U.S. Department
of Transportation
Federal Transit Administration
Office of Safety and Security

FTA Drug And Alcohol Regulation *Updates*

Summer 2001 **Issue 19**

Introduction....

The Federal Transit Administration (FTA) published its final rules on prohibited drug use (49 CFR Part 653) and the prevention of alcohol misuse (49 CFR Part 654) on February 15, 1994. Shortly thereafter, the FTA published the *Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit* to provide a comprehensive overview of the regulations.

Since the *Guidelines* were published there have been numerous amendments, interpretations, and clarifications to the Drug and Alcohol testing procedures and program requirements.

This publication is being provided to update the *Guidelines* and inform your transit system of all of these changes. This Update is the nineteenth in a series.

Inside....

Part 655 Is Final!!!

On August 1, 2001, the Federal Transit Administration's (FTA) final rule on the Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations (49 CFR Part 655) became effective. The rule was first posted on the DOT website and then published in the Federal Register on August 9, 2001 (Volume 66, No. 154, Pages 41996-42036). The new rule replaces FTA's previous drug and alcohol testing rules (49 CFR Parts 653 and 654, respectively) which were simultaneously abolished.

The final rule conforms FTA's rule to the Department of Transportation's (DOT) newly revised drug and alcohol testing rule (49 CFR Part 40) that also became effective on August 1, 2001. Part 655 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.

A copy of the rule may be obtained via the Internet from the FTA Office of Safety and Security at http://transit-safety.volpe.dot.gov, the Federal Register at http://www.nara.gov/fedreg and from the Government Printing Office database at http://www.access.gpo.gov/nara. A summary of the major changes incorporated into the new rule is provided on Pages 2-5 of this newsletter.

DOT Publishes Part 40 Technical Amendments

The Department of Transportation's (DOT) rules covering the procedures for transportation workplace drug and alcohol testing programs (40 CFR Part 40) were revised on December 19, 2000 (65 FR 79462) with an August 1, 2001 effective date. The new rule is very comprehensive and includes substantial organizational and content changes. Since the rule's publication, various errors, omissions, and inconsistencies have been identified that require correction or clarification. Thus, the DOT published Technical Amendments that became effective on August 1, 2001 and were posted on the DOT web page the same date. The Amendments were printed in the Federal Register on August 9, 2001 (Volume 66, No. 154, Pages 41943-41955).

The document addresses four major areas. First, the Technical Amendments clarify certain provisions of the rule and address various errors and omissions. Summaries of the most substantive modifications are presented on pages 8-11 of this newsletter.

The second purpose of the Technical Amendments was to provide a preamble discussion that responds to comments by the maritime industry concerning the pre-employment record check requirements required by§40.25. This section of the regulation requires employers to seek out the DOT covered drug and alcohol testing history of applicants for the preceding two year period. See Issue 18, page 7 of the *Updates* for more information on the requirement. The DOT concluded that the maritime industries concerns were unfounded and thus, §40.25 remains in the rule unchanged.

The third purpose of the document was to provide a "common preamble" to the individual modal rules that amended their drug and alcohol testing rules to conform to the new Part 40.

Finally, the document solicits comment on the issue of employee access to laboratory information. The DOT is interested in hearing from laboratories, employers, employee organizations, and other interested parties on what type of information, if any, should be provided. The docket will remain open to receive comment until September 30, 2001. Subsequent changes will go through the rule making process before becoming final.

PART 655 SUMMARY

Where To Find?.....

49 CFR Part 655, Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations

August 9, 2001
Federal Register Vol. 66
Pages 41996 - 42036

The information presented on this page should be used to update Chapter 2 of the *Implementation Guidelines*.

Part 655 Summarized

The final rule on the prevention of alcohol misuse and prohibited drug use in transit operations (49 CFR Part 655) went into effect on August 1, 2001. The final rule does not vary significantly from the proposed rule described in the Notice of Proposed Rulemaking (NPRM) published on April 30, 2001.

The final rule successfully combines the FTA's drug (49 CFR Part 653) and alcohol (49 CFR Part 654) rules and conforms to the Department of Transportation's (DOT) new drug and alcohol testing procedures rule (49 CFR Part 40). In addition, the FTA received 84 comments in response to the NPRM. Where appropriate, modifications and/or clarifications were made to reflect the merits of these comments.

Each of the major changes is summarized on this and the following pages. The reader should note, however, that only the major highlights are discussed herein. Readers are strongly encouraged to read the regulatory text including the preamble and section-by-section discussion to obtain their own understanding of the regulatory requirements.

Basic Components Remain the Same

The basic components of the regulation including the testing of safety-sensitive employees for the use of controlled substances and the misuse of alcohol, and the requirement for a policy statement, education, and consequences remain virtually the same. The five illegal drugs that are prohibited (i.e., marijuana, cocaine, amphetamine, opiates, and phencyclidine) are the same, as are the five testing categories (i.e., pre-employment, random, reasonable suspicion, return-to-duty, and follow-up). FTA also chose to keep the training requirements the same, but acknowledged that employers may choose to enhance and/or expand their training program under their own authority.

