



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

FTA Drug And Alcohol Regulation *Updates*

Summer 1999

Issue 12

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 twelfth in a series.

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State DOTs Lead the Way

State DOT's that administer the Section 5311 and Section 5307 programs are required under 49CFR Parts 653.83 and 654.83 to certify compliance with the FTA drug and alcohol testing regulations on behalf of those subrecipients.

In light of the new level of scrutiny that the compliance audits have brought to the drug and alcohol testing program, many states have concluded that they need to take a more proactive role to provide their subrecipients with the necessary tools, training, and oversight to effectively implement and maintain the program.

Two of the most proactive state substance abuse oversight programs are being developed by the Arkansas State Highway & Transportation Department and the Virginia Department of Rail and Public Transit. Jim Gilbert, Administrator of the Public Transit Section of the Arkansas State Highway & Transportation Department, points out that Arkansas takes this program very seriously and believes that if all the parties including FTA, the states, subrecipients, and testing vendors work together, the program can be a success. Mr. Gilbert points out that the threat of FTA sanction is minor compared to the liability an organization could incur for failure to carefully adhere to mandated requirements in the event of litigation possibilities.

The Arkansas program is being developed to support the transit systems within Arkansas, but can serve as a model for other states. Mr. Gilbert advocates that the states must redefine their role in the process and take an active stance on program compliance and safety. The Arkansas model includes the creation of a new Safety and Security Program Manager position in the Public Transportation Section; that manager's responsibilities will include subrecipient program oversight, monitoring and provision of technical assistance. The State has already conducted mock audits of subrecipient programs and sponsored the Substance Abuse

Program Management Workshop provided by the Transportation Safety Institute. Future efforts will include the development of a recordkeeping template and sample forms, creation of a State Management Continuity Book, and development of a Post Accident Checklist and Kit. Special emphasis will be placed on collection site compliance including training, oversight and development of a Compliance Guide. The State will also distribute a "Best Practice" Substance Abuse Policy. Once the support materials are developed, they will be included in a "kit" and shared with other states.

The Virginia Department of Rail and Public Transportation (VDRPT) shares this same commitment to quality. Like many others, VDRPT refocused attention on the drug and alcohol testing programs in the Commonwealth after coming to the realization that many of their subrecipients had not successfully implemented or maintained compliant programs. In response, VDRPT assigned a staff person to manage the Drug and Alcohol Program, whose duties include the conducting of on-site drug and alcohol testing reviews of all Section 5311 grantees. The purpose of the reviews is to assess conformity to the FTA regulations and to help each transit system develop and maintain a compliant program that meets the unique needs of each system. This staff member also provides guidance on technical issues, reviews policies and evaluates collection sites.

A detailed questionnaire is used to conduct these program reviews. To obtain copies of this questionnaire or to discuss the VDRPT program further, please contact Elroy Bentick at www.state.va.us/drpt or (804) 786-7451. To obtain more information about the Arkansas model program, please contact Mr. Jim Gilbert at (501) 569-2471.



Technical Assistance

Where To Find?.....

49CFR Part 653, Prevention of Prohibited Drug Use in Transit Operations
February 15, 1994
Federal Register Vol. 59
Pages 7572-7611

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

December 8, 1998
Federal Register Vol. 63
Pages 61612-61613
Primary Topic: Use of Law Enforcement Post-Accident Test Results

December 14, 1998
Federal Register Vol. 63
Pages 68818-68819
Primary Topic: Random Drug Testing Rate at 50%

January 5, 1999
Federal Register Vol. 64
Pages 425-427
Primary Topic: Safety-sensitive Maintenance Functions

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*.

Calculations of Number of Random Tests

Every employer covered by the FTA drug and alcohol testing regulations is required to have a random testing program that serves as a strong deterrent against employees beginning or continuing prohibited drug use and/or alcohol misuse. The manner in which the random testing rates are used to generate the actual number of tests to be performed has been the source of significant confusion in the industry resulting in under-testing by many and some unnecessary over-testing by others. To clarify this issue, the following step-by-step method of calculation is provided.

