



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

FTA Drug And Alcohol Regulation *Updates*

Summer 1996

Issue 3

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 third of four that will be published this year.

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Tests Cost Less than Expected

Prior to implementation of their drug and alcohol testing programs, many rural transit systems expressed concern regarding the cost of the program and the subsequent burden the program would have on the operating environment. Six months into the program, most of these concerns have not materialized or have been overcome.

Even the most rural of states have been able to come into compliance in a cost-effective manner. Lowell Richards of the South Dakota Department of Transportation reports that all ten rural public transit systems in the state are in compliance with an average cost per test, including administration costs, of \$88.17, which is far less than their original projection.

Insufficient Volume Rule Changes

On July 19, 1996, the Department of Transportation published a final rule in Volume 61 of the *Federal Register* (pages 37693-37700) modifying its procedures regarding insufficient volume during urine specimen collection.

Previously the rule stated that individuals who could not provide sufficient volume (45 ml) of urine should be instructed by the collection site person "to drink not more than 24 ounces of fluid, and after a period of up to two hours, again attempt to provide a complete sample." If the individual was still not able to provide sufficient volume, the individual had to be referred for a medical evaluation to determine whether the individual's inability to provide a specimen was genuine or constituted a refusal to test.

In response to concerns expressed by many through a Notice of Proposed Rule-Making (July 25, 1995) it was determined that the two-hour period to obtain a sufficient volume is too short.

Consequently, the DOT has revised the rule to allow up to **three hours** to obtain a complete sample. In addition, the fluid intake amount was raised from 24 to not more than 40 ounces during the period. The three hour period will provide a comfortable margin of safety to employees who may need additional time to generate a sufficient specimen and the 40 ounce level provides an enhanced chance for employees required to provide the required volume of urine. The rule does not propose a schedule for how the fluids should be consumed. The rule simply requires that the fluids be administered at reasonable intervals throughout the three hour period.

If an individual refuses to drink fluids as directed or refuses to provide a new urine specimen, the individual will be considered to have refused the test which has the same consequences as a positive test. The effective date of this change was August 19, 1996.

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

August 2, 1995
Federal Register Vol. 60
Pages 39618-39620
Primary Topic: Exemption of Volunteers and Post-Accident Testing Provision

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 7 of the *Implementation Guidelines*.

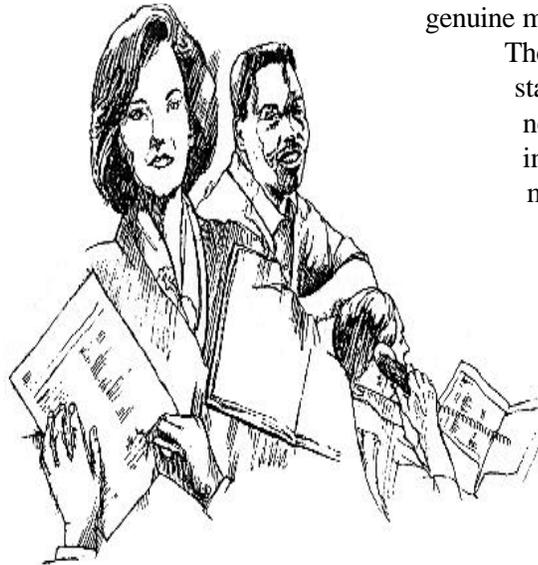
Medical Exam Requirements Clarified

If an individual is unable to provide a sufficient specimen within three hours of their first attempt, the collection process must stop and the employer must refer the individual for a medical examination to be conducted as soon as possible. The examination must be performed to determine whether the employee's inability to provide a sufficient specimen is medically "genuine."

In the July 19, 1996 *Federal Register* (page 37699) Section 40.25 clarifies what constitutes an adequate medical explanation.

The rule states that "a medical condition includes an ascertainable

physiological condition (e.g., a urinary system dysfunction) or a documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or "dehydration."



The physician's decision ultimately must be decided on a case by case basis. If the physician is unable to identify an adequate medical explanation as defined above, the individual's failure to provide a

sufficient specimen shall be regarded as a refusal. The physician is required to provide the MRO with a brief written statement indicating whether or not the insufficient specimen was within a high degree of probability the result of a genuine medical condition.

The written statement should not include detailed information on the medical condition of the

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The MRO will in turn notify the employer in writing of the medical examination conclusion.

