



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

FTA Drug And Alcohol Regulation *Updates*

Summer 1997

Issue 5

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 fifth in a series.

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FTA Conducts Compliance Audits

The final FTA drug and alcohol testing regulations were published on February 15, 1994. Large systems have been required to be in compliance since January 1, 1995, while small systems have been required to be in compliance since January 1, 1996. Consistent with FTA's oversight responsibilities, FTA has initiated a program of transit system audits assessing compliance with the drug and alcohol testing regulations (49 CFR Part 653 and Part 654).

The audits are being performed by a team of experts on the regulations, including FTA and Volpe Center staff and private consultants. The audit teams consist of three to eight persons which spend two to four days on-site, depending on the size and complexity of the transit system.

The audit is comprehensive in nature, including a review of each agency's policies, procedures, and recordkeeping. The vendors, including collection sites, medical review officers, and substance abuse professionals are also interviewed and a mock collection is performed. Complete audits are also performed of each recipient/sub-recipient's safety-sensitive contractors and their vendors. These contractors are held to the same standards as the direct recipient/sub-recipient.

Transit systems are selected for audits based on a selection process that ensures a representative cross-section of FTA recipients, including system size, location, and mode of operation. Other systems that have had compliance issues identified through the FTA Triennial Review process or MIS reports will also be candidates for a detailed FTA

compliance audit.

The process begins when the recipient/sub-recipient is notified in writing that it has been selected for an audit. The system is requested to provide various materials documenting its drug and alcohol testing program to the audit team within two weeks of receipt of the letter. The site visit is conducted within six weeks of the receipt of the letter.

After the audit is complete, the audit team conducts an exit interview presenting the findings, if any, to the transit system management. A letter and final report documenting the deficiencies and necessary corrective actions are provided to the system during the exit interview. The recipient will then have 90 days to take

corrective actions and provide appropriate documentation to the audit team.

It is imperative that all transit systems, their contractors, and vendors understand the nature, extent and seriousness of the audit process and should prepare accordingly. Systems that do not take action to come into compliance may jeopardize their current and future FTA funding.

Transit systems are encouraged to assess the extent of their program's compliance with the drug and alcohol testing regulations and take corrective action in anticipation of an audit rather than in response to one.

FTA Pilot Audit Results

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 9 of the *Implementation Guidelines*.

Pilot Audits: Common Compliance Issues

During March and April, the FTA compliance audit process was pilot tested and refined at four locations. The pilot sites included a large metropolitan area transit system, a medium-sized transit system, members of a state-wide consortium-based program and various rural transit operations which were sub-recipients of a state DOT.

Even though the systems were unique and represented a diverse cross-section of FTA recipients/sub-recipients and geographic locations, seven common compliance issues emerged.

Each of these problem areas is briefly described below so that other agencies may learn from the process and take corrective action as appropriate. The articles presented on pages 3 through 6 give more detailed explanations regarding each of these compliance issues. The seven issues are:

- 1 Post-Accident Testing:** In several instances, post-accident tests were significantly delayed or not conducted at all. The delay or omission often resulted because of lack of clear operating procedures that define when an FTA-required test is to be performed, inadequately trained supervisors, and lack of authority by supervisors to make testing referrals.
- 2 Random Testing:** In many cases, the credibility of the random process was compromised. In some cases, the employer scheduled the tests at the convenience of the employee, the employer, or the collection site, resulting in predictable patterns of testing that were not distributed throughout the year, testing period, or work shift. The notification process was further compromised in cases where several employee numbers were drawn at the beginning of a testing period and the whole group was sent to a test at once, rather than distributing them throughout the period.
- 3 Policy:** Policy reviews indicated that several systems made no distinction between testing provisions required under their own authority, FTA's authority, or other regulatory agency's authority. Policies were also incomplete, not dated, out-of-date, or not officially approved by the appropriate governing board.
- 4 Vendor Oversight:** In most cases, employers failed to perform any oversight of the testing vendors including collection sites, medical review officers, and substance abuse professionals. Many agencies erroneously assumed their vendors were knowledgeable about FTA regulatory requirements and the testing procedures specified by 49 CFR Part 40. The audit process found that many vendors had significant procedural flaws that jeopardized the integrity of the transit system's testing program.
- 5 Safety-Sensitive Contractors:** FTA recipients that utilize contractors to provide safety-sensitive job functions have a responsibility to ensure that these contractors have programs that are in compliance with the regulations. However, several agencies included in the pilot audits failed to provide such oversight, assuming that their contractors' programs were sufficient. This was an incorrect assumption; a large percentage of the contractors' programs that were audited had significant problems.
- 6 Safety-Sensitive Employees:** Some employers incorrectly defined employees as being non-safety-sensitive even though they performed dispatch functions (controlling the movement of vehicles).
- 7 Recordkeeping:** In general, most employers did not maintain sufficient records to accurately document their testing program. Records were either missing or incomplete.

