, or substituted test result.
- — Receive documentation of serious illness, injury, inability to contact the MRO, or other unavoidable circumstances that prevented the employee from contacting the MRO within 72 hours of being notified of the verified positive result.

Medical Review Officer

- — Direct the analysis of the split specimen if he/she concludes that there is legitimate explanation for the employee's failure to contact the MRO within 72 hours? If the MRO concludes that there is no legitimate explanation for the employee's failure to contact the MRO within 72 hours, then the MRO is not required to direct the analysis of the split specimen to be performed.
- — Maintain all necessary records and send test result reports to the transit agency's drug and alcohol program manager.
- — Protect the employees' privacy and testing program confidentiality.

☐ Are procedures in place for disclosure of verified positive test results to the employer and the confidentiality that is required for medical information not specifically related to the use of drugs?

- — If any quantitative results are given in the lab report, the employer is <u>not</u> authorized to receive such quantitative results and they should <u>not</u> be transmitted by the MRO to the employer.

☐ Does the Medical Review Officer transmit all test results in a timely and secure manner? Results must be transmitted the same day they are verified or the next business day.

☐ Does the Medical Review Officer know the procedure for dealing with adulterated, diluted, and "unsuitable for testing" specimens?

- — If a specimen is adulterated or substituted:
  - — The donor has a right to a split specimen test.
  - — The donor has the right to discuss the result with the MRO and provide evidence that supports how the test results could be obtained legitimately through physiological means.
  - — If the MRO is not satisfied with the explanation or evidence provided, these specimens will be reported to employers as a "refusal to test."

☐ Does the MRO have a copy of the DOT Medical Review Officer Guidelines?

☐ Does the MRO know when no-contact test results can be verified positive?

ALCOHOL TESTING PROCEDURES

ALCOHOL TESTING

Alcohol Testing

- ☐ To the greatest extent possible, is the alcohol test conducted before the drug test? Is the alcohol test performed without undue delay?
- ☐ Are provisions made to conduct alcohol tests during all days and hours that the transit system employees perform safety-sensitive functions?
- ☐ Do you prohibit the use of consent forms?
- ☐ Is the donor's ID checked? Is there a procedure in place to confirm the donor's identity if no ID is presented?
- ☐ Is there a procedure in place for notifying the employer if the employee does not report for the test in a timely manner?
- ☐ Is there a procedure in place to notify the BAT/STT of the identity and contact information of the Designated Employer Representative (DER)?
- ☐ Is the initial screen performed by an evidential breath testing device (EBT), or a non-evidential breath-testing device that is on the respective NHTSA Conforming Products List?
- ☐ Is breath specimen for a confirmatory test being collected by a breath alcohol technician (BAT) using an EBT on the conforming products list?
- ☐ Are procedures in place to ensure that an employee with a breath alcohol concentration (BAC) of 0.04 or greater is not allowed to return to duty (if employer has a second chance policy) and perform a safety-sensitive duty until he/she has been evaluated by an SAP and has passed a return-to-duty test?
- ☐ Are procedures in place that ensure that employee with BAC of 0.02 or greater but less than 0.04 is removed from duty for 8 hours or until a retest shows an alcohol concentration of less than 0.02?
- ☐ Does the alcohol testing site:
  - — Provide visual and aural privacy to the individual being tested?
  - — Provide security with no unauthorized access at any time when the EBT is unsecured or when testing is occurring?
  - — Provide all necessary materials and DOT alcohol testing forms?

Alcohol Testing

- ☐ Is only one test conducted at a time?
- ☐ Is the new Alcohol Testing Form being used (mandatory by 2/01/02)?
- ☐ Does the BAT wait at least 15 minutes between completion of the screen test and beginning the confirmatory test?
- ☐ Is the confirmation test being conducted within 30 minutes of the initial screen?
- ☐ Are procedures in place to ensure that the BAT and the employee complete, sign, and date the alcohol testing form prior to conducting the breath alcohol test?
- ☐ If the employee fails to sign Step 2 of the ATF, is this considered a test refusal?
- ☐ Is the result of the confirmation test deemed final?
- ☐ Is the collection site providing copies of the alcohol testing form to the correct individuals?
  - — Copy 1: Breath Alcohol Technician/STT
  - — Copy 2: Employee
  - — Copy 3: Employer
- ☐ Will the BAT allow other attempts as necessary to blow into the EBT to obtain a valid test result?

Evidential Breath Testing Device

EVIDENTIAL BREATH TESTING DEVICE

- ☐ Does a qualified Breath Alcohol Technician (BAT) operate the EBT?
- ☐ Is the collection site's EBT capable of conducting an airblank and performing an external calibration check?
- ☐ Are there procedures in place to ensure that the BAT is complying with the NHTSA-approved quality assurance plan by ensuring that the external calibration checks of each EBT are performed as described in the manufacturer's plan? The EBT must be taken out of service if the external calibration check results are outside the tolerances for the EBT. The manufacturer or a certified maintenance representative must perform inspection, maintenance, and calibration of each EBT.

☐ Does the transit agency maintain records of external calibration checks of the EBT?

Evidential Breath Testing Device

☐ Is the EBT stored in a secure place?

☐ Has the transit system made provisions for the use of a backup EBT for times when the primary EBT is unavailable (e.g., acquire a second EBT, arrange for a loaner, or arrange to use another transit system's EBT)?

☐ If the transit system uses a non-evidential screening device, is it used only for initial alcohol screening tests and is it operated only by a qualified Screen Test Technician?

BREATH ALCOHOL TECHNICIAN

Breath Alcohol Technician

☐ Has the transit system identified the person(s) that will serve as its BAT(s)? Has the transit system identified the person(s) who will serve as a backup BAT as well?

☐ Has the Breath Alcohol Technician:

- — Basic information: Completed an NHTSA-approved course of instruction that provides training in the principles of EBT methodology, operation, and calibration checks?
- — Part 40 and current DOT guidance?
- — Qualification training: Completed training on the fundamentals of breath analysis for alcohol content, the procedures required for obtaining a breath specimen, and interpreting and recording EBT results?
- — Initial proficiency demonstration: Demonstrated proficiency in the operation of the specific EBT he/she will be using?
- — Received refreshed training every 5 years?
- — Received error correction training following mistakes that resulted in a cancelled test?

☐ Has the transit system documented the training and testing proficiency of the BAT?

☐ Are policies in place to ensure that the supervisor of an employee to be tested for alcohol misuse does not serve as the BAT for that person's test?

☐ Does the BAT transmit all results to the employer's designated representative in a confidential manner (in writing, in person, by telephone, or other electronic means)?

- ☐ Does the BAT notify the employer's representative immediately if an employee must be removed from safety-sensitive duties?
- ☐ Is the BAT knowledgeable about procedures for "insufficient volume of breath?"
- ☐ Is the BAT knowledgeable about what constitutes a test refusal or invalid test?

SCREEN TEST TECHNICIANS

Screen Test Technicians

- ☐ Has the STT successfully completed a DOT course of instruction or equivalent?
  - — Basic knowledge
  - — Qualification training
  - — Refresher training every 5 years
  - — Error correction training following mistakes that result in a cancelled test
- ☐ Has the STT demonstrated proficiency in the operation of the non-evidential screening device being used, including the ability to correctly discern changes, contrasts, or readings?
- ☐ Does the STT correctly use DOT alcohol test forms?
- ☐ Is the STT knowledgeable about procedures for "insufficient volume" or inability to successfully complete the initial screen test?
- ☐ Does the STT transmit all results to the employer's designated representative in a confidential manner?
- ☐ Is the STT knowledgeable about procedures used to transport and transfer responsibility of the donor to the BAT if the initial screen is greater than 0.02?
- ☐ Is the STT knowledgeable about what constitutes a test referral or invalid test?

SUBSTANCE ABUSE PROFESSIONAL

- The FTA regulations require that any individual who refuses a test or has a verified positive drug test result or a BAC of 0.04 or greater must be referred to a substance abuse professional (SAP). The SAP determines what assistance, if any, the employee needs in resolving problems associated with prohibited drug use or alcohol misuse.

☐ Are all individuals that have refused a test or have a verified positive drug test result or a breath alcohol test result of 0.04 BAC or greater referred to an SAP for assessment? Even if the system's policy stipulates termination of an employee who receives a verified positive drug or alcohol test, the system must make such a referral.

☐ Are all applicants who test positive or refuse a pre-employment test provided with a list of SAPs?

☐ Is the transit system's SAP a: 1) licensed physician (Doctor of Medicine or Doctor of Osteopathy), licensed or certified psychologist, social worker, employee assistance professional; or 2) an addiction counselor certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission or by the International Certification Reciprocity Consortium/Alcohol and other Drug Abuse?

☐ Does the SAP have knowledge of and clinical experience in the diagnosis and treatment of drug and alcohol-related disorders?

☐ Is the SAP knowledgeable about the SAP functions as they relate to employer interests in safety-sensitive duties?

☐ Does the SAP have basic knowledge about 49 CFR Part 40, DOT/FTA regulations, and DOT SAP guidelines? Do they keep current on regulatory changes?

☐ Does the SAP have a copy of the DOT Substance Abuse Professional Guidelines?

☐ Has the SAP met the qualification training and examination requirements?

☐ Does the SAP receive 12 hours of continuing education every 3 years?

☐ Is the SAP able to conduct a face-to-face clinical assessment?

- ☐ Does the SAP evaluate whether a safety-sensitive employee that has refused to submit to a drug or alcohol test, has a verified positive drug test result, or a BAC of 0.04 or greater is in need of assistance in resolving problems associated with prohibited drug use or alcohol misuse? Does the SAP recommend an appropriate education/treatment program in all cases?

- ☐ Does the SAP evaluate whether a safety-sensitive employee that has a verified positive drug or alcohol test result has successfully complied with the SAP's recommendations? Does the SAP provide the recommendation to the employer in a written report?

- ☐ Does the SAP recommend the duration and frequency of follow-up tests beyond the minimum of six tests during the first 12 months?

- ☐ Does the SAP recommend whether the employee with a positive drug result should also be subject to return-to-duty and follow-up alcohol testing in accordance with 49 CFR Part 40?

- ☐ Does the SAP recommend whether the employee with a positive alcohol test should also be subject to return-to-duty and follow-up drug testing?

- ☐ Does the transit system have backup SAPs to perform assessments when the primary SAP is not available?

- ☐ Has the transit system monitored the SAP for conflicts of interest? The transit system is responsible for ensuring that the SAP is not referring employees to the SAP's private practice from which the SAP receives compensation or to a person or organization in which the SAP has a financial interest.

TYPES OF TESTING

PRE-EMPLOYMENT DRUG TESTING

Pre-employment Drug Testing

- All applicants for employment in safety-sensitive positions or individuals being transferred into safety-sensitive positions must be given a pre-employment **drug** test. The FTA does not allow any waivers of pre-employment drug tests. Employers must get written consent from the applicant to check the applicant's drug and alcohol testing records from previous DOT covered employers. Employers are required to complete this records check. Obtaining drug test results from a previous employer does not waive the requirement to conduct a pre-employment drug test on new employees.

☐ Does the transit agency have on file the negative drug test results for all new hires?

☐ Does the transit agency assign an employee safety-sensitive functions only after the employer has a negative drug test result for the applicant?

- If an individual has a positive pre-employment drug test he/she cannot be assigned safety-sensitive duties.

- If an individual reapplies for a safety-sensitive position after a previous positive pre-employment test, the applicant must provide evidence of successful completion of the return-to-duty process including the completion of an education/treatment program and evidence of well-being from a SAP and be enrolled in a follow-up testing program, before he/she can be assigned safety-sensitive duties.

- The employer must allow the applicant to discuss the results of the test with a medical review officer prior to making a final decision to verify a positive drug test result. Employers must provide a list of qualified SAPs to applicants who test positive.

- If a pre-employment drug test is cancelled, the applicant is required to submit to and pass another test.

☐ Is the time between the hire date and the test date reasonable (less than 90 days)? If not, another pre-employment test is required.

☐ Are MROs allowed to report a negative pre-employment test result for individuals that are unable to provide sufficient volume because of a permanent disability, but have a medical evaluation that indicates no chemical evidence of illegal drug use?

Pre-employment Drug Testing

☐ If a pre-employment test results in insufficient volume, is a contingent offer of employment made prior to the medical evaluation?

☐ Are you aware of the behaviors that constitute a test refusal for pre-employment tests?

- — Failure to appear for a pre-employment test, delayed test, or leaving the collection site prior to commencement of a test is not a test refusal.
- — Once the collection has commenced, however, the donor has committed to the process and must complete the test or it is considered a test refusal.

☐ Do you ask applicants whether they failed a pre-employment drug test for another DOT regulated company within the past 2 years?