The physician who performs the medical examination must be a licensed physician who is acceptable to the employer.

Split Sample Results Go to Employer

On July 19, 1996, Section 40.33 (f)(2) was added to 49 CFR Part 40 clarifying that the result of a split specimen test be reported by the MRO to both the employer and employee regardless of who pays for the test.

The rule remains silent regarding who chooses the second DHHS certified laboratory for split specimen testing. The selection of the second lab should be considered a local decision. Most commonly the selection is made by the employer, employee, MRO or collective bargaining unit depending on local policy.

Regulatory Amendments

Confirmed Positive Tests Issue Resolved

Upon receiving a confirmed positive test result from the laboratory, the Medical Review Officer is required to make every reasonable attempt to contact the individual to afford them the opportunity to discuss the test result. If the MRO can not reach the individual, the MRO is to ask the employer to contact the employee. Under the previous version of the rule, the test could not be verified as positive until the employee had been contacted and given the opportunity to discuss the result with the MRO.

However, in some cases, employees simply do not return to work following the test and/or are not able to be contacted, thus leaving the

testing process incomplete. The *Federal Register* published on July 19, 1996 (pages 37699-37700) amended 49 CFR Part 40 to address this issue. The regulation states in Section

This amendment is based on the premise that the individual has an obligation in all cases to participate in the verification process.

40.33(c)(5)(ii) that if neither the MRO or employer, after making all reasonable efforts, has been unable to contact the employee within 14 days after the MRO receives the laboratory result, the MRO may verify the test result as positive.

If the individual was not able to contact the MRO during the 14 day period due to serious illness, injury, or other circumstance beyond the control of the individual, the individual may present documentation to the MRO of such occurrence. Upon reviewing the information submitted, the MRO may re-open the process and allow the individual to provide an explanation for the positive test result. If the MRO concludes that there is a legitimate explanation, the MRO is to declare the test to be negative.

SAP Definition Expanded

The drug and alcohol testing regulations require that individuals who test positive or refuse to take a test be referred to a Substance Abuse Professional (SAP) for assessment. The SAP's fundamental 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 use or prohibited drug use and to recommend a course of treatment. The SAP must also determine if the individual has successfully completed the recommended treatment program and directs the employee's follow-up testing program.

The DOT rule was amended on July 17, 1996 in the *Federal Register* (pages 37222-37224) to expand the SAP definition to read as follows: "A licensed physician (Medical Doctor or Doctor of Osteopathy); or a

licensed or certified psychologist; social worker; or employee assistance professional; or an addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission or by the *International Certification Reciprocity Consortium/ Alcohol and other Drug Abuse* [Emphasis added]). All must have knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders." Individuals that do not meet these requirements can not serve as SAPs. Also, note that agencies or Employee Assistance Programs may employ individuals that are SAPs, but the agency program can not be considered the SAP; SAPs must be specific individuals.

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

August 2, 1995
Federal Register Vol. 60
Pages 39618-39620
Primary Topic: Exemption of Volunteers and Post-Accident Testing Provision

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 7 of the *Implementation Guidelines*.

Testing Procedures

Where to Find?

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

Amended:

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

August 19, 1994
Federal Register Vol.59
Pages 42996-43018
Primary Topic: Clarified Urine Specimen and Collection Procedures and Clarified Alcohol Testing Procedures

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

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

Collection Practices Need Improvement

Anecdotal information from transit systems, third party administrators, and some collection sites indicate that the standard operating procedures of some collection sites are in violation of the regulatory requirements. The most common violations are:

- ◆ **Limited Service Hours** - Transit systems are required to perform collections any time an employee is conducting safety-sensitive job functions. This includes early morning, evening, and weekends for most transit systems that operate beyond normal business hours. If the primary collection site has limited hours of operation, it is up to the transit system or their designee to obtain collection services elsewhere during the extended hours. The fact that a collection site is closed is not sufficient justification for failure to conduct a test.
- ◆ **Procedural Violations** - Collection sites are required to give an employee up to three hours to provide a sufficient specimen following an initial attempt that resulted in an insufficient volume. In some cases, collection sites have simply sent the employee home at the normal closing time, instructing the employee to return the next morning. This practice is in direct violation of the regulation. The collection process,

once initiated, must be followed completely to its conclusion.

