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

FTA Drug And Alcohol Regulation *Updates*

Fall/Winter 1995

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 first of four that will be published over the next year.

Inside....

How To Achieve Compliance

Large operators were required to be in compliance with FTA's Drug and Alcohol Regulations by January 1, 1995. Small operators have until January 1, 1996 to attain compliance (see definitions of large and small operators on page 7 of this *Update*). There has been much confusion and speculation regarding FTA's interpretation of which elements needed to be complete by the implementation date. To eliminate this confusion, FTA has identified the following elements that must be in place before a transit system can claim compliance on January 1. The other compliance issues must be addressed as soon as possible thereafter.

- A policy statement must be adopted by the Governing Board or Authorized Official.
- Employees must be given a copy of the system's policy.
- All safety-sensitive employees must receive at least 60 minutes of training on the effects and consequences of prohibited drug use.
- All supervisors must have completed Reasonable Suspicion training. (1 hour on drugs and 1 hour on alcohol)
- Drug and alcohol testing services must be in place.
- Random selection process must be in place.
- Substance Abuse Professionals must be available for referrals.
- Each system must have the ability to conduct drug and alcohol testing by their compliance deadline.

Reaction From The Industry

Many systems that implemented their FTA Drug and Alcohol Testing programs to meet the January 1, 1995 deadline have reported that their implementation went relatively smoothly. To the surprise of many, the programs have been met with employee and union acceptance. The primary problems reported thus far have been logistical in nature and for the most part unique to individual transit systems. Most systems attribute their successful implementation to their planning efforts and communication with their employees. Some of the benefits reported by transit systems include:

A reduction in Workers Compensation Premiums. Recognizing the positive benefit of drug and alcohol testing programs on the reduction of Workers Compensation claims, several states are now offering reductions in premiums of up to five percent for those companies who have testing programs.

Fewer Accidents. Several systems have observed a reduction in accidents. Others have indicated that the prevention of just one accident may provide savings that pay for the whole testing program for an entire year.

Improved Morale. Other systems have reported improved employee morale as systems are perceived to be safer working environments.

Regulatory Amendments

Where To Find?.....

49 CFR Part 653 , Prevention of Prohibited Drug Use in Transit Operations

February 15, 1994
Federal Register Vol.59
Pages 7572-7611

Amended:

December 2, 1994
Federal Register Vol. 59
Pages 62217-62231
Primary Topic: Random Drug Testing Rates (see page 6 of the *Update*)

August 2, 1995
Federal Register Vol. 60
Pages 39618-39620
Primary Topic: Exemption of Volunteers and Post-Accident Testing Provision (see this page of the *Update*)

Technical Corrections:

March 6, 1995
Federal Register Vol. 60
Pages 12296-12300
Primary Topic: Corrections and Clarifications (see pages 6-8 of the *Update*)

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

Post-Accident Testing Provision

The FTA received a number of comments in response to the Notice of Proposed Rule Making (NPRM) published on February 6, 1995 regarding when a post-accident test would be required. Most of the commentors believed that the regulatory requirement for a citation from a local or state law enforcement officer as one of the criteria for a non-fatal accident would result in few post-accident tests. Commentors indicated that law enforcement officers rarely issue citations in time for a post-accident drug or alcohol test to be administered. Consequently, FTA amended the final rule changing the conditions under which post-accident drug and alcohol tests are to be performed.

For non-fatal accidents, a post-accident test will be required anytime one or more individuals receives injuries requiring immediate transport to a medical treatment facility or anytime one or more vehicles receives disabling damage (see page 7 for definition of disabling damage). The vehicle operator must be tested unless his or her conduct can be completely discounted as a contributing factor to the accident. Other safety-sensitive employees (i.e., mechanics) may be tested if their conduct may have contributed to the accident.

Transit systems should note that if they choose not to perform a test that meets the accident criteria, the burden is on the transit system to show that their employees did not, in any way, contribute to the accident. The determination is independent of whether an accident is deemed by the transit system to be preventable or chargeable under its own work rules and should not be influenced by any determinations made by a law enforcement officer.

Exemption Of Volunteers

The regulations, as originally published on February 15, 1994, included volunteers in the testing program if they performed safety-sensitive job functions. The FTA received an overwhelming response from transit professionals who believed volunteers who perform safety-sensitive job functions should not be subject to testing. Many felt that individuals would not volunteer if they were required to submit to drug and alcohol testing while others thought that it would be both costly and impractical for their system to test volunteers. Based on this input, FTA has exempted volunteers from the drug and alcohol testing requirement.

