



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

# FTA Drug And Alcohol Regulation *Updates*

**Spring 1996**

**Issue 2**

## **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 second of four that will be published this year.

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## **Reaction from the Industry**

Small systems have had their FTA drug and alcohol testing programs in place now for several months. During this period, systems have worked hard to identify and remedy problems with their program implementation. The most common problem cited refers to inadequate internal procedures for employee substitution for random testing and transportation of employees to and from the collection site(s).

FTA is aware of a relatively small number of transit systems that continue to have difficulty coming into compliance. For the most part, however, testing programs appear to be operating smoothly and acceptance is increasing as the testing program becomes part of each system's standard operating procedures.

Many small urban and rural program managers who thought they had no problem with drug use or alcohol misuse among their employees have expressed surprise at the number of positive test results that have been generated by the program, many by senior level employees. Others have

expressed concern regarding the number of positive test results associated with post-accident tests. These systems are coming to the realization that no system is exempt from substance abuse no matter how small or how remote. Most of these systems acknowledge that the testing program is an effective tool to deter and detect drug abuse and alcohol misuse with the end result of making their systems safer.

## **Bernstein to Head DOT Drug Office**

Secretary of Transportation Federico Peña has appointed Mary Bernstein as Director of the Department's Drug Enforcement and Program Compliance Office. Prior to joining DOT she worked at GTE Service Corporation where she formulated, implemented, and managed drug and alcohol testing programs. She also worked for TransWorld Airlines (TWA) where she designed and administered innovative programs for employees with substance abuse and mental health

problems.

Ms. Bernstein has been a leader and consultant in the areas of employee assistance programs, standards for health management operations, and a variety of health-related care and delivery systems.

In her current capacity she will work on behalf of the Secretary to monitor compliance and to promote consistency among the DOT modal administrations on common issues.

# Corrections & Clarifications

## 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

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

The information presented on this page should be used to update Chapter 6 of the *Implementation Guidelines*.

## Pre-Employment Drug Testing Required

Effective May 10, 1995, FTA suspended the pre-employment alcohol testing provision of 49 CFR Part 654. Pre-employment drug testing *was not* suspended and is still in effect.

Many people have also been operating under the belief that obtaining drug test results from a previous employer waives the requirement to conduct a pre-

employment drug test on a new employee. This provision may be allowed by other DOT administrations, but not by the FTA.

The FTA *does not* allow any waivers of pre-employment drug tests. The employee must have received a negative pre-employment drug test result before they can perform a safety-sensitive job function for the FTA regulated employer.

## Testing Must be Performed Promptly

Many transit systems have developed their policies and procedures for drug and alcohol testing around the assumption that they have a two hour window of time after the employee has been notified of the need for a test in which to get the test completed. This assumption is incorrect. For random testing, the alcohol regulation (49 CFR Part 654 (h)) states clearly that once an employee is notified of the test requirement they are to proceed to the test site *immediately*. The same logic exists for random

drug tests.

The post-accident and reasonable suspicion provisions of both the drug and alcohol testing regulations require a test

as soon as practical following the incident.

The regulations

require that the employer document the reasons if a post-accident or reasonable suspicion test is not administered within two hours following the incident. This reporting requirement, however, should not be misconstrued to give transit systems a two hour window.

Delays due to unavailability of EBTs, BATs, or excessive travel times are not acceptable. Transit systems should have testing services available in reasonable proximity to their service area to avoid unnecessary delays.

## Citation No Longer Required

On August 2, 1995, the FTA published an amendment to the drug and alcohol final rules removing the citation requirement for a non-fatal accident.

The amended regulation requires a post-accident test for non-fatal accidents any time one or more individuals receives injuries requiring immediate transport to a medical treatment facility or any time one or more

vehicles receive disabling damage. The vehicle operator must be tested unless his or her conduct can be completely discounted as a contributing factor. The requirement for a citation is no longer part of the regulatory language (See page 2 of the Fall/Winter 1995 Update). Testing is mandatory when there is an accident resulting in a fatality.

