FTA Drug and Alcohol REGULATION UPDATES

October 2022

Issue 76

The FTA Audit Team is Back on the Road

FTA has resumed its in-person Drug and Alcohol Compliance Auditing Program after a postponement due to the COVID-19 public health emergency. In 2021, FTA conducted audits remotely, which allowed FTA to continue its safety oversight program consistent with federal, state, and local public safety guidance.

FTA is also now offering in-person training on drug and alcohol requirements. For more information, see the article, "Drug and Alcohol Substance Abuse Trainings Available" on page 5 of this newsletter issue.

2022 Management Information System (MIS) Reporting

MIS reporting for 2022 drug and alcohol testing results begins January 1, 2023, when the Drug and Alcohol Management Information System (DAMIS) opens. Covered grantees should receive a notification letter with login instructions in December 2022. The notification letters are mailed to the certifying official listed on the previous year's MIS submission. Additionally, a grantee's list of subrecipients/contractors is based on the previous year's MIS submission. Grantees needing changes to the listed certifying official or to the list of covered subrecipients/contractors should send these updates to the FTA Drug and Alcohol Project Office at fta.damis@dot.gov.

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U.S. Department of Transportation
Federal Transit Administration

Employers who Operate Seasonally Must Still Meet Minimum Testing Rates

To comply with 49 CFR Section 655.45, FTA employers must randomly test a percentage of their employees at a rate that meets or exceeds the published testing rate, which is currently 50 percent for drugs and 10 percent for alcohol. There are no exemptions to the minimum testing rate requirements. Employers who operate seasonally should use the averaging method to determine the number of safety-sensitive employees to report on the annual MIS, as well as the number of random tests they are required to conduct. To calculate the number of covered employees, the employer should add the number of employees in the random selection pool each time selections are made, and then divide by the number of selection periods in the year.

For example, consider an employer who has 10 safety-sensitive employees for three-quarters of the year and 30 safety-sensitive employees for one quarter of the year. If this employer conducts quarterly selections, they calculate: (10+10+10+30)/4 = 60/4 = 15 covered employees. The 50 percent and 10 percent minimum rates would be calculated from this number of employees, so they would be required to conduct at least 8 random drug tests and 2 random alcohol tests annually.

Common Follow-Up Testing Issues

In accordance with 49 CFR Section 40.309(b), follow-up testing must be unannounced with no discernable pattern as to its timing. Some employers make the mistake of routinely sending an employee for testing at recurring times, such as when they first arrive at work. This creates a predictable pattern that undermines the deterrent effect of follow-up testing.

Any follow-up testing that is conducted must match the Substance Abuse Professional's (SAP) plan, per § 40.309(a). This means the employer must keep track of when each employee's testing year begins and ends, they must not send the employee for additional follow-up testing beyond what the SAP prescribed, and they must ensure that employees are tested for drugs, alcohol or both according to the SAP's instructions. Conducting too many or too few tests is non-compliant.

All return-to-duty and follow-up drug tests must be directly observed, per § 40.67(b). Employers should examine Step 2 of each applicable Custody and Control Form (CCF) to ensure the test was conducted under direct observation. If a CCF does not indicate that a directly observed test was conducted when one was required, the employer should contact the collector to determine whether direct observation occurred but was not recorded, or if it did not occur at all. If the directly observed test did occur but was not marked, the collector should provide a memorandum of correction to the employer. If the employer learns that no directly observed test occurred at all, the employee must be immediately sent for a retest per § 40.67(n).

DOT Tests Are Separate From and Take Priority Over Non-DOT Tests

Section 40.13 requires DOT drug and alcohol tests to remain separate from non-DOT tests in all respects . The regulation includes the following:

- DOT tests must take priority and must be conducted and completed before a non-DOT test is begun.
  - You must discard any excess urine left over from a DOT test and collect a separate void for the subsequent non-DOT test.
  - You may not decide to conduct a DOT test based on a non-DOT test result. For example, you may not consider the result of a rapid test in your decision to conduct a DOT post-accident or reasonable suspicion test.
- You must not perform any tests on DOT urine or breath specimens other than those specifically authorized by Part 40 or DOT agency regulations.
  - You may not test a DOT urine specimen for additional drugs.
  - A laboratory may not make a DOT urine specimen available for a DNA test or other types of specimen identity testing.
- No one is permitted to change or disregard the results of DOT tests based on the results of non-DOT tests.
  - 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.
- You must not use the federal Custody and Control Form (CCF) or DOT Alcohol Testing Form (ATF) in your non-DOT testing programs.