☐ Are all applicants notified in writing of the requirement to pass a drug test?

☐ Do you obtain written consent from applicants requesting test information from previous DOT-regulated employers (previous 2 years)?

☐ Do you send the consent along with the request to the previous employer? Do you make a good faith effort to obtain the information from the previous employers?

☐ If the information is not obtained within 30 days of this, do you remove the employee from safety-sensitive duties? Do you document the good faith effort?

☐ If you obtain information that an applicant had a previous non-negative test result, do you remove the person from duty until you have documentation that the individual successfully completed the return-to-duty process and has completed a follow-up testing program If the person has not successfully completed the return-to-duty process or the follow-up testing program, have you made arrangements to pick up where the employee left off?

☐ Do you conduct a pre-employment test on employees that have been absent from their safety-sensitive positions for 90 days or more regardless of the reason, and not included in the random selection pool during the timeframe?

REASONABLE SUSPICION TESTING

☐ Have the circumstances that warranted reasonable suspicion tests been justified using the minimum criteria specified in the regulation?

- FTA regulations require a safety-sensitive employee to submit to a test when the employer has reasonable suspicion that the employee has used a prohibited drug or has misused alcohol as defined in the regulations. The request to undergo a reasonable suspicion test must be based on **"specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the safety-sensitive employee."**

- If one supervisor, or other company official trained to identify the signs and symptoms of drug and alcohol use, reasonably concludes that objective facts may indicate drug use or alcohol misuse, this is sufficient justification for testing. Only one supervisor is required by FTA; employers may require two or more.

☐ Is comprehensive documentation available for all reasonable suspicion tests?

☐ Have all supervisors or other company officials received the requisite reasonable suspicion training?

- A supervisor or other company official that will be called upon to make a reasonable suspicion determination must be trained in the facts, circumstances, physical evidence, physical signs and symptoms, or patterns of performance and/or behavior that are associated with use (See Training). Supervisors must be trained in the proper procedures for confronting and referring the employee for testing.

☐ Have only **trained** supervisors made reasonable suspicion determinations?

Only a trained supervisor can make a reasonable suspicion determination. The term "supervisor" refers to the job function, not the job title. The supervisor who makes the actual observation does not have to be the employee's direct supervisor, but can be any **trained** supervisor or company official within the transit organization. The supervisors must receive reasonable suspicion training and be empowered to take action when they make specific, articulable, and contemporaneous observations of the appearance, speech, behavior, or body odor of the employee that are consistent with probable drug abuse or alcohol misuse.

Reasonable Suspicion Testing

☐ Are procedures in place to have employees proceed immediately to a collection site following a reasonable suspicion determination? Once a supervisor has made a reasonable suspicion determination, the employee must proceed to the testing site immediately.

☐ Is there a procedure in place to document alcohol tests that are delayed more than 2 hours? The employer must document the reasons if a test does not take place within 2 hours. However, this does not give the employer a 2 hour window in which to get the test completed. Attempts to complete the test must cease after 8 hours.

Post-Accident Testing

POST-ACCIDENT TESTING

- FTA regulations require testing for prohibited drugs and alcohol in the case of certain transit accidents.

☐ Are post-accident tests required for accidents where there is loss of life?

☐ Are post-accident tests required for non-fatal accidents unless the employee can be completely discounted as a contributing factor?

- A non-fatal accident is defined as an occurrence associated with the operation of a revenue service vehicle in which:
  - — An individual suffers a bodily injury and immediately receives medical treatment away from the scene of an accident; or
  - — One or more vehicles involved incur disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle; or
  - — If the transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the transit vehicle involved is removed from revenue service.

- Employees subject to testing include all safety-sensitive employees whose functions could have contributed to the accident including the driver, dispatcher, maintenance, and other associated employees.

- Note: Accident does not necessarily mean collision. If an individual falls while riding in a vehicle and needs to be taken to the hospital, then an accident has occurred, and a post-accident test is required unless the driver can be completely discounted as a contributing factor to the accident. The burden is on the transit agency to prove that their employees did not, in any way, contribute to the accident. (Fall/Winter 1995 *Update* , page 2, Spring 1996 *Update*, page 5)

- Disabling damage means damage that prevents any of the vehicles involved from leaving the scene of the occurrence in a usual manner in daylight, after simple repairs of damage to the vehicle that could have been operated but would have been further damaged if so operated. Disabling damage does not include damage that could be remedied temporarily at the scene of the occurrence without special tools or parts; tire disablement even if no spare tire is available, or damage to headlights, tail-lights, turn signals, horn, or windshield wipers that makes them inoperative. (Fall/Winter 1995 *Update*, page 7).

☐ Is there documentation for all accidents that indicate whether or not a test was administered and why?

☐ If tests are performed for accidents that do not meet their FTA definition, are the tests clearly performed under the authority of the transit system using non-US DOT forms?

Fatal Accident

☐ Whenever there is a loss of life, are policies and procedures in place to test every surviving safety-sensitive employee operating the transit vehicle?

☐ Are policies and procedures in place to test other safety-sensitive employees not on the vehicle (e.g., maintenance personnel, dispatcher), whose performance may have contributed to the accident (as determined by the transit agency at the time of the accident)?

Nonfatal Accident

☐ Are procedures in place to determine when post-accident tests must be performed and who must be tested?

☐ Are procedures in place to determine if an employee can be completely discounted as a contributing factor? Is proper explanation provided when a decision is made not to test?

☐ Are policies and procedures in place to ensure that post-accident drug and alcohol tests are performed as soon as possible?

☐ Are procedures in place to discontinue efforts to obtain a drug test if more than 32 hours have passed since the accident?

☐ Are procedures in place to document the reason for delays (greater than 2 hours) in the alcohol test? If an alcohol test is not administered within 2

hours following the accident, the employer must still attempt to administer the test and must prepare and maintain on file the reason for the test delay.

Post-Accident Testing

☐ Are procedures in place to discontinue efforts to obtain an alcohol test if more than 8 hours have passed since the accident? Is the explanation documented?

☐ In the unlikely event that you are unable to conduct an FTA post-accident alcohol and/or drug test due to circumstances beyond your control (i.e., employee is unconscious, incarcerated), do you know that you may accept test results from local or state law enforcement officers in lieu of the FTA tests if they will provide you with the results consistent with state and local law?

After Hours Post-Accident Testing

☐ Does the transit agency have internal policies and procedures in place to conduct testing any time individuals are performing safety-sensitive job functions? This includes periods of time outside of the normal business day.

☐ Has the agency designated the contact person that will determine whether a post-accident test is required, where to report for testing, and how the employee will be transported to and from the collection site?

☐ Are procedures in place for accidents occurring outside of the transit agency's immediate service area?

RANDOM TESTING

Random Testing

- The FTA regulations require random testing of drugs and alcohol for all safety-sensitive employees. This type of testing can serve as a deterrent against employees beginning or continuing drug use and alcohol misuse.

☐ Is the transit agency using a scientifically valid random-number selection method to select safety-sensitive employees to be tested?

Valid methods include the use of a random-number table or a computer-based random-number generator that is matched with safety-sensitive employees' identification numbers. The *Random Drug Testing Manual* is available from the FTA Office of Safety and Security. All safety-sensitive employees in the random pool must have an equal chance of being selected for testing and shall remain in the pool, even after testing (i.e., the individual may be tested more than one time in one year).

Random Testing

☐ Does the transit agency have a procedure in place to ensure that the minimum number of tests is conducted?

In 2001, the number of random drug tests to be conducted must equal at least 50 percent of the total number of safety-sensitive employees and 10 percent for alcohol testing (a slightly higher number should be tested to allow for cancelled tests). If the transit system joins a consortium, the number of tests to be conducted may be calculated for each individual consortium organizational member or for the total number of safety-sensitive employees within the consortium, but must equal 50 percent and 10 percent at a minimum.

☐ To account for fluctuating employee bases, does the transit agency base the number of random tests per testing period on the number of safety-sensitive employees at the beginning of the testing period?

☐ Has the transit agency based the frequency of random number selections (quarterly, monthly, weekly, or daily) on the expected number of random tests each year? (See the Spring 1996 *Update,* page 3)

☐ Is group testing avoided?

☐ Is there a procedure in place to ensure that test dates are spread reasonably throughout the year in a pattern that is not predictable? Are tests distributed throughout the draw period, and throughout the day/shift?

☐ If safety-sensitive functions are performed on weekends and holidays, are tests performed on weekends and holidays?

The number of tests conducted each week, month, or quarter should remain fairly constant. Testing should be performed at varying times throughout the work shift, on different days of the weeks, and at different times throughout the annual cycle. (Fall/Winter 1996 *Update*, page 5)

☐ Is the transit system aware that a random drug test can be performed any time an employee is on duty, whereas a random alcohol test can only be performed just before, during, or just after the performance of a safety-sensitive job function?

☐ Are procedures in place to ensure that once the employee is notified that he or she has been randomly selected for a test they must proceed **IMMEDIATELY** to the testing site?

☐ Are random numbers substituted only when the selected individual will not be performing job duties during the testing period?

If an employee is unavailable during the draw period due to vacation or other long-term absence, a replacement number should be drawn. If an employee is temporarily unavailable at the time the employer wishes to conduct the test, or it is their day off, the number should be held until their next shift within the same testing period. No employee should be excused because of operational difficulties.

Random Testing

☐ Is the random number selection process conducted in strict confidence to ensure that individuals are not pre-warned?

The process must be unannounced. The transit agency should establish a standard procedure and practice for notifying employees that have been selected for testing. The transit agency should arrange for someone to take over the individual's duties while being tested without giving advance indication that a test will be conducted.

☐ Are only US DOT safety-sensitive employees included in the random pool?

All safety-sensitive employees must be included in the random pool. If the transit agency decides to test non-safety-sensitive employees, those employees must be placed in a separate pool and tested under the transit agency's authority, not the FTA's or DOT's.

☐ Are procedures in place to avoid administrative manipulation of the program if the administrator is included in the random pool?

If the transit agency's administrator is in the random testing pool, someone outside of the pool must be notified of the administrator's random number selection. When the administrator's number is randomly selected another employee or responsible individual should be designated as the contact. This person should schedule and notify the administrator of the test and ensure that the test is performed immediately upon notification (Fall/Winter 1996 *Update*, page 6).

☐ Are procedures in place to provide privacy to the safety-sensitive employee being tested? The agency should discreetly notify the employee to report to the collection site.

☐ Are there a limited number of individuals that have knowledge of the random numbers? Are procedures in place to ensure confidentiality and integrity of the process?

☐ Is the transit agency documenting the random selection process, numbers drawn, date, and time of notification and collection?

RETURN-TO-DUTY TESTING

Return-to-Duty Testing

- Following a verified positive drug test, an alcohol result of 0.04 or greater, a refusal to submit to a test, or any other violation of the regulations, the safety-sensitive employee must pass a return to duty test, be evaluated by an SAP, successfully complete to the SAP's satisfaction the recommended education/treatment program, and be determined by the employer to be presently free of alcohol and/or prohibited drugs, and able to return to work.

☐ Is the return-to-duty decision and subsequent test made by the employer based on the SAP's assessments and determination that the employee followed the recommended treatment program?

☐ Do the return-to-duty procedures reflect that a safety-sensitive employee must have a verified negative drug test or an alcohol test result of less than 0.02? If the tests are incomplete or cancelled, the employer must require the employee to submit to and pass another test.

☐ If an employee has a disability that results in insufficient volume, does the MRO report the test as negative if a medical examination shows no evidence of illegal drug use?

FOLLOW-UP TESTING

Follow-up Testing

☐ Are the minimum requirements for follow-up testing being met? After returning to duty, the employee is subject to unannounced follow-up testing for a minimum of 12 months, but not more than 60 months. A minimum of six tests is required within the first 12 months.

☐ Is the duration and frequency of the follow-up tests established by the SAP in a follow-up plan?

☐ Is the SAP recommended schedule for follow-up testing being followed? The follow-up testing plan may not be released to the employee.

☐ Are employees that are subject to follow-up testing also included in the random testing pool and tested whenever their name comes up for random testing?

☐ If an employee has a disability that results in insufficient volume, does the MRO report the test as negative if a medical examination shows no evidence of drug use?

BLIND PERFORMANCE TESTING

Blind Performance Testing

- Transit agencies, employers, and C/TPAs that have over 2,000 covered employees are required to perform blind sample proficiency testing as a quality assurance measure for the testing laboratory.

☐ Does the agency, TPA have over 2,000 safety-sensitive employees?

☐ If the above is true, does the agency have procedures in place to conduct blind performance testing? For each laboratory that analyzes 100 or more specimens per year, employers are required to submit quality control specimens to the laboratory at a rate of 1 percent for every 100 employee specimens sent for testing, up to a maximum of 100 blind samples per quarter.

