



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

FTA Drug And Alcohol Regulation *Updates*

Winter 1999

Issue 10

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 tenth in a series.

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Employers have Choice of MIS Report Format

All employers subject to FTA's drug and alcohol testing regulations must file annual reports summarizing test results for Calendar Year 1998 by March 15, 1999. Employers who submitted forms for 1997 were mailed a package of information and forms during the first week of January. Rural systems may receive their reporting packages directly from their state Department of Transportation.

The package includes reporting forms and instructions. In addition, for the first time, the package also includes a diskette and directions for producing the reports electronically. Each employer has the option to submit their information on the paper forms or on the diskette, but not both.

If you did not submit reports in 1997 or did not receive a 1998 reporting package, please contact the Volpe National Transportation Systems Center at (617) 494-6336. You should also call this number if you need assistance in completing your report or if you have questions. See the article on page 6 that describes the most common mistakes made when completing the forms.



Test Rates Remain the Same

Random testing rates for employers subject to FTA drug and alcohol testing rules (49 CFR Part 653 and Part 654) will remain at 50 percent for drug testing and ten percent for alcohol testing for calendar year 1999. The rates were published in the December 14, 1998 *Federal Register* on pages 68818-68819.

The drug test rate was established based on the positive random rate experienced by the entire transit industry during the previous two years (1996 and 1997). The positive rate is derived from information provided to FTA by individual employers on their annual MIS forms. The rate is calculated by adding the positive tests to the number of refusals and dividing the total by the total number of random tests conducted and refused. For both 1996 and 1997, the positive rate for random drug tests was in excess of one percent so the testing rate will remain at 50 percent. The positive rate in 1997 was 1.21 percent, down from 1996 when the positive rate was 1.50 percent.

Similarly, the industry-wide violation rate for random alcohol tests is calculated by dividing the sum of the number of employees testing at 0.04 or greater and the number of test refusals by the sum of the total number of tests conducted and refused. In 1996, the violation rate was 0.21 percent and in 1997 the violation rate was 0.19 percent. Since the rates for both years were below 0.5 percent, the alcohol random rate will remain at ten percent.

Rule Changes

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:

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
Chapters 6 and 7 of the
Implementation Guidelines.

Opiate Threshold Raised

Effective December 1, 1998, the minimum threshold level for opiates defined in 49 CFR Part 40 was raised from 300 nanograms per milliliter (ng/ml) to 2000 ng/ml. This Department of Transportation (DOT) rule change is consistent with changes made by the Department of Health and Human Services (DHHS) to its Mandatory Guidelines for Federal Workplace Testing Programs. The final rule also established a new requirement to test for 6-acetylmorphine (6-AM), a metabolite that comes only from heroin, using a 10 ng/ml confirmatory level, for specimens that have tested positive for morphine on the confirmatory test at the 2000 ng/ml level.

The final DOT rule was published in the *Federal Register* on November 25, 1998. Under the previous standards, 87 percent of laboratory positives for opiates were verified as negative by medical review officers (MROs) because there was no clinical evidence of illegal drug use. DHHS and DOT anticipate that these amendments will eliminate the identification of most individuals legitimately taking prescription medications including morphine or codeine or who have ingested poppy seeds.

Law Enforcement Results Acceptable in Rare Cases

Effective January 7, 1999, employers subject to the FTA drug and alcohol testing rules (49 CFR Part 653 and Part 654) may **under limited circumstances** use drug and alcohol post-accident test results administered by State and local law enforcement officials. The state and local law enforcement officials must have independent authority for the test and the employer must obtain the results in conformance with state and local law. The test may be administered in a manner (i.e., blood) different from that prescribed by 49 CFR Part 40. Acceptance of these test results is only permissible in circumstances when the employer is unable to perform an FTA drug and alcohol test (i.e., employee is unconscious, employee is detained by law enforcement agency). The final rule was published in the *Federal Register*, pages 67612-67613 on December 8, 1998.

Results from tests administered by State or local law enforcement personnel may not be used when the employer did not but could have conducted its own test. This provision does not permit employers to ignore their obligation to test, nor does it prohibit duplicate post accident testing. In such cases, it is expected that the employer will conduct FTA drug and alcohol tests, while law enforcement officials conduct tests under their own authority. In instances where law enforcement test results are accepted in lieu of FTA test results, the employer must document the circumstances which prevented the conduct of the FTA drug and alcohol tests.

