



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

# FTA Drug And Alcohol Regulation *Updates*

Spring 2003

Issue 24

## Introduction....

The Federal Transit Administration (FTA) published its revised rule on prohibited drug use and the prevention of alcohol misuse (49 CFR Part 655) on August 1, 2001. The FTA published the revised *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 these changes. This Update is the twenty-fourth in a series.

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## Drug & Alcohol Discussion Forum Announced

The FTA Office of Safety and Security recently announced the creation of the FTA Drug and Alcohol Discussion Forum. The forum can be accessed on the FTA website at <http://transit-safety.volpe.dot.gov/Safety/BBS>. The forum is an FTA-monitored bulletin board where registered users can ask questions of the FTA or other registered users, discuss topics related to FTA drug and alcohol testing regulations, raise issues for further discussion, make suggestions, express opinions, and learn where to find additional information or technical assistance. Registering to access the Forum is fast and easy, just go to the website and follow the easy steps.

## Drug and Alcohol Audit Questions Revised

In 1997 the FTA Office of Safety and Security began auditing grantee drug and alcohol testing programs. The audits assess compliance with the FTA drug and alcohol testing regulations (49 CFR Part 655) and the appropriate provisions of the DOT testing procedures (49 CFR Part 40). The audits also give FTA the opportunity to provide extensive technical assistance and to obtain a better understanding of the difficulties that grantees encounter when implementing rules.

Since the audit program's inception, the process and audit questions have been fine-

tuned, streamlined, and where appropriate made more grantee-friendly. Following the publication of Part 655 and the new Part 40, the audit questions went through a major revision to reflect the changes. The latest version of the audit questions can be found on the FTA Safety and Security website at <http://transit-safety.volpe.dot.gov/Safety/DATesting/Audit/default.asp>.

The questions can be a useful tool in monitoring your transit system's drug and alcohol program or in providing oversight of your contractors and/or service agents.



## Hosts Needed for Substance Abuse Seminars

The FTA is seeking volunteers to sponsor FTA Substance Abuse Seminars in FY 2004 (October 2003 to June 2004). The one-day seminars provide an overview of 49 CFR Parts 655 and 40, prescription and over-the-counter medications and agency best practices. Hosts are required to provide an ADA

accessible site able to house 100 participants and audio-visual equipment. If you are interested in sponsoring a future seminar and are able to meet these requirements, please contact Louise Lawson at (617) 494-3798 or via email at [Louise.Lawson@volpe.dot.gov](mailto:Louise.Lawson@volpe.dot.gov).

## FTA Drug & Alcohol Program - Topic at CTAA

FTA Drug and Alcohol Program Manager, Mark Snider, will conduct a leadership session titled "Drug and Alcohol Regulations" at the Community Transportation Association of America (CTAA) Expo in Philadelphia, PA on May 22<sup>nd</sup> from 9:00 am

to 12:00 pm. The workshop is included in the conference and trade fair registration fee.

The FTA Drug and Alcohol Program will also be exhibiting at the CTAA Trade Fair on May 21<sup>st</sup> and 22<sup>nd</sup>. The FTA will be in Booth 1006 on the main exhibit floor. Repre-

sentatives will be available at the booth to answer questions, provide copies of recent publications, the new ONEDOT MIS form and self-audit tools. The FTA Drug and Alcohol website including MIS Internet reporting will also be demonstrated.

# FOR YOUR INFORMATION

## Where To Find?.....

**49 CFR Part 655, Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations**

August 9, 2001  
Federal Register Vol. 66  
Pages 41996 - 42036

### Notice of Interpretation:

April 22, 2002  
Federal Register Vol. 67,  
Pages 19615-19616  
Primary Topic: FTA/USCG  
regulation applicability to ferry  
boats.

**The information presented on this page should be used to update Chapters 2 and 7 of the revised Implementation Guidelines.**

## MIS Reports Must Be Maintained in Files

All FTA recipients/sub-recipients that received notice they were required to submit their FTA Drug and Alcohol Management Information System (MIS) reports for calendar year 2002, were required to do so by March 15, 2003. Those that did not re-

ceive notice are still required to complete their MIS forms, but are not required to submit them to FTA. All covered transit agencies, regardless of whether they must submit or not, are required to keep their MIS reports on file for at least five years.