- ◆ **Rushing Second Attempt** - Some collection site personnel have frustrated the collection process by asking for a retry too soon following an initial effort resulting in insufficient volume. Attempting a retry too soon may result in additional insufficient volume collections. Thus, collection site personnel should take care to avoid this problem.
- ◆ **Delayed Collections** - Often, collection sites require individuals to wait for extended periods of time prior to beginning the collection process. This waiting increases the time associated with each collection and the corresponding costs. Thus, collection sites should be encouraged to initiate their collection process as soon as an individual arrives at the site.

The FTA recipient is ultimately responsible for the quality of the collection process; thus recipients should work closely with their consortium, third party administrators and/or collection sites to ensure that the collections are performed consistent with the regulations.

Body Temperature Measurements

As part of the collection process, the temperature of each urine specimen is checked to identify specimens that have been altered or substituted. If a specimen is outside the 90°F to 100°F range, the individual's body

temperature is checked. More than 1.8°F difference between the specimen and body temperature will result in an observed collection. The July 19, 1996 *Federal Register*, (page 37699) clarifies that an individual's body temperature

can be measured by any medically accepted means, including oral and tympanic, but excluding rectal.

Information Disclosure and Benefits

The regulations permit the disclosure of drug and alcohol testing results only under very limited circumstances (see Spring 1996 *Update*, page 4). Requests for test result information by an unemployment service bureau can be granted, if the

individual's dismissal was a result of a positive drug or alcohol test. The information can be released under 49CFR section 653.75 (g) and 49CFR section 654.55 (g) which state information can be released to the decision-maker in a lawsuit, grievance, or other proceeding initiated

by or on the behalf of the employee tested. Since the request for unemployment benefits was initiated by the employee, the employer may release the information to the decision-maker in a confidential manner.

MIS Reports Due March 15

FTA requires that transit agencies file annual reports summarizing test results (49CFR 653.53 and 49CFR 654.53) by March 15 of each year for the previous calendar year. FTA requires that transit systems use the Standard Management Information System (MIS) reports found in the back of the regulations. To avoid reporting problems, FTA provides the following guidance.

- ◆ Only FTA forms can be used. Do not alter the forms. Computerized replicas of the forms are acceptable.
- ◆ One form must be provided for alcohol and one for drug test results.
- ◆ Each form submitted must be an original signed by an authorized official of the transit agency.
- ◆ All forms must be typed or completed in ink.
- ◆ Each form must be completed in its entirety.
- ◆ The pre-employment portion of the alcohol form should be disregarded.
- ◆ EZ forms for alcohol test reporting can only be used if there were no test results indicating an alcohol

- ◆ concentration of 0.02 or greater.
- ◆ EZ forms for drug test reporting can only be used if there were no positive drug tests.
- ◆ Reports can not be filed by a consortium; individual transit agencies must submit their own reports.

Each of the transit system's safety-sensitive contractors that fall under these regulations must complete a set of forms. The transit agency should bundle these forms along with the transit system's in its submittal to FTA. The transit agency should not summarize or co-mingle the results. Likewise, state DOTs should bundle the forms from each of the programs they administer in their submissions to FTA. All completed and bundled forms should be sent to the FTA Office of Safety and Security by March 15.

Agencies that are required to bundle their submittals should request forms from their contractors or sub-recipients well in advance to ensure sufficient time for review and a timely submittal. Likewise, consortium members should request report data in time to meet the FTA deadlines.

Where To Find?.....

Part 40 Amendments, Con't.

July 16, 1996
Federal Register Vol.61
Pages 37015-37017
Primary Topic: Use of Labs
Outside the U.S.

July 17, 1996
Federal Register Vol.61
Pages 37222-37224
Primary Topic: Expansion of
SAP Definition

July 19, 1996
Federal Register Vol.61
Pages 37693-37700
Primary Topic: Insufficient
Specimen

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*.

FTA Program Monitoring

Q & A

Q. Is the employer compelled to pay for an employee's SAP evaluation?

A. No. The regulations are silent regarding who pays for the SAP evaluation, leaving the decision up to individual employers and/or labor-management negotiations, if applicable. A review of industry practice indicates that costs are commonly paid by either the employer, employee, or employee's insurance carrier.