Some Provisions are Omitted

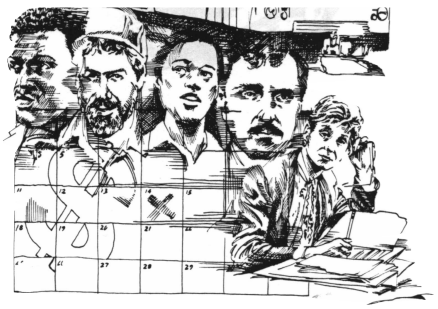
Several provisions that were previously included in 49 CFR Parts 653 and 654 have been omitted from Part 655 as these have been addressed in the revised Part 40 that became effective on August 1, 2001. Specifically these topic areas are test refusals (§40.191 and §40.261), Substance Abuse Professional (SAP) roles and responsibilities (Part 40 Subpart O), return-to-duty testing (Part 40 Subpart O), and follow-up testing (Part 40 Subpart O).

Policy Requirements Minimized

The requirements for a covered employer's policy statement are defined in §655.15. The requirements represent the minimum components that must be included to be considered compliant. Employers are allowed the discretion to develop a policy statement that provides additional detail or that includes additional requirements not mandated by FTA as long as those provisions are identified as being included under the employer's own authority. The simplification of the policy requirement is most noticeably demonstrated by the employer's need only to reference that the system will abide by 49 CFR Part 40 in their policy instead of including detailed discussions of the testing procedures. Including this information by reference may result in a shorter, less cumbersome policy that is easier to keep updated. Employers who choose this method of reference, however, must subsequently ensure that the current version of Part 40 is available for review by employees when requested.

Volunteers Are Covered if They Receive Benefit

The definition of a covered employee (§655.4) clarifies that a volunteer is covered under the regulation if they are required to hold a commercial driver's license (CDL) to operate a vehicle, or if they receive remuneration in excess of his/her actual expenses incurred in the provision of the volunteer activity.



Stand Down

Consistent with the stand-down waiver procedures defined in the revised Part 40 (§40.21), FTA included a new section (§655.5) that specifies the procedure for requesting a stand-down waiver. For more information on stand-downs, readers should consult the article provided on Page 6 of Issue 18 of this newsletter.

PART 655 SUMMARY

Part 655 Summary (Continued)

Employers To Determine If Dispatchers Are Safety-sensitive

FTA requested comment from the transit industry on the duties and responsibilities of dispatchers in an attempt to clarify those activities that constitute safety-sensitive functions. The comments reflected a myriad of duties depending on the employer and the type and size of transit system. Commenters also had varying views on whether or not those activities should be considered safety-sensitive. Given the differences in terminology and job duties, FTA concluded that it could not develop a universal definition of dispatcher at this time. Thus, the rule stipulates that each employer must continue to decide whether a particular employee performs any safety-sensitive function keeping in mind that the decision should be made on the type of work performed rather than job title.

Oversight Agencies Are Provided Access to Records

State recipients and grantees that have safety-sensitive contractors that "stand-in their shoes" are responsible for the compliance of their contractors and as such are required to certify their contractors compliance with Part 655 and Part 40 on an annual basis. FTA recognized that the ability of the States and grantees to oversee their contractors in an effective manner was significantly hampered by the restricted access to records.

Originally, FTA suggested that state recipients and grantees be included in the term "employer" thus enabling them access to contractor records. However, given the potential for legal and technical implications, the employer title was dropped. Instead, the FTA added §655.73(i) under Access to Facilities and Records. This section states that an employer may disclose drug and alcohol testing information including individual employee test results to the respective state oversight agency or grantee required to certify compliance to FTA. The oversight agency is held to the same standard of confidentiality as the employer.

Release of Information to Law Enforcement Prohibited

Even though several commenters stated that law enforcement agencies should have access to transit system's testing records, the FTA decided not to allow the release of information to law enforcement agencies to protect the privacy of the individual. This should not be confused with the provision in Part 40 (§40.323(a)(2)) that allows you to release information in a criminal or civil action resulting from an employee's performance of safety-sensitive duties, in which a court or competent jurisdiction determines that the test information is relevant to the case and issues an order directing the employer to produce the information. The Part 655 prohibition deals with an information release based solely on the request of the law enforcement agency where as, the Part 40 provision allows the release of information to the court system once criminal or civil charges have been made.

Taxi Operators Contracted to Provide Service Are Covered

FTA requested comments on the inclusion of contractors including taxi operators and multi-provider systems. FTA has historically acknowledged the practical difficulty of administering a drug and alcohol testing program to service providers in a user-side subsidy program where there are multiple service providers.

FTA wanted to know if there was a difference between the patron choosing the provider and the grantee or broker choosing the provider. Most of the comments reflected around the taxi industry. FTA attempted to balance the concern for safety with the practical difficulty of administering a drug and alcohol-testing program to companies that only incidentally provide transit service. Additionally, FTA wanted to be consistent with the FTA Master Agreement that requires recipients to include appropriate clauses in third party contracts requiring contractors to comply with applicable Federal requirements. Therefore, the discussion provided in the Part 655 overview indicates that 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 selects the taxi company that provides the transit service.