## Split Specimen Cancellation Form

Medical Review Officers (MROs) are required to cancel drug tests anytime a split specimen cannot verify the presence of the drug or drug metabolite found in the original specimen. A split specimen may not be able to reconfirm a positive if the drug/metabolite is not present in the specimen (i.e., false positive), the split is unavailable for testing (i.e., lost, does not exist), the split does not contain sufficient volume for testing, the split

is untestable, or other. Anytime a split specimen is cancelled, the MRO is required (§40.187) to report the cancellation to the U.S. Department of Transportation (DOT) with a relevant explanation.

In an effort to assist MROs in providing consistent and specific information regarding cancelled tests, the DOT developed a Split Specimen Cancellation Form<sup>®</sup> for MROs to use. By standardizing the form

and the information provided, the DOT will be better able to effectively monitor the drug-testing program. Use of the form is voluntary, but its use is encouraged to facilitate MRO/DOT communication. Completed forms are to be faxed or mailed directly to the Office of Drug and Alcohol Policy and Compliance (ODAPC). The form can be downloaded directly from the ODAPC web site at [www.dot.gov/ost/dapc](http://www.dot.gov/ost/dapc).

## Alternative Testing Methods Not Approved For DOT Use

Support is growing in the drug testing community for the use of alternative drug testing methodologies including hair, sweat, and saliva. Although these methodologies are receiving acceptance in the scientific community and in many drug-free workplace programs, they are not approved by the Substance Abuse and Mental Health Services Administration (SAMHSA) and are therefore not permitted for use in DOT testing at this time.

## Coast Guard Still Follows DOT Testing Procedures

On March 1, 2003, the US Coast Guard (USCG) was formerly transferred from the Department of Transportation (DOT) to the newly formed Department of Homeland Security. The transfer was initiated in part to meet terrorist threats against Americans at home.

While part of the DOT, the USCG and FTA agreed that ferry boats and other vessels that were grantees or sub-grantees of FTA funding would be deemed to be in concurrent compliance with the testing requirements of 49 CFR Part 655 when they complied with the USCG's chemical

and alcohol testing requirements. However, FTA funded vessels would remain subject to FTA's random alcohol testing requirements because the USCG does not have a similar requirement.

This FTA/USCG agreement will not change under the new organizational structure. All FTA grantees that fall under the USCG programs should continue testing in the same manner following the same procedures and using the same forms as before.

# SERVICE AGENT UPDATE

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## Agencies Offer SAP Exams

The FTA regulations require that all individuals who have a positive drug or alcohol test or who refuse a test must be referred to a Substance Abuse Professional (SAP) regardless of whether the employer's policy is to terminate the employee or provide a second chance. If an employer allows an employee to return to duty following a positive test result or test refusal, the individual cannot be allowed to return to a safety-sensitive position until he/she has completed the SAP evaluation, referral, education/treatment, and return-to-duty process. The SAP is the "gatekeeper" of the return-to-duty process and is responsible for protecting public safety to the greatest extent possible by professionally evaluating the employee and recommending appropriate education/treatment, follow-up tests, and after-care in the event the employee returns to performing safety-sensitive functions.

Subpart O of Part 40 defines the SAP qualifications, roles, responsibilities and procedures. To be recognized as a SAP an individual must be a licensed physician; a licensed or certified psychologist; a licensed or certified social worker a licensed or certified employee assistance professional; or an alcohol or drug abuse counselor certified by the National Association of Alcoholism and Drug

Abuse Counselors (NAADAC), or by the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse (ICRC).

The SAP must have knowledge of and clinical experience in the diagnosis and treatment of substance abuse-related disorders, and must have knowledge of the SAP's role in the protection of public safety. The SAP must complete qualifications training by December 31, 2003 and satisfactorily complete an examination that is given by a nationally recognized professional or training organization. The examination must cover all elements discussed in the qualifications training, and the test must be validated by a test evaluation organization.

A number of agencies are offering the qualifications training, but only two are currently offering the examination. The National Association of Alcoholism and Drug Abuse Counselors (NAADAC) offers a manual and a test that can be ordered by contacting the NAADAC Education and Certification Administrator at [sbeckett@naadac.org](mailto:sbeckett@naadac.org). The Employee Assistance Professionals Association (EAPA) offers qualifications training and an on-line exam. For more information contact [a.osullivan@eap-association.org](mailto:a.osullivan@eap-association.org)



## All Collectors Must Be Trained

The deadline for collectors to receive qualifications training passed on January 31, 2003. Consequently, all existing collectors conducting collections under the USDOT rule (49 CFR Part 40) must have completed the training and demonstrated proficiency to be in compliance. All future collectors must receive the training and demonstrate proficiency before they perform any collections. This means **all** collectors including those that work at hospitals, clinics, and emergency care units and those that perform these duties infrequently or on an incidental basis must comply. There are **no exceptions**. The number, frequency, or clinical environment of the test is irrelevant. All collectors must meet the minimum requirements.