Check with the Medical Review Officer (MRO) to Determine Cancellations due to Collector Error

When a collector makes a mistake in the collection process that causes a test to be cancelled (i.e., a fatal or uncorrected flaw), § 40.33(f) requires the collector to undergo error correction training within 30 days of being notified of the error. In error correction training, the collector must demonstrate their proficiency in the collection procedures by completing error-free mock collections in the subject matter area in which the error that caused the test to be cancelled occurred. (See § 40.33(f) for details.)

When the MRO cancels a drug test, they must determine if the collector is at fault. For example, if a test is cancelled due to an insufficient specimen, the MRO will determine if the specimen leaked in transit, or if an insufficient amount of urine was collected. If the laboratory finds no evidence of leakage, it is likely the collector failed to collect the appropriate amount of urine, and error correction training would be necessary.

If the cancelled test is a result of collector error, the MRO will note this determination when reporting the cancelled test to the employer. The employer is responsible for notifying the collector of the error correction training requirement, and for ensuring the training takes place. The employer may also delegate this authority to a service agent (e.g., MRO, third-party administrator).

Factoring Travel Times into Testing

Many employers use collection facilities that require lengthy travel times. This circumstance should always be factored into the testing process, with the employer anticipating and accounting for delays due to distance, traffic, etc.

At the time of notification, the employer should have an informed estimate on what a reasonable travel time would be, and this should be communicated (in writing if possible) to the collection site. Note, the estimated arrival time should not be communicated to the employee, but rather the employee must be instructed to proceed immediately to the testing site. A collection site requiring a lengthy travel time should be called in advance to ensure they will be available for the donor.

Documenting estimated travel times and arrival times at the collection site will allow the Drug and Alcohol Program Manager (DAPM) to more easily determine if an employee has proceeded immediately, as required by § 655.45(h). FTA has a sample Drug and Alcohol Testing Notification form which can be used for this purpose.

Refusal Exemptions for Pre-Employment Tests

A DOT pre-employment test differs slightly from other types of tests in the way refusals are determined. For pre-employment testing, an employee/applicant's failure to appear for testing – or their failure to appear within a reasonable amount of time – does not constitute a refusal, provided that the testing process has not yet commenced, per § 40.191(a)(1). Similarly, an employee/applicant's failure to remain at the testing site and to provide a specimen are not refusals if testing has not yet commenced, § 40.191(a)(2). So, when does the DOT urine testing process begin? It begins with the selection, unwrapping, and provision of the collection container (i.e., the cup) to the donor, as stated in DOT's Urine Specimen Collection Guidelines.

While less common than the aforementioned scenarios, MROs (and employers) are reminded that an employee/applicant's failure to undergo a medical evaluation as part of the pre-employment test verification process shall not be deemed a refusal unless the test was conducted following a contingent offer of employment, per § 40.191(a)(7).

Taxicab Exception

FTA Drug and Alcohol Regulation Updates newsletter Issue 74 discusses the applicability of the requirements of 49 CFR Part 655 to contracted ridesourcing companies. The article states "if a public transit passenger can randomly choose from among two or more ridesourcing providers or taxicab companies, the FTA testing regulations do not apply to those companies." This is the "taxicab exception" and is consistent with the preamble to Part 655 which states "rules do not apply when the patron (using subsidized vouchers) selects the taxi company that provides the transit service." FTA wishes to be clear that only a choice between two or more ridesourcing and/or taxicab companies would meet the exception. A choice between a ridesourcing service and another type of service, such as fixed route bus service, does not meet the taxicab exception.

More on Found Items: Unauthorized Items Left in the Restroom

An article in Issue 75, "What Happens When a Collector Finds Items Used to 'Beat' a Drug Test," discusses the requirement for an employee to empty their pockets prior to a drug test, and the subsequent actions taken if an item is presented that could be used to adulterate a specimen.