Q & A

Q: Can an FTA pre-employment test be conducted for leaves of absence less than 90 days?

A: No. Part 655.41 (d) state that when a covered employee or applicant has not performed a safety-sensitive function for 90 consecutive calendar days regardless of the reason, and the employer has not been in the employer's random selection pool during that time frame, the employer shall require that the employee pass a pre-employment test. Any test conducted for absences of less than 90 days may not be performed under FTA authority but if conducted must be done under company authority.

The information presented on this page should be used to update Chapters 2 of the *Implementation Guidelines*.

PART 655 SUMMARY

Q & A

Q: Under 49 CFR Part 655, may company officials other than the employees supervisor make a reasonable suspicion determination?

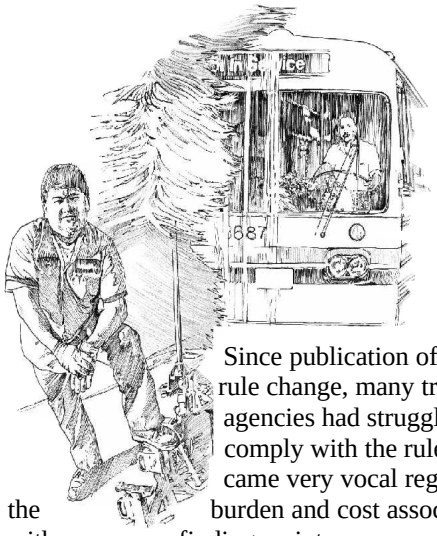
A: Yes. Under 655.43 (b) company officials are included as persons who may make reasonable suspicion determinations as long as they have been trained in detecting the signs and symptoms of drug use and alcohol misuse and have made the required observation.

The information presented on this page should be used to update Chapter 2 of the *Implementation Guidelines*.

Part 655 Summary (Continued)

Maintenance Contractors of Recipients Serving Populations of 200,000 or Less Are Exempt

The performance of maintenance functions has always been considered safety-sensitive under FTA regulations. Likewise, maintenance contractors that "stand in the shoes" of an FTA recipient to perform safety-sensitive functions must have a compliant drug and alcohol testing program unless they are a rural operator that receives Section 5311 funding. In 1999, the drug and alcohol rules were changed to clarify that safety-sensitive maintenance functions included engine and major component overhauls and rebuilds.



Since publication of the rule change, many transit agencies had struggled to comply with the rule and be came very vocal regarding the burden and cost associated with finding maintenance contractors willing to comply with the regulations. These concerns were expressed in response to the Part 655 NPRM. Balancing the concern for safety with the practical difficulties experienced by many transit agencies, language was included in the regulation (§655.4) that exempts maintenance contractors that perform maintenance functions for FTA recipients of Section 5309 and 5307 funding that serve populations of 200,000 or less (as delineated by the FTA apportionate definition) and Section 5311 rural funding recipients.

Pre-employment Testing Modifications

Previously, FTA required that employers have negative test results for applicants prior to their hire. Part 655.41(a) modified the pre-employment testing requirement to indicate that the employer must receive a negative drug test result for each employee prior to the first performance assignment of safety-sensitive functions. Thus, an employer that chooses to hire an applicant and assign non-safety-sensitive duties (i.e., training) while awaiting test results may do so. An employer may not transfer an employee from a non-safety-sensitive position to a safety-sensitive position until a verified negative test result is received (§655.41(b)).

FTA also added a provision to the final rule (§655.41(d)) that requires a pre-employment test anytime a covered employee or applicant has not performed a safety-sensitive function within a 90-day period, if that person was also not in a random selection pool during the timeframe.

The reason for the 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 to 90 days or more is subject to a test if they were not included in the testing pool. Employees should be taken out of the pool if it is known that the individual will not perform a safety-sensitive duty during the testing period.

Similarly, any applicant that is tested, but is not assigned safety-sensitive duties within a 90-day timeframe will have to be retested prior to their first performance of safety-sensitive duties.

The rule also states (§655.41(a)(2)) that an applicant or covered worker that has previously failed a pre-employment drug test must present to the employer proof of having successfully completed a return-to-duty process prior to performing safety-sensitive job duties.

This section of the regulation also (§655.42) clarifies that pre-employment alcohol tests are allowed, but are not required under the regulation. If an employer chooses to conduct pre-employment alcohol tests, the employer must follow the testing procedures defined in 49 CFR Part 40.

Governing Board Approval Clarified

The preamble to the final rule also states that polices must be approved by the employer's governing board. In the event the employer has no governing board or the governing board does not have approval authority, the highest-ranking official with authority to approve the policy can do so.