☐ Are the specimens provided in such a way that the laboratory does not know they are quality control specimens? Are the blind specimens evenly spread throughout the year?

☐ Are 75 percent of the blind specimens drug/metabolite free? Are 15 percent of the blind specimens spiked with a known drug or metabolite? Are 10 percent of the blind specimens either substituted or adulterated?

TRAINING

TRAINING FOR SAFETY-SENSITIVE EMPLOYEES

Training for Safety-Sensitive Employees

☐ Does the transit agency display and distribute additional information regarding the prohibited drug use and alcohol misuse policy and program? Does the transit agency also display and distribute informational material about the effects of drugs and alcohol as well as a community service hotline telephone number to help employees that may be experiencing problems with prohibited drugs and alcohol?

☐ Has the transit agency provided educational materials that explain the requirements of the FTA's alcohol rule and the agency's policies and procedures?

☐ Has the transit agency provided safety-sensitive employees with information concerning the effects of alcohol misuse on individual health, work, and personal life and signs and symptoms of an alcohol problem? (Training safety-sensitive employees is not a requirement of the alcohol regulation, but is highly recommended).

☐ Has the transit agency trained all safety-sensitive employees on the effects of drug use and the indicators of drug use?
- — Was the training at least 60 minutes in length?
- — Did the training cover the effects and consequences of prohibited drug use on personal health, safety, and the work environment?
- — Did the training describe the manifestations and behavioral clues that may indicate prohibited drug use?
- — Was the training presented in the context of prohibited drug use in the workplace, the FTA regulation, and the transit agency's policy?

☐ Are there procedures in place to ensure that all new hires receive the training as soon as possible after hire (i.e., at employee orientation)?

TRAINING FOR SUPERVISORS

Training for Supervisors

☐ Has the transit agency provided reasonable suspicion training to all supervisors that may be in a position to make reasonable suspicion determinations for drug and alcohol tests?
- — Was the reasonable suspicion training at least 2 hours long--60 minutes for the alcohol program and 60 minutes for the drug program (the transit agency can provide more than 2 hours of training to fully cover the information)?
- — Did the reasonable suspicion training cover the topics required by FTA regulations (See page 5-17 and 5-19 in the *Implementation Guidelines* for a training agenda that is compliant with regulations)?

☐ Does the transit agency have procedures in place to train all new hires and transfers into supervisory positions prior to the time they actually perform duties where reasonable suspicion determinations might be required?

OTHER TRAINING

☐ Consistent with the Drug Free Workplace Act of 1988, does the transit agency provide training for the entire workforce on the importance of maintaining a drug-free workplace and the resources that are available to workers that may have problems with prohibited drugs?

☐ Are the employees retrained on a regular basis (not required, but highly recommended)?

ADMINISTRATIVE REQUIREMENTS

- Every transit system must maintain records concerning their testing programs for specific periods of time and submit annual reports to the FTA regarding testing program activities and results.
- Transit systems that receive funds directly from the FTA must certify annually that they are in compliance with the alcohol and drug testing regulations.
- State agencies certify on behalf of those transit systems that receive their FTA funding through the state agency. The state agency may require the transit agencies to provide certification of compliance.

RECORD KEEPING

Record Keeping

☐ Does the transit system maintain records on their program administration and the test results of individuals for whom they have testing responsibility?

☐ Are drug and alcohol program records kept in a secure location with controlled access?

☐ Are drug and alcohol records kept separate from personnel files to protect confidentiality?

☐ Are the following records kept on file for 1 year?

Alcohol Program

- Records of alcohol test results less than 0.02.
  - Employer's copy of the alcohol test form, including results of the test.

Drug Program

- Records of Verified Negative Drug Test Results
  - Employer's copy of custody and control form.

☐ Are the following records kept on file for 2 years?

- Records Related to the Collection Process:
  - Collection logbook, if used
  - Documents related to the random selection process
  - Documents generated in connection with decisions to administer reasonable suspicion alcohol tests
  - Documents generated in connection with decisions on post-accident tests
  - Documents showing existence of medical explanation of inability of safety-sensitive employee to provide enough breath for test
  - Records of inspection, maintenance, and calibration of EBT
- Education and Training Records:
  - Materials on alcohol misuse awareness, including a copy of the employer's policy on alcohol misuse
  - Educational materials that explain the regulatory requirements
  - The employer's policy and procedures with respect to implementing the regulatory requirements
  - Names of safety-sensitive employees attending training on prohibited drug use and the dates and times of such training
  - Documentation of training provided to supervisors to qualify them to make reasonable suspicion determinations
  - Certification that training complies with the regulatory requirements

☐ Are the following records kept on file for at least 3 years?

- Previous employees' drug and alcohol test records
- Good faith effort documentation

☐ Are the following records kept on file for 5 years?

- Alcohol test records with alcohol readings of 0.02 or greater
  - The employer's copy of the alcohol test form, including the results of the test
- Records of covered employee verified positive drug test results
  - The employer's copy of the chain-of-custody form
- Documents related to the refusal of any safety-sensitive employee to submit to an alcohol test required by 49 CFR Part 654

Record Keeping

- Documents presented by a covered employee to dispute the result of an alcohol test administered under 49 CFR Part 654
- Records pertaining to a determination by a substance abuse professional concerning a safety-sensitive employee's need for assistance
- Records concerning a safety-sensitive employee's compliance with the recommendations of the SAP
- SAP follow-up testing plan
- Annual MIS reports
- Records pertaining to a determination by a SAP concerning a safety-sensitive employee's suitability to return to work as a safety-sensitive employee.

Confidentiality and Access to Records

CONFIDENTIALITY AND ACCESS TO RECORDS

☐ Does the transit system only release testing records and results under the following circumstances?

- — When an employee gives written instruction that the transit system may release information or copies of records regarding an employee's test results to a third party or subsequent employer;
- — When, due to a lawsuit, grievance, or proceeding initiated on behalf of the employee tested, the result must be released to the decision-maker in the case;
- — When an employee provides a written request for copies of his/her records relating to the test(s) (can not be contingent on payment);
- — When an accident investigation is being performed by the National Transportation Safety Board (NTSB) and the post-accident test results are needed for the investigation;
- — When records are requested by the DOT or any DOT agency with regulatory authority over the employer or any of its employees, or to a state oversight agency authorized to oversee rail fixed guideway systems;
- — When a criminal or civil action resulting from an employee's performance of safety-sensitive duties in which a court or competent jurisdiction determines the test information is relevant to the case and orders the employer to produce the information;
- — When required by a state Department of Transportation (DOT) or grantee that has oversight responsibility and is required to certify compliance for FTA.

☐ Does the transit agency ensure that each request for release of information specifically identifies the person to whom the information is to be released, the circumstances under which the release is authorized,

and the specific kind of information to be released? Is this documentation maintained?

☐ Is a separate release signed each time information is to be disclosed?

- FTA recipients that contract out the performance of safety-sensitive functions are permitted to have access to individual test results of their contractor's employees since the recipient has oversight authority of the employer. Likewise, state DOTs have authority to have access to testing records of their subrecipients due to their oversight responsibilities.

REPORTING

Reporting

- FTA requires that transit agencies complete annual reports summarizing test results. The standard reporting form is the Management Information System (MIS) form (found in the back of the drug and alcohol testing regulations). Transit systems are required to submit their forms to FTA if they are specifically requested to do so. FTA will select systems to submit reports based on a stratified random sampling technique.

☐ Does the transit system complete the MIS forms annually and maintain for 5 years?

☐ Are all forms typed or printed in ink or electronically generated?

☐ Are all blanks on the form completed?

☐ Is each form signed by an authorized official of the transit agency?

☐ Does the transit agency require MIS forms be prepared by its safety-sensitive contractors?

☐ If the transit agency submits MIS forms on behalf of its safety-sensitive contractors, are the contractor and transit agency MIS forms bundled and submitted together?

☐ When requested to do so by FTA, are annual reports submitted to the FTA Office of Safety and Security or its designees by March 15?

☐ If the transit system is a member of a testing consortium, does the transit system review the consortium's reports for accuracy and complete MIS forms with the consortium information?

CERTIFICATION

Certification

- ♦ Each year transit systems must certify to their regional FTA office that their system is in compliance with the drug and alcohol testing rules.

☐ Has the transit system's certification been authorized by the system's governing board or authorized official? The transit system should maintain a record indicating an appropriate level of review of the program and the certification prior to the signing. Figure 9-3 in Chapter 9 of the *Implementation Guidelines* describes individuals that might be given authority to certify compliance at various types of organization as well as the records that should be maintained to demonstrate proper granting of authority and review.

☐ If the transit system is a direct recipient of FTA funding, is the system certifying compliance with the Drug-Free Workplace Act of 1988, as well as the FTA's drug and alcohol testing regulations?

☐ Do 5311 systems certify compliance with their respective state DOT (highly recommended)?

VENDOR/TPA OVERSIGHT

Vendor/TPA Oversight

- ♦ Transit systems are responsible for the integrity of the drug and alcohol testing program and the quality of testing services provided by vendors.

☐ Are your vendors/TPAs providing adequate services in conformance with the regulations?
- — Collection site(s)
- — DHHS-certified lab(s)
- — Medical Review Officer
- — Breath Alcohol Technician/Screen Test Technician
- — Substance Abuse Professional

☐ Do you have procedures in place to conduct oversight of your vendors?
- — Monitor number and explanation of cancelled tests
- — Performance of mock collections
- — Record keeping and reporting procedure
- — Confidentiality

☐ Do your vendors provide sufficient volume, capacity, location, and service hours?

☐ Do your vendors provide a reasonable response time?

Vendor/TPA Oversight

☐ Do your vendors provide good customer service (highly recommended)?

☐ Do you require documentation of staff credentials and training? Have your service agents complied with the Part 40 specified training requirements?

☐ Do your vendors follow the correct procedures and use the correct forms?

☐ Are your vendors staying up-to-date with changes in regulations, standard procedures, and DHHS guidelines?

☐ Do your vendors have backups in case they are unable to provide the required services in a timely manner?

☐ Do your vendors have in their possession all appropriate guidelines and manuals prepared by DHHS and DOT for US DOT drug and alcohol testing?

☐ Do your vendors belong to any drug and alcohol testing related trade associations (optional; highly recommended)?

☐ Has a PIE been issued against your vendor? Any vendor affiliates or contractors?

☐ Are you aware that DOT test results cannot be changed or disregarded?

☐ Are you aware that the employer is responsible for obtaining test results and other information that is needed for compliance purposes?

☐ If you use the services of a C/TPA, have you as the employer determined the extent and nature of the services to be provided consistent with the limitation set forth in 49 CFR Part 40?

CONTRACTOR OVERSIGHT

Contractor Oversight

- All safety-sensitive contractors that "stand in the shoes" of the recipient must have a drug and alcohol testing program that meets the same requirements as the subrecipient.

☐ Have all safety-sensitive contractors that fall under the regulation been identified?