- Determine how frequently random draws are made (daily, weekly, monthly, quarterly). This is the testing period. See *Updates*, Issue 2 Page 3 for article on establishing testing period and frequency of draw.
- For each testing period, determine the number of safety-sensitive employees that are in the pool. Be sure to update the file to ensure that all new hires and individuals placed into active status have been added to the pool and those who have been discharged or put on inactive status have been removed. See *Updates*, Issue 3 Page 7 for article on status change.
- Calculate the number of tests to be performed during the testing period as follows:
 1. Multiply the number of safety-sensitive employees in the pool at the beginning of the testing period by the required testing rate (50% for drugs and 10% for alcohol in 1999).
 2. Divide the total by the number of testing periods in the year (quarterly = 4; monthly = 12; weekly = 52; daily = 365).

The result is the number of tests to be performed for that testing period. This method is demonstrated in the example provided in the accompanying box.

Once the total number of tests per testing period has been calculated, the total should be

Testing Period	Safety-Sensitive Employees in Period (A)	Test Periods Per Year (B)	1999 Random Rate		Number of Completed Tests Required	
			Drug (C)	Alcohol (D)	Drug ([A*C]/B)	Alcohol ([A*D]/B)
Quarter 1	160	4	50.0%	10.0%	20	4
Quarter 2	126	4	50.0%	10.0%	16	4
Quarter 3	62	4	50.0%	10.0%	8	2
Quarter 4	168	4	50.0%	10.0%	21	5
Total Year					65	15

adjusted for cancelled tests. Only completed tests can be used to meet the random test rate. Thus, if any of the individuals selected during the current test period were not tested or the test was cancelled, an adjustment must be made when calculating the number of tests to be performed during the next testing period to ensure that the required rates are achieved within the year. Progress toward rate achievement should be monitored throughout the year to avoid the need to make one major adjustment at the end of the year.

Also, note that the same method of calculation holds true for consortia as well. The employer and consortium must have procedures in place to ensure that the pool is up-to-date before each draw and to inform the consortium of cancelled or incomplete tests that will require an adjustment in the number of draws made for the next testing period.

Some program managers have also been confused because of a reporting requirement in the annual MIS Drug and Alcohol Data Collection Forms. These forms require each employer to report the number of covered employees that were employed in each safety-sensitive function. The report requires that the number of covered employees reported be a cumulative total of all employees performing safety-sensitive functions over the course of the reporting year. Given employee turnover, cumulative totals usually exceed the number of safety-sensitive positions as they include a counting of all individuals that sometime during the year fell under the FTA regulatory authority. Many people have assumed that the random test rate should be based on this cumulative total. This is not the case, and would result in over testing for systems with larger staff turnover. Rather the method described above should be used, reflecting the fluctuation in staffing levels.

Self-Assessment Checklist

FTA Drug and Alcohol
Regulation *Updates*
Issue 12, page 3

The FTA regulations require reasonable suspicion, return to duty, and follow-up testing. To assist in clarifying or identifying these circumstances, the FTA has developed these checklists for use by employers in their program assessments. The checklists (on pages 3 and 4) include regulatory requirements, as well as “best practice” recommendations; they should not be construed as the “last word” in regulatory compliance - they merely provide guidance.

Reasonable Suspicion Checklist

The FTA drug and alcohol regulations require testing for prohibited drugs and alcohol in the case that a trained supervisor has reasonable suspicion that a safety-sensitive employee has used a prohibited drug or misused alcohol as defined in the regulations.

- Have the circumstances which warranted reasonable suspicion tests been justified using the minimum criteria specified in the regulation?
 - ◆ FTA regulations require a safety-sensitive employee to submit to a test when the employer has reasonable suspicion that the employee has used a prohibited drug or has misused alcohol as defined in the regulations. The request to undergo a reasonable suspicion test must be based on **“specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the safety-sensitive employee.”**
 - ◆ If a supervisor, trained to identify the signs and symptoms of drug and alcohol use, reasonably concludes that objective facts may indicate drug use or alcohol misuse, this is sufficient justification for testing.
- Is comprehensive documentation maintained for all reasonable suspicion tests for at least two years from the date of the incident?
- Have all supervisors received the requisite reasonable suspicion training?
 - ◆ A supervisor who will be called upon to make a reasonable suspicion determination must be trained in the facts, circumstances, physical evidence, physical signs and symptoms, or patterns of performance and/or behavior that are associated with use. Supervisors must be trained in the proper procedures for confronting and referring the employee for testing.
 - ◆ Supervisors must receive 60 minutes of training on the signs and symptoms of drug abuse, and an additional 60 minutes of training on signs and symptoms of alcohol misuse.
- Have only **trained** supervisors made reasonable suspicion determinations? Only a trained supervisor can make a reasonable suspicion determination. The term “supervisor” refers to the job function, not the job title. 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 transit organization. The supervisors must receive reasonable suspicion training and be empowered to take action when they make a reasonable suspicion determination.
- Are procedures in place to have employees proceed immediately to a collection site following a reasonable suspicion determination?
- Is there a procedure in place to document alcohol tests that are delayed more than two hours? The employer must document the reasons if a test does not take place within two hours. Attempts to complete the test must cease after eight hours. Is there a procedure in place to document the circumstances that resulted in a failure to test because the eight hour time limit was exceeded?
- Do you require only one supervisor to make a reasonable suspicion determination?
- Are reasonable suspicion alcohol tests only performed just before, during, or just after the performance of a safety-sensitive job function?
- Do you prohibit the supervisor who makes the reasonable suspicion determination from serving as the breath alcohol technician for the alcohol test or the specimen collector for the drug test?