PART 655 SUMMARY

Part 655 Summary (Continued)

Reasonable Suspicion Testing Procedures Clarified

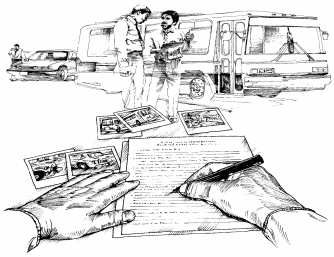
Previously, FTA had indicated that only one trained supervisor was needed to make a reasonable suspicion determination. The Part 655 NPRM went further and prohibited employers from requiring second opinions. Commenters to the NPRM protested this provision and as such, FTA modified the language (§655.43(b)) and removed the prohibition. Consequently, employerswho have a policy that requires two or more supervisors to participate in or agree on the reasonable suspicion determination may be allowed to do so. The rule also stipulates, company officials other than supervisors may also make reasonable suspicion determinations as long as they have received reasonable suspicion training.

Post-Accident Testing Requirements Clarified

The new regulation (§655.44 (a) requires all covered employers to document the testing decision and the decision-making process for each accident. Documentation of the decision not to test is just as important as the documentation of the decision to test.

Part 655 (§655.44 clarifies that a post-accident test conducted by Federal, State, or local officials having independent authority for a test can only be used in the event the employer is unable to perform a post-accident test within the required timeframe. In this rare event, such tests can only be used if it conforms to the applicable Federal, State, or local testing requirements, and that the employer is able to obtain the test results.

The regulation (655.44 (a)) also eliminates duplication by stating that in the case of a fatality where the fatal accident testing requirements of the Federal Motor Carrier Safety Administration (FMCSA) rule (49 CFR 382.303 (a)(1) and (b)(1)) apply, testing under the FTA rule is not required.



Annual Submission of MIS Reports Not Required By All

The Management Information System's (MIS) forms that are required to be completed by all FTA covered employers on an annual basis have been modified to ease the reporting process and to eliminate much of the confusion that was generated by the previous version. The new forms are provided as Appendix A of Part 655. All FTA covered employers will continue to be required to complete the forms, but only a few selected using a stratified random sampling method will be required to submit their forms directly to FTA (§655.72). MIS records will also be subject to review during an FTA drug and alcohol testing program compliance audit, triennial review, or state management review.

Each recipient is responsible for ensuring the accuracy and timeliness of each report submitted by an employer, subrecipient, contractor, consortium or third party administrator acting on the recipient's behalf.

FTA Offers Training On Part 655

The Federal Transit Administration will be offering one-day briefings on Part 655 at various locations throughout the country. The briefings will provide a general overview of the Part 655 rule changes and should not be considered as a substitute for the more detailed TSI course discussed below. The briefings will be free with attendees responsible for their own travel and accommodations. A schedule of the dates and locations of the briefings is yet to be determined, but will be posted on FTA's home page. Notices will also be mailed to recipients. If you would like to host a briefing or would like more information, contact Jennifer Whalley of the Volpe Center National Transportation Systems Center at (617) 494-2686, or e-mail at **Whalley @volpe.dot.gov**.

The Transportation Safety Institute will once again offer the Substance Abuse Management & Program Compliance course that has been revised to incorporate Part 40 and Part 655 changes. The course will be provided for the direct cost of materials. If you are interested in attending or hosting a program, please contact TSI at (405) 954-3682.

Q & A

Q: If an applicant has a negative dilute test result, can he/she be assigned safety-sensitive duties or do they have to be retested?

A: The test result may be treated as an negative and the person assigned safety-sensitive duties. However, §40.197 gives the employer discretion to direct the applicant to take another test immediately. Should you choose this later option, you must treat all applicants the same.

The information presented on this page should be used to update Chapter 2 of the *Implementation Guidelines*.

ACTION ITEMS

Q & A

Q: When an employee is taken out of service following a post-accident test, pending the test results, is a stand down waiver required?

A: No. The stand down waiver is required for an employer that removes the employee from duty based solely on a laboratory result prior to verification of the results by the MRO. If an individual is removed from duty following an accident, it is the accident itself that is the reason for the employee removal, not the laboratory test result.

The information presented on this page should be used to update Chapter 2 of the *Implementation Guidelines.*

Immediate Action Items

Usually final rules are published at least thirty days prior to their effective dates to allow covered individuals sufficient time to come into compliance with the regulation. FTA's drug and alcohol testing rule (49 CFR Part 655), however, became effective on August 1, 2001, the date of its publication. The exception was made to ensure that FTA's drug and alcohol testing regulation was consistent with the August 1, 2001 effective date for the DOT's regulation on testing procedures (49 CFR Part 40). Consequently, FTA covered employers must take action immediately to come into compliance with Part 655 and Part 40. A list of some of these immediate action items is listed below. The list is provided as guidance and should not be considered an exhaustive list. Employers should expand or modify the list as appropriate based on their own circumstances and knowledge of the revised regulations.