Contractor Oversight

- ☐ Do they have a copy of your policy, regulations, and other related materials necessary to develop and operate a compliant program?
- ☐ Do you require that your contractors demonstrate and certify compliance with the regulations?
- ☐ Do contracts and service agreements include requirements for compliance?
- ☐ Do contractors understand that compliance is a condition of the contract?
- ☐ Do you provide oversight to ensure contractor compliance?
  - — Checklist
  - — Reports
  - — Inclusion in your program
  - — Periodic assessments

Appendix K

Substance Abuse Management Oversight Questionnaires

DRUG AND ALCOHOL POLICY REVIEW QUESTIONNAIRE
LOCAL BOARD ADOPTION: Has the policy, as most recently revised, been adopted by the local governing board of the employer or operator, or other responsible individual with appropriate delegation of authority?
CONTACT PERSON: Does the policy identify the person, office, branch or position designated by the employer to answer employee questions about the anti-drug and alcohol misuse prevention program?
COVERED EMPLOYEES: Does the policy correctly and completely list, or describe, the categories of employees (covered employees) who are subject to the provisions of the anti-drug and alcohol misuse prevention program?
Does the category of covered activities include operating a revenue service vehicle, whether in or out of service?
Does the category of covered activities include maintaining a revenue service vehicle or equipment used in revenue service?
Does the category of covered activities include controlling the dispatch or movement of a revenue service vehicle, and if so, is the category description consistent with Part 655?
Does the category of covered activities include operating a non-revenue service vehicle that requires a CDL?
Does the category of covered activities include carrying a firearm for security purposes?
COVERED VOLUNTEERS: If an operator has volunteers performing safety-sensitive duties, are the volunteers classified with covered employees (subject to drug and alcohol testing) if: 1) the volunteer is required to hold a CDL, or; 2)the volunteer receives remuneration in excess of his or her actual expenses incurred while engaged in the volunteer activity?
ANALYSIS OF SAFETY-SENSITIVE JOB FUNCTIONS: Does the policy indicate which job titles are covered because the employer has determined that the duties require or may require the performance of safety-sensitive duties?
PROHIBITED DRUG USAGE: Does the policy indicate that employees may be tested for the five specified drugs anytime while on duty?
PROHIBITED BEHAVIOR - ALCOHOL: Does the policy adequately contain specific information concerning employee conduct that is prohibited by the alcohol misuse prevention portion of FTA's rule? The topics include the following periods of compliance: 1) No usage for 4 hours before performing and while performing a safety-sensitive duty; 2) No usage for 8 hours following an accident, or until a post-accident alcohol test is performed; and 3) Testing is permissible only just before, during and just following the performance of a safety-sensitive duty.
ALCOHOL USAGE: Does the policy indicate that alcohol use is impermissible for 4 hours prior to performing a safety-sensitive duty, while on-call to perform a safety-sensitive duty and while performing a safety-sensitive duty?
ALCOHOL TESTING: Does the policy indicate that alcohol use by any covered employee required to take a post-accident alcohol test is prohibited for 8 hours following the accident or until the alcohol test is performed, whichever occurs first?
ALCOHOL TESTING: Does the policy indicate that random and reasonable suspicion alcohol testing is only permissible just before an employee performs safety-sensitive duties, during that performance, and just after an employee has performed covered duties?
CIRCUMSTANCES OF TESTING: PRE-EMPLOYMENT: Does the policy provide a complete and detailed discussion of the following requirements for pre-employment testing: Negative drug test result received before first performance of a safety-sensitive duty; Evidence of successful completion of a rehabilitation program from an applicant or employee

who has previously failed a DOT drug test; Testing for an employee who has not performed safety-sensitive duties for 90 consecutive days and has not been in the random pool; and Part 40 compliant if the employer chooses to do alcohol testing?
PRE-EMPLOYMENT DRUG TESTING: Does the policy state that: The candidate must produce a negative drug test result prior to first performing a safety-sensitive duty; If the test is canceled, the employee must retake and pass the test before being hired; and An employee being transferred must provide a verified negative urinalysis prior to performing a safety-sensitive function?
PRE-EMPLOYMENT DRUG TESTING: Does the procedure for a covered employee or applicant who has previously failed or refused a DOT pre-employment drug test include requiring evidence that the employee has successfully completed a referral, evaluation and treatment plan?
PRE-EMPLOYMENT DRUG TESTING: Does the policy include the provision that a covered employee who has not performed a safety-sensitive duty for 90 consecutive days or more and has not been in the employer's random selection pool shall take a pre-employment drug test with a verified negative result before returning to safety-sensitive duties?
PRE-EMPLOYMENT ALCOHOL TESTING: If the employer chooses to conduct pre-employment alcohol testing, are all the following requirements covered: 1) Testing before the first performance of a safety-sensitive function for every covered employee; 2) Testing all covered employees for this type of alcohol testing; 3) Testing conducted after the employer makes a contingent offer of employment or transfer subject to the employee passing this alcohol test; 4) Testing must follow the procedures described in Part 40; and 5) The covered employee must not be allowed to begin performing safety-sensitive duties unless the result is a BAC below 0.02.
CIRCUMSTANCES; RANDOM TESTING FOR DRUGS AND ALCOHOL: Does the policy describe random testing as: Scientifically valid; Reasonably spread; Unannounced and immediate; and With no discretion by managers (i.e., all covered employees having an equal chance of being selected)?
RANDOM SELECTION METHOD: Does the policy state that random selection shall be by a scientifically valid method, such as a random number table or a computer-based random number generator?
REASONABLY SPREAD: Does the policy state that random tests are to be spread reasonably throughout the year? Operationally, this means that: (1) Testing is continuous throughout the year (i.e., testing starts in January and there is no period during which testing is halted); and (2) Testing is conducted on all days and hours during which the transit service is in operation.
UNANNOUNCED AND IMMEDIATE: Does the policy state that random test dates are unannounced and immediate? (Employees are required to go for the test upon notification, allowing little opportunity to circumvent the test procedures.)
NO DISCRETION: Does the policy state that each covered employee shall have an equal chance of being tested each time selections are made?
CIRCUMSTANCES: POST-ACCIDENT: REQUIRED TESTING FOR DRUGS AND ALCOHOL. Does the policy describe post-accident testing as:

Meeting FTA thresholds; Meeting drug and alcohol testing time limits; and Requiring employees to remain "readily available" for testing?
FTA THRESHOLDS: Does the policy state the FTA post-accident testing thresholds as follows: A fatality; Bodily injury requiring medical attention away from the scene of the accident, or If the mass-transit vehicle is a rubber-tire vehicle and any of the involved vehicles is towed away; If the mass transit vehicle is a rail vehicle or vessel and the mass transit vehicle is removed from revenue service?
WHO MUST BE TESTED: FATALITY? Does the policy state that, in a fatality, the following individuals must be tested: All surviving covered employees operating the mass transit vehicle at the time of the accident; and All other covered employees whose performance could have contributed to the accident?
WHO MUST BE TESTED: NON-FATALITY? Does the policy state that, in a non-fatal accident, the following individuals must be tested: All covered employees operating the mass transit vehicle unless their performance can be completely discounted as a contributing factor based on the best information available at the time of the decision; and All other covered employees whose performance could have contributed to the accident?
TIME TO COMPLETE POST-ACCIDENT DRUG TEST: Does the policy state that the employer must complete post-accident testing as soon as possible, not longer than 32 hours following the accident?
TIME TO COMPLETE POST-ACCIDENT ALCOHOL TEST: Does the policy state that the employer must: Attempt to complete test within 2 hours of the accident? If not able to obtain a specimen within 2 hours, file a report explaining why and continue attempts to obtain specimen? If not able to obtain a specimen in 8 hours, cease attempts to obtain a specimen and update the 2-hour written report?
REQUIREMENT TO REMAIN "READILY AVAILABLE" FOR TESTING: Does the policy state that a covered employee subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or the employer representative of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing?
REQUIREMENT TO REMAIN "READILY AVAILABLE" FOR TESTING: Does the policy state that accident testing is stayed while the employee assists in resolution of the accident or receives medical attention following the accident?
CIRCUMSTANCES: REASONABLE SUSPICION: Does the policy state that reasonable suspicion testing is required when: One or more trained supervisors or company officials can articulate and substantiate physical, behavioral and performance indicators of probable drug use or alcohol misuse by observing the appearance, behavior, speech, or body odors of the covered employee?
CIRCUMSTANCES: RETURN-TO-DUTY AND FOLLOW-UP TESTS (DRUG AND ALCOHOL): If the company has a second-chance policy, does the policy require that these tests be conducted as specified in 49 CFR Part 40 Subpart O?
PROCEDURES: Does the policy include a statement that all drug and alcohol testing will be conducted in accordance with 49 CFR Part 40? This covers the requirement of Part 655.15(e)

to include the procedures that will be used to test for the presence of illegal drugs or alcohol misuse, protect the employee and the integrity of the drug and alcohol testing process, safeguard the validity of the test results, and ensure the test results are attributed to the correct employee.
REQUIREMENT TO SUBMIT- DRUG TESTING: Does the policy include the requirement that a covered employee submit to drug tests administered in accordance with Part 655?
REQUIREMENT TO SUBMIT- ALCOHOL TESTING: Does the policy include the requirement that a covered employee submit to alcohol tests administered in accordance with Part 655?
REFUSALS DEFINED: Does the policy state that the following elements are circumstances constituting a refusal: Refusals for both drug and alcohol testing; Drug testing - additional refusals; Alcohol testing - additional refusals; and No claim that refusal to take a test required under company authority will be considered as a refusal to take a DOT-required test.
REFUSAL - DRUG AND ALCOHOL TESTING: Are all of the following included? 1) Failure to appear in a reasonable time except for pre-employment tests? 2) Failure to remain until the testing process is complete? 3) Failure to provide a specimen? 4) Failure to provide a sufficient specimen with no medical explanation? 5) Failure to undergo a medical evaluation as required by a MRO or DER? 6) Failure to cooperate with any part of the testing process?
REFUSALS: Does the policy state that failure to appear in a timely fashion (except for pre-employment tests) for drug and alcohol tests is a refusal?
REFUSALS: Does the policy state that the failure to remain until the testing process is complete for drug and alcohol tests is a refusal?
REFUSALS: Does the policy state that failure to provide a breath or urine specimen in alcohol and drug testing is a refusal?
REFUSALS: Does the policy state that failure to provide a sufficient specimen with no medical explanation in drug and alcohol tests is a refusal?
REFUSALS: Does the policy state that failure to undergo a medical evaluation as required by the MRO or DER for drug and alcohol testing is a refusal?
REFUSALS: Does the policy state that failure to cooperate with any part of the testing process for drug and alcohol testing is a refusal?
REFUSAL - DRUG TESTING: Does the policy state that the following are refusals in drug testing? Failure to permit monitoring or direct observation; Failure to take a second test as directed by the collector or employer; and Have an adulterated or substituted test result verified by an MRO?
REFUSALS: Does the policy state that the failure to permit monitoring or observation under drug testing is a refusal?
REFUSALS: Does the policy state that failure to take a second test as directed by the collector or employer under drug testing is a refusal?
REFUSALS: Does the policy state that the MRO's verification of a test as adulterated or substituted constitutes a refusal?
REFUSAL - ALCOHOL TESTING: Does the policy state that refusal to sign the certification at Step 2 of the ATF constitutes a refusal?
REFUSALS: Does the policy address only FTA-required testing under these categories of refusals, not any other employer-required drug or alcohol testing?

CONSEQUENCES OF A FAILED OR REFUSED DRUG TEST: Does the policy describe the consequences for a covered employee who has a verified positive drug test result or refuses to submit to a drug test under this part, including the mandatory requirements that the covered employee be removed immediately from his or her safety-sensitive function; and Does the policy state that the individual will be referred to an SAP?
CONSEQUENCES OF A FAILED OR REFUSED ALCOHOL TEST: Does the policy describe the consequences for covered employees found to have violated the alcohol misuse prevention prohibitions, including the requirement that the employee be removed immediately from safety-sensitive functions; and Does the policy state that the individual will be referred to an SAP?
CONSEQUENCES OF BREATH ALCOHOL CONCENTRATION (BAC) IN RANGE OF .02 TO .039: Does the policy describe the consequences for covered employees found to have an alcohol concentration of 0.02 or greater, but less than 0.04?
EMPLOYER SPECIFIC ELEMENTS: If the employer implements elements of an anti-drug program and alcohol misuse prevention program that are in addition to those required by Part 655, does the policy give covered employees specific information concerning which provisions are mandated by the FTA rules and which are not? Are any such additional policies or consequences clearly and obviously described as being based on independent authority?
PROVISIONS CONTRARY TO FTA REGULATIONS: Do any provisions found in the policy have the effect of thwarting the FTA regulations?
END OF DRUG AND ALCOHOL POLICY REVIEW QUESTIONNAIRE

DRUG AND ALCOHOL PROGRAM MANAGER QUESTIONNAIRE
Do you have in your possession, or access to a current copy of the Federal Transit Administration drug and alcohol testing regulations (49 CFR Part 655)?
Do you have in your possession, or access to a current copy of the DOT drug and alcohol testing regulations (49 CFR Part 40)?
Does this transit system maintain either a record that each employee has received a copy of the anti-drug policy, or written notice that the policy is available for review?
Were the actual job duties at this transit system reviewed to decide who performed safety-sensitive functions?
Does this transit system have a company-wide testing program, including testing that goes beyond the requirements of the FTA regulations?
Does this transit system assure that the Federal Drug Testing Custody and Control Form and the DOT Breath Testing Form are not used for testing of non-safety-sensitive employees?
How is the employee notified of the FTA authority for each test conducted under FTA authority?
What arrangements have been made to conduct drug and alcohol tests after normal business hours and on weekends?
Have all company officials who are qualified to make Reasonable Suspicion referrals received at least 60 minutes of Reasonable Suspicion training on the indications of prohibited drug use and 60 minutes of training on probable alcohol misuse?
How would you know which company officials have received the required Reasonable Suspicion training?
At what point in the hiring process do you require candidates for safety-sensitive positions to pass a pre-employment drug test?
Who is responsible for ensuring that employees who transfer internally to safety-sensitive positions pass a drug-screening test before performing safety-sensitive functions?
Who is responsible for ensuring that employees who have been out of the random testing pool for 90 days pass a pre-employment drug-screening test before performing safety-sensitive functions?
How does this system maintain up to date lists of the covered employees subject to random testing?
Do you have a seasonal workforce, and if so, do you remove or retain seasonal employees in the random testing pool while they are not working?
Does this transit system randomly test non-safety-sensitive employees under its own authority?
Are the safety-sensitive and non-safety-sensitive employees selected for testing from separate random pools?
How are the random selections drawn?
Are the random numbers or random lists recorded and saved?
How frequently are random selections drawn?
Once you receive the list of random draws, how do you decide when the actual testing will occur (week, day, time, etc.)?
How frequently are random tests conducted?
Once they are printed, how is the security of the random testing lists maintained?
Who decides the actual day and time to notify an employee to go for a random test?
How are the random testing lists for the day transmitted to the supervisor?
Does this system conduct random testing on all workdays, including holidays?
Does this system conduct random testing on all work shifts?