Compliance Issues

FTA Drug and Alcohol
Regulation *Updates*
page 3

Random Testing

The FTA rules require that employers utilize a scientifically valid random number selection process, and that employee notification cannot be predictable or provide employees advance notice of the test. The rules require employees to proceed immediately to the collection site upon notification of the need for a test. The tests must also be distributed throughout the year, testing period, and work shift (*See Updates*, Issue 4, page 5-6; Issue 2, page 3) to avoid any pattern that would signal when tests are likely or unlikely to be conducted.

Random tests must not be performed at the convenience of the employee, the employer, or the collection site; rather, tests should be scheduled with the intent to maintain the integrity of the random testing process. This means that employees should know they are subject to a test anytime they are on duty performing a safety-sensitive job function.

Although a group of employee numbers may be selected all at one time at the beginning of a testing period (i.e., quarterly, monthly, weekly), those tests must be performed throughout the period rather than all at once.

Compliance Tips:

- Upon notifying an employee of a random test, require him/her to immediately proceed to the collection site;
- Utilize the frequent random number selection interval that best fits the size of your pool of safety-sensitive employees (i.e., quarterly, monthly, weekly, daily; see *Updates*, Issue 2, page 3).
- Distribute tests throughout the testing period. Do not conduct all at once.
- Conduct tests at all times of the day and days of the week when safety-sensitive functions are being performed, including the beginning, middle, and end of work shifts. If your system operates on weekends, evenings, and holidays, you must test during those periods of service as well.
- Document the random selection process, numbers drawn, date, and time of notification and collection.

Post-Accident Testing

Transit systems must establish and convey to supervisors clear, well-defined procedures on when and how a FTA-required post-accident drug and alcohol test is to be performed (*See Updates*, Issue 2, page 3 and 5). In addition, supervisors or individuals who can be called upon to respond to an accident must be educated and empowered to send employees for testing when warranted.

Post-accident testing must be a routine part of the agency's post-accident procedures to avoid unnecessary delays and ensure that tests are performed when they are required by FTA. Similarly, accident and incident report forms should be modified to reflect if a test was performed and if not, why.

Compliance Tips:

- Establish internal policies and procedures to conduct testing any time individuals are performing safety-sensitive job functions;
- Train and empower supervisors or responsible employees to send employees for testing when warranted;
- Provide post-accident checklists to ensure that proper procedures are followed;
- Document testing decisions on internal accident/incident reports, including the date and time of the accident, when the referral for a test was made, and the signature of the supervisor who made the referral.
- Document decisions not to test, including explanation of accident, injury, disabling damage, and why the employee was completely discounted as a contributing factor.

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 6 of the *Implementation Guidelines*.

Compliance Issues

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 Chapters 2 and 4 of the *Implementation Guidelines*.

Safety-Sensitive Employees

The FTA drug and alcohol testing regulations define a safety-sensitive position as one which requires the performance of any of the following duties: 1) operation of a revenue service vehicle, even if not in revenue service; 2) operation of a non-revenue service vehicle that requires a CDL; 3) dispatch or controlling movement of a revenue service vehicle; 4) maintenance of a revenue service vehicle or equipment used in revenue service (Section 5311 maintenance contractors exempt); or 5) carrying a firearm for security purposes. Chapter 2 of the *Implementation Guidelines* offers additional clarifications of these duties. However, since job titles and corresponding duties are not consistent from system to system, individual job **functions** should be considered, rather than job titles. If an individual performs any of the safety-sensitive job functions, then that individual should be classified as such.

The audits have revealed that the dispatch function has been the source of much confusion

Policy Statements

The requirement for a comprehensive policy statement and its content is defined in detail in both the drug and alcohol regulations. Each FTA recipient and safety-sensitive contractor must have policies in place that meet these requirements and are officially approved by their respective governing boards. Anytime an employer makes substantive changes in the program, the policy must be modified, officially approved by the governing board, and communicated to all employees. The date that the policy was last revised and approved should be clearly indicated on the policy.

Policy statements must be comprehensive, addressing each of the points identified in the regulations. Similarly, distinctions must be made between provisions that are required under FTA's authority, the employer's own authority, or another regulatory authority (i.e., FHWA). The audits have demonstrated that these distinctions are not being made clear to management or employees. The FTA regulations represent the minimum requirements; any additional or more stringent provisions, due to internal policies or other regulatory requirements, must be identified as such and not represented as an FTA requirement.

because employees with the title "dispatcher" often perform an array of job duties, many of which are not safety-sensitive. The key to whether or not a person should be classified safety-sensitive as a dispatcher is whether or not the individual controls the movement of vehicles. Does the individual give instructions to drivers, in person or over the radio, that changes how or where the driver moves the vehicle? Individuals who are called upon to give such direction during typical daily operations or in response to emergency situations, do, in fact, perform the dispatch function, regardless of title and should be considered safety-sensitive.