- Obtain and read copies of the regulations including Part 655, the revised Part 40, and technical amendments.
- Revise policy to eliminate all references to Parts 653 and 654. Replace citations to reflect Part 655.
- Revise policy as necessary to reflect changes and new provisions set forth in Part 40 and 655.
- Abolish the use of any consent forms used in the urine specimen collection procedure.
- Develop a procedure or form that will be used to inform urine specimen collectors, Breath Alcohol Technicians (BAT) and Screen Test Technicians (STT) of the name and telephone number of the Designated Employer Representatives (DER) for each test.
- Develop a procedure for notifying the appropriate service agent of the employees anticipated arrival time so that late arrivals can be so noted and reported to the DER.
- Revise accident/incident forms to document testing decisions.
- Make sure your service agents are aware of the Part 40 revisions and technical amendments that went into effect on August 1, 2001. Ask them to describe their current level of compliance and ask them to outline their remaining compliance actions with a schedule.
- Make sure your collections sites and Substance Abuse Professionals (SAP) have copies of the newly published collector and SAP guidelines (See article on Page 7 of this newsletter).
- Should your service agents be unwilling or unable to comply with the regulatory requirements, seek out new service agents as soon as possible.
- Make sure the new Chain of Custody and Control forms are being used and that collection personnel are aware of the corrections procedures that must be used in the event an old form must be used.
- Discuss with your service agents, especially your MRO, the procedures that will be used to communicate test results, requirements for retests, and other confidential information.

- Talk to your MRO about validity testing and invalid, dilute, substitute, and adulterated specimens to ensure these situations will be handled appropriately.
- Encourage BATs and STTs to begin using the new Alcohol Testing Form (ATF).
- Check the dates of existing service agent qualifications training and proficiency demonstrations to determine when refresher training is required.
- Discuss with service agents, how and when qualifications, refresher and error correction training will be accomplished.
- Incorporate SAP referral process into pre-employment testing process. All applicants that have non-negative test results must be provided a list of SAPs (§40.287).
- Incorporate procedure to pre-employment test any covered employee who has not performed safety-sensitive duties and has not been in a random pool for 90 days or more.

RELEVANT COURT CASES

Flight Attendant Awarded $$$ in Drug Test Case

In a highly publicized court case, a jury awarded a Delta Air Lines flight attendant $400,000 after a drug-testing laboratory incorrectly reported that she had a substituted specimen. Under DOT regulations a substituted specimen is considered a test refusal. Consistent with airlines 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 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 the financial award. 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 have fallen victim to 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 of a significant financial cost associated with mistakes that affect the livelihoods of DOT-covered workers. This case was also a primary impedance for the inclusion of validity testing in the revised Part 40 regulations. As soon as the DHHS publishes its mandatory guidelines for validity testing, they will be a required component of DOT testing. Any laboratory that makes a mistake of this magnitude in the future may be the subject of a Public Interest Exclusion for their mistakes.

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.

Supreme Court Decides Medical Use of Marijuana Case

On May 14, 2001, the U.S, Supreme Court ruled that marijuana may not be distributed to individuals who use marijuana 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, posses 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.

New DOT Collection and SAP Guidelines

The DOT has released the new DOT Substance Abuse Professional Guidelines and the new DOT Urine Collection Procedure Guidelines. These documents are available on the DOT website at http://www.dot.gov/ost/dapc/prog_guidance.html.

The manuals must be included in training programs for Urine Collectors and SAPs respectively. 49 CFR Part 40.33 (a) contains the requirement for collectors to be knowledgeable of the current DOT Urine Specimen Collection Procedures Guideline. 49 CFR Part 40.281 (b) (3) contains the requirement that a SAP be knowledgeable and remain current with the DOT Substance Abuse Professional Guidelines.

Q & A

Q: Since the MIS reports will now only need to be submitted to the FTA upon request, is a transit system still required to complete a yearly MIS?

A: Yes. 655.72 (a) states that "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." The annual reports will be subject to review during an FTA drug and alcohol program compliance audit, FTA Triennial Review or State Mangement Review.

The information presented on this page should be used to update Chapter 2 of the *Implementation Guidelines.*

PART 40 TECHNICAL AMENDMENTS

Where to Find? .....

49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs

Revised:
December 19, 2000
Federal Register Vol. 65,
Pages 79462 - 79579.
Primary Topic: Procedures for Transportation Workplace Drug and Alcohol Testing Program Revised Final Rule (49 CFR Part 40)

Technical Amendments:
August 1, 2001
Federal Register Vol. 66
Pages 41943 - 41955
Primary Topic Clarifications and Collections to Part 40; Common Preamble to Modal Rules

HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs Notice of Proposed Rulemaking:
August 21, 2001
Federal Register Vol. 66
Pages 43876-43882

The information presented on this page should be used to update Chapters 7 and 8 of the *Implementation Guidelines*.

Use of Old CCF Requires Corrective Action

The Department of Transportation's (DOT) newly revised drug and alcohol testing regulation (49 CFR Part 40) requires the use of the new version of the Federal Drug Testing Custody and Control Form (CCF) for all DOT tests beginning August 1, 2001.

The Substance Abuse and Mental Health Services Administration (SAMHSA) revised the form in the summer of 2000 and the DOT subsequently announced that covered employers were permitted to use the new CCF as of August 1, 2000 and would be required to use them by August 1, 2001. Even with this advanced notice, the DOT has discovered that several laboratories, consortiums/third party administrators (C/TPA), and other parties have failed to distribute copies of the new form to employers and collection sites by the deadline. Since the use of the old CCF is no longer authorized, any use of the old form requires corrective action.

