

Advanced Drug & Alcohol Program Manager (DAPM)

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Agenda

In this session, we'll explore a variety of key technical issues and interpretations that may be unfamiliar to even experienced DAPMs. We'll clarify and provide best practices to help transit employers maintain a compliant drug and alcohol testing program.

Topics include:

- Definition of a DER
- Statistical Summaries
- FMCSA Clearinghouse
- Shy Bladder
- Pre-Employment Testing and Previous Employer Requests
- Random Testing
- Disabling Damage and Completely Discounting
- Split Specimen Testing
- Non-DOT Testing
- DUIs and Arrests
- Collection Site Availability
- Reasonable Suspicion
- Arbitration
- Removal From SS Functions

What is a Designated Employer Representative?

- The Designated Employer Representative (DER) is your key employee for many drug and alcohol program functions.
 - The DER must be a company employee.
- You must give your service agents the DER's contact information.
 - DERs should be readily available.
- To ensure good coverage, a best practice is to have multiple DERs.



§ 40.3: 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.

Statistical Summaries (§40.111)

- Are you getting semi-annual reports from lab?
 - DOT requires laboratories to disclose aggregate statistical summaries of DOT drug and alcohol testing data to employers on a semi-annual basis.
- You can also request a summary in response to an audit or inspection, and the lab must provide this to you unless you have fewer than five aggregate tests results (6 months).
- This must be broken out by employer!
 - Not broken out by DOT Agency.

FMCSA Clearinghouse

- What if you have an employee with FMCSA positive transferring over to FTA?
 - Send return-to-duty /follow-up results (ATF, CCF, MRO-Verified Result) to clearinghouse@dot.gov.
- What do I do when the State put operator in 'prohibited' status' (CDL) due to positive or refusal in Clearinghouse?
 - Same as above.

Employers and drivers **exclusively covered by FTA drug and alcohol testing regulations are exempt from FMCSA Clearinghouse requirements.-49 CFR § 382.103(d)(1).

- What if my FTA-covered CDL holder's positive was mistakenly added to the Clearinghouse?
 - Drivers must register for the Clearinghouse to view the violation information and the steps they need to take if they feel information has been inaccurately record.
 - Submit a Petition for Data Review.



The FMCSA Drug & Alcohol Clearinghouse is using Login.gov to allow you to sign in to your account safely and securely.

Sign in

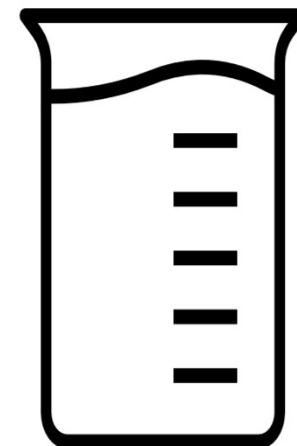
Create an account

More info at:

<https://clearinghouse.fmcsa.dot.gov>

Shy Bladder (§40.193)

- Does an employee have medical issue that precludes them from providing a specimen?
- An employee must make an appointment in 5 days.
 - Evaluating Physician – acceptable to MRO
 - Can be MRO
 - Can be Primary Care if acceptable to MRO
 - Expertise in appropriate medical issue
- An employee **cannot** be removed from safety-sensitive functions pending medical evaluation.
 - This is the same situation as shy lung. (§40.265)
- If an employee drops specimen and cannot produce another in three hours, must go through shy bladder process.
 - **Result: Cancelled or Refusal**



Shy Bladder, cont. (PE, RTD, FU) – (§40.195)

- Pre-employment, return-to-duty and follow-up: a ‘negative’ for safety sensitive functions.
 - The employee has valid documented medical condition that precludes them from providing a specimen.
 - They still must go through shy bladder procedure every time they go for a test.
 - Treat everyone the same!
 - The MRO must:
 - Determine if clinical evidence of illicit drug use exists.
 - Conduct medical evaluation.
 - Consult with primary physician and physician who performed shy bladder evaluation.
 - If no evidence – MRO report ‘Negative.’
 - If evidence – MRO reports ‘Cancelled Test.’

Consortium — Are you in One?

