



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

FTA Drug And Alcohol Regulation *Updates*

Spring 1998

Issue 8

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 eighth in a series.

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FTA Provides Checklists

In an effort to assist recipients/sub-recipients and their contractors and vendors in their program monitoring and assessment activities, FTA will be providing checklists on each of the major components of the testing program. The checklists will be published in this and subsequent issues of the *Updates*. The checklists can be used as a self-assessment tool to identify incorrect or omitted components of a program or as an oversight tool to assess compliance. A checklist for policies is provided on pages 3 and 4 of this *Update*.

State Oversight

The regulations (49 CFR Parts 653.83 and 654.83) require that the states certify compliance with the FTA drug and alcohol testing program on behalf of the Section 5311 and 5307 transit programs they administer. They are also required to collect annual MIS forms from each sub-recipient and their contractors and submit them to FTA. FTA does not specify what actions must be taken by states to ensure sub-recipients' compliance, but states are encouraged to develop an oversight program that will provide a reasonable confidence level that their sub-recipients are in

compliance before they certify compliance. Successful oversight activities have included policy reviews, on-going training, technical assistance, and compliance checklists.

Among the most informative tools is the policy review. Several states evaluate policies of each of their sub-recipients to ensure that every system has a policy in place and to assess the policy content for compliance. Some states have reviewed the policies using a checklist similar to the one provided in this *Update*. The states that have performed those reviews have found them to be very useful because they often reveal the nature and extent of a sub-recipient's compliance problems.

Information sharing and training is another effective oversight tool. Most states have provided some level of training for their sub-

recipients. A few states have supplemented their initial training by providing refresher courses aimed at informing sub-recipients of regulatory changes, new interpretations, and ways to avoid common mistakes. Several states have also developed resource libraries that are

available to sub-recipients and have disseminated information through newsletters, alerts, e-mails, or faxes.

Some states have developed monitoring programs that require sub-recipients to complete comprehensive checklists and provide documentation indicating how they complied with each regulatory requirement. A

review of the checklists enables the state to identify problems and require the sub-recipients to take corrective actions. Other states have included abbreviated testing program checklists into their on-going regulatory compliance review processes.

Regardless of the methods used, each state should be committed to the program and should take their oversight responsibilities seriously. Oversight programs that successfully identify problem areas, and initiate corrective actions will enhance the integrity of each sub-recipient's testing program, minimize compliance issues, avoid potential legal conflicts and improve the overall effectiveness of the program.

Example of a Proactive State Oversight Program

- ⇒ Policy Reviews
- ⇒ On-going Training and Information Dissemination
- ⇒ Compliance Checklist with Documentation
- ⇒ On-going Technical Assistance

Notice of Proposed Rulemaking

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

January 6, 1998
Federal Register Vol. 63
Pages 418-419
Primary Topic: Random Drug Testing Rate at 50%

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 2 of the *Implementation Guidelines*.

New NPRM Seeks Comments

On March 2, 1998, the FTA published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* (pages 10183-10185) seeking comments on a proposed change in the definition of maintenance safety-sensitive job functions. The rules currently cover all maintenance workers that perform on-going, daily maintenance and repair work. The NPRM proposes to expand the definition to include those workers who also engage in engine, revenue service vehicle, and parts rebuilding and overhaul. This change would eliminate the distinction between maintenance workers involved in on-going daily maintenance and repair work and those who, on a routine basis, perform rebuilding and overhauling work. The proposal is intended to apply to all transit systems, their contractors that perform safety-sensitive functions and all maintenance repair employees. Maintenance contractors of Section 5311 or rural Section 5309 recipients would remain exempt from the regulations. The present exemption of repair maintenance workers of newly manufactured equipment or equipment under the manufacturer's warranty is also unaffected.

Comments on the proposed change must be submitted by June 1, 1998. Written comments should be sent to:

USDOT, Central Dockets Office
PL-401
400 Seventh Street, SW
Washington, DC 20590

When submitting comments, refer to docket number **FTA-98-3474**.