The Technical Amendments to 49 CFR Part 40 provides relief to the employees and employers affected by the tardy distribution of the new CCFs by allowing results to be reported on the old CCF until October 31, 2001 even if the corrective action does not take place. However, any old CCFs used after October 31, 2001 must be corrected or the specimen will be rejected for testing.

As defined in 40.205(b)(2), the corrective notice that must accompany the old CCF must contain all information needed for a valid DOT drug test; a statement indicating that the incorrect form was used inadvertently or was the only form available for the test; and, the steps that have been taken to prevent future use of the expired form for DOT tests. A single corrective notice is required for each old CCF form used (corresponding to a single test made up of both the primary and split specimen).

The Technical Amendments also directs laboratories, C/TPAs, and others who distribute CCFs to stop sending any more copies of the expired CCFs to program participants. Additionally, these entities are directed to affirmatively notify program participants that they must not use the expired form. The DOT has also indicated that it will seriously consider investigative and regulatory actions against those who continue to distribute the old CCFs and who do not take appropriate steps to resolve use of these expired forms.

Use of New ATF Required 02/01/02

Appendix G of the revised Part 40 rule published in December 2000 provided a new and improved version of the Alcohol Test Form (ATF) that is to be used for alcohol tests administered under the DOT rule. Use of the form was authorized beginning January 18, 2001 with required use by August 1, 2001. The Part 40 Technical Amendments revised the required implementation date to February 1, 2002 to make the transition to the new form easier. If Breath Alcohol Technicians (BAT) continue to use the old forms prior to the required implementation date, they must follow the new procedures for completing the form that are defined in the revised Part 40 Subparts L and M.

Awaiting HHS Guidance on Validity Testing

When DOT published the revised 49 CFR Part 40 rule in December 2000, it anticipated that the Department of Health and Human Services (HHS) would amend its Mandatory Guidelines for drug testing establishing final requirements for validity testing by HHS-certified laboratories by the August 1, 2001 Part 40 implementation date. This did not occur. Consequently, the DOT Technical Amendments to Part 40 eliminated the requirement that laboratories conduct validity tests on each DOT specimen, but instead indicated that laboratories are authorized to conduct validity testing. Once the HHS issues the final Mandatory Guidelines, the DOT will amend Part 40 once again to require validity testing.

On August 21, 2001, HHS published a Notice of Proposal Rulemaking (NPRM) requesting input on its proposed revisions to the Guidelines. Publication of the final Guidelines is therefore, not expected until sometime in 2002.

PART 40 TECHNICAL AMENDMENTS

Service Agent Qualifications Clarified

The Technical Amendments to 49 CFR Part 40 that were published in the Federal Register (Volume 66, Pages 41943-41955) on August 1, 2001 clarified several issues regarding service agent training requirements and minimum qualifications.

Section 40.33(c)(2) clarifies the required qualifications for monitors that evaluate the proficiency and procedural compliance of urine specimen collectors during the required mock collections. Previously, the rule required that a monitor must have conducted DOT drug test collections for at least a year; conducted collector training for at least a year; or, successfully completed a "train the trainer" course for at least a year. The Technical Amendments expanded the requirements by requiring that monitors must also have successfully completed qualification training for collectors.

The requirement for refresher training for Medical Review Officers (MRO), Breath Alcohol Technicians (BAT), and Screen Test Technicians (STT) was also clarified to address when refresher training is required for service agents who had completed their qualifications training and examinations prior to August 1, 2001. Section 40.121(d)(3) states that MROs who have completed the qualification training and examination requirements prior to August 1, 2001, must complete their first increment of twelve (12) continuing education credit (CEU) hours prior to August 1, 2004. Section 40.213(e) states that BATs and STTs who have completed qualification training before January 1, 1998 must complete refresher training by January 1, 2003.

Section 40.213(c) also increased the number of consecutive error-free mock tests for BATS from three to seven and for STTs from three to five. This change was made to be consistent with the DOT Model Course established for BATs and STTs.

No Consent Forms

Previously, it was not uncommon for an individual to be requested to sign a consent form, release statement, liability waiver or indemnification agreement prior to the commencement of a drug or alcohol test. The requirements for signing such forms was placed on the individual by the collection site, laboratory, medical review officer, third party administrator or employer who believed that this procedure provided them additional protections from suit, grievance or other proceeding initiated by or on the behalf of the individual to be tested.

This additional step was never part of the DOT testing procedures. Since the DOT views these procedures to be unnecessary and an interference with the DOT testing process, Section 40.355 of the revised rule clearly prohibits any service agent to require individuals to sign consents, releases, waivers, indemnifications, or any other form that is not part of the DOT procedures as defined in Part 40. The August 1, 2001 Technical Amendments to the regulation expand this prohibition to employers acting on behalf of service agents (40.355(a)) or on their own accord (40.27).

