



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

FTA Drug And Alcohol Regulation *Updates*

Spring 2002

Issue 21

Introduction....

The Federal Transit Administration (FTA) published its revised rule on prohibited drug use and the prevention of alcohol misuse (49 CFR Part 65) on August 1, 1994. 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 twenty-first in a series.

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"BEST PRACTICES" Out in Spring

The long awaited "*Best Practices*" manual is scheduled for distribution in May. The manual provides "real world" examples of policies, procedures, sample forms, and approaches that transit employers have used successfully to manage their drug and alcohol testing programs.

Although some of the FTA testing requirements dictate straightforward responses, the regulation allows significant latitude in the manner in which individual employers implement their programs. The regulations represent the minimum requirements. Employers must not only meet these requirements, but must do so in a manner that reflects the unique nature of the employer, operating environment, labor/management relationship and existing policies and procedures.

The discussion and examples provided in the *Best Practices* manual represent materials that transit employers have found helpful to manage their programs and to comply with the regulations. In some cases, multiple examples are given to address the same issue.

All section 5307, 5309 and state grantees will be mailed one hard copy of the *Best Practices* manual. The manuals will be three hole punched and shrink wrapped for ease

of placement in a three-ring binder. The majority of the best practice examples appear in the manual as six different appendices that are referenced and discussed in the text. The text is bound separately from the appendices so it can be removed from the binder for ease of use when referring to the examples.

Grantees are encouraged to make hard copies of the manual available to their subrecipients. Grantees and subrecipients will also be provided multiple copies of the manual in PDF format on CD-ROMs.

The text and appendices will also be provided on the FTA Office of Safety and Security website (<http://transit-safety.volpe.dot.gov>) in both PDF and html format. The website will also provide links from the text to the appendices for easy reference. In some cases where the examples are too large to include in the hardcopy of the manual (i.e., training materials), they will be presented in their entirety on the website.

The revised *Implementation Guidelines* that summarize the regulatory requirements are currently under review and are due out later this summer. Together, these two companion manuals will provide a comprehensive guide to the FTA drug and alcohol testing program.

Hosts Needed for Part 655 Briefings

The FTA offered several daylong briefing sessions on Part 655 at various locations throughout the country last year. The last session was held in February 2002. The sessions were well received and attendance exceeded expectations. Consequently, FTA has decided to offer additional sessions. The session will be scheduled throughout the fiscal year beginning as early as October.

The objective of the briefings is to update participants on the regulatory changes and provide them with the technical knowledge necessary to modify their drug and alcohol testing programs to ensure compliance with the new rule. The intended audience is Drug and Alcohol Program Managers.

If you would like to host a briefing

session, please contact Jennifer Whalley at (617) 494-3798, or e-mail at Whalley@volpe.dot.gov. Hosts will be chosen based on geographic spread throughout the country, proximity to transit systems, and suitability of accommodations. The host will be expected to provide a meeting location at no charge that is capable of seating a minimum of 100 people and is equipped with microphones, LCD projector and screen. The site must also be ADA accessible.

The briefings will be free with attendees responsible for their own travel and accommodations. A schedule of the dates and locations of the briefings will be published in future issues of this newsletter and on FTA's home page at <http://transit-safety.volpe.dot.gov>. Notices will also be mailed to grantees.

AUDIT UPDATE

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

Audit Process Resumes

After a six-month hiatus following the publication of Part 655, FTA has resumed its intensive schedule of drug and alcohol program compliance audits. The compliance audit process and questions have been modified to reflect the requirements set forth in 49 CFR Part 655 and the revised DOT drug and alcohol testing procedures defined in 49 CFR Part 40.

The format of the audits will remain virtually the same as that used for previous audits. A team of three to eight auditors will spend two to four days on-site. The on-site time will be spent conducting a comprehensive review of grantee records, selected safety-sensitive contractor(s) and service agents. A mock collection will be conducted of at least one collection site. Interviews will be conducted with the agency's drug and alcohol program manager (DAPM), medical review officer (MRO), substance abuse professional (SAP), collection site personnel, and the agency's third party administrator (TPA), if applicable. The auditors will use a standard list of questions. The revised audit questions will be available on the FTA homepage (<http://transit-safety.volpe.dot.gov>) by late spring.

Grantees are initially notified of the audit by a telephone call from the audit team leader whom explains the audit process. The call is followed by a letter from FTA confirming the selection and listing the information that the

grantee must send to the audit team prior to the on-site review. The grantee is given two weeks to submit the preliminary information. The on-site portion of the audit will begin seven weeks following the first notification.

The audit begins with an FTA representative explaining the audit process and introducing the audit team. All agency contractor and service agent personnel with drug and alcohol program responsibilities should be available according to the schedule outlined by the auditors. The agency DAPM should be active in the process and if possible accompany the auditors to the contractor and service agent facilities. The audit team generally completes all on-site questioning and record review within three days. 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.

The final report only lists findings of non-compliance and does not include an acknowledgement or discussion of compliant areas. The auditors will offer suggestions on how to correct deficiencies cited. The grantee is given the opportunity to ask questions regarding the findings for clarification, but the findings are final and not open to negotiation. The grantee is given ninety days to correct the deficiencies and provide supporting documentation. The grantee is responsible for the audit findings and subsequent compliance of all safety-sensitive contractors and service agents.