How much notice is given to the employee to report for a random test?
Who decides that an employee may be legitimately excused from testing, and what are valid reasons?
If an employee selected for random testing is not available on the test day, do you keep a record of why the individual was excused from the test?
Do you ever select substitutes for employees who cannot be random tested?
If substitutes are needed, how are they selected?
Do you have a way to know if the employee arrived at the collection site in a timely manner? For instance, does the collection site know who is coming for a test and when that individual should arrive?
Are you notified of accidents that might necessitate post-accident testing?
Who has the primary responsibility for assuring that post-accident testing is accomplished?
Who is responsible for documenting the decision-making process when a decision is made that post-accident testing is not required?
Do you use DOT forms for post-accident testing only when the FTA threshold has been met?
Do you know what to do if the proper DOT form is not used for an FTA post-accident test?
Who would decide whether to perform a drug and alcohol test if there were a fatality in the accident?
Who determines whether a FTA post-accident testing threshold has been reached?
What criteria would that person use to determine whether a vehicle has sustained disabling damage?
Are there any circumstances that would cause you to test others in addition to the driver?
If the driver were unable to give consent to be tested due to being injured, unconscious, or dead, would you proceed with testing?
When would you commence drug and alcohol testing after an accident?
What would be the result if an employee fails to remain “readily available” for testing after an accident?
Does this transit system maintain a list of qualified and accepted SAPs?
Who would be the person responsible for ensuring that an employee who had a positive drug or alcohol test, or refused a test, was referred to the Substance Abuse Professional for an evaluation, even if the employee is not eligible for reinstatement?
Does this transit system offer employees an opportunity for rehabilitation after testing positive for one of the five prohibited substances and/or alcohol?
If an employee who failed or refused a test were eligible to be reinstated, who would be responsible for determining that the employee was ready to take a Return-to-Duty test?
Do you receive a written evaluation of the individual’s readiness to return to duty and a follow-up testing plan?
Whose responsibility is it to determine the number of follow-up tests for an individual returning to duty?
Do you review each return-to-duty plan/schedule submitted by the SAP?
Who is responsible for ensuring that the SAP's follow-up testing plan is followed?
Whose responsibility is it to determine when an employee must actually go for a follow-up test?
Purely as a matter of best practices data-gathering, do you do anything after a year to determine whether the employee continues to need follow-up testing, such as having the SAP evaluate the employee’s continuing progress?
Do you maintain all records related to the drug and alcohol program in a secure location with controlled access?

Does this transit system have some method to record post-accident decisions?
Does this transit system use forms or otherwise document reasonable suspicion referrals?
Have you ever inspected and obtained documentation of the professional credentials of your MRO, SAP, laboratory, and collectors?
When a person has a positive alcohol test, by what method and how soon after the test is verified (or completed) do you receive notice of the positive test result?
Have the transit system and the collection site established a password or other verification method to ensure that the transmission of the breath alcohol test result is secure?
When a person has a positive drug test, by what method and how soon after the test is verified (or completed) do you receive notice of the positive test result?
What contact information does the MRO have for the transit system?
How do you know if a drug test result is not received from the MRO within a reasonable period after the test?
Do you use a consortium or third-party administrator?
If the results from the MRO are transmitted to you through the consortium or third-party administrator, is there written authorization for that process?
Does this transit system utilize contractors who perform safety-sensitive duties?
Do you maintain and update a list of your covered contractors?
Does your agreement with your contractor(s) contain a requirement that they must be in compliance with the FTA drug and alcohol testing program rules?
How do you monitor the drug and alcohol programs of your contractors?
Did you receive this year's Drug and Alcohol MIS reports from all of your contractors in a timely manner?
Are your covered contractors in compliance with the FTA drug and alcohol rules?
What contractual remedies do you have if your contractor is not in compliance?
What would you do if you determine that your contractor was not in compliance?
How was the annual Drug and Alcohol MIS report prepared for this transit system, and did you lead or assist in the preparation?
Did you review the annual MIS report for content and completeness?
Did you show your MIS reports to top management before sending it to FTA?
Did your system achieve its random testing goals last year?
Was the Drug and Alcohol Program Manager prepared for the audit team, and did the DAPM cooperate with the audit team and facilitate the audit process, including producing the required records?
END OF DRUG AND ALCOHOL PROGRAM MANAGER QUESTIONNAIRE

RECORDS MANAGEMENT QUESTIONNAIRE
APPROPRIATENESS OF RECORDS MAINTENANCE: Does the auditor observe that a set of records has been established with the following characteristics: 1) Secure location and access controlled to those few individuals with a need to know; 2) Information released only as appropriate; 3) Federally required tests and testing has priority and is separate from non-DOT testing; 4) Records are maintained for the proper length of time.
Does the employer maintain records of its anti-drug and alcohol misuse program in a secure location with controlled access?
Except as required by law, or expressly authorized or required, does the employer refrain from releasing information pertaining to a covered employee that is contained in records required to be maintained by Part 655.71?
Are DOT tests completely separate from non-DOT tests in all respects, and do DOT tests take priority (i. e. DOT tests conducted and completed before a non-DOT test is begun, urine collected in a DOT test not used for a non-DOT test)?
Are the following records maintained for a minimum of 5 years from the date of creation: (1) covered employee verified positive drug or alcohol test results; (2) documentation of refusals to take required drug or alcohol tests; (3) covered employee referrals to the SAP; (4) reports from SAPs, and copies of annual MIS reports submitted to FTA?
Are records kept for 3 years of information concerning drug and alcohol test results of applicants requested under Section 40.25 from previous employers?
Are records related to the collection process and employee training maintained for a minimum of 2 years from the date of creation?
Are records of negative drug or alcohol test results maintained for a minimum of 1 year from the date of creation?
MIS REPORT, STATISTICAL SUMMARIES, AND BLIND SPECIMENS: Do the records indicate that the transit operator prepares reports and maintains information confidentiality in a proper manner: 1) MIS report information prepared even if the grantee is not selected to submit a MIS report; 2) MIS report information collected from safety-sensitive contractors; 3) Current list of safety-sensitive contractors and vendors; 4) Bi-annual statistical summaries and blind specimens in order.
Does the recipient annually prepare and maintain a summary of MIS-required information summarizing the results of its anti-drug and alcohol misuse testing programs during the previous calendar year, even if the recipient has not been selected to file an MIS report?
Does the recipient ensure the accuracy and timeliness of each MIS report submitted by an employer, contractor, consortium, or joint enterprise or by a third party service provider acting on the recipient's or employer's behalf?
Does the recipient receive a semi-annual statistical summary of its drug and alcohol testing program from each laboratory to which it submits drug specimens for analysis? If so, does it appear that the count of negative tests and positive tests for the previous calendar year approximately agrees with data from the MIS report?
If the employer has 2,000 or more covered employees, does it submit the required number of blind specimens? If it does, is there any indication that the laboratory analysis of the specimen does not agree with the certified contents of the specimen provided by the specimen vendor?
Does the employer have a method for tracking test results and actively obtaining information required by Part 40 from its service agents?

EMPLOYEE AND SUPERVISOR TRAINING: Do the records indicate that the employer complies with the employee and supervisor education and training requirements, including: 1) Displaying and distributing drug and alcohol informational material? 2) Providing and documenting 60 minutes of employee drug awareness training? 3) Providing and documenting 120 minutes of supervisor reasonable suspicion drug and alcohol training? 4) Not requiring employees to sign drug and alcohol testing consent forms, except the required "prior employer" records release forms?
Does the employer display and distribute informational material and a community service hot-line telephone number for employee assistance, if available?
Do employees receive at least 60 minutes of training on 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?
Do supervisors and/or other company officers authorized by the employer to make reasonable suspicion determinations receive at least 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use and at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse?
Does the employer require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by Part 40 (including, but not limited to, collections, laboratory testing, and MRO and SAP services)?
After August 1, 2001, does the employer check the prior drug and alcohol testing record of employees it is intending to use to perform safety-sensitive duties, including employees transferring to safety-sensitive positions after that date?
After August 1, 2001, does the employer obtain specific consent from the applicant or employee to obtain information about prior DOT drug and alcohol test records from all DOT-regulated employers who employed the individual within the 2 years previous to the date of the application or transfer?
Does the employer maintain a record of having transmitted this information request and consent to each of the employers from whom they have requested information?
Is the authorization for the release of information transmitted in written form (e.g., fax, e-mail, letter) and does this form ensure confidentiality?
Does the employer request the following information from DOT-regulated employers who have employed the employee during any period during the 2 years before the date of the employee's application or transfer: (1) Alcohol tests with a result of 0. 04 or higher alcohol concentration; (2) Verified positive drug tests; (3) Refusals to be tested (including verified adulterated or substituted drug test results); (4) Other violations of DOT agency drug and alcohol testing regulations; and (5) With respect to any employee who violated a DOT drug and alcohol regulation, documentation of the employee's successful completion of DOT return-to-duty requirements (including follow-up tests)?
If the employer obtains information that the employee has violated a DOT agency drug and alcohol regulation, does the employer refrain from using the employee to perform safety-sensitive functions unless the employer also obtains information that the employee has subsequently complied with the return-to-duty requirements of Subpart O of this part, and DOT agency drug and alcohol regulations?

If the information requested is not received from all identified DOT-regulated employers within 30 days after the employee first performed safety-sensitive duties, do the records indicate that the employer has made a good faith effort to obtain this information or that the employer removes the employee from safety-sensitive duties until the information is received?
Does the employer also ask the employee whether he or she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied for, but did not obtain, safety-sensitive transportation work covered by DOT agency drug and alcohol testing rules during the past 2 years?
Does the auditor observe that the transit system promptly provides the requested drug and alcohol testing information to a prospective employer upon receipt of a proper information request and consent form, and that the transit system maintains its copy of the information and request form and a copy of the summary of the information it provided?
PRE-EMPLOYMENT TESTING: Does the auditor observe that the pre-employment testing program has the following characteristics: 1) Notification of FTA authority; 2) Verified negative result is received before the employee performs a safety-sensitive duty (or is hired if the transit system continues with the previous policy); 3) Cancelled tests, if any, must be retaken and passed before the employee performs a safety-sensitive duty (or is placed on the payroll); and 4) No more than 90 days between the pre-employment test and the date the employee becomes subject to random testing.
Does the employer, before performing a pre-employment drug or alcohol test under Part 655, notify the covered employee that the test is required under Part 655?
Does an employee or applicant, before performing a safety-sensitive function for the first time, take a pre-employment drug test with a verified negative test result?
Do the records indicate that no more than 90 days elapse between the receipt of the negative pre-employment test and the date the employee first performs a safety-sensitive duty and is placed into the random testing pool?
Do the records indicate that, if a pre-employment drug test is cancelled, the employer requires the covered employee to take another pre-employment drug test administered under this part with a verified negative result?
Does the employer ensure that an employee is not transferred from a non-safety sensitive function to a safety-sensitive function until the employee takes a pre-employment drug test with a verified negative result?
If the employer chooses to conduct pre-employment alcohol testing, does the employer conduct all pre-employment alcohol tests using the alcohol testing procedures set forth in 49 CFR Part 40?
REASONABLE SUSPICION TESTING: Do the reasonable suspicion testing records indicate that test results were properly ordered by trained supervisors?
Do the records indicate that the employer's determination that reasonable suspicion exists was based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee?
Do the records indicate that supervisor(s) ordered the reasonable suspicion test, or other company official(s) trained in detecting the signs and symptoms of drug use and alcohol misuse?