HHS Publishes Validity Testing NPRM

The Department of Health and Human Services (HHS) published a Notice of Proposed Rulemaking (NPRM) in the Federal Register (Volume 66, No.162, Pages 43876-43882) on August 21, 2001 to establish standards for determining the validity of urine specimens under the Mandatory Guidelines for Federal Workplace Drug Testing Programs. The proposed standards are intended to ensure that validity testing and reporting procedures are uniformly applied to all Federal agency urine specimens when a validity test is conducted. Even though the standards are developed for Federal agency workplace drug testing programs, these standards will subsequently be adopted for the DOT drug testing procedures and incorporated into the Part 40 regulations, as appropriate.

The proposed Mandatory Guidelines (§2.4(g)) require laboratories to conduct validity testing on all Federal employee urine specimens and to comply with the specific requirements for conducting validity testing using the substitution and adulteration criteria set forth. The NPRM proposes the requirement for the laboratories to conduct validity tests for oxidizing adulterants, nitrites and other foreign substances that will be included on a list of known adulterants that will be published monthly in the Federal Register. Comments to the docket must be submitted on or before October 22, 2001.

DHHS Labs

The current list of DHHS certified labs is published the first week of each month and is printed in the Federal Register under the Substance Abuse and Mental Health Services Administration heading (SAMHSA). Only those labs certified can be used for FTA drug testing. The list should be checked monthly as new labs are being added and others are being removed.

Website location: http:/www.health.org/workplace.

To verify the certification status of laboratory, DHHS has established a telephone HELPLINE (800) 843-4971.

Conforming Products List

Evidential Breath Testing (EBT) Devices
July 21, 2000
Federal Register Vol.65
Pages 45419 - 45423
Primary Topic: Conforming Products List (CPL)
Website location: www.nhtsa.gov/people/injury/alcohol

Note: This list will be updated periodically.

Non-evidential Testing Devices
May 4, 2001
Federal Register Vol.66
Pages 22639 - 22640
Primary Topic: Initial Alcohol Screening Devices

Note: This list will be updated periodically.

The information presented on this page should be used to update Chapter 2 of the *Implementation Guidelines.*

CLARIFICATIONS

Where to Find? .....

Urine Specimen Collection Guidelines Office of Drug and Alcohol Policy and Compliance
United States Department of Transportation
Version 1.0
August 2001
ww.dot.gov/ost/dapc
Fax on Demand
(800) 225-3784

Substance Abuse Professional Guidelines Office of Drug and Alcohol Policy and Compliance
United States Department of Transportation
August 2001
ww.dot.gov/ost/dapc
Fax on Demand
(800) 225-3784

The information presented on this page should be used to update Chapter 7 & 8 of the *Implementation Guidelines*.

Designated Employer Representative Defined

The new Part 40 introduced the term Designated Employer Representative (DER). A DER is an employee that receives test results and other communications for the employer and is required to make decisions in the testing and evaluation process. The DER must also be authorized by the employer to take immediate action (directly or through the employee's direct supervisor) to remove employees from safety-sensitive duties.

An employer may have more than one DER to ensure coverage during all times testing is occurring. The employer must provide the collector, BAT or STT the name and telephone number of the appropriate DER to be contacted for each individual test. This notification is required to ensure that the service agent knows whom to contact in case a problem or unusual circumstances arises that requires employer notification, direction, or action.

Some individuals have confused the DER with the Drug and Alcohol Program Manager (DAPM). Even though a DAPM is not specifically required by the regulations, most employers have found that it is prudent to assign the responsibility of overall program administration and management to one primary individual. If a transit employer has a DAPM, that individual will most likely also serve as one of the agency's DERs whose functions are supplemented by other DERs designated within the organization as appropriate to address situations when the DAPM is unavailable. Thus, a DAPM is usually a DER, but not all DERs will be DAPMs.

The policy requirements specified in Part 655 also requires that each covered employer also identify a contact person designated by the employer to answer questions about the employer's drug and alcohol testing program. This contact is usually the DAPM.

Arbitrators Prohibited From Substitution Judgement for MROs

Section 40.149 of the revised Part 40 clearly states that the MRO is the only person permitted to change a verified test result. The regulation states emphatically that the MRO is the gatekeeper of the testing program and is the key person in determining the disposition of a non-negative laboratory result (i.e., positive, adulterated, substituted, invalid, refusal and cancelled). As a qualified medical professional, the MRO is called upon to make decisions regarding the legitimacy of medical explanations for non-negative tests based on his/her professional training and experience. Thus, arbitrators, employers, or anyone else in the drug testing program cannot overturn the MRO's medical judgment.

This provision does not prohibit an arbitrator from canceling a test based on procedural errors, but an arbitrator may not decide that an employee presented a legitimate medical explanation for a non-negative test result when the MRO determines that there was none.

Conforming Products List Expanded

On May 4, 2001, the Conforming Products List (CPL) for alcohol screen test devices was expanded adding five additional devices to the list. In total, twelve devices are listed on the CPL that was printed in the Federal Register, Volume 66, No. 87, pages 22639-22640. Only devices that appear on this list or devices listed on the CPL for Evidential Breath Testing (EBT) devices can be used on DOT covered alcohol screen tests. The screen test devices, however, can be used only for the screen test and cannot be used to conduct a DOT covered confirmation test. The most recent CPL for EBTs was published on July 21, 2000, Volume 65, Pages 45419-45423.