A collector may also find items left in a restroom that could be used to adulterate a specimen. Section 40.63(e) requires an immediate collection under direct observation if the collector, at any time during the collection process, observes behaviors or materials brought to the collection site that indicate an attempt to tamper with a specimen. This includes materials found in the privacy enclosure after the employee has provided their urine sample.

The collection site security and integrity steps required by § 40.43 help to ensure collectors discover any items used to "beat" the test that are left behind by employees.

This regulation requires collectors to inspect the restroom and to secure areas and items that appear suitable for concealing contaminants before and after each collection. These requirements help collectors identify employees who have attempted to adulterate their specimen and ensure unauthorized materials are removed from the restroom prior to the next drug test. Finally, inspecting the restroom before and after each collection gives the collector confidence that any illicit materials found were, in fact, left by the last employee to use the restroom.

Employer Discretion When Scheduling Random Tests

Employers are not precluded from establishing a process for randomly testing employees who provide advance verifiable notice of scheduled medical or family and childcare commitments. Employees in this case would be tested for drugs no later than three hours before the end of their scheduled shift. The process cannot excuse a covered employee from random testing once selected and does not extend to an employee who has not provided advance verifiable notice of a previous commitment to the employer. These commitments need to be brought to the employer's attention before notification of the test, and employees cannot claim they are unavailable for testing after they've been notified of their selection. Employers must also periodically verify the scheduled commitments to ensure they still exist.

Drug and Alcohol Substance Abuse Trainings Available

Free FTA sponsored drug and alcohol training sessions provide essential information to facilitate covered employers' compliance with the drug and alcohol testing regulations (49 CFR Part 655 and Part 40). FTA provides these one-day trainings at a host site, and they are open to the public. Trainings are led by the FTA Drug and Alcohol Program and Audit Team Members. For those unable to travel or host, virtual sessions will continue to be offered. For a schedule of upcoming trainings and to register, please visit the training website. If you are interested in hosting a training session, contact the FTA Drug and Alcohol Project Office at fta.damis@dot.gov or 617-494-6336 for more information.

If You Receive FTA Operating Funds, All Safety-Sensitive Functions are Covered

The drug and alcohol program requirements of Part 655 not only apply to direct recipients of Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311, but also to any "contractor of a recipient or subrecipient of Federal assistance under 49 U.S.C. 5307, 5309, 5311." If an employee of a recipient of Chapter 53 funds performs a safety-sensitive function, the employee would be subject to FTA drug and alcohol testing, regardless of whether they are paid with Federal or local funds, or whether contracts for these services are Federally or locally funded.

Reclassifying Drug and Alcohol Tests

There are three cases in drug and alcohol testing that may cause a reclassification effort:

1. Changing a non-DOT test to a DOT test
2. Changing a negative DOT test to a non-DOT test
3. Changing DOT test with a violation to a non-DOT test

In the first instance, if the test was inadvertently conducted using a non-DOT form or was done using a non-DOT form because no current DOT forms were available, a memorandum can be created following the steps set forth at § 40.205(b)(2) stating why the wrong form was used and that all information required for a DOT test is present on the non-DOT form. A similar process is provided for alcohol tests at § 40.271(b)(2).

For the second case, in which a non-DOT test with a negative result was inadvertently conducted as a DOT test (e.g., a non-safety-sensitive worker was given a DOT test by mistake), the employer can simply make a memorandum and keep this on file with the test. This result would not be reported on the employer's annual MIS statement, as it is no longer considered a DOT test. Note that a pattern of mistaken DOT tests could result in a violation of DOT testing rules.

In the final case, in which a test was mistakenly performed as a DOT test and had a verified positive result, was a refusal to test, or had a confirmed alcohol result of 0.04 or greater, the applicable DOT agency's Drug and Alcohol Program Manager must be contacted before any reclassification is performed (FTA's Program Manager, Ms. Iyon Rosario, can be reached at Iyon.Rosario@dot.gov or at 202-366-2010). When requesting such a reclassification, the employer should provide the agency DAPM with all information pertinent to the event, including the employee's position, the circumstances surrounding the testing event and the specific test results. If the agency DAPM allows a reclassification, this notice should be maintained on file with the test. This result would not be reported on the employer's MIS statement.

Regulation Updates

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