- Consortium means a group of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members (§ 40.3)
- 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 in the consortium who are subject to random drug and alcohol testing adequate to meet the minimum annual testing rates. (§ 655.45)
- What if you use a service agent?
 - If they prepare the MIS on behalf of the employer, a company official (employee) still must certify the accuracy and completeness of the MIS report. (§ 655.72)
- Consortium numbers will be requested for an FTA D&A Audit.

What is Disabling Damage?

- Towing does not always mean disabling damage!
- § 655.4, “disabling damage”: prevents a vehicle from departing the scene of the accident in its usual manner in daylight after simple repairs. Includes where a vehicle would be further damaged if driven. Excludes damage that can be temporarily remedied at the scene without special tools or parts, tire disablement, and damage to headlights, taillights, turn signals, horn, or windshield wipers.
- Towing alone or the presence of a tow truck does not automatically qualify as a threshold for disabling damage



What Does it Mean to “Completely Discount” an Operator in an Accident? (§655.44)

- Remember: For non-fatal accidents only.
- You determine with the best available information that the employee’s performance could not have contributed to the accident in any way.
 - Post-accident testing under FTA authority is prohibited.
 - Include detailed documentation of the decision not to administer drug and alcohol tests.
 - Documentation is required!

Common Questions about Random Testing

- Can you drug test more than one employee on the same day?
 - You may random drug test more than one safety-sensitive employee on a single day.
 - You should not bunch or ‘batch’ tests, which would eliminate a reasonable spread.
- Can an employer mandate a specific day for testing?
 - A client can mandate the day of random testing.
 - The schedule of random tests should be proportional to the performance of safety-sensitive functions.
 - If the majority of employees work between 9 a.m.- 5 p.m., it is expected that the majority of random testing would occur during those same hours.
 - If fewer employees work early morning, fewer random tests would be conducted in early morning.

Tests should still be spread ‘reasonably’ and unpredictably; there should be no discernable pattern of testing (§ 655.45(g)).

Random Pool Management

- What if employee is terminated but is rehired in less than 90 days - is pre-employment performed?
 - Does not require a pre-employment test but § 40.25 applies.
- What if an operator performs both FMCSA (public works) and FTA (public transit) functions for a city or county government?
 - An employee is randomly tested under the authority of the agency that regulates more than 50% of the employee's functions. (§ 655.45(j))
 - **Is the employee in both random pools?**
 - No!
 - FMCSA and FTA may be combined into one pool.
 - Ensure the testing rates meets the agencies' standards.
- What if I send the wrong operator for a random drug test?
 - What if the result is positive?
 - Document, Document, Document!

Previous Employer Checks (§40.25)

- FTA only requires two prior years.
 - What if an employee worked for a covered employer 18 months ago, but worked for them for five years?
 - What if they had a positive drug test four years ago?
- Consent must be specific release to the past employer, it cannot be a blanket release for multiple employers.
- You must obtain and review the testing history before the employee performs safety sensitive functions if possible.
 - Document a good faith effort to obtain the information from the previous employers.
 - Let us know if having trouble getting this or if they are directing you to Clearinghouse.

Sample Previous Employer Release of Information Form

EMPLOYER NAME/LOGO

Release of Information Form – 49 CFR Part 40 Drug and Alcohol Testing

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

Employee Name: _____ SS/ID Number: _____

I hereby authorize release of information from my DOT-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.

Employee Signature _____ Date _____

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

I-B:
 Previous Employer Name: _____
 Designated Employer Representative: _____
 Address: _____
 Phone #: _____ Fax #: _____

Section II: To be completed by the previous employer and transmitted 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?	Yes ___ No ___

II-B:
 Person providing information in Section II-A:
 Name: _____ Title: _____
 Phone #: _____ Date: _____

Pre-Employment Alcohol Testing (§655.42)

- You may conduct pre-employment alcohol testing under DOT authority, but only if two conditions are met:
 1. The pre-employment alcohol testing must be conducted for all covered employees not just some.
 2. The employer must conduct the test after making a contingent offer of employment or transfer.