Q. When does the employee training have to occur for new hires?

A. The 60 minutes of training on the effects and consequences of prohibited drug use must be provided to all new hires prior to the performance of safety-sensitive job functions. It is recommended that this training be included as part of the initial employee orientation training. Reasonable Suspicion training of supervisors must be conducted before they can make Reasonable Suspicion referrals.

Triennial Review

Compliance with the FTA drug and alcohol testing program has been included as one of the elements that is assessed during the triennial review process. The review addresses certification and annual reporting, policy, and record-keeping. To prepare for this portion of the review, transit systems must be able to satisfactorily address the following items:

- ◆ Have the annual MIS reports been filed with the FTA?
- ◆ Is there a policy in place including all required elements?
- ◆ Are records maintained in a secured location with controlled access?
- ◆ Has it been clearly defined to whom test results may be released?
- ◆ Is the required testing being performed for all categories?
- ◆ Are approved USDOT Drug Testing Custody and Control Forms being used?
- ◆ Are approved USDOT Breath Alcohol Testing Forms being used?
- ◆ Are the laboratories used certified by the DHHS?
- ◆ Is the MRO a licensed physician with appropriate medical training and knowledge of substance abuse disorders?
- ◆ Does the SAP meet minimum requirements for licensing and clinical experience?
- ◆ Are employees with positive drug or alcohol tests referred to the SAP for evaluation?
- ◆ Is a NHTSA approved EBT used for confirmatory alcohol testing?
- ◆ Have BATs been trained on a NHTSA approved course of instruction?
- ◆ Have all safety-sensitive employees been given 60 minutes of training on illegal drug use awareness?
- ◆ Have supervisors received reasonable suspicion training: a minimum of 60 minutes on drugs and 60 minutes on alcohol?

FTA Oversight Audits

In addition to Triennial Reviews, FTA will also be performing field audits on selected transit systems. Systems will be selected for an audit if problems are identified through MIS reports, triennial reviews, hotline tips, or media coverage. Other systems may be selected on a random basis.

Definition of Supervisor

The drug and alcohol testing regulations stipulate that only a trained supervisor can make reasonable suspicion determinations. The term supervisor refers to job function rather than job title. Depending on the organization, a number of individuals with varying job titles could serve in a supervisory capacity. Each of these individuals should receive reasonable suspicion training and be empowered to take action when they make specific, articulable and contemporaneous observations of the appearance, speech, behavior, or body odor of the employee that are consistent with probable drug abuse or alcohol misuse.

The decision to test can only be made by trained individuals that directly observe the employee. Organizations that require other upper management personnel (i.e., Director of Personnel), to make the final testing determination are in violation of this regulation unless the person making the final determination has also been appropriately trained and has observed the employee.

The supervisor that makes the actual observation does not have to be the employee's direct supervisor, but can be any trained supervisor within the organization.

Correction

The article on pre-employment drug testing found on Page 2 of the Spring 1996 issue of the *Updates* incorrectly stated that a negative pre-employment drug test result was required before an individual *can perform* a safety-sensitive job function. Instead, the article should have stated that an applicant must receive a negative pre-employment drug test before they are *hired to perform* safety-sensitive job functions.

Pre-employment Test Following Leave

The drug testing regulation require that a pre-employment drug test be conducted *before* an applicant is hired to perform a safety-sensitive job function, or before an employee is transferred into a safety-sensitive position.

In instances where a person is on temporary leave (i.e., vacation, sick, jury duty) no pre-employment test is required before the individual can resume their safety-sensitive duties. However, in instances where the individual's status within the agency changes or is reclassified (i.e., seasonal layoff, leave of absence, out or reassigned for worker's compensation), a pre-employment test is required prior to reassignment to a safety-sensitive job function.

Chain of Custody and Control Forms

The Chain of Custody and Control (CoC) Form that accompanies each urine specimen through the testing process serves as a vital piece of documentation that must be accurately and completely filled out. This form is used to document the exchanges of the specimen from the time of production by the donor until the test is completed. Since the form documents the chain of custody and serves as legal evidence that the reported test results apply to the donor, the employee should not have sole access to the form at any time and especially prior to the test. Rather, the CoC forms should only be available to the collection site and lab personnel and the MRO. By limiting access to the forms, the opportunity for tampering or altering the forms prior to the test is minimized. The employee will be provided with their copy of the form once the collection process has been completed.

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**

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.

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 World Wide Web home page: <http://www.fta.bts.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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