(This information was excerpted from the Drug and Alcohol Program Self-Assessment Checklist developed for the Transportation Safety Institute by RLS & Associates, Inc.)

Where To Find?.....

49CFR 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

December 8, 1998

Federal Register Vol. 63

Pages 67612-67613

Primary Topic: Use of Law Enforcement Post-Accident Test Results

December 14, 1998

Federal Register Vol. 63

Pages 68818-68819

Primary Topic: Random Alcohol Testing Rate at 10%

January 5, 1999

Federal Register Vol. 64

Pages 425-427

Primary Topic: Safety-Sensitive Maintenance Functions

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 Chapters 6 and 9 of the *Implementation Guidelines*.

Self-Assessment Checklists

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 6 and 9 of the
Implementation Guidelines

Return-to-Duty Testing Checklist

In the event the employer gives employees a second chance, after previously testing positive, a return-to-duty test is required. Employers that choose to discharge employees following a positive test result do not, of course, conduct return-to-duty tests. The exception is when an individual is put back to work by an arbitrator, judge, or other ruling that is binding on the employer. In this case the employer must adhere to the return-to-duty and follow-up testing requirements.

- Do you require employees to have a negative return-to-duty test?
 - ◆ Following a verified positive drug test, an alcohol result of 0.04 or greater, a refusal to submit to a test, or any other violation of the regulations, before being allowed to return to work in a safety-sensitive job function.
- Are the return-to-duty tests performed after the employee has been evaluated by a substance abuse professional, who has determined the employee to be presently free of alcohol and/or prohibited drugs, is able to return to work (see article on page 5 of this Update), and has followed the SAP recommended actions? Do the return-to-duty procedures reflect that a safety-sensitive employee has successfully completed treatment (e.g. rehabilitation)?
- Do the return-to-duty procedures reflect that a safety-sensitive employee must have a verified negative drug test or an alcohol test result of less than 0.02? If the tests are incomplete or cancelled, the employer must require the employee to submit to and pass another test.
- Does the SAP recommend whether the employee with a positive drug test should also be subject to return-to-duty alcohol testing?
- Does the SAP recommend whether the employee with a positive alcohol test should also be subject to return-to-duty drug testing?

Follow-up Testing Checklist

After returning to duty, the employee is subject to unannounced follow-up testing for a minimum of 12 months but not more than 60 months. The twelve-month period begins on the day the individual returns to work, after having passed a return-to-duty test. A minimum of six tests is required within the first 12 months.

- Are the minimum requirements for follow-up testing being met?
- Is the duration of the follow-up tests, above the minimum requirements, established by the Substance Abuse Professional?
- Is the frequency of the follow-up tests, above the minimum requirements, established by Substance Abuse Professional?
- Is the SAP recommended schedule for follow-up testing being followed?
 - ◆ The schedule is not negotiable by employee, employer, or union. The SAP must set the schedule based on their own professional judgement and the circumstances of each case. Follow-up testing must be frequent enough to deter and if necessary detect any further drug use or alcohol misuse.
- Are employees that are subject to follow-up testing also included in the random testing pool and tested whenever their name comes up for random testing?
- Does the SAP recommend whether the employee with a positive drug test should also be subject to follow-up alcohol testing?
- Does the SAP recommend whether the employee with a positive alcohol test should also be subject to follow-up drug testing?
- In the event of an employee who previously tested positive on a DOT test or failed to complete the follow-up testing requirement for any reason (i.e. change in employers, extended leave), do you require that they resume the follow-up testing program when they return to a safety-sensitive job?

(This information was excerpted from the Drug and Alcohol Program Self-Assessment Checklist developed for the Transportation Safety Institute by RLS & Associates, Inc.)