Recent Court Actions

The United States District Court recently found in favor of the Massachusetts Bay Transportation Authority in two civil actions involving implementation of the FTA drug and alcohol testing regulations. In the first case, O'Brien, et. al. v. MBTA (Civil Action No. 95-10837-6AO), the transit police challenged the provision that preempts any conflicting provision in State law. The court held that, "by reason of the express preemptive provision, 49 USC 5331(f)(1), no inconsistent provision of State law, including State constitutional law, can be given effect to relieve the MBTA, or its obligation to comply with the Federal regulations." As of May 5, 1998, the plaintiffs have filed a Notice of Appeal and are seeking a stay pending appeal.

The second case, Dwan, et. al. v. MBTA, filed as a

Memorandum of Decision (Civil Action No. 95-12430-6AO) addressed the claim that the MBTA testing program violated the Fourth Amendment to the United States Constitution which prohibits unreasonable searches and seizures. The plaintiff asserted that he did not occupy a "safety-sensitive" position. The court held that maintenance functions performed by the plaintiff (i.e., repairing and installing body panels and welding and repairing vehicle understructure) were consistent with the regulatory definition of "safety-sensitive" position and thus, including the plaintiff in the random testing program does not violate the Fourth Amendment. Additionally, other requirements imposed by the MBTA that exceed the FTA requirements, but do not conflict or interfere with the

requirements of the rule were challenged. The court concluded that the differences between the explicit requirements of the regulations and the MBTA program as adopted appear to be authorized in 49 CFR Part 653.11 and thus, the plaintiff's claim had no merit.



Policy Checklist

FTA Drug and Alcohol
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FTA Substance Abuse Policy Checklist

The FTA drug and alcohol regulations require employers to develop and disseminate a policy statement describing their prohibited drug use and alcohol misuse programs. This statement must be adopted by the local governing board of the employer or operator, and be made available to each covered employee.

The rules require policies to include a *detailed* discussion of a number of different items, as outlined in Sections 653.25 and 654.71. To assist in clarifying, or identifying missing or incorrect information in existing policies, the FTA has developed this checklist regarding policy contents. The checklist includes regulatory requirements, as well as "best practice" recommendations; it is not to be construed as the "last word" in drug and alcohol policies - it merely provides guidance.

- The policy must be current with all amendments to parts 653, 654, and 40.
- Proof of policy adoption by the appropriate governing body.
- Effective date of policy.
- Identity of the person designated by the employer to answer employee questions about the anti-drug and alcohol misuse program.
- Prohibited substances for which employees will be tested.
- Categories of employees who are subject to testing.
- Documentation of how the employer determined which employees were safety-sensitive.
- Narrative describing what period of the work day covered employees are required to be in compliance and when employees may be tested.
- Requirement that participation in the testing program is a condition of performing a safety-sensitive function.
- Prohibited behavior, including when the regulations prohibit the use of alcohol and drugs.
- Testing circumstances for drugs and alcohol (i.e., pre-employment, random, post-accident, reasonable suspicion, return-to-duty, and follow-up testing).
- An indication of when employees are subject to pre-employment/pre-transfer drug testing, and that applicants for a safety-sensitive position may not be hired before a verified negative drug test result is received.
- A basic description of the random testing process (including selection and notification).
- A description of the criteria which must be satisfied for conducting FTA mandated post-accident testing, an indication of who must be tested when those criteria are achieved, and time frames for conducting post-accident testing.
- A description of the reasonable suspicion decision-making process, and the fact that only trained supervisors may make reasonable suspicion referrals.

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

January 6, 1998
Federal Register Vol. 63
Pages 418-419
Primary Topic: Random Alcohol Testing Rate Changed to 10 Percent

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 4 of the Implementation Guidelines.

Policy Checklist

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 4 of the
Implementation Guidelines.