FTA defines volunteers as non-employees who perform a service as a charitable act without the expectation of receiving a benefit. Those who provide charitable services in return for some benefit (i.e., workfare, community service as an alternative to a criminal sentence, academic credit, or payment by another agency) remain covered by the rule.

Transit systems should also note that volunteers are included and continue to be covered if they operate a vehicle requiring a Commercial Drivers License.

Regulatory Amendments

Non-Evidential Testing Devices Approved for Initial Screening

On April 20, 1995 the Department of Transportation issued a final rule (FR Vol. 60; pages 19675-19681) that allows non-evidential screening devices listed on the National Highway Traffic Safety Administration (NHTSA) Conforming Products List (CPL) to be used for initial alcohol screening tests. An Evidential Breath Testing (EBT) device must still be used to perform all confirmatory alcohol tests.

The non-evidential testing devices currently on the NHTSA CPL (see article on page 4 of this *Update*) include four breath testing devices and three saliva testing devices. These testing devices are capable of detecting alcohol concentrations of 0.02 or greater. Only qualified Screen Test Technicians (STT) may operate the non-evidential screening equipment. If an initial screen test cannot be completed using a non-evidential testing device, then an EBT must be used.

Transit systems should note that the use of non-evidential testing devices is not required, but permitted. Transit systems may choose to use an EBT for both the initial screen and the confirmatory test.

Change Of Interval Between Screen And Confirmatory Alcohol Test

If an initial alcohol screen detects an alcohol concentration of 0.02 or greater, the Breath Alcohol Technician (BAT) must wait at least fifteen minutes before conducting the confirmatory test to allow any residual mouth alcohol to dissipate. The regulation, as published on February 15, 1994, required the confirmatory test to be completed within 20 minutes from the completion of the initial test. On April 20, 1995, an amendment was published that increased this time interval to 30 minutes. The increase in time will not significantly impact the results of the tests, but will provide the transit systems more time to conduct their confirmatory tests.

If the 30 minute time interval is exceeded, the DOT has determined this will not be considered a fatal flaw, but the test should be conducted as soon as possible. Any operational practice or policy that results in a pattern of delayed tests for a particular system, however, will be considered a violation of the regulation. If the confirmatory test is delayed beyond the 30 minute interval, the BAT must provide an explanation on the Alcohol Testing Form.

Where To Find?.....

49 CFR Part 654, Prevention of Alcohol Misuse in Transit Operation

February 15, 1994
Federal Register Vol.59
Pages 7532-7571

Amended:

May 10, 1995
Federal Register Vol. 60
Pages 24765-24766
Primary Topic: Suspension of Pre-employment Alcohol Testing (see page 4 of the *Update*)

August 2, 1995
Federal Register Vol. 60
Pages 39618-39620
Primary Topic: Exemption of Volunteers and Post-Accident Testing Provision (see page 2 of the *Update*)

Technical Corrections:

March 6, 1995
Federal Register Vol. 60
Pages 12296-12300
Primary Topic: Corrections and Clarifications (see pages 6-8 of the *Update*)

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

Regulatory Amendments

Where To Find?.....

Evidential Breath Testing (EBT) Devices

March 16, 1995
Federal Register Vol. 60
Pages 14320-14322
Primary Topic: Conforming Products List (CPL) (see this page of the *Update*)

Note: This list will be updated periodically.

Non-evidential Testing Devices

August 15, 1995
Federal Register Vol. 60
Pages 42214-42215
Primary Topic: Initial Alcohol Screening Devices (see this page of the ***Update***)

Note: This list will be updated periodically.

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

Pre-employment Alcohol Testing

The United States Court of Appeals of the Fourth Circuit issued a decision that vacated pre-employment alcohol testing from the Federal Highway Administration (FHWA) alcohol testing rule. Since FTA's rule that was published on February 15, 1994 is based on language similar to FHWA's, FTA suspended the pre-employment alcohol testing provision of 49 CFR Part 654 effective May 10,1995 until further notice. Pre-employment drug testing was not effected by this court decision and is still in effect.