Compliance Tips:

- Review each employee's job function (independent from title) to determine if that employee should be classified as safety-sensitive.
- Review radio procedures, street supervision responsibilities, and emergency procedures to determine which employees control movement of vehicles; classify these employees as safety-sensitive.

Compliance Tips:

- Utilize the policy checklist provided in the *Implementation Guidelines* to scrutinize your policy;
- Update your policy to reflect all regulatory modifications, clarifications, and FTA interpretations that are relevant to your organization that have occurred since your policy was last revised. (Check past issues of the *FTA Updates* for changes.)
- Ensure that your governing board has adopted the current version of the policy;
- Make sure the date of the last policy revision is clearly stated on the policy;
- Make sure future revisions of a substantive nature also receive Board approval;
- Make sure all employees have the most current version of the policy;
- Modify your policy as necessary to clearly distinguish between provisions included under FTA's authority, employer authority, or authority of another regulatory agency.

Vendor Services

Transit systems are responsible for the integrity of the drug and alcohol testing program and the quality of testing services provided by vendors.

Consequently, transit employers must monitor the quality of its testing service vendors, including collection sites, medical review officers, and substance abuse professionals. The employer should not assume that its vendors are following the correct procedures defined in 49 CFR Part 40 or

that they are truly knowledgeable about the FTA regulations. Even though vendors will market their services indicating that they will achieve complete compliance for their clients, FTA has found that there are often significant procedural flaws.

Collection sites must perform collections exactly as specified in 49 CFR part 40, including specimen handling procedures, chain of custody, and procedures for observed collections, split specimens, insufficient volume and identifying signs of specimen adulteration or tampering. Likewise, accommodations must be made for after-hours collections and back-up when the site is closed. In addition, once a test is initiated, the test must be completed even if the

process extends beyond the close of business. The collection site personnel must remain at the site to facilitate the conclusion of

procedures, such as laboratory reports, the verification process, assessment of test results in relation to an individual's

medical history, and employee contact provisions. Transit systems should not assume that all physicians can effectively perform the duties of an MRO.

Substance abuse professionals must meet very specific educational, clinical, and certification requirements. They must be individuals rather than an organization or Employee Assistance Program. They must also perform assessments face-to-face with the employee. The SAP

must understand his/her role in the program and be able to implement return-to-duty and follow-up testing programs consistent with regulatory requirements and agency philosophy. The SAP should have an appreciation for his/her role in protecting public safety.

the test. Medical Review Officers must meet the minimum requirements specified in the regulations. They should also be held to minimum requirements for response time, process administration, and recordkeeping. MRO's should be well-versed in the Part 40

Compliance Tips:

- Conduct periodic mock collections to identify procedural flaws.
- Investigate any reports by employees of flawed procedures.
- Provide vendors copies of USDOT handbooks and procedural manuals listed on page 8 of this *Update*.
- Require documentation of vendor credentials.
- Even though not a regulatory requirement, consider requiring vendors to hold memberships or be certified in their respective industry's trade association or otherwise demonstrate a method of continuing education in their field. (See sidebar, page 6).
- Monitor cancelled test rates, and require detailed explanations for each cancelled test.
- Include minimum performance standards in contracts that provide disincentives for cancelled tests or non-performance.
- If vendors are unwilling or unable to perform their duties consistent with the regulations, cancel their contract and obtain service elsewhere.

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

Conforming Products List

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 7 of the *Implementation Guidelines*.

Compliance Issues

Testing Industry Trade Associations:

American Association of Medical Review Officers (AAMRO)

P.O. Box 12873
Research Triangle Park, NC
27709
919/ 489-5407

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
847/ 228-6850

Substance Abuse Program Administrators Association

1926 Waukegon, Ste. 1
Glenview, IL 60025
714/285-4333

National Association of Collection Sites

1414 Prince St.
Alexandria, VA 22314
703/548-0901

The information presented on
this page should be used to
update Chapters 2 and 9 of the
Implementation Guidelines.

Recordkeeping

Both the drug and alcohol regulations require that records be maintained to document program administration and test results. Specifically, records must be maintained for verified negative test results (one year), collection and employee training documentation (two years), and verified positive tests, refusals, referrals, MIS reports and EBT calibration documentation (five years).