## Where To Find?.....

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

**Revised:**

December 19, 2000  
Federal Register Vol. 65,  
Pages 79462-79579.  
Primary Topic: Procedures for Transportation Workplace Drug and Alcohol Testing Program Revised Final Rule (49 CFR Part 40)

**Technical Amendments:**

August 1, 2001  
Federal Register Vol. 66  
Pages 41943-41955  
Primary Topic: Clarifications and Collections to Part 40; Common Preamble to Modal Rules

**Notice of Proposed Rulemaking**

September 30, 2002  
Federal Register Vol. 67  
Pages 61306-61313  
Primary Topic: MIS Reporting

**HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs Notice of Proposed Rulemaking:**

August 21, 2001  
Federal Register Vol. 66  
Pages 43876-43882  
Primary Topic: Validity Testing

**The information presented on this page should be used to update Chapter 5 of the revised *Implementation Guidelines*.**

# RELEVANT COURT CASES

## Where to Find? .....

### DHHS Labs

The current list of DHHS certified labs is published the first week of each month and is printed in the Federal Register under the Substance Abuse and Mental Health Services Administration heading (SAMHSA). Only those labs certified can be used for FTA drug testing. The list should be checked monthly as new labs are being added and others are being removed.

Website location: <http://www.workplace.samhsa.gov/ResourceCenter/lablist.htm>

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

**The information presented on this page should be used to update Chapter 2 of the revised *Implementation Guidelines*.**

## US Supreme Court to Hear ADA/Drug Rehab Case

On Monday, February 24, 2003, the US Supreme Court decided it would hear a case that has the potential to impact all employers that conduct drug and alcohol testing. The case will determine whether Raytheon's Hughes Missile Systems, Co. violated Joel Hernandez's civil rights by refusing to rehire him following a positive drug test and subsequent rehabilitation.

Hernandez tested positive for cocaine in 1991 and was allowed to resign rather than be fired. Hernandez went through drug treatment and in 1994 reapplied to Hughes. Her-

nandez was denied the position because the company had a policy not to rehire previous employees that were fired or allowed to resign in lieu of firing. Hernandez argued that the company violated the Americans with Disabilities Act (ADA) by refusing to hire him because of his past drug addiction.

The ADA protects individuals with disabilities from discrimination. Current drug use is not protected by the ADA, but an individual with a previous drug addiction that has been rehabilitated is afforded ADA protections. The lower

court sided with Hughes, but the US Court of Appeals for the 9<sup>th</sup> Circuit decided that since Hernandez had been successfully rehabilitated he could not be denied re-employment because of his past record of drug addiction.

The company's appeal is based on the premise that many employers have no re-hire policies, particularly those that deal with confidential government contracts or with hazardous materials. They argue that the ADA does not confer "preferential rehire rights."

The court will hear the case next fall.

## Ohio Supreme Court Prohibits Testing Injured Workers

The Ohio Supreme Court recently ruled that the Ohio's worker's compensation law that permitted drug and alcohol testing of injured workers was unconstitutional. Under the law employers were allowed to deny workers' compensation benefits to any employee whose injury was caused by use of a controlled substance or alcohol. A refusal to test was treated the same as a positive test. The court determined that the testing constituted a state action that violated constitutional prohibitions against unreasonable search and seizure and that the need for testing was outweighed by the expectation of privacy.

This case, however, does not address or in any way discount federally mandated drug and alcohol testing programs. This case was based solely on workers' compensation benefits and does not address the issue of public safety. The US Federal court system has repeatedly held that

drug testing employees that perform safety-sensitive job duties does not violate the US Constitution as the need to protect public safety outweighs an individual's expectation of privacy.

The DOT regulations [§40.323(a)(1)] go on to say that drug and alcohol test results can be released to the decision-maker in a lawsuit, grievance or other proceeding initiated by, or on the behalf of, the employee tested. This includes workers' compensation, unemployment compensation, or other proceeding related to a benefit sought by the employee when the test results are pertinent to the proceeding. How the state administered workers' compensation program deals with the information and whether the information is taken into consideration when determining extent of benefit that is due the employee is unique to each state.