Approved Alcohol Testing Equipment

Only equipment approved by the National Highway Traffic Safety Administration (NHTSA) can be used for DOT alcohol testing. The most recent Conforming Products List (CPL) for Evidential Breath Testing (EBT) devices was published on March 16, 1995 in Volume 60 of the Federal Register (pages 14320-14322). Care should be used when viewing the list as different standards were used on the generation of the list. Only those without asterisks (*) meet the DOT requirement and were tested at blood alcohol concentrations (BAC) of 0.000, 0.020, and 0.040. When reviewing CPLs, always check the footnotes to ensure you are reading the list correctly.

The most recent CPL for non-evidential testing devices was published on August 15, 1995 in Volume 60 (page 42214-42215) of the Federal Register. This list reports on seven devices that were evaluated and found to meet the model specifications established by NHTSA for use in DOT initial alcohol screening tests and are accurate in detecting the presence of alcohol concentration of 0.020 or greater.

STT Qualifications

Only individuals qualified as Screen Test Technicians (STT) are permitted to perform initial alcohol screens with non-evidential testing devices. In order to become a STT, an individual must successfully complete a DOT model course of instruction, or an equivalent, demonstrate proficiency in the operation of the device, be able to read the test results, and must receive additional training to remain updated on alcohol testing procedures. A Breath Alcohol Technician (BAT) may act as a STT if they have demonstrated proficiency in the operation of the non-evidential testing device.

Observed Transport

If an initial alcohol screening test is conducted at a location different from where the confirmatory test is to be performed, and the test result is 0.02 or greater, the employee must be driven to the new test site. The employee must not drive or perform any safety-sensitive functions and must be continually observed by a supervisor or a designated transit system employee while being escorted to the confirmatory testing location.

Testing Procedures

Minimum Threshold For Marijuana Lowered

The Department of Health and Human Services (DHHS) reduced the originally established minimum threshold levels for marijuana metabolites in the initial test from 100 ng/ml to 50 ng/ml. The confirmatory test cut-off levels for marijuana metabolites have remained unchanged at 15 ng/ml. The reduced level remains effective when identifying specimens resulting from illegal consumption of marijuana, but is high enough to rule out the presence of the metabolites resulting from second-hand smoke or other incidental contact. The DOT August 19, 1994 regulatory amendments modified its regulations consistent with these DHHS modifications. This lower threshold has resulted in a larger number of verified marijuana positive test results that previously would have gone undetected.

Temperature Range Change

The temperature of each urine specimen is checked to identify specimens that may have been altered or substituted. The August 19, 1994 regulatory amendments established a new acceptable temperature range of 90 ºF to 100 ºF. Urine specimens with temperatures outside of this range will result in an observed collection immediately, unless the individual's body temperature is within 1.8 ºF of the specimen's temperature. Body temperature may be taken using any medically accepted means.

Shipment Of Specimen And Chain Of Custody

On August 19, 1994, The Department of Transportation clarified its procedures indicating that persons involved in the shipment of specimens in intact shipping containers are not required to make a chain of custody entry. Likewise, there is no need to make chain of custody entries when a sealed shipping container is put into or removed from temporary, secure storage. The fact that the specimens are sealed in packages that would indicate tampering negates the need for an entry on the chain of custody form.

Split Sample Procedures Clarified

The DOT has changed its split sample collection procedures to be consistent with the DHHS'(see August 19, 1994 Federal Register). Thus, if a collection container is used, the collection site person, in the presence of the donor, pours 30 ml. of urine into the primary specimen bottle and 15 ml. into the split specimen container. If a single specimen bottle is used as a collection container, the collection site person, in the presence of the donor, pours 15 ml. of urine from the specimen bottle into the split specimen bottle, leaving the remaining 30 ml. or more in the collection bottle that will then be considered the primary specimen.

Where To Find?.....

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

December 1, 1989
Federal Register Vol. 54
Pages 49856-49883
Primary Topic: Drug Testing Procedures

Amended:
February 15, 1994
Federal Register Vol.59
Pages 7340-7366
Primary Topic: DOT Alcohol Testing Procedures and Split Sample Procedures for Drug Testing

August 19, 1994
Federal Register Vol. 59
Pages 42996-43018
Primary Topic: Clarified Urine Specimen Collection Procedures and Clarified Alcohol Testing Procedures (see this page of the *Update*)

April 19, 1995
Federal Register Vol. 60
Pages 19535-19537
Primary Topic: Standardized Chain of Custody and Control Form

April 20, 1995
Federal Register Vol. 60
Pages 19675-19681
Primary Topic: Established Procedures for Use of Non-evidential Alcohol Screening Devices (see page 3 of the *Update*)

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

Corrections & Clarifications

Where To Find?.....