# Corrections & Clarifications

## Random Selection And Scheduling Procedures Clarified

Transit systems must use a scientifically valid random number selection method to select safety-sensitive employees for unannounced drug and alcohol testing. Depending on the size of the safety-sensitive employee pool, numbers may be selected on a daily, weekly, monthly, or quarterly basis. Selections should be made as frequently as possible, but not less often than quarterly. (See chart this page)

Once an employee number is drawn, the employer should schedule the collection within the testing period (i.e., day, week, month, or quarter) taking measures to ensure that the employee is not inadvertently notified of the test until it is time to proceed to the collection site. Tests should be performed evenly throughout the testing period to eliminate predictability of the test.

If the employee is unavailable due to vacation or other long-term absence, a

replacement number should be drawn. If an employee is temporarily unavailable at the time the employer desires to conduct the test, or it is their day off, the number should be held until their next shift as long as the test can be performed during the testing period (i.e., day, week, month, quarter) for which the number was selected.

Every effort should be made to test the individual that was initially selected. Replacement numbers should only be selected when the initial employee selected is truly not on duty or is unavailable for testing anytime during the designated testing period. Logistical difficulties, operational requirements, or complicating personnel issues that make the testing process more difficult are not acceptable reasons for choosing a replacement.

Suggested Frequencies of Random Number Selections Random Tests <u>Per Year</u>	<u>Frequency of Random Number Selections</u>
1-11*	Quarterly
12-51	Monthly
52-364	Weekly
>364	Daily

\*Small systems that conduct few tests per year may need to conduct more tests to ensure the testing is spread throughout the year

## After Hours Post-Accident Testing

Accidents can happen anytime or anywhere an employee is performing safety-sensitive job functions. Transit systems are all required to conduct drug and alcohol post-accident tests as soon as possible following the accident. Consequently, systems must have internal policies and procedures in place to conduct testing any time individuals are performing safety-sensitive job functions. This includes periods of time outside of the normal business day (i.e., early morning, evening,

weekends). Internal procedures might include a designation of who is to be contacted (i.e., supervisory personnel, management) to make the determination of whether a post-accident test is required, where to report for collection service and how the employee will be transported to and from the collection site. Procedures must be established for accidents occurring within the system's recognized service area as well as for any trips that might occur outside the service area.

### 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 2 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

**The information presented on this page should be used to update Chapter 6 of the *Implementation Guidelines*.**

# Corrections & Clarifications

## Where To Find?.....

### Evidential Breath Testing (EBT) Devices

January 30, 1996  
Federal Register Vol. 61  
Pages 3078-3080  
Primary Topic: Conforming  
Products List (CPL)

**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

**Note:** This list will be updated  
periodically.

The information presented on  
this page should be used to  
update Chapter 9 of the  
*Implementation Guidelines*.

## Information Disclosure

The FTA regulations go to great length to ensure employee privacy and confidentiality in the drug and alcohol testing process. Employers are required to maintain records in a secure manner so that disclosure of information to unauthorized persons does not occur. Each transit system's drug and alcohol policy must clearly define to whom and under what circumstances testing records will be released. The regulations state the following circumstances under which information can be released:

- ◆ to a third party only as directed by specific, written instruction of the employee;
- ◆ to the decision-maker in a lawsuit, grievance, or other proceeding initiated by or on the behalf of the employee tested;
- ◆ to subsequent employer upon receipt of written request from the employee;
- ◆ to the employee, upon written request;
- ◆ to the National Transportation Safety Board during an accident investigation; and
- ◆ to the DOT or any DOT agency with regulatory authority over the employer or any of its employees, or to a state oversight agency authorized to oversee rail fixed-guideway systems.

An employee request for release of information must specifically identify the person to whom the information is to be released, the circumstances under which the release is authorized, and the specific kind of information to be released, (i.e., the results of any DOT-mandated drug test). A separate release must be signed each time information is to be disclosed. This includes the release of information to union representatives or other employee representatives.

In cases where records are subpoenaed in criminal or civil suits, required for inspection by the state highway patrol or state transportation safety board, or other freedom of information statutes, transit systems should first consult with their own legal staffs regarding the jurisdiction over these records before they are released.

## Monitoring Contractor Compliance

The direct recipients of FTA funds are ultimately responsible for compliance with these regulations. If a direct recipient contracts with another agency or firm to provide safety-sensitive job functions, they may hold that agency accountable through the contractual relationship.