Re-Audits Underway

In November 2001, the FTA began re-audits of grantees that had previously undergone an audit. Re-audits are designed to ensure that grantees have successfully put new policies and procedures in place to correct the deficiencies noted in the previous audit. The re-audits are limited in scope and only address the non-compliant issues identified in the original audit. Compliance issues not previously identified are not addressed.

Grantees selected for a re-audit will be contacted by the audit team leader by telephone and notified of the re-audit process and timeline. An official FTA letter confirming the re-audit will follow. The grantee will be asked to submit documentation to the audit team two weeks from notification. The information that will be requested will vary by site depending on the specific nature of the compliance issues raised in the original audit. The on-site review will be scheduled four weeks from initial notification of the re-audit.

The on-site review will last approximately three days. The re-audit will address the grantee, safety-sensitive contractors and service agents that were involved in the original audit. The nature and extent of the record review and questions will vary with the nature and extent of the original audit findings. An exit interview will be held on the third day to describe the re-audit findings. The grantee will have forty-five days to implement corrective actions and to provide supporting documentation to FTA.

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

Part 40 Clarifications

DOT Issues Part 40 Clarifications

The Office of Drug and Alcohol Policy and Compliance (ODAPC) of the Department of Transportation is the only agency that can provide official and authoritative guidance and interpretation concerning 49 CFR Part 40. When the ODAPC provides a definitive interpretation, the information is posted on the agency's website at www.dot.gov/ost/dapc/qandq.html. Twenty interpretations were posted in January 2002. A summary of the interpretations that are of special interest to employers is provided below. However, readers should consult the website to obtain the complete question, answer and explanation.

- When requesting drug and alcohol test results from applicants' previous employers, the request should be made for the entire two year period even if the two years began prior to the August 1, 2001 implementation date of the rule (§40.25).
- If an Evidential Breath Testing Device (EBT) is not available for use within 30 minutes of an alcohol screening test location, the employer is considered to be out of compliance with Part 40 (§40.229; §40.231).
- An employer may not conduct any additional follow-up testing under company authority that goes beyond the follow-up testing established by the SAP (§40.307).
- Following a breath or urine collection that results in insufficient volume, the employee is given five business days (excluding holidays and weekends) to obtain a medical evaluation to determine if there is a legitimate medical explanation for the insufficient volume (§40.193; §40.265).
- An MRO must not require that an employee's split specimen test request be in writing. MROs must accept a verbal request to have the split specimen tested (§40.171).
- Only the employee can request that the MRO have the split specimen tested. An employer, union or other labor representative may not act on the behalf of the employee in requesting that the split be tested (§40.171).
- Since the Department of Health and Human Services (HHS) certifies each laboratory separately and on its own merits, a split specimen may be sent to a second HHS certified laboratory that is under the same corporate title as the primary laboratory (§40.171). 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.
- An MRO may not send an "in-progress" negative or non-negative test result to the employer while awaiting additional information necessary to complete the verification process. An MRO must not report test results until and unless he/she has received all required information from the collection site and laboratory (§40.163).
- Following a non-negative test result, the MRO must attempt to contact the employee during the evening, at the evening phone number if the employee is not available at the daytime number (§40.131).
- Since validity testing is currently an employer option, employers who chose not to conduct validity tests are not required to submit blind specimens to laboratories that are adulterated or substituted. An employer that opts not to conduct validity tests must submit 75 percent of the blind specimens as blank (drug-free) and 25 percent must be positive for one or more drugs (§40.103).



DOT Corrects Error

On January 31, 2002 the Department of Transportation published a minor correction to Part 40 in the Federal Register (Vol. 67, No. 21, page 4677). The correction changes the reference in Section 40.45(a) to the Department of Health and Human Services website where the Federal Drug Testing Custody and Control Form (CCF) can be viewed. The address should read <http://workplace.samhsa.gov>.

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 6 of the *Implementation Guidelines*.

FOR YOUR INFORMATION

Where to Find?

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.

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

S.C. Supreme Court Prohibits Sale of Urine

In 1999, Act 65 was signed into law in South Carolina outlawing efforts to obstruct or interfere with alcohol and/or drug tests.

Violations of the Act include selling or possessing adulterants, substituting a specimen, and spiking a specimen. The law makes it illegal to give away or sell urine to be used to defraud a drug or alcohol screening test. First time offenders can be sentenced to up to three years in prison.

The South Carolina Supreme Court upheld the Act by ruling (Curtis v. South Carolina, 01-875) that a person cannot sell his fluids (i.e., urine) as part of a business that

caters to people who are trying to beat a drug test.



Kenneth Curtis, the individual that initiated the case, sells drug-free urine, along with a small pouch, tubing and a warming packet for \$69. He claims that use of his product can not be detected even if directly observed. The Court determined that the statute, which makes it unlawful to defraud a drug test, furthers the public

purpose of ensuring a drug-free workplace and therefore, was upheld.