Technical Corrections:

March 6, 1995
Federal Register Vol. 60
Pages 12296-12300
Primary Topic: Technical Corrections (see pages 6-8 of the *Update*)

MRO/SAP Training and Information:

American Association of Medical Review Officers (AAMRO)
6320 Quadrangle Dr., Suite 340
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Mr. Ted Schults
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American Society of Addiction Medicine (ASAM)
4601 North Park Ave., Ste. 101
Chevy Chase, MD 20815
Ms. Sandy Schmedtje
301/ 656-3920

American College of Occupational and Environmental Medicine (ACOEM)
55 W. Seegers Rd.
Arlington Heights, IL 60005
Dr. Donald Hoops
708/ 226-6850

Substance Abuse Program Administrators Association
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Suite C
Glenview, IL 60025
708-699-1666

Procedural Guidelines For Substance Abuse Professionals

Any employee who tests positive or refuses a test must be referred to a Substance Abuse Professional (SAP) for an assessment. The SAP's primary responsibility is to provide a comprehensive face-to-face assessment and clinical evaluation to determine if the employee needs assistance resolving problems associated with alcohol misuse or prohibited drug use.

In June, 1995, the DOT Office of Drug Enforcement and Program Compliance issued procedural guidelines for SAPs. The guidelines define SAP duties for evaluation, referral, follow-up evaluation, and follow-up testing. In addition, the guidelines describe SAP prohibitions, release of information, and record maintenance.

See page 12 of this *Update* for information on how to obtain these guidelines

Retention of Records Clarified

The drug and alcohol regulation preamble as originally printed on February 15, 1994, included indications that some records must be maintained for three years while the regulations themselves indicated these records must be maintained for only two years. The two year requirement is, in fact,. correct. The one and five year requirements were correctly printed as they originally appeared.

FTA, however, encourages transit systems to maintain records for as long as they see fit recognizing the timeframe presented in the regulations should be considered minimums.

In addition, transit systems should consider keeping records for at least three years consistent with the triennial review process even though this is not required by the regulations.

Random Testing Rates

The random testing rate for drugs has been established at 50 percent by FTA. If the transit industry as a whole generates a random positive drug test result of less than one percent for two consecutive calendar years, FTA may reduce the drug testing rate to 25 percent. Similarly, the random testing rate for alcohol has been established at 25 percent. FTA may lower the random rate to 10 percent if the industry random positive result for alcohol is below one half of one percent for two consecutive years.

If the testing rate ever exceeds the 1 percent rate for drugs during any calendar year, however, it will be increased back up to the 50 percent level. In the case of alcohol, the random testing rate may be increased up to 50 percent if the industry as a whole generates a random positive rate of 1 percent or more during any calendar year.

The industry-wide positive rate will be calculated based on the annual MIS reports that transit systems are required to submit to FTA by March 15th of every year. (See table below)

Alcohol and Drug Testing Rates

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

Corrections & Clarifications

What Defines A Large And Small System?

The implementation deadlines for transit systems is dependent on whether they are considered to be a large or a small transit system. Large systems had a compliance date of January 1, 1995 while small systems have until January 1, 1996.

A clarification was made in the definition of large operators to include any system operating primarily in an urbanized area of 200,000 or more in population. A small system operates primarily in a non-urbanized area or an urbanized area with a population of less than 200,000. Thus, all Section 18 operators are considered small by definition. A Section 9 system may be considered either large or small depending on the area in which it operates.

A transit system that serves a portion of a large urbanized area (i.e. a small city within a larger urbanized area) is still considered large even if its service area is small. The number of employees is not a factor in the decision under FTA regulations.

Disabling Damage Definition Clarified

The definition of disabling damage is very important in the determination of whether a post-accident test will be performed. Many systems have defined the term to mean damage that requires the vehicle to be towed from the scene of the accident. Even though this is part of the definition, it is too narrowly focused. Thus, FTA clarified the definition to mean "damage which precludes the departure of a motor vehicle from the scene of an accident in its usual manner in daylight after simple repair." This includes damage to vehicles that could have been driven, but would have been further damaged by such movement (i.e. limped away). Disabling damage does not include damage that can be readily fixed on the scene, tire disablement, headlight or taillight damage, or damage to turn signals, horn, or windshield wipers.