However, a direct recipient can not distance themselves from the regulation by delegating all responsibility for compliance to their contractor. The recipient must make a good faith effort to ensure their contractors establish compliant programs and then should monitor them over the course of the contract.

Recipients should take whatever steps

they feel are necessary to ensure contractor compliance. At a minimum, it is suggested that contractors provide the recipient a copy of their policy; employee and supervisor training documentation; name and location of the collection site, laboratory, MRO, BAT, and SAP; a description of their random selection process; quarterly management reports summarizing test results; and annual MIS reports.

If the contractor is unwilling to establish or maintain a program meeting the recipients' minimum requirement, the recipient must take action to remedy the situation as soon as possible or terminate the contract.

## Accident Definition Includes Some Incidents

In the transit industry, the terms accident, incident, and occurrence mean different things to different systems. Many program managers have assumed that a post-accident test is only required when there is a collision and have not been testing for incidents that occur on the vehicle when there was no collision.

The definition of an accident that is included in 49 CFR Part 653 and Part 654 does not refer to a collision. The definition refers to all fatal accidents and to non-fatal accidents when one or more individuals receives injuries requiring immediate transport to a medical treatment facility, *or* anytime one or more vehicles receives disabling damage. Thus, if there was no collision, but an individual falls on a vehicle and requires immediate transport to a medical treatment facility, a post-accident test is required **unless** the driver can be completely discounted as a contributing factor to the accident.

## Charters, Vehicle Leases, and Motorpools

Transit systems will sometimes formally or informally lease their revenue service vehicles to provide charter services or to supplement human service transportation programs. In some cases the arrangements are made on an incidental or ad hoc basis, in others the arrangements are well established, formalized, and provided on a routine basis.

The regulations state that the drug and alcohol rules apply to any entity that performs a safety-sensitive function (i.e., operation of a revenue service vehicle, including when not in revenue service) consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement between the parties.

Consequently, transit systems that have established an on-going relationship with other agencies or companies to provide revenue service vehicles, must require that these entities establish and maintain drug and alcohol testing programs compliant with the FTA regulations for the portion of the business that uses these vehicles.

In instances where vehicles are provided on a one-time or incidental basis and there is no on-going relationship (i.e., mayor drives a bus in a parade, radio personality drives a bus during a vehicle rodeo), the regulations do not apply.

*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 on this page.*

### For Interpretations Contact:

**Office of the Chief Counsel  
FTA  
400 7th Street SW  
Washington, DC 20590  
(202) 366-4011**

# Testing Procedures

## 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.

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

## Identifying the Presence of Adulterants

The DOT drug testing procedure regulation (49 CFR Part 40) authorizes, but does not require, laboratory analysis for the presence of adulterants. Consequently, employers should consult with their MROs to determine the course of action that should be taken if abnormal test results are obtained (i.e., request additional information/analysis at additional cost). The DOT has identified three categories of abnormal results.

1. A *diluted specimen* occurs when the specific gravity is less than 1.003 and creatinine is less than 0.2 g/L. This result is not reason to require the donor to submit to another specimen collection, but does *allow* the employer to require the next specimen submitted by the donor to be collected under direct observation.
2. If a *specimen is not suitable* for laboratory analysis, but the presence of adulterants is not substantiated, the

MRO should contact the employee to identify any medical explanation for the unsuitability. If no acceptable explanation is given, another specimen must be collected under direct observation.

3. If requested, a laboratory will report a specimen as *adulterated* when a specific adulterant is identified and can be forensically validated. This test result should be interpreted as a positive test with corresponding consequences.

In each of these scenarios, the laboratory should be required to provide expert witness testimony to defend its findings in arbitration, litigation, or other actions resulting from the drug test report.

## Split Specimen Requests

Once notified by the MRO of a confirmed positive test result, the employee may request that the split specimen be tested. Many transit systems require that the cost of the split specimen test be paid for by the employee. Employers should be cautioned that they can not predicate the availability of split specimen analysis on the employee's ability to pay. Thus, all requests for split specimen analysis must be processed by a transit system's MRO without regard to financial considerations. The employer may recover the costs after the analysis has been completed.