## List of States Prohibiting Adulterants Expands

South Carolina was among the first states to prohibit efforts to obstruct or interfere with alcohol and/or drug tests. The law, enacted in 1999, makes it illegal to sell or possess adulterants, substitute specimens, or spike a specimen. The law makes it illegal to give away or sell urine with the intent to beat a drug test.

Louisiana, Nebraska, New Jersey, North Carolina, Oregon, Pennsylvania, Texas and Virginia have each enacted similar laws, and the issue is currently under consideration by the Arkansas General Assembly. There is a grass roots movement to encourage other states to consider similar laws.

# Rx & OTC Medications

## Employer Rx/OTC Policy Guidance

All FTA employers are strongly encouraged to develop a policy statement addressing the use of prescription (Rx) and over-the-counter (OTC) medications. Even though the policy is not an FTA requirement, a policy statement is an essential part of a comprehensive program designed to educate transit employees on the potential safety risks associated with the use of Rx and OTC medications by employees who perform safety-sensitive duties. An effective Rx/OTC policy statement will include the following provisions:

- Emphasis on safety--statement of risks associated with Rx/OTC use.
- Statement of purpose: to balance the treatment of medical conditions with requirements of performing safety-sensitive job duties. Not intended to force employees in need of medical attention to work. Not intended to keep employees receiving medical treatment off duty who are able to work.
- Requirements for obtaining medical input into an employee's fitness-for-duty. The policy should address the use of Rx/OTC in relation to the underlying medical condition or illness in determining an employee's ability to safely perform safety-sensitive duties.
- Statement regarding the removal of employees from safety-sensitive duty who are impaired by Rx/OTC medications. Describe responsibility for employee initiated removal and management initiated removal.
- An attendance policy that reflects Rx/OTC-use related absences. Be careful that your attendance policy does not inadvertently encourage employees from reporting for work or remaining on duty when impaired by illness or Rx/OTC use (i.e., no sick leave; Rx/OTC use ineligible for leave, etc.). Be sure to consider Rx/OTC use when establishing limitations on sick leave use.
- Limitations on use of certain types of medication. Employers may choose to prohibit certain types of medications or medications with specific types of warnings or side effects. At a minimum, medications that cause drowsiness, fatigue or have warning labels that caution against the operation of machines, heavy equipment, or automobiles should be prohibited. Requirements for obtaining medical authorization to use certain medications.
- Employer responsibility for final determination.
- Definition of employees' responsibilities.
- Employee reporting requirements.
- Consequences for policy violations including the use of Rx/OTC that contributes to cause or severity of an accident and failure to report use or obtain medical authorization, if required.
- Statement of confidentiality in relation to records and interaction with medical practitioners.

Employers should refrain from policies that are based solely on the employee's perception of impairment. Employees are commonly unaware or unable to accurately ascertain their degree of impairment and may report for work or remain on duty when they pose a safety risk to themselves, other transit system employees and the general public. Thus, employers are discouraged from developing policies that rely solely on employee self-assessment and instead, are encouraged to develop policies that require a medical evaluation and input into an individual's overall fitness for duty.

## Where to Find? .....

**Conforming Products List**  
Evidential Breath Testing (EBT) Devices  
July 21, 2000  
Federal Register Vol.65  
Pages 45419 - 45423  
Primary Topic: Conforming Products List (CPL)  
Website location:  
[www.nhtsa.gov/people/injury/alcohol](http://www.nhtsa.gov/people/injury/alcohol)

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

**Non-evidential Testing Devices**  
May 4, 2001  
Federal Register Vol.66  
Pages 22639 - 22640  
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 5 of the revised *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](http://www.fta.dot.gov)**

*FTA Office of Chief Counsel: <http://www.fta.dot.gov/office/chiefc>*

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

*FTA Letters of Interpretation: <http://www.fta.dot.gov/library/legal/dral/02toc.htm>*

*DHHS-Certified Laboratories: <http://workplace.samhsa.gov/ResourceCenter/lablist.htm>*

*Center for Substance Abuse Prevention: <http://prevention.samhsa.gov/>*

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

*Best Practices Manual: FTA Drug & Alcohol Testing Program*

*Drug and Alcohol Consortia Manual*

*Drug and Alcohol Testing Results: 1995, 1996, 1997, 1998, 1999 and 2000 Annual Reports*

*Random Drug Testing Manual*

*Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit, Revised 2002*

*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 and Alcohol Policy and Compliance: (202) 366-3784**

*Urine Specimen Collection Procedures Guideline*

*Substance Abuse Professional Guidelines*

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