Split Specimen Testing (§40.153, §40.173)

- In the event of a verified positive drug test result, or a verified adulterated or substituted result, the employee can request that the split specimen be tested at a second laboratory.
 - An employee has 72 hours to request the split-test.
 - The test must happen no matter who pays for it.
- The MRO must move forward if a split test is requested and if the employee does not pay for it, they will bill the employer.
- The employer is responsible for ensuring the test occurs in a timely manner.
 - The employer can request the employee to pay for all or part of split, however if the employee refuses to do so the employer must pay.

Have this in your policy to avoid confusion about who is paying!

Who Pays?

- The employee requests drug and alcohol records from employer or former employer.
 - What about production (copying) costs?
 - Employee requests drug and alcohol records from MRO, lab or other service agent?
- Payment for SAP services?
 - Follow up/ Return-to-duty tests

Have this in your policy!



Non-DOT Quick/Rapid Test

- An employer's policy includes conducting a quick test following a minor accident (no threshold is met) - is this allowed?
 - What if it is positive?
- Can you perform a non-DOT quick test after 30 days out of service/pool?
- Quick tests do NOT impact DOT testing
- Can you use a quick test to determine if a DOT test should be done?
- Can you do a quick test to determine if an employer should remove an employee from safety-sensitive function? (PA & RS)



§ 40.13: DOT tests must be completely separate from non-DOT tests in all respects.

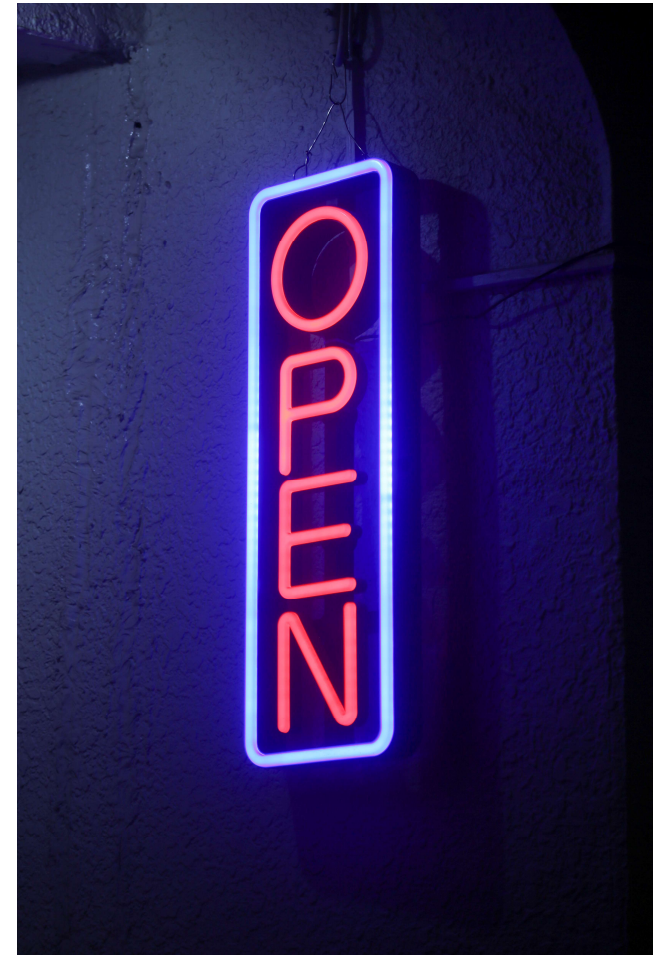
DUI & Drug Arrest

- What if an operator has a DUI on personal time / vehicle?
 - Does DUI impact ability to perform FTA-defined safety-sensitive function?
- What if it results in a CDL disqualification?
 - Are they allowed to operate non-CDL safety-sensitive vehicle?
- What if FTA safety-sensitive employee has a drug 'arrest'?
 - Must the employee be terminated?
 - Must the employee be referred to a SAP?
 - Can the employee perform a safety-sensitive function?
 - Can the employee operate a CDL required vehicle?



Collection site only open 9 a.m. to 5 p.m.