This amendment imposes no requirement on State or local law enforcement personnel to perform post-accident testing for FTA covered employers. In fact, employers should not assume that law enforcement personnel routinely perform post-accident testing or that law enforcement officials will make test results readily available to them. Most law enforcement agencies will require a subpoena or official request to release test results to employers, and even then, will likely deny requests.



Rule Changes

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Safety-Sensitive Maintenance Functions Clarified

On January 5, 1999, FTA published a final rule in the *Federal Register* (pp. 425-427) that clarified its definition of safety-sensitive functions for maintenance activities. The rule becomes effective on February 4, 1999 and requires drug and alcohol testing of all maintenance workers including those engaged in engine, revenue service vehicle and equipment repair, rebuilding, and overhaul. Previously, the rule only specifically included workers involved in on-going, daily maintenance and repair work.

The rule modification was made to ensure that all maintenance workers that perform safety-sensitive work are subject to the rules and that similarly situated maintenance workers should be treated equally. Maintenance contractors for urbanized systems (recipients of Section 5307 funding) that perform these maintenance functions are also covered by these regulations. Rural system (Section 5311 recipients) maintenance

contractors remain exempt.

The discussion that accompanies the final rule indicates that maintenance contractors that perform overhaul/rebuilding work on an ad hoc or one time basis with no long term contract are not covered under the rule as there is no "on-going" relationship. Also, this rule does not cover warranty work as this is considered to be part of the manufacturing process.



Court Re-confirms FTA Authority to Pre-empt Contrary State Law

On December 4, 1998, the United States Court of Appeals for the First Circuit upheld a federal district court decision that permitted the Massachusetts Bay Transportation Authority (MBTA) to conduct the random drug and alcohol testing of transit police. In this case, *O'Brien v. MBTA*, two transit police officers contended that MBTA's drug testing program violated their rights under federal law and the Massachusetts Declaration of Rights. The Court of Appeals concluded that by accepting federal transit assistance, Massachusetts officials must abide by the conditions that Congress attached to them, one of which mandates random drug and alcohol tests for employees who perform safety-sensitive functions. The Court of Appeals stated that because the Act includes an express pre-emption provision, contrary state law cannot stand as an obstacle to the testing protocol.

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
Changed to ten Percent

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 2 of the *Implementation
Guidelines*.

Test Reporting Guidelines

Q & A

Q Does my lab have to test for specimen validity or for adulterants?

A No, each employer should consult with their respective MROs to determine if/when validity tests should be performed and when additional tests for interfering substances/adulterants should be performed. The employer should then take the necessary steps to ensure their laboratory is willing and able to conduct the specified tests under these circumstances or obtain a new laboratory that is.

Q If the employer conducts FTA drug and alcohol tests and law enforcement officers conduct tests under their own authority, whose tests results take precedence?

A The test results obtained by the employer shall take precedence for purposes of compliance with Parts 653 and 654.

The information presented on this page should be used to update Chapter 6 of the *Implementation Guidelines*.

DHHS Provides Guidance for Test Result Reporting

The DOT regulation (49 CFR Part 40) permits laboratories to conduct additional tests to determine the validity of a specimen. To ensure consistency among laboratories, the Department of Health and Human Services (DHHS) has established guidelines to standardize procedures, definitions, and reporting procedures.

A laboratory may determine the nitrite concentration, creatinine concentration, specific gravity, and pH for the primary specimen following scientifically suitable methods that produce results that are accurately quantified. If the laboratory suspects the presence of an interfering substance/adulterant and the laboratory is unable to identify the interfering substance, the laboratory may send the specimen to another DHHS certified laboratory that has the capability of conducting the validity tests and identifying the interfering substance.

When a laboratory reports the test result, they must report the result as either Negative, Positive, or Test Not Performed. For Positive and Negative tests they must also include an explanation on the Custody and Control Form (CCF) when the specimen is dilute. If the result is neither positive or negative, the "Test Not Performed" box must be checked and one of the following explanations must be provided on the "Remarks" line.