Policy Checklist Continued

- Return-to-duty and follow-up testing requirements and an indication of the minimum frequency and duration of follow-up testing.
- Procedures that will be used to test for the presence of drugs, including the use of a split specimen collection method.
- Procedures that are in place to protect the employee and the integrity of the drug testing process.
- Procedures that are in place to protect the employee and the integrity of the breath testing process.
- Description of an employee's right to access his/her drug and alcohol records.
- Procedures that are in place to safeguard the validity of the test results.
- Procedures that are in place to ensure that the test results are attributed to the correct covered employee.
- Identify qualifications, role, and responsibilities of the MRO, SAP, collection sites, and laboratory.
- Description of employee and supervisor drug and alcohol training programs (time frames and content).
- Description of the behavior and circumstances that constitute a refusal to take a drug and/or alcohol test.
- Statement that refusals constitute a verified positive test result.
- Description of the consequences for a covered employee who has a verified positive test result, including that they must immediately be removed from their safety-sensitive function and referred to the SAP. If the system has a second chance policy, a description of the evaluation and treatment processes must be included.
- Description of the consequences for covered employees found to have an alcohol concentration of 0.02 or greater but less than 0.04.
- Information concerning the effects of alcohol misuse on an individual's health, work, personal life.
- Information concerning signs and symptoms of possible alcohol misuse.
- Methods of intervening when an alcohol problem is suspected.
- Elements of an anti-drug or alcohol misuse program that are in addition to those required by FTA. The policy must include specific information concerning which provisions are mandated by FTA rules and which are not. For example, the policy must include information on additional employer policies with respect to post-accident testing (testing for accidents which do not meet FTA thresholds for testing); or information regarding the use or possession of alcohol, including consequences for an employee found to have a specified alcohol

Testing Procedures

Lab Processes for Adulterated Specimens

The Department of Health and Human Services (DHHS) laboratories have experienced an increased number of adulterated urine specimens that have been submitted for USDOT mandated drug tests. Individuals are adding products to their specimens during the collection process that prevent laboratories from reconfirming the presence of a drug/metabolite in the split specimen following a verified positive result in the primary specimen.

In response to this practice, on March 9, 1998, DHHS issued a notice to DHHS certified laboratories and Medical Review Officers informing them of the practice and instructing them to test the split specimen for

adulterants any time the split specimen test is unable to reconfirm the positive result from the primary specimen's analysis. If an adulterant is found in the split specimen, the primary specimen must also be tested for adulterants. If adulterants are found in either specimen, the information must be documented on the Federal Custody and Control Form and the MRO must report a "Refusal to Test" to the employer.

If no adulterant is found in the split, and the second laboratory is unable to reconfirm the presence of the drug/metabolite in the split specimen, both the primary and the split tests must be canceled.

Adulterated Primary Specimen Constitutes Test Refusal

In the instance where a laboratory analysis of the primary specimen identifies the presence of an adulterant, the Medical Review Officer must immediately report the finding to the employer, not the employee.

The identification of an adulterant should not be considered a positive test result because the analysis cannot be completed. The adulterant masks or destroys the presence of drugs and therefore, the existence of these substances cannot be measured. The identification of an adulterant in the primary specimen, however, constitutes a test refusal which requires the immediate removal of the employee from his/her safety-sensitive position and referral to a Substance Abuse Professional. The employer may also invoke other consequences consistent with its substance abuse policy.

If an adulterant is identified in the primary specimen, the employee *does not* have the right to request that the split specimen be tested.

Updated List of Labs

The most up-to-date list of DHHS certified labs can be obtained by calling (301) 443-6014 or through the internet at <http://www.health.org>. The most current conforming products list for Evidential Breath Testing devices (EBT's) and non-evidential testing devices can be found at www.faa.gov/avr/aam/drug/adaplc.htm. These lists should be reviewed to make sure you are using qualified vendors and equipment to perform your FTA-required testing.

Trade Associations Source of Information

Although the FTA does not endorse any trade association or organization, FTA applauds any exchange of information that will assist in the improved quality of testing services. The following is a list of organizations that can help transit agencies find testing services.

- ⇒ National Association of Collection Sites at (703) 548-0901 or www.collection-sites.org
- ⇒ American Association of Medical Review Officers at (919) 489-5407
- ⇒ American Society of Addiction Medicine at (301) 656-3920
- ⇒ American College of Occupational and Environmental Medicine at (847) 228-6850

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
February 27, 1998
Federal Register Vol.63
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*.

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.

RLS & Associates, Inc.
3131 South Dixie Hwy., Ste 202
Dayton, Ohio 45439
Phone: (937) 299-5007
FAX: (937) 299-1055
rlsasc@mindspring.com

Urine Specimen Collection Procedures Guideline

Substance Abuse Professional Procedures Guidelines for Transportation Workplace Drug and Alcohol Testing Programs

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

Drug and Alcohol Testing Results: 1996 Annual Report

Random Drug Testing Manual

Substance Abuse in the Transit Industry

Identification of Drug Abuse and/or Alcohol Misuse in the Workplace: An Interactive Training Program

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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