- Are there other collections sites within reasonable distance?
- Will current collection site open for you after hours?
 - Random / Follow-Up
 - Post Accident or Reasonable Suspicion
- Is there a mobile/ off-hours collector available?
 - \$\$\$
- Do you have an airport, railroad, trucking, transit, a harbor near you?
- You can train an employee to become an inhouse collector
 - No direct supervisors



Reasonable Suspicion

- Can HR require they be consulted prior to any reasonable suspicion decisions?
- Must the reasonable suspicion determiner be a supervisor?
- Can reasonable suspicion be performed based on video on social media?
- What about safety-sensitive work performed remotely?
- What if incorrect determination is made?
 - What if result is positive?
 - Results never change due to a mistake!

Remember **specific, contemporaneous, articulable** observations (§ 655.43)

Arbitration

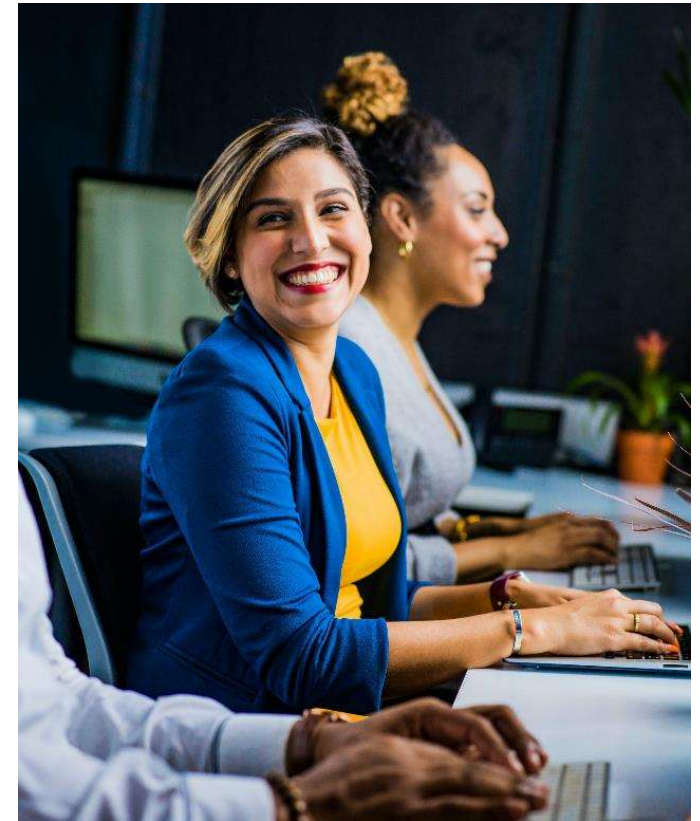
- Can employer consequence of DOT drug or alcohol violation be disputed?
 - Arbitrators may overturn the employer discipline or termination following a refusal or positive test result, but NOT the DOT test **result**.
- Can DOT consequences of DOT drug positive or DOT alcohol result of 0.04 or greater be disputed?
 - Still remains a DOT positive/refusal to test
- Can arbitrator overturn DOT violation?
- Can arbitrator overturn refusal determination?
- Can arbitrator cause DOT test to be cancelled?
- The violation must **still** be reported as a positive/refusal on MIS report.

Can I Remove from Safety Sensitive Functions?

Yes or No?	(§ 40.21, § 40.23)
Following a shy bladder / shy lung - awaiting evaluation?	NO
Following a significant delay while awaiting a MRO-verified result?	NO
Following a call/ inquiry from MRO for more information?	NO
Following a negative dilute if policy is to retest?	NO
Following a direction by MRO for DO following an invalid lab result?	NO
Following a quick test 'positive' result while awaiting the MRO verified result?	NO

Other Training Opportunities?

- FTA provides FREE virtual and onsite D&A trainings. Below is a link to the FTA D&A training webpage.
 - <https://transit-safety.fta.dot.gov/DrugAndAlcohol/Training/Default.aspx>
 - Trainings are updated on a regular basis. In addition, FTA may provide onsite trainings upon request (free).
- TSI Training
 - <https://www.transportation.gov/transportation-safety-institute>



Questions?



Thank you!

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