Clarifications and Corrections

FTA Drug and Alcohol
Regulation *Updates*
Issue 12, page 5

Substance Abuse Professional Role

The FTA regulations require that any safety-sensitive individual who refuses a test, tests positive for drugs or has a breath alcohol concentration of 0.04 or greater must be immediately removed from duty and referred to a Substance Abuse Professional (SAP). An SAP is “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). All must have knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substance-related disorders.

The SAP has four primary functions. First, the SAP must provide a comprehensive face-to-face assessment and clinical evaluation to determine what assistance, if any, the employee needs in resolving problems associated with prohibited drug use or alcohol misuse. Second, the SAP must recommend a treatment or rehabilitation program as necessary and monitor the individual's progress through the treatment program. Third, the SAP must determine when the individual has successfully completed the recommended treatment program and when they are ready to return to a safety-sensitive position. Finally, the SAP must determine the frequency and duration of follow-up tests beyond the minimum required in the regulations.

Most SAPs understand and adequately perform the first two functions with few problems. However, the audits have found that transit system program managers have failed to adequately convey their expectations to the SAP for the performance of the last two functions. This misunderstanding of the SAP's role may compromise the integrity of the return-to-duty process. Specifically, many SAPs are returning employees to duty as soon as possible; that approach is consistent with their training as counselors that emphasizes getting the person back into a stable work environment where they must be accountable. This philosophy, however, may be contrary to the basic premise upon which the SAP's function was established. Due to the safety-sensitive nature of the positions the



individuals fill, the SAP should be very careful in his/her assessment of the employee and the progress made in the treatment program. “Putting in the time” is simply not enough for an individual returning to a safety-sensitive position. Similarly, if the SAP rushes the return-to-duty test or if multiple attempts are made before achieving a negative return-to-duty test result, the employee may be putting the transit system at risk. The

SAP must not release the individual to come back to work until the SAP has a reasonable level of assurance that the individual will stay drug and alcohol free based on the individual's attitude, support structure, participation in the treatment program, and motivation.

Similarly, the duration and frequency of follow-up testing should also reflect the

SAP's honest assessment of the employee's recovery progress. Follow-up testing must be unannounced and frequent enough to deter use. To be effective, the employee should expect that a test could occur at any time. In the event that the individual relapses and continues to use again, the tests should be frequent enough to detect the usage. SAPs that routinely make the same recommendation are not fulfilling their integral role in protecting public safety. Each case should be reviewed independently and a course of treatment recommended based on the specific, unique circumstances of each individual's situation.

SAPs should also be monitored to ensure that they are using the full complement of treatment options available in the area. A SAP that repeatedly recommends the same program should be scrutinized. The SAP should have no conflicts of interest or receive any monetary gain from referrals.

Transit system program managers should initiate a dialog with their SAP(s) to communicate the transit system's philosophy and expectations. The SAP's functions should not be considered merely a requirement that must be fulfilled, but rather a critical part of the continued safe operation of the system—one that can not be compromised.

Where To Find?....

Part 40 Amendments, Cont.

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

November 25, 1998
Federal Register Vol.63
Pages 65128-65129
Primary Topic: Opiate Threshold

Correction:

On Page 5 of Issue 11 of the *Updates* there was a typographical error in the definition of reasonable suspicion. The description under the Reasonable Suspicion topic heading read “extemporaneous observations.” It should have read “contemporaneous observations.”

The information presented on this page should be used to update Chapters 7 and 8 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.

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FTA home page: www.fta.dot.gov

FTA Office of Chief Counsel: www.fta.dot.gov/office/counsel

FTA Office of Safety & Security: <http://transit-safety.volpe.dot.gov>

FTA Letters of Interpretation: www.fta.dot.gov/library/legal

DHHS-Certified Laboratories: Center for Substance Abuse Prevention: www.health.org/labs/index.htm

FTA, Office of Safety and Security: (202) 366-2896

Drug and Alcohol Consortia Manual

Drug and Alcohol Testing Results: 1995, 1996, and 1997 Annual Reports

Random Drug Testing Manual

Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit

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

USDOT Drug and Alcohol Documents FAX on Demand: 1 (800) 225-3784

USDOT, Office of Drug Enforcement and Program Compliance: (202) 366-3784

Urine Specimen Collection Procedures Guideline

SAP Procedures Guidelines for Transportation Workplace Drug and Alcohol Testing Programs

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