Essentially, transit systems are required to maintain documentation of every element of their program including when tests were performed, when they were not, and why. Documentation is necessary to prove the integrity of the testing program and must be exhaustive to withstand any challenge.

Compliance Tips:

- ☑ Maintain all your records in a secure location separate from personnel files.
- ☑ Develop procedures or checklists for ensuring that documentation regarding all testing decisions are in place (i.e., random selection, post-accident, reasonable suspicion, pre-employment, return-to-duty and follow-up).
- ☑ Develop procedures for ensuring all documentation associated with program administration is maintained properly.

Contractor Oversight

Contractors that “stand in the shoes” of FTA recipients to perform safety-sensitive functions must have drug and alcohol testing programs that meet the FTA regulatory requirements (*See Updates, Issue 2, page 4*). Section 5311 maintenance contractors are the only safety-sensitive employers that are exempt from the requirements.

FTA recipients/sub-recipients must identify all contractors which are safety-sensitive and then require compliance as necessary. The contractor must be held to the same standards as the FTA recipient/sub-recipient, including: policy, random selection process, testing services, training, and recordkeeping.

Recipients/sub-recipients also have the responsibility to monitor and enforce contractor compliance. Should a contractor be out of compliance, the FTA recipient’s funding would be jeopardized just as if the recipient were out of compliance.

The recipient/sub-recipient should not

assume that their contractors are knowledgeable about the regulations or that they have compliant programs. Audit findings indicate that even nationally-based, highly reputable firms often fall short of the regulatory requirements, with inadequate policies, policies that meet FHWA requirements rather than FTA’s, or which conduct little or no testing.

Each recipient/sub-recipient must develop and adhere to a contractor oversight program that is rigorous enough to ensure compliance. This might include a policy and program review that requires each contractor to provide sufficient documentation on its policy, training, vendors, and recordkeeping.

Additionally, the recipient/sub-recipient should require and monitor contractor testing data provided throughout the year and/or the year-end MIS reports. Contractors that do not implement compliant programs should no longer be utilized and the transit system must find alternative contractors or alternative methods of getting the safety-sensitive duties performed.

Compliance Tips:

- ☑ Review all contractors to determine which must meet the regulatory requirements;
- ☑ Require immediate corrective action to remedy problems found;
- ☑ Develop on-going monitoring program, including a checklist to document contractor compliance;
- ☑ Include the requirements for a compliant drug and alcohol testing program in contract language;
- ☑ Do not assume that contractors, no matter how reputable, are in compliance.

DOT Rules Pre-empt California and Arizona Drug Initiatives

Last November, California voters approved an initiative authorizing physicians to recommend the use of marijuana for use in the treatment of some illnesses. A prescription or other written record of the recommendation for the use of marijuana is not required.

Similarly, the voters in Arizona passed an initiative that allows physicians to prescribe the use of Schedule I drugs to treat certain diseases or to relieve the pain and suffering of seriously ill patients. Marijuana, heroin, and phencyclidine are among the Schedule I drugs that can be prescribed.

The passage of these initiatives has not changed the Department of Transportation's (DOT) drug testing regulations. The use of Schedule I drugs, whether for recreational or medicinal purposes, adversely affects the performance of safety-sensitive functions in transportation and are thus prohibited.

Consequently, prescriptions

and/or recommendations from California or Arizona physicians for the use of Schedule I drugs can not be used to establish a legitimate medical explanation for the presence of a prohibited substance identified by a DOT drug test. Such test results shall be verified by an MRO as positive with corresponding FTA and employer consequences.

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.

THC in Food Products

A common method of marijuana consumption is the ingestion of food products such as brownies that have had marijuana added to the ingredients. Recently, some manufacturers have begun to

market food products containing hemp seeds or extracts. These products may have THC levels high enough to result in a positive test result for marijuana. Since these products do not constitute a "legitimate medical explanation" for the presence of THC in an individual's specimen, test results will be confirmed as positive with corresponding FTA and employee consequences.

New Consortia Manual

FTA recently published the *Drug and Alcohol Consortia Manual* and is making it available free of charge upon request. The manual is intended to provide transit managers with background information regarding drug and alcohol testing consortia. The manual provides a process for managers to use to determine whether participating in a consortium would meet their agency's needs. This manual also describes how to successfully design, implement, and participate in a drug and alcohol testing consortium. To obtain a copy call the FTA Office of Safety and Security at (202) 366-2896.

Resource Materials

Who Should Be Receiving This Update?

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

RLS & Associates, Inc.
3131 South Dixie Hwy., Suite 202
Dayton, Ohio 4543
Phone: (937) 299-5007
FAX: (937) 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.dot.gov/>

Drug and Alcohol Consortia Manual

Drug and Alcohol Testing Results; 1995 Annual Report

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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