Do the records indicate that if the reasonable suspicion alcohol test was not administered within 2 hours, there is a record stating the reasons the alcohol test was not promptly administered? If a reasonable suspicion alcohol test is not administered within 8 hours, does the employer cease attempts to administer an alcohol test and state in the record the reasons for not administering the test?
POST-ACCIDENT TESTING: Do the records indicate that the post-accident testing program has the following characteristics: 1) Proper observance of FTA testing thresholds; 2) Proper notification of test authority; 3) Proper use of the federal CCF; and 4) Testing completed within the required time limits or records maintained of testing efforts.
Do the records indicate that the employer performs an FTA post-accident test after an accident when an individual dies, regardless of whether the operator's performance can be completely discounted as a possibly contributing factor?
Do the records show that the employer conducts FTA post-accident testing after non-fatal accidents that reach an FTA post-accident testing threshold, unless the operator's performance can be completely discounted as a contributing factor to the accident?
Do the records show that the employer ever conducts post-accident testing, asserting FTA authority by using a federal CCF, after an accident that does not meet an FTA post-accident threshold?
Do the records indicate that the employer tests other covered employees whose performance could have contributed to a fatal or non-fatal accident?
In the case of an accident that reaches an FTA post-accident testing threshold, is the employer's decision not to administer a post-accident drug and/or alcohol test documented in detail, including the decision-making process used to reach the decision not to test?
If a post-accident alcohol test is not administered within 2 hours following the accident, does the employer prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered?
If a post-accident alcohol test is not administered within 8 hours following the accident, does the employer cease attempts to administer an alcohol test and maintain the record?
Is a covered employee who is required to be drug tested after an accident, tested as soon as practicable, but within 32 hours of the accident?
If a covered employee who is subject to post-accident testing fails to remain readily available for such testing, has the employee been deemed by the employer to have refused to submit to testing?
If the employer is unable to perform a post-accident test within the required timeframe and the employer uses the results of a blood, urine, or breath test conducted by federal, state, or local officials having independent authority for the test, do such tests conform to the applicable federal, state, or local testing requirements, and are the test results obtained by the employer?
RANDOM TESTING: Do the records indicate that random testing has the following required characteristics: 1) Draws are made frequently enough; 2) Testing is spread reasonably; 3) Method is scientifically valid; 4) Notices are held confidentially; 5) Employees proceed immediately; and 6) Excusals are valid and recorded.

Has the employer met the minimum annual percentage rate for random drug testing of 50 percent of covered employees and the random alcohol testing rate of 10 percent of covered employees?
Is the selection of employees for random drug and alcohol testing made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying number?
Does the selection process used provide each covered employee with an equal chance of being tested each time selections are made?
Are random drug and alcohol tests unpredictable - e.g., the dates for administering random tests are spread reasonably throughout the calendar year?
Are random drug and alcohol tests unpredictable - e.g., the tests are conducted at all times of the day when safety sensitive functions are performed?
Are random drug and alcohol tests unpredictable - e.g., the tests are conducted on all days of the week when safety sensitive functions are performed?
Does each covered employee who is notified of selection for random drug or random alcohol testing proceed to the test site immediately?
When employees are excused from random testing, are records of excusals maintained, and do the records indicate that excused employees were legitimately unavailable for random testing during the testing period?
ACTIONS AFTER NON-NEGATIVE TEST RESULTS: Do the records indicate that the employer takes the following actions in response to non-negative or refused drug or alcohol test results: 1) Immediate removal of the employee from safety-sensitive duties; 2) Referral to a qualified Substance Abuse Professional who is acceptable to the transit employer and reasonably available to the employee, or providing the employee with a list of qualified SAPs who are reasonably available to the employee?
Does the employer require that the covered employee cease performing a safety-sensitive function immediately after receiving notice from a medical review officer (MRO) or a consortium/third party administrator (C/TPA) that a covered employee has a verified positive, adulterated or substituted drug test result?
Does the employer require that the covered employee cease performing a safety-sensitive function immediately after receiving notice from a Breath Alcohol Technician (BAT) that a covered employee has a confirmed alcohol test result of 0.02 or greater?
If an employer chooses to permit a covered employee to perform a safety-sensitive function within 8 hours of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04, does the employer retest the covered employee to ensure compliance with the provisions of Part 655.35 and ensure the covered employee does not perform safety-sensitive functions unless the confirmation alcohol test result is less than 0.02?
Does the employer require that the covered employee cease performing a safety-sensitive function immediately after receiving notice that the employee has refused to submit to a required drug and alcohol test?
Does the employer ensure that an employee with direct or immediate supervisory responsibility or authority over another employee does not serve as the urine collection person, breath alcohol technician, or saliva-testing technician for a drug or alcohol test of the employee?

Does the employer (or C/TPA or other service agent) provide to each employee (including an applicant or new employee) who violates a DOT drug and alcohol regulation, a listing of SAPs readily available to the employee and acceptable to the employer, with names, addresses, and telephone numbers?
RETURN-TO-DUTY AND FOLLOW-UP TESTING: If the company has a Second-Chance policy, do the records indicate that the return-to-duty and Follow-up process is conducted properly, including: 1) Evaluation by a properly qualified SAP; 2) Receipt of the initial evaluation report by the SAP; 3) Return-to-duty test after written recommendation by the SAP; 4) Receipt of the frequency and duration of follow-up testing plan from the SAP; and 5) Adherence to the follow-up testing plan.
If the employer offers an employee an opportunity to return to a DOT safety-sensitive duty following a violation, and before the employee again performs that duty, does the employer ensure that the employee receives an evaluation by a SAP meeting the requirements of Section 40.281 and that the employee successfully complies with the SAP's evaluation recommendations?
Does the employer ever seek a second SAP's evaluation if the employee has already been evaluated by a qualified SAP? If the employee has obtained a second SAP evaluation, does the employer rely on it for any purpose?
Does the SAP’s report of the initial evaluation meet the reporting requirements of Part 40?
Does the SAP’s report of the follow-up evaluation meet the reporting requirements of Part 40?
If the employer decides to permit an employee to return to the performance of safety-sensitive functions, does the employer ensure that the employee takes a return-to-duty drug and/or alcohol test with a negative result and that this test does not occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment?
Does the employer carry out the SAP's follow-up testing requirements and not allow the employee to continue to perform safety-sensitive functions unless follow-up testing is conducted as directed by the SAP?
Does the employer schedule follow-up tests on dates of their own choosing and ensure that the tests are unannounced with no discernible pattern as to their timing, and the employee is given no advance notice?
Does the employer ever substitute any other tests (e.g., those carried out under the random testing program) conducted on the employee for this follow-up testing requirement or count a follow-up test that has been cancelled as a completed test?
Do the records indicate that the employer has received a dilute negative test result, and do the records indicate that the employer has developed a policy regarding dilute negative test results and informed employees in advance on the policy developed regarding dilute negative tests?
Do the records indicate that the employer or other person administering the drug and alcohol testing process reviews CCFs and identifies and corrects any errors in the testing process of which they become aware, even if they are not considered problems that will cause a test to be cancelled?
Do the records indicate that any drug or alcohol tests were cancelled because they were determined to be fatally flawed? If so, has the transit operator sought and received indication that the service agent has received the required retraining?

Do the records indicate that any drug or alcohol tests had correctable flaws that were properly resolved, or were cancelled because they were not properly resolved? If so, has the transit operator sought and received indication that the service agent has received the required retaining?
Do the records indicate that, after receipt of a cancelled test result when a negative result is required (e.g., pre-employment, return-to-duty, or follow-up test), the employer directed the employee to provide another specimen immediately and was that specimen properly collected?
Do the records indicate that, after the MRO required an immediate observed collection, the employer directed an immediate collection under direct observation with no advance notice to the employee, and was the specimen properly obtained?
"SHY BLADDER-SHY LUNG" TEST RESPONSES: Does the auditor observe any records indicating that a covered employee experienced a "shy bladder" urine test or a "shy lung" breath test, and if such records exist, did the DER and operator properly comply with Part 40 requirements?
Does the DER, when informed by the collector that an employee has not provided a sufficient amount of urine, consult with the MRO and direct the employee to obtain within 5 days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen?
Does the employer, after receipt of a report from the MRO indicating that a shy bladder test is cancelled, take no further action with respect to the employee and keep the employee in the random testing pool?
Does the employer, if an employee has not provided a sufficient amount of breath, direct the employee to obtain, within 5 days, an evaluation from a licensed physician who is acceptable to the employer and who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen?
If the MRO, in the case of a "shy bladder" test, or the physician in the case of a "shy lung" test, verifies that the test is a Refused Test, does the employer refrain from returning the employee to safety-sensitive duties and initiate disciplinary action as described in its policy?
If the C/TPA or other service agent acts as an intermediary in the transmission of drug and alcohol testing information, has the employer chosen to have the C/TPA or other service agent perform this function?
If the C/TPA maintains records for the employer, were those records made available to the audit team in an appropriate and timely manner?
Did the employer permit access to all facilities utilized and records compiled in complying with the requirements of this part, and disclose data for its drug and alcohol testing programs, and any other information pertaining to the employer's anti-drug and alcohol misuse programs to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its employees or to a state oversight agency authorized to oversee rail fixed guideway systems?
END OF RECORDS MANAGEMENT QUESTIONNAIRE

URINE COLLECTION QUESTIONNAIRE
Was the employee required to sign a consent form?
Upon the employee's arrival at the collection site, does the collector positively identify the individual by photo identification?
If the employee is also going to take a DOT drug test, was the alcohol test administered first?
Does the collector ask the individual to remove any unnecessary outer garments that could conceal items for use in adulterating a specimen and ensure that personal items such as purses and briefcases remain with outer garments?
Does the collector direct the employee to empty his or her pockets and display the items in them to ensure that there are no items present that could be used to adulterate the specimen?
Is the employee allowed to keep his/her wallet?
Does the collector explain the basic collection procedure to the employee and/or show the employee the instructions on the back of the CCF?
After the employee is asked to remove outer clothing and empty pockets, is the employee instructed to wash and dry his/her hands?
Is there a source of water for hand washing, which if practicable, should be external to the privacy enclosure?
Is the employee then provided with a single-use collection container or a specimen bottle capable of holding at least 55 milliliters of urine?
Are collection containers sealed, and does the employee or collector remove the sealer wrapper in the presence of employee?
Do the specimen bottles have a tamper-evident seal to preclude undetected opening, a means to affix a unique identifying number identical to that appearing on the CCF, and provision for initialing by the employee to affirm the identify of the specimen?
Is the employee then required to remain in the presence of the collector (with no access to water, soap, or other adulterating agents) until entering the privacy enclosure to provide the specimen?
Is there a privacy enclosure for urination, in which all sources of clear water have been eliminated, possible specimen contaminants have been removed, and all places where paraphernalia could be hidden have been secured or removed?
If a non-dedicated facility (public restroom or hospital examining room) is used for collections, is that portion used for testing secured during drug testing by: 1) visually inspecting the privacy enclosure; 2) assuring that undetected access (e.g., through a rear door) is prevented; and 3) POSTING THE FACILITY AGAINST UNAUTHORIZED ACCESS?
Are there always bluing agents in toilet tanks to preclude diluting of the specimen?
To the maximum extent possible, do collection site personnel keep the individual's specimen bottle within sight before and after the individual has urinated?
Does the collector then determine that the specimen quantity is at least 45 milliliters?
Using the temperature strip attached to the collection container, does the collector determine within 4 minutes that the temperature is within the range of 32°-38°C/90°-100°F?
Are the two specimen bottles sealed until it is time to pour the sample from the collection container?
After specimen collection and temperature reading, does the collector pour at least 30 ml of urine into the primary specimen bottle?
Is at least 15 milliliters of the remaining specimen poured into the second container, to be used as the split specimen?
Is there a suitable clean surface for writing?

Does the employer utilize the standard five-part, carbonless, standard Federal Drug Testing CCF?
Does the collector securely place an identification label on the bottles that displays the date, the number, and any other identifying information provided or required by the employer? If separate from the label, is the tamper-proof seal also applied?
Does the collector write the date on the seals?
Does the employee initial the identification label on the specimen bottles for the purpose of certifying that it is the specimen collected from him/her?
Does the collector enter on the CCF all information identifying the specimen and sign the form certifying that collection was accomplished in accordance with federal regulations?
Is the employee asked to read and sign a statement on the CCF certifying that the specimen identified as having been collected from him/her is in fact the specimen he/she provided?
Does the collector check the CCF to assure that the dates and signatures are correct and complete?
Does the collector complete the chain of custody portion of the CCF to indicate receipt of the specimen from the employee and certify proper completion of the collection?
Are both bottles placed in a single shipping container, together with only Copy 1 of the CCF?
Are copies 1 through 5 of the CCF sent to the (1) laboratory, (2) MRO, (3) collector, (4) DER, and (5) employee, respectively?
Were the collector and employee both present and was the specimen in view of both the collector and employee during sealing, identification and labeling of the specimen bottles?
Was the collection site person the ONLY one to handle the specimen before it was poured into the bottles and sealed with tamper-evident seals?
Does the collector have only one employee under his/her supervision at one time until the collection process is completed (i.e., specimen has been collected, the urine bottle has been sealed and initialed, the CCF has been completed and the employee has departed)?
Is the employee's employee identification or Social Security number completed and legible on the CCF?
Is the employer's name, address, telephone, and fax numbers completed and legible on the CCF?
Is the MRO's name and address, telephone and fax numbers completed and legible on the CCF? A C/TPA may also be included.
Are the drugs for which testing is to be performed (unless the list is preprinted) completed and legible on the CCF?
Is the reason for testing (pre-employment, random, etc.) completed and legible on the CCF?
Is the time elapsed between when the employee finished voiding the specimen and when the temperature reading was taken (must be less than 4 minutes), and whether the temperature was within the required range (32°-38°C/90°-100°F) completed and legible on the CCF?
Is the chain of custody block for any transfer of the specimen at the collection site completed and legible on the CCF?
Is the collector's name, date of collection, collection site location, remarks concerning unusual collection circumstances, and whether a split sample was legibly completed on the CCF?
Is the collector's printed name, signature, time and date completed and legible on the CCF?
Is a dedicated facility securely maintained at all times?
Are only authorized personnel permitted in any area of the designated collection site where urine specimens are collected or stored?
Is security of the collection materials and completed specimens within the collection site maintained at all times?