CLARIFICATIONS

Test Refusals Definition Expanded

Section 40.191 of the revised Part 40 clarified what actions constitute a test refusal for a drug test. Similarly, Section 40.261 clarifies the actions that constitute a test refusal for an alcohol test. The list of behaviors presented in both sections represents a significant expansion from that provided in the earlier rules and includes the actions listed in the box below.

Under FTA regulations, a test refusal incurs the same consequences as a positive test result. As a result, the individual may not perform safety-sensitive functions until the individual has successfully completed the return-to-duty process. In addition, the individual is required to report the test refusal to future DOT-covered employers for a period of two years following the test refusal.

This definition of test refusal is to be used for every testing category except for pre-employment (i.e., random, reasonable suspicion, post-accident, return-to-duty, and follow-up).

Test Refusals Common to Drug and Alcohol Tests

- Failure to appear for a test in the timeframe specified by the employer.
- Failure to remain at the testing site until the testing process is completed.
- Failure to provide a urine specimen, saliva, or breath specimen, as applicable, for a required DOT test.
- Failure to provide a sufficient volume of urine, or breath without a valid medical explanation for the failure.
- Failure to undergo a medical examination to verify insufficient volume.
- Failure to cooperate with any part of the testing process.

Test Refusals Specific to Drug Tests

- Failure to permit the observation or monitoring of specimen donation when so required (40.67(l) and 40.69(g)).
- Failure to take a second test required by the employer or collector
- A drug test result that is verified by the MRO as adulterated or substituted.

Test Refusals Specific to Alcohol Tests

- Failure to sign the certification on Step 2 of the ATF form.

In a case of pre-employment testing, the list of behaviors that constitute a test refusal is limited by comparison due to the very real possibility that applicants may fail to appear for a test for a number of legitimate reasons. For example, the individual may choose another job, choose to remain with their current employer, or decide they no longer want the position. In these situations, the DOT believes it would be unfair to label the failure to appear a test refusal with the subsequent consequences. In addition, the DOT believes there are circumstances where an applicant could legitimately leave a collection site before the test actually commences.

Thus, in the Technical Amendments to Part 40 (§40.191 (a)(1-3)) published on August 1, 2001, the DOT clarified the definition of a test refusal for pre-employment tests. Once an applicant has begun the collection process (i.e., selection of the collection container), the donor has committed to the process, and must complete it. If the employee leaves the collection site prior to the completion of the test, or takes another action listed above, the applicant will have been considered to have refused a test with corresponding DOT dictated consequences. However, if the applicant leaves the site before the test commences or does not appear at all for the pre-employment test, then this absence is not considered a test refusal and has no DOT consequences. Additionally, in the case of a pre-employment test that requires a medical examination as part of the MRO verification process or as required by the DER, the employee is deemed to have refused to test only if the pre-employment medical examination was conducted following a contingent offer of employment.

Q & A

Q: If an MRO receives a positive test result from the lab and then receives an explanation from the employee that requires verification, can the employer remove the employee from duty while the MRO is awaiting documentation of a medical explanation for the test result?

A: No, removing a person from their safety-sensitive position prior to the final verification of the test is considered a stand down that is prohibited by Part 40. As soon as the MRO verifies the test result he/she must inform the employer immediately, but not prior to the final verification.

The information presented on this page should be used to update Chapter 7 & 8 of the *Implementation Guidelines*.

Resource Materials

Who Should Be Receiving This *Update*?

In an attempt to keep each transit system well informed, we need to reach the correct person within each organization. If you are not responsible for your system's Drug and Alcohol program, please forward this update to the person (s) who is and notify us of the correct listing. If you know of others who would benefit from this publication, please contact us at the following address to include them on the mailing list. This publication is free.

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FTA home page: www.fta.dot.gov
FTA Office of Chief Counsel: www.fta.dot.gov/office/counsel
FTA Office of Safety & Security: http://transit-safety.volpe.dot.gov
FTA Letters of Interpretation: www.fta.dot.gov/library/legal
DHHS-Certified Laboratories: Center for Substance Abuse Prevention: www.health.org/labs/index.htm

FTA, Office of Safety and Security: (202) 366-2896
Drug and Alcohol Consortia Manual
Drug and Alcohol Testing Results: 1995, 1996, 1997, 1998, and 1999 Annual Reports
Random Drug Testing Manual
Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit
Identification of Drug Abuse and/or Alcohol Misuse in the Workplace: An Interactive Training Program

USDOT Drug and Alcohol Documents FAX on Demand: 1 (800) 225-3784
USDOT, Office of Drug and Alcohol Policy and Compliance: (202) 366-3784
Urine Specimen Collection Procedures Guideline
Substance Abuse Professional Guidelines

Produced by:	Published by:	Edited by:	Illustrated by:
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