Maintenance Contractor Exclusion Clarification

Section 18 maintenance contractors are excluded from the definition of safety-sensitive functions and thus are not subject to testing. This exclusion was expanded to maintenance contractors for Section 3 systems that operate in non-urbanized areas of less than 50,000 in population. Section 3 funded systems that operate in urbanized areas must include their maintenance contractors.

Direct Supervisors Cannot Act As BATs, Or Collection Personnel

The regulations as published on February 15, 1994, prohibited any supervisor from acting as a collection site person for any employee they directly supervised following a reasonable suspicion determination. On March 6, 1995, the FTA technical corrections expanded this prohibition to supervisors acting as Breath Alcohol Technicians (BAT). In addition, this prohibition was expanded to all testing categories. Thus, supervisors cannot collect urine or breath specimens from any employee they directly supervise at any time.

Certification of Compliance

Transit systems are required to certify compliance with the regulations each year. Large systems have already submitted their initial certifications. The first certification is due from the small systems by January 1, 1996. Section 9 systems must certify directly to FTA. State DOT's must certify on behalf of their Section 18 systems. Thereafter, however, instead of sending a letter of certification each year, FTA has decided to include the certification as part of the annual grant application process that includes a single signature page for all required certifications and assurances.

Q & A

Q. If following a positive FTA test an employee is put back to work through an arbitration procedure, what is the transit systems responsibility regarding the regulatory requirements?

A. The consequences set forth by FTA in the drug and alcohol regulations must be adhered to and cannot be compromised. Before an employee can be allowed to return to duty they must have satisfactorily completed the treatment program recommended by the SAP and taken a return-to-duty drug and/or alcohol test(s) with negative results. The employer is then subject to follow-up testing for a period of one to five years. If an arbitrator rules in the favor of an employee and puts an employee back to work before they have successfully followed the SAPs recommendations or before the return-to-duty test is completed with a verified negative result, the employee shall not be assigned safety-sensitive job duties until such time as the requirements are met.

Corrections & Clarifications

Q & A

Q. The regulations require that the urine collection process allow for individual privacy. Aren't there some instances, however, where collections are required to be observed?

A. Yes, observed collections are required if the employee provides a urine specimen that falls outside the 90º to 100º F temperature range and the employee declines to provide a measurement of body temperature or the body temperature varies by more than 1.8ºF from the temperature of the specimen. An observed collection is also required if the collection site person observes conduct that clearly and unequivocably indicates an attempt to substitute or adulterate the sample. In these two cases, the individual is required to remain at the collection site and provide another sample while being observed by a technician of the same gender as the person being tested. Observed Collections may also be authorized if the previously donated specimen had a specific gravity of less than 1.003 and a creatinine concentration below 0.2 g/l, or if the test is a return-to-duty or follow-up test.

Applicability Of FTA Rules Clarified

Both the drug testing regulation (49 CFR Part 653) and the alcohol testing regulation (49 CFR Part 654) state very clearly that all funding recipients of Section 3, 9, or 18 of the Federal Transit Act, as amended must comply with the FTA regulations. Some transit systems, however, are part of larger organizations or government entities that may also fall under the authority of other DOT modal administrations. The following FTA interpretations are provided to clarify the applicability of these regulations in these situations.

- If the transit system is the direct recipient of Section 3, 9, or 18 funds, all safety-sensitive employees are subject to testing under FTA authority. This includes all holders of CDLs regardless of whether they operate a revenue service vehicle or not. Thus, transit systems do not need to comply with the Federal Highway Administration (FHWA) testing program.
- Municipalities or other governmental units that have a separate and distinct transit department have to follow the FTA rule for the transit department, but may also have to comply with other DOT modal administration testing programs for other departments (i.e., FHWA for Public Works CDL holders).
- Umbrella agencies such as Community Action Councils (CAC) that often provide a mixture of service need only test the public transportation component of their service that receives FTA funds as long as the FTA portion of the service has a separate budget and personnel that are distinctly separate. If transportation programs are mixed without a clear distinction between transportation programs, then all agency safety-sensitive employees may be subject to the FTA rules.
- If one employer falls under the drug/alcohol testing rules of more than one DOT modal administration, it must establish programs for each group of employees allowing for corresponding differences in the modal rules. Each employee must know under whose authority they are being tested. The employer may either establish a separate random pool for each group of employees, or combine them into one random pool. If they chose the latter option, they must test at the highest percentage rate established by the DOT modal administration to which the employer is subject.
- If an employee has more than one employer, they are subject to testing by each employer.