If a non-dedicated facility (public restroom or hospital examining room) is used for collections, is that portion used for testing secured during drug testing by: 1) visually inspecting the privacy enclosure; 2) assuring that undetected access (e.g., through a rear door) is prevented; and 3) posting the facility against unauthorized access?
Do you have a copy of Part 40 with technical amendments, and the urine specimen collection guidelines?
What is done if the employee does not have any form of ID?
If the employee does not have ID, is identification of the employee by another employee being tested accepted?
If an employee says he is not ready because an employee representative is delayed in arriving, what is done?
What is done if an employee says he is unable to urinate?
In the collection process, the employee is directed to display the items in his pockets. What is done if he has a bag filled with urine in his pockets?
If the employee is clearly and unequivocally trying to adulterate or substitute the sample, what do you do?
If the employee refuses to cooperate with the collection process, what three steps are taken?
If the employee provided an adulterated sample, and refused to allow an observed collection, what is done with the previously collected adulterated sample?
What is done if the temperature is outside the acceptable range?
In a case where you have collected more than one specimen, and the temperature of the first specimen collected is out of range, what is sent to the lab?
How often should the security of the designated bathroom be checked?
If there is visual indication of contamination, is this recorded anywhere, and if so, where?
If there is visual indication of contamination, and a second specimen will be collected, what is done with the first contaminated sample?
If the employee is unable to provide a specimen of at least 45 milliliters, what is done?
What is done with the original insufficient specimen?
If the employee refuses the attempt to provide a new urine specimen, or if the employee leaves the collection site before the process is complete, what is done?
If the employee has not provided a sufficient specimen within 3 hours of the first unsuccessful attempt to provide the specimen, what is done?
If the employee is in the 3-hour period during which an attempt to collect a sufficient urine specimen must be made and it is time to close the collection facility, what is done?
If during a collection, an event occurs which prevents completion of a valid test or collection (e.g., a procedural or paperwork error) what is done?
If it is necessary to correct the error, can another collection be conducted as part of this effort?
May I see a copy of the new Part 40 regulations?
Are employees required to sign consent forms?
How are unauthorized persons prevented from entering the part of the collection site in which urine specimens are collected or stored?
Have any collectors been hired since August 1, 2001?
Did they receive training? May I see copies of their certificates?
Did the training include five error-free mock collections?
What are the five mock collections with two uneventful collection scenarios that collector's receive during training?
How were collectors hired before August 1, 2001 updated on the new regulations?

If tests are cancelled because of a mistake in the collection process, what corrective actions are taken with the employee that made the mistake?
How soon must error correction training occur following notification that a test has been cancelled because of collector error?
How long is Copy 3 (Collector's copy) of the CCF kept?
What is done if someone doesn't arrive for a scheduled appointment?
How often are specimens shipped to the laboratory?
What is done with Copy 2 and Copy 4 of the CCF?
How soon are CCF copies delivered to the MRO and DER?
Are on-site collections conducted in a non-dedicated facility?
How are collection sites made secure?
Does this center always have a person available who can be a same-gender collector, in case an observed collection is needed?
What is the result if the collector forgets both to sign AND to print his or her name, so that the portion of the CCF is blank?
What is the result if the collector uses a non-DOT form, and the problem is not corrected?
What is the impact if the employee doesn't sign the certification statement and the collector doesn't make note of this in the remarks line?
Is there any impact if the specimen temperature was not checked and the "Remarks" line did not contain an entry regarding the temperature being out of range?
Is there any impact if the collector doesn't sign the certification statement?
How are drug test problems corrected?
What is the impact if the collector makes a mistake in the collection process that causes a test to be cancelled (i.e., a fatal or uncorrected flaw)?
Why is it important to correct procedural problems that are not sufficient to cancel a drug test?
Was the Urine Collection Site prepared for the audit team, and did the vendor cooperate with the audit team and facilitate the audit process, including producing the required records?
END OF URINE COLLECTION QUESTIONNAIRE

BREATH ALCOHOL TEST TECHNICIAN QUESTIONNAIRE
STANDARD COLLECTION WITH NEGATIVE RESULT: Did the collector complete a standard collection with no incorrect or missed steps?
Upon arrival of an employee at the collection site, does the collector positively identify the individual by photo identification?
Was the employee required to sign a consent form?
If the employee is also going to take a DOT drug test, was the alcohol test administered first?
Did the BAT explain the testing procedure to the employee and/or show the employee the instructions on the back of the ATF?
Did the BAT use the breath alcohol testing form prescribed in Part 40?
Did the BAT complete Step 1 on the Breath Alcohol Testing Form?
Did the BAT then ask the employee to complete Step 2 on the form, signing the certification?
Did the BAT open an individually sealed mouthpiece in view of the employee and attach it to the EBT in accordance with the manufacturer's instructions?
Did the BAT instruct the employee to blow forcefully into the mouthpiece for at least 6 seconds or until the EBT indicates that an adequate amount of breath has been obtained?
Does the BAT show the employee the result displayed on the EBT?
If the EBT does not print the test, does the BAT record the displayed result, test number, testing device, serial number of the testing device, time and quantified result in Step 3 of the form?
If the EBT prints on a paper strip, does the BAT then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape)?
If the result of the screening test is a breath alcohol concentration of less than 0.02, does the BAT date the form and sign the certification in Step 3 of the form?
Did the BAT then distribute the three parts of the form properly? Was Copy 1 (white) transmitted to the employer? Was Copy 2 (green) provided to the employee? Was Copy 3 (blue) retained by the BAT?
Were all necessary equipment, personnel, and materials for breath testing provided at the location where testing is conducted?
Did the BAT conduct alcohol testing in a location that affords visual and aural privacy to the individual being tested, sufficient to prevent unauthorized persons from seeing or hearing test results?
Did the BAT supervise only one employee's use of the EBT at a time?
Did the auditor observe that the BAT did not leave the alcohol testing location while the testing procedure for a given employee was in progress?
What level of concentration of alcohol in the breath requires that a confirmation breath alcohol test must be conducted?
Is there a required waiting period before the confirmation breath alcohol test can be administered, and if so, how long is it?
Are there any instructions you are required to give the employee concerning things they should, or should not do while waiting for an alcohol confirmation test?
Do you note that you gave these instructions?
If the employee doesn't follow your instruction about things they should not do during the waiting period, is this noted? If so, where is it noted?
Before a confirmation test is conducted, must an air blank test be done?
If the confirmation test is not conducted within 30 minutes of the screening test, what is done?

If you conducted the initial test, and you are also conducting the confirmation test, is the same Breath Alcohol Testing Form used, or is a new form started?
If a second Breath Alcohol Test Technician is conducting the confirmation test, does the new BAT use the same Breath Alcohol Testing Form, or start a new form?
Is a new mouthpiece used for the confirmation test?
Before the confirmation test is administered, do you and the employee read the sequential test number displayed by the EBT?
After the confirmation test is completed, do you show the employee the result displayed on the EBT?
After the confirmation test is completed, is there anything left for the employee to sign?
If the employee can't provide an adequate amount of breath, what is done?
If the employee won't sign step 4, what is done?
If the employee refuses to take an alcohol test, what is done?
If the next external calibration check of an EBT produces a result that differs by more than the tolerance stated in the quality assurance plan (QAP), does that have any impact on any prior alcohol test that may have been positive?
Is there any impact if the BAT does not observe the minimum 15-minute waiting period prior to the confirmation test?
Is there any impact if the BAT does not perform an air blank of the EBT before a confirmation test?
Is there any impact if the BAT does not sign the form and it is not corrected?
Is there any impact if the BAT has failed to note on the remarks section of the form that the employee has failed or refused to sign the form, and this is not corrected?
Is there any impact if an EBT fails to print a confirmation test result?
Is there any impact if the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result?
Is there any impact if a test result printed by the EBT does not match the displayed result?
Did you train on this model of EBT?
Do you have a copy of the QAP for this machine?
May I see your records of calibration checks for this EBT?
Who do you notify about a positive test result?
How do you ensure the results are immediately received by the DER?
If the initial transmission is by telephone, is a mechanism established to verify your identity before providing the information?
QUALIFICATIONS OF THE BAT: Were the proper BAT training and qualification documents maintained at the testing site?
May I see evidence that all collectors hired since August 2001 have been trained to proficiency in the alcohol testing procedures of Part 40?
How many consecutive error-free mock tests must the BATs complete in training in order to pass?
When you are notified that a BAT made a mistake in the alcohol testing process that caused a test to be canceled (i. e. a fatal or uncorrected flaw), are there any training requirements?
How frequently must the BATs satisfactorily complete BAT/STT refresher training?
How do you know whether your EBT is on the NHTSA Conforming Products List (CPL)?
How are factory calibrations of the EBTs performed as required by your QAP?
What is done if the air blank reading was greater than 0.00 on both the first and second time the BAT did an air blank test during a confirmation test?

Do you maintain a copy of the new Part 40 regulations at this location? May I see a copy of the new Part 40 regulations?
If someone doesn't arrive for his or her scheduled appointment, what is done?
What other types of alcohol tests (e.g., blood, urine) are permitted under DOT regulations?
Was the Breath Alcohol Collection Site prepared for the audit team, and did the vendor cooperate with the audit team and facilitate the audit process, including producing the required records?
END OF BREATH ALCOHOL TEST TECHNICIAN QUESTIONNAIRE

SALIVA TEST TECHNICIAN QUESTIONNAIRE
STANDARD COLLECTION WITH NEGATIVE RESULT: Did the collector complete a standard collection with no incorrect or missed steps?
Upon arrival of an employee at the collection site, does the collector positively identify the individual by photo identification?
Was the employee required to sign a consent form?
If the employee is also going to take a DOT drug test, was the alcohol test administered first?
Did the saliva test technician (STT) explain the testing procedure to the employee and/or show the employee the instructions on the back of the ATF?
Did the STT use the breath alcohol testing form prescribed in Part 40?
Did the STT complete Step 1 on the Breath Alcohol Testing Form?
Did the STT then ask the employee to complete Step 2 on the form, signing the certification?
Did the STT check the expiration date on the device and show it to the employee?
Did the STT open an individually wrapped or sealed package containing the device in the presence of the employee?
Did the STT offer the employee the opportunity to use the device?
Did the STT note the fact that a saliva test was used in Step 3 of the ATF?
Did the STT direct the employee to take a confirmation test, sign, and date Step 3 of the ATF?
Did the STT advise the employee not to eat, drink, belch, or put anything (e. g. , cigarette, chewing gum) into his or her mouth?
Did the STT note on the “Remarks” line of the ATF that the waiting period instructions were provided?
Did the STT then distribute the three parts of the form as provided? Was Copy 1 (white) transmitted to the employer? Was Copy 2 (green) provided to the employee? Was Copy 3 (blue) retained by the STT?
Were all necessary equipment, personnel, and materials for breath testing provided at the location where testing is conducted?
Did the STT conduct alcohol testing in a location that affords visual and aural privacy to the individual being tested that is sufficient enough to prevent unauthorized persons from seeing or hearing the test results?
Did the auditor observe that the STT did not leave the alcohol testing location while the testing procedure for a given employee was in progress?
How does the employee get to the confirmation-testing site?
Are results transmitted to the DER in a confidential manner? How?
If the result of the screening test is negative, what parts of the ATF are completed?
If the employee is unconscious or dead, would you conduct a post-accident test with the ATF?
Can a confirmation test be conducted using a swab?
What is done if the swab is accidentally dropped on the floor before test results are read?
If the test is being repeated because the first swab was dropped on the floor before the reading was taken, is a notation made of why a second test is being conducted?
What happens when an employee is unable to provide a sufficient amount of saliva for an alcohol-screening test?
If the screening test is invalid, what do you tell the employee?
If the employee refuses to sign step 2, is that a refused test?
What is done if the employee terminates testing because of a refusal to provide a saliva sample?