HEMP Product Controversy Continues

The Drug Enforcement Administration (DEA) issued an interpretive rule in October 2001 that bans hemp seed and oil food products that contain any amount of tetrahydrocannabinols (THC). The rule states that any product containing any THC should be considered a Schedule I controlled substance even if the portion of the plant used is excluded from the Controlled Substances Act (CSA) definition of marijuana.

Products are considered illegal if use of the product results in THC entering into the body. As a result, these products may not be made, sold or consumed in

the U.S.

Hemp product makers are subsequently challenging the rule in the Ninth U.S. Circuit Court of Appeals. As a result of the court action, the DEA has postponed the deadline for requiring the disposal of all products defined as illegal in the rule until the motions are resolved.

Regardless of the final outcome of the hemp product ban, the Department of Transportation made it very clear in Part 40 that MRO's must not accept an explanation that use of a hemp product or other non-prescription marijuana product was the

cause of a positive test result for marijuana. The regulation (40.151(f)) states that "consuming or using such a product is not a legitimate medical explanation" and thus if its use results in a THC concentration above the minimum thresholds, the test must be considered positive for marijuana.

Given the availability of hemp products in the U.S. marketplace, employees subject to DOT drug testing should be aware of the potential risks and consequences of their use. For more information on the hemp controversy consult the DEA's website at www.dea.gov.

Alcohol Found in Unsuspecting Places

Alcohol is defined as the intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohol including methyl or isopropyl alcohol. Any or greater concentration of alcohol that results in a breath alcohol concentration of 0.04 is considered positive under the FTA regulation (§655.31). A concentration of 0.02 or greater, but less than 0.04 will result in the employee's removal from safety-sensitive duties for at least eight hours unless a retest results in a concentration of less than 0.02.

Since alcohol is a legal substance, the source of the alcohol is irrelevant if the breath alcohol concentration is above the minimum thresholds. Safety-sensitive employees should be cautious and read content labels when consuming food products, beverages, medicines, and oral hygiene products to ensure that alcohol is not being inadvertently consumed. Some unsuspecting products that sometimes contain alcohol include non-alcoholic beer, candy, cough medicines, cold remedies, mouthwash, breath spray, gum, and denture adhesives.

FOR YOUR INFORMATION

Information Release Required

All employers covered under the DOT drug and alcohol testing regulations are required to make good faith efforts to obtain drug and alcohol testing records from safety-sensitive applicants' previous DOT-covered employers for the previous two years. If employers subsequently find that an employee previously tested positive or violated a DOT rule, the employer may not assign the applicant safety-sensitive job duties until the employee has successfully completed the return-to-duty process as outlined in Part 40 Subpart O. This process was put into place to prevent rule violators from avoiding the consequences of the rule by job-hopping.

The success of this process is not only dependent on employers that aggressively pursue this information, but also on those DOT covered employers that release the information when it is requested. Consequently, the rule (§40.25(h)) requires all DOT-covered employers to provide drug and alcohol test information on previous employees when a request is accompanied by the previous employee's



consent. Many employers concerned about confidentiality and privacy have balked at this later requirement fearing potential suit.

This fear is unfounded if the employer only releases information that is specifically detailed in the written consent from the employee and the information is released in a confidential manner.

The release request should identify the employer by name, the specified time period, and the specific information to be released.

Copies of actual test results or federal Custody and Control forms to support employer responses are not required. However, if an employee tested positive or violated the rule during the time frame indicated, the employer must release documentation of the employee's successful completion of a DOT return-to-duty process, if appropriate.

DOT covered employers that do not release information when requested are in direct violation of the rule.

National Database of Rule Violators Not Practical

Congress directed the Department of Transportation (DOT) to investigate the feasibility of creating a national database to house information concerning the positive drug testing records of commercial drivers. The request came following the aftermath of a high profile, fatal, charter bus accident that was due in part to a driver that had been able to avoid the repercussions of repeated DOT drug test rule violations by job-hopping. The driver was able to hide previous positive test results from potential employers.

All DOT covered employers (including FTA covered employers) are required to obtain consent from applicants allowing their previous DOT covered

employers to release their drug and alcohol test results for the previous two year period [40.25]. If the information indicates a rule violation, the employee cannot be assigned safety-sensitive duties until the DOT return-to-duty process has been completed. A driver, however, can easily withhold employment history information and the employer has no way to ascertain if the information provided is correct and/or complete. The extent of this practice is unknown, but the public safety implications are significant.

Congress requested that the DOT investigate the possibility of requiring Medical Review Officers (MRO) to report positive results to a national database for all commercial driver's

license holders. Employers would then have the ability to access the database to view an applicant's previous drug test results and would be able to make a hiring decision based on complete information.

Kenneth Rogers of the Enforcement and Compliance Office at the Federal Motor Carrier Safety Administration (FMCSA) indicated that the preliminary results of the study effort indicate that the development of a national database and MRO reporting of test results is not practical at this time. The stumbling blocks cited include limited financial resources of the FMCSA to establish the program and a lack of interest by the states to manage the database. Another major concern is confidentiality.

Where to Find?

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.

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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