Additional information clarifying these issues further will be provided in future issues of the Update.

FTA Interpretations

Summary Of Commonly Requested Interpretations

Transit systems that have questions regarding the regulations or who need clarification about how the rules may apply to a specific situation may write and ask for an interpretation. Since the regulations were first published, the FTA has received numerous requests for interpretations. Many of the responses are unique to individual transit systems, while others are applicable to transit systems in general. A summary of some of the interpretations is presented below.

Safety Sensitive Employees

Many systems have asked for clarification on whether a particular employee classification should be considered safety-sensitive. FTA has responded to these questions by replying that each employer must decide for itself whether a particular employee performs any of the safety-sensitive functions identified in the rules.

Maintenance Contractors

Many systems have asked for clarification on which maintenance contractors must be required to comply with the regulations. FTA has responded by indicating that maintenance contractors performing routine, on-going repair or maintenance work, must be included. Contractors that perform less routine activities such as warranty, overhaul, component rebuilds, or rehabilitation work are not included. FTA also clarified that there does not have to be a formal contract to be included; an informal arrangement that reflects an ongoing relationship between parties is all that is required to be considered a maintenance contractor under the rules.

Pass Through Funding

In situations where a transit system serves only as a conduit to pass through non-FTA funding to another transportation agency, FTA has concluded that the later is not covered by the regulations. Those pass through funds must be clearly identified and distinct from other FTA funds.

Incidental Overlap

Agencies that provide several transportation programs under one umbrella need only test the public transportation component of the services as long as the services are distinctly separate. Specifically, if there is no intermixing of funds or personnel, the services are considered separate and the non-FTA funded transportation programs are not subject to the FTA's drug and alcohol testing rules.

In situations where there is some overlap of duties or shared responsibilities of staff (i.e., back-up driver in an emergency, shared dispatcher) that is minimal, FTA considers this "incidental overlap" and as such does not require coverage of the individuals performing the incidental job functions.

For Interpretations Contact:

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Q & A

Q. The alcohol regulation states that safety-sensitive employees can only be subject to random, reasonable suspicion , and follow-up testing just before, during, or just after the performance of safety-sensitive functions. If I have an employee that is not scheduled to perform a safety-sensitive job function, but may be called on anytime the need arises (i.e., secretary who is required to dispatch when the dispatcher gets called out of the office), when is the employee subject to alcohol testing?

A. If an employee could be required to (and is expected to be able to) perform safety-sensitive duties anytime he or she is at work, then it is reasonable to determine that the employee is immediately available to perform such duties and could be subject to alcohol testing any time they are at work.

Notice Of Proposed Rule Making

Where To Find?.....

Notice of Proposed Rule Making

July 25, 1995
Federal Register Vol. 60
Pages 38200-38203
Primary Topic: Notice of Proposed Rule Making - Insufficient Volume and MRO/Lab Relationship (see summary on this page of the *Update*)

Comments were accepted until 9/25/95. Comments received after this date will be considered to the extent practical.

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.

Insufficient Volume

The current drug testing procedures require the employee to provide 45 milliliters of urine for testing purposes. Individuals who are unable to provide this amount must remain at the collection site for up to two hours and again attempt to provide a complete sample. During this two hour period the individual must be instructed to drink not more than 24 ounces of fluid. If the individual is unable to provide the specimen, the test is halted and the individual must be referred for a medical examination to determine if the inability to provide sufficient volume was genuine (shy bladder) or whether it constitutes a test refusal.

This provision has generated several concerns. Many people feel that two hours is too short a time to allow employees to generate sufficient volumes of urine. Another concern is the lack of guidance on what factors a physician should use to determine if the inability to provide sufficient volume is medically genuine. Others, however, favor the regulation as written, citing that additional time will result in more hours off the job, a greater likelihood of producing a dilute specimen, and greater risks of water intoxication.

The proposed amendment described in the Notice of Proposed Rule Making (NPRM) provides up to four hours for an employee to drink up to 40 ounces of fluid before making the second attempt. The employee would only be allowed to drink eight ounces of water each 30 minutes until the 40 ounce maximum is reached. Refusal to drink the fluid or make another attempt to provide a new specimen would be considered a test refusal. The NPRM requested input on the following issues.