May I see a copy of the new Part 40 regulations?
Is there one designated employer representative (and an alternate) at the transit operation with which you communicate alcohol-testing results, or are there several persons?
QUALIFICATIONS OF THE STT: Were the proper STT training and qualification documents maintained at the testing site?
May I see evidence that the collectors have been trained to proficiency in the alcohol testing procedures of Part 40?
How many consecutive error-free mock tests must the STTs complete in training in order to pass?
How frequently must the STTs satisfactorily complete refresher training?
What problems, which left uncorrected, will cause an alcohol test to be cancelled?
What is the procedure if someone fails to arrive for his or her scheduled appointment?
Was the Saliva Alcohol Collection Site prepared for the audit team, and did the vendor cooperate with the audit team and facilitate the audit process, including producing the required records?
END OF SALIVA TEST TECHNICIAN QUESTIONNAIRE

MEDICAL REVIEW OFFICER (MRO) QUESTIONNAIRE
Please describe your qualifications to serve as an MRO.
Did you become a MRO before or after August 1, 2001?
If you became a MRO after August 1, 2001, do you have documentation that you have successfully completed and passed the MRO training and examination required by Part 40?
Would you describe the continuing education requirement for a MRO and the length of time for the completion of that requirement?
Do you have a copy of the Part 40 regulations as amended, including the Technical Amendments published August 8, 2001?
What is your professional relationship with this transit operation?
Do you have any financial interest with the laboratory being utilized?
Do you report drug test results to the consortium or directly to the employer, or do you report drug test results to the consortium and employer in parallel?
Do you have a method of confirming your identity when you need to talk with the DER?
Do you ensure that drug tests conducted under the FTA regulations by this transit operation are analyzed by a laboratory on the current DHHS approved list?
As a MRO, are you required to personally review a certain percentage of all Chain of Custody Forms (CCFs) with negative results? If so, what percentage of CCFs must you review?
At a minimum, what elements must be included in your review of negative CCFs?
Do you have any responsibility if you discover that a previous negative test had a flaw or an error that would NOT have caused the test result to be cancelled?
Do you report both positive and negative test results to the employer, or only positive test results?
What do you report to the employer if you conclude that there is a legitimate medical explanation for a confirmed positive test result that is consistent with legal drug use?
When you report positive test results, do you report the drug (or drugs) found?
Is there anything you are required to inform an employee regarding third-party disclosure before beginning the verification process?
If an employer requests, do you provide the quantitation of the drugs verified positive?
If a SAP requests, are you allowed to provide any medical information or quantitation of drugs?
In positive test result cases, do you contact the tested individual confidentially to determine whether the employee wishes to discuss the test result, or do you first contact the employer?
Do you attempt to speak with the individual directly, or does your staff inquire whether or not the employee would like the opportunity to speak with you?
Do you always conduct the verification yourself, or do others in your office who are not MROs conduct the verification interview?
Do you always personally review the employee's medical history and any relevant biomedical factors provided by the individual?
To whom do you report the verified positive test result?
How soon do you transmit verified positive test results to the DER?
What review of documents do you perform before you verify a positive test result?
As the MRO, can you change your initial verification of a positive drug test result or refusal to test?
In your estimation, what is the rough percentage of laboratory confirmed positives you have verified as negative to the employer after your review of the employee and any information supplied by the employee?

Are there requirements on the number of times you must attempt to contact the employee regarding a positive test?
What do you do if you cannot contact the employee?
Can you verify a drug test as positive without talking with the individual?
Is one of those circumstances that the employee expressly declines the opportunity to discuss the test?
After the employer representative has documented a contact with the individual directing him/her to contact the MRO, but the employee does not contact you, how many hours must you wait before you may verify a “no contact” positive?
If neither the MRO nor the designated employer representative, after making all reasonable efforts, has been able to contact the employee, how many days must you wait before verifying a “no contact” positive?
If the individual cannot be contacted, and a test is verified as a “no contact” positive, is the employee allowed to present to you information documenting that serious illness, injury, inability to contact MRO, lack of actual notice of the verified positive test result, or other circumstances unavoidably prevented the employee from contacting the MRO?
In this case, if appropriate, do you reopen the verification, allowing the employee to present information concerning a legitimate explanation for the confirmed positive test result?
What do you do if the laboratory confirms the presence of an opiate?
In the case of a “shy bladder”, where an employee cannot provide an adequate specimen (at least 45 milliliters), do you have any involvement in determining whether the individual's ability to provide a specimen is genuine or constitutes a refusal to test?
If the laboratory reports that the specimen has been "rejected for testing," what do you report about the test result to the DER?
As the MRO, are there any "correctable flaws" that are your responsibility to correct?
Is there a date after which a test taken on the 7-part CCF must be cancelled if it is not corrected?
If you notify a collection site that a test was conducted on an expired CCF, what is the time period by which the collection site must correct the test, and what information must be provided to correct the test?
As an MRO, if you cancel a laboratory confirmed positive, adulterated, substituted, or invalid drug test report, what do you complete on the CCF?
As an MRO, when the laboratory reports a invalid result, what actions are you required to take?
As an MRO, when you receive a laboratory report that a specimen is adulterated or substituted, do you have any responsibility for determining whether or not there may be a legitimate medical explanation for the test result?
As the MRO verifying a specimen reported adulterated by the laboratory, do you have the burden of proof that there is no medical explanation for the presence of the adulterant in the specimen, or does the employee have the burden of proof that there is a medical explanation for the presence of the adulterant in the specimen?
After you have informed the employee that you will verify the test as positive, adulterated, or substituted, what do you inform the employee concerning his/her rights to have the split specimen analyzed?
What must you do when the employee requests a split specimen?
To whom do you report when you receive the split specimen results from the second laboratory confirming the positive from the primary laboratory?
What action would you take if the analysis of the split specimen test fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen?

What action would you take if the split specimen is not available for testing or the laboratory reports that the split specimen results are invalid?
On your request, do the laboratories provide you with the quantitation of individual test results?
Does the laboratory transmit the test results to you directly, or does the laboratory transmit laboratory reports through a C/TPA to you?
How many days do the regulations provide for the receipt of test results by the employer?
Was the MRO prepared for the audit team, and did the MRO cooperate with the audit team and facilitate the audit process, including producing the required records?
END OF MEDICAL REVIEW OFFICER (MRO) QUESTIONNAIRE

SUBSTANCE ABUSE PROFESSIONAL (SAP) QUESTIONNAIRE
Do you have one of the following credentials: 1) A licensed physician (Doctor of Medicine or Doctor of Osteopathy); or, 2) a licensed or certified psychologist, social worker, or employee assistance professional; or, 3) an addiction counselor certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission or by the International Certification Reciprocity Consortium/Alcohol & Other Drug Abuse?
Do you have knowledge of, and clinical experience in, the diagnosis and treatment of alcohol and controlled substance-related disorders?
Do you know that you must meet the SAP qualification training requirement and pass a national certification test no later than December 31, 2003?
How long a period do you have from the date of your SAP examination to complete your continuing professional education requirements?
How many hours are needed to complete the continuing education requirement?
What do the regulations say is your most essential function as a SAP?
When is a SAP evaluation required under the DOT Part 40 regulation?
What services must you provide during the SAP evaluation for each employee referred to you?
Are you precluded from making referrals of employees to your private practice, or to a person or organization in which you have a financial interest or association?
Can SAP evaluations be conducted by telephone or online?
Are you required to always recommend a program of education and/or treatment to every employee, during the initial evaluation?
Can employers and employees seek a second SAP evaluation if they disagree with your findings, recommendations, or conclusions?
As an SAP, are you allowed to consult with the MRO to gather information on the employee for the SAP evaluation?
As an SAP, are you allowed to get quantitative values for drug or validity test results from the MRO?
Does the transit operator refer employees to you as part of a second-change policy, or are employees terminated from employment when they are referred to you?
For employees in a second chance policy, what reports are you required to provide to the employer?
Upon request, do you provide employees with employer reports?
Do you provide the initial and follow-up evaluation on your own letterhead?
What rehabilitation programs in the area are reasonably available, and to which do you refer employees for treatment?
Whose responsibility is it to make a “fitness for duty” determination to return the employee to safety sensitive duties?
DOES THE SUBSTANCE ABUSE PROFESSIONAL DETERMINE THE FREQUENCY AND DURATION OF FOLLOW-UP TESTING FOR A COVERED EMPLOYEE, AS FOLLOWS: • What is the minimum number and duration of follow-up drug and/or alcohol tests that an employee is subject to? • Can you recommend to the employer to conduct more tests during the first months and fewer tests in latter months of the year? • What is the maximum duration of follow-up testing for the employee? • In addition, does follow-up testing ever include testing for drugs if the employee tested positive for alcohol, or alcohol if the employee tested positive for drugs, as directed by the SAP to be performed in accordance with 49 CFR Part 40?

- As the SAP, can you substitute any other tests (i.e., random testing program) conducted on the employee as a follow-up testing requirement?
- If an employee misses a follow-up test, or if a follow-up test is cancelled, do the regulations require that the test must be made up?
- Was the SAP prepared for the audit team, and did the SAP cooperate with the audit team and facilitate the audit process, including producing the required records?

END OF
SUBSTANCE ABUSE PROFESSIONAL (SAP) QUESTIONNAIRE

CONSORTIUM/THIRD PARTY ADMINISTRATOR QUESTIONNAIRE
Do you, or does your company, act as an intermediate in transmitting drug test results from the MRO to the employer? That is, does the MRO communicate drug test results directly to the employer, or does the MRO transmit results to you, and do you transmit them to the employer?
Does your company have a written agreement with the employer requesting that you act as an intermediary to transmit drug and alcohol testing information from the MRO to the employer?
If you act as an intermediary, are you allowed any additional time to transmit information to the employer from the MRO?
As a C/TPA acting as an intermediary, do you know what drug and alcohol testing information Part 40 does not allow you to transmit?
Do you know whether or not the Part 40 regulations allow consortium/third party administrators (C/TPA) to transmit laboratory reports, positive as well as negative, from the laboratory to the MRO?
Do you know whether or not the Part 40 regulations allow C/TPAs to transmit verified MRO reports, positive as well as negative, from the MRO to the employer?
Do you know whether or not the Part 40 regulations allow C/TPAs to transmit SAP reports from the SAP to the employer?
What confidentiality requirements concerning transmission of drug and alcohol information are applicable to C/TPAs?
How do you ensure that you meet these confidentiality requirements?
Do you maintain any records concerning the drug and alcohol testing program and/or the results of employees' tests? If so, for how long?
When an employer is asked by a DOT agency representative to produce drug and alcohol related information in relation to an inspection or regulatory requirement, how many days do you have to produce and make any information in your control available to your client and to the DOT representative?
What is the scientifically valid method this consortium uses to make its random selections?
How does your firm maintain up-to-date lists of covered employees subject to random testing?
Are the random numbers and/or random lists recorded and saved, and if so, for how long?
Has a statistician or auditor ever checked the random numbers?
How frequently are random selections drawn?
If you select days and times for testing, do you put any limitations on the dates and times that may be assigned for testing the employees?
Does your program select alternates or substitutes for employees who cannot be randomly tested?
If an employee selected for random testing is successfully tested, does your consortium receive information about the test result?
Do you receive information on the drug test results for this transit system, and do you receive that information from the laboratory directly, or from the MRO?
How do you assure that members of your consortium achieve the 50 percent and 10 percent random testing requirements over the course of a year?
Does the Drug Testing CCF, and the Breath Alcohol Testing Form, have a code number or name of the employer on it, or does it have the name of the consortium, but not the name of the employer?
Does the laboratory, consortium, or both provide each employer with a semi-annual statistical report of test results attributable to that employer?

Do you assist your members in any way to prepare their annual MIS reports?
Do you monitor the quality of collection services provided by the designated urine collection sites and breath alcohol collection sites?
Does your consortium have contracts with more than one DHHS-certified drug testing laboratory, so that an employee may readily have a split specimen tested.
Do your members receive SAP services through this consortium?
How long does your consortium keep records associated with positive tests?
Does this consortium also provide employee and/or supervisor training for your clients?
Was the C/TPA prepared for the audit team, and did the C/TPA cooperate with the audit team and facilitate the audit process, including producing the required records?

END OF
CONSORTIUM/THIRD PARTY ADMINISTRATOR QUESTIONNAIRE