Regardless of who pays for the split specimen test, the results will be reported by the laboratory to the MRO who will subsequently forward the results to the employer.

## Shy Bladder— Two Hour Clock

If an individual is unable to provide 45 ml of urine for a drug test, the collection site person is to instruct the individual to drink not more than 24 ounces of fluid, and after a period of up to two hours, again attempt to provide a sample. (49 CFR Part 40.25(f)(10)(iv)). The two hour clock begins to run after the donor returns from the restroom and provides either no specimen or a specimen of insufficient quantity.

# FTA/FHWA Applicability

## Contractors that Fall under Multiple

Many transit systems contract with service providers that are already required to comply with Federal Highway Administration (FHWA) drug and alcohol testing regulations. If these contractors are able to segregate the employees that provide transit service from those that operate commercial vehicles, the employer is required to establish programs for each group of employees allowing for the corresponding differences in the modal rules.

However, if the contractor's employees operate both transit and commercial vehicles, the employer must determine which modal administration, FTA or FHWA, regulates the majority of the employees' safety-sensitive functions. Even though very difficult, it is possible for an employer to craft one policy that complies with both rules.

Once determined, the employee will be subject to pre-employment and random testing under the regulatory authority of the primary modal administration.

However, the assignment of regulatory authority for reasonable suspicion and post-accident testing will depend on the function an employee is performing at the time of the incident. Return-to-duty and follow-up tests will be assigned to the modal administration that generated the initial positive test result.

The FTA and FHWA covered employees can be combined into one random pool, but the employer must distinguish between FTA and FHWA tests for reporting purposes.

## FTA/FHWA Regulatory Differences

In many instances, drug and alcohol testing program managers have been requested to develop policies and programs that address both the FTA and FHWA regulatory requirements. Many have assumed that, if they have established a program that is compliant with one modal administration's regulation, it will also be in compliance with the other's regulation. This is an incorrect assumption. The regulations are similar but they *are not* identical.

The primary areas where there are differences between the FTA and FHWA regulations include, but are not limited to, those listed below:

- ◆ Regulatory Authority
- ◆ Applicability
- ◆ Safety-Sensitive Definition
- ◆ Consequences for Alcohol Test
- ◆ Transference to Contractors
- ◆ Safety-Sensitive Employee Training
- ◆ Pre-employment Drug Test Waivers
- ◆ Prohibited Behavior
- ◆ Reasonable Suspicion Documentation
- ◆ Post-Accident Definition and Test Requirement
- ◆ Post-Accident Test Procedures
- ◆ Reporting
- ◆ Release of Information by Previous Employer
- ◆ Compliance Penalties
- ◆ Large and Small Employer Differences

Before a program manager attempts to develop a program that addresses both regulations, they must first understand each regulation and their differences. Also note that each regulation requires covered employees to know under whose authority they are being tested (federally mandated vs employer mandated). If a system exceeds the requirements for one or the other groups of employees to make them consistent with the other, the employees must be notified that these additional provisions are set forth under the authority of the employer.

## Q & A

**Q.** If an employee works for more than one covered employer, under whose program should they be included?

**A.** Employees that have more than one employer are subject to each employer's testing program without regard to the other employer. There is no waiver of the pre-employment test and there should be no sharing of information between employers. The employee must be included in each employer's random pool and be subject to testing by each.

**Q.** Where do I find the FHWA regulations?

**A.** On March 8, 1996, the Federal Highway Administration (FHWA) published technical corrections to its final rule (49 CFR Part 382) on the Commercial Driver's License (CDL) program and Controlled Substance and Alcohol Use and Testing. The amendments corrected errors in the 1994 final rule and codified final dispositions of waivers of the CDL program. The March 8, 1996 Federal Register published the FHWA rule in its entirety.

# 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.

**RLS & Associates, Inc.**  
3131 South Dixie Hwy., Suite 202  
Dayton, Ohio 45439  
Phone: (513) 299-5007  
FAX: (513) 299-1055

*Urine Specimen Collection Procedures Guideline*  
*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**  
**FTA WorldWide Web home page: <http://www.fta.dot.gov>**

*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**

**USDOT Drug and Alcohol documents FAX on Demand 1-(800) 225-3784**

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