- Appropriateness of the time frame (4 hours).
- Amount of water intake allowed (40 ounces).
- Collection site person discretion to proceed immediately to the shy bladder procedures if the individual acknowledges an inability to provide sufficient volume upon arrival at the site.
- Physician responsibilities in determining medical explanations for insufficient volume.

MRO/Lab Relationships

The DOT solicited comments on the extent and nature of prohibition regarding relationships between the MRO and laboratories. The primary issue is whether packaged MRO and laboratory services constitute a conflict of interest. Packaged programs are common and accepted in the industry and are promoted as providing a high level of quality control in the drug testing process. However, there is a concern that packaged programs compromise the independence of the parties in the process to an unacceptable degree.

Unresolved Positives

The DOT proposed an amendment to the regulations that would allow MROs to verify laboratory results as positive if the MRO or employer have been unable to contact the employee within 30 days from the date the MRO receives the lab results. Currently the test remains in limbo if the employee cannot be contacted.

In addition, the DOT requested comments on what should be done in the event of a non-contact opiate positive and what should be done if the documentation of a legitimate medical explanation is delayed longer than 30 days.

The Role Of Consortia And Third Party Administrators

On July 25, 1995, the DOT published guidance in th eFederal Register Vol. 60 (pages 38204-38205) on the proper role of consortia and third party administrators (TPA) in assisting employers meet their drug and alcohol testing requirements. DOT interpretations are provided on the general role and function of these organizations, requirements regarding confidentiality, test results, record keeping, Medical Review Officer (MRO) issues, and enforcement. Major points include the following:

- The consortium/TPA "stands in the shoes" of the employer and as such may be allowed to have access to confidential information regarding test results without the written consent of the employee. The consortium/ TPA must follow the same rules of confidentiality as the employer.
- The consortium/TPA may combine employees from more than one DOT regulated company in the same random testing pool.
- The consortium/TPA cannot make reasonable suspicion, post-accident, or refusal determinations. These determinations must be made by the employer.
- Consortium/TPA may maintain records concerning the drug and alcohol testing programs on behalf of the employers. However, employers are still required to maintain certain information in their own files as specified in the regulations.
- Confirmed drug test results must be sent directly from the lab to the MRO. The consortium/TPA cannot receive the results and then assign them to an available MRO.
- Monthly statistical summary reports may be sent directly to consortium/TPA and then distributed to the respective employers.
- The MRO of a consortium/TPA must perform their duties independently and confidentially. The MRO must personally conduct the final interviews with employees who have a confirmed positive test result from the laboratory and must personally make the decision concerning whether to verify a test as positive or negative. The MRO cannot delegate these responsibilities to staff.
- The MROs and Breath Alcohol Technicians (BAT) must send final positive test results directly to the employer for prompt removal of the employee from safety-sensitive job functions. The results may not be transmitted to the consortium/TPA as an intermediary step.
- The results can be sent to the employer and the consortium/TPA at the same time.
- Like an employer, a consortium/TPA may not provide individual test results or other confidential information to another employer without a specific written consent form from the employee, even if the employer is part of the consortium. Blanket consent forms authorizing release of information are not permitted.

The employer cannot delegate responsibility for compliance to the consortium. If the consortium fails to implement or operate the testing program consistent with the regulations, the employer is responsible and is subject to the suspension of their FTA funds. The *Guidelines* are more extensive than the information presented here and should be consulted directly for additional information.

Where To Find?.....

FTA Guidance

July 25, 1995
Federal Register Vol. 60
Pages 38204-38205
Primary Topic: Guidance on the Role of Consortia and Third Party Administrators (see summary on this page of the *Update*)

MRO Conflicts Of Interest

Consistent with DHHS revised guidelines, the DOT has specifically prohibited relationships between laboratories and Medical Review Officers (MRO) that could have the reality or create the appearance of conflicts of interest.

Resource Materials

Drug Testing Procedures Handbook, Employers Guide to 49 CFR Part 40
Substance Abuse Professional Procedures Guidelines for Transportation Workplace Drug and Alcohol Testing Programs
Medical Review Officer Guide for Regulated Transportation Industries
USDOT, Office of Drug Enforcement and Program Compliance, (202) 366-3784

Bulletin Board Service
FTA, Office of Safety & Security, (800) 231-2061

Random Drug Testing Manual
Substance Abuse in the Transit Industry
Employee Assistance Program for Transit Systems
FTA, Office of Safety and Security, (202) 366-2896

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.

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