- (1) Fatal Flaw (e.g., broken seal),
Specify
- (2) Uncorrected Fatal Flaw; Specify
- (3) Specimen Unsuitable; Cannot Obtain Valid Drug Test Result
- (4) Specimen Adulterated:
 - ⇒ Nitrite too high
 - ⇒ pH is too high or too low
 - ⇒ Presence of adulterant detected,
Specify
- (5) Specimen Substituted: Not consistent with normal human urine

The quantitative results for validity tests (e.g., nitrite concentration, creatinine concentration, actual specific gravity, or

actual pH) may not be routinely reported to the MRO, but may be provided to the MRO upon request on a case by case basis. The MRO must report the test result to the employer as Negative, Positive, Test Not Performed or Test Canceled. If a primary specimen is dilute, the MRO must also report to the employer that the next time the donor is selected for a drug test, the employer may require the specimen to be collected under direct observation. If the test on the primary specimen was not performed due to a fatal flaw or an uncorrected fatal flaw, the MRO must report the results as Test Not Performed and Test Canceled. Under this circumstance, the MRO reports to the employer that the test is canceled, the reason for the cancellation, and that no further action is required unless a negative test result is required.

If the primary specimen is unsuitable and a valid drug test result cannot be obtained, the MRO should obtain additional information from the laboratory and contact the donor to inform him/her that the specimen was not suitable for testing or contained an unexplained interferrant. The MRO should inquire as to medications the donor may have taken. If an acceptable explanation is provided to the MRO, the MRO will report the test as canceled and provide the reason for the cancellation. If the explanation is not acceptable, the MRO should report the test as cancelled, provide the explanation for why the test was cancelled, and notify the employer that a second collection must be performed immediately under direct observation. If the primary specimen is adulterated or substituted, the MRO reports the test result as Adulterated or Substituted and Refusal to Test. The MRO reports to the employer that the donor refused the test and the donor's right to have the split specimen tested is withdrawn.

Checklist

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Information Disclosure Checklist

The FTA drug and alcohol regulations specify the limited circumstances under which testing records and results can be released. To assist in clarifying or identifying these circumstances, the FTA has developed this checklist for use by employers in their program assessments. The checklist includes regulatory requirements, as well as “best practice” recommendations; it should not be construed as the “last word” in regulatory compliance - it merely provides guidance.

- The transit system may only release testing records and results under the following circumstances:
 - ⇒ When an employee gives written instruction that the transit system may release information or copies of records regarding an employee’s test results to a third party or subsequent employer;
 - ⇒ When, due to a lawsuit, grievance, or proceeding initiated on behalf of the employee tested, the result must be released to the decision-maker in the case;
 - ⇒ When an employee provides a written request for copies of his/her records relating to the test(s) (can not be contingent on payment);
 - ⇒ When an accident investigation is being performed by the National Transportation Safety Board (NTSB) and the post-accident test results are needed for the investigation;
 - ⇒ When records are requested by the DOT or any DOT agency with regulatory authority over the employer or any of its employees, or to a state oversight agency authorized to oversee rail fixed guideway systems.
- The transit agency must ensure that each request for release of information specifically identifies the person to whom the information is to be released, the circumstances under which the release is authorized, and the specific kind of information to be released. This documentation must be maintained.
- A separate release must be signed each time information is to be disclosed.

In cases where records are subpoenaed in criminal or civil suits, required for inspection by the state highway patrol or state transportation safety board, or other freedom of information statutes, transit systems should first consult with their own legal staffs regarding the jurisdiction over these records before they are released. (Spring 1996 Update, page 4)

Requests for test result information by an unemployment service bureau can be granted, if the individual’s dismissal was a result of a positive drug or alcohol test, because the request for unemployment benefits was initiated by the employee. (Summer 1996 Update, page 5)

Drug and alcohol test results can only be released without written consent directly to an authorized representative of the employee’s employer of record. FTA recipients that contract out the performance of safety-sensitive functions do not have access to individual test results of their contractor’s employees since the recipient is not the employer. Unless the contractor’s employee gives specific consent in writing to release the results to the FTA recipient, no employee-specific testing information can be provided.

(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?.....

Confirming Products List

Evidential Breath Testing (EBT) Devices
February 27, 1998
Federal Register Vol.63
Primary Topic: Confirming Products List (CPL)

Note: This list will be updated periodically.

Nonevidential 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.

Trade Association Update

The National Association of Collection Sites has changed its name and broadened its scope. The new name is the Drug & Alcohol Testing Industry Association. This organization can be reached at 1 (800) 355-1257 or at www.datia.org.

The article on trade associations found on page 5 of the Spring 1998 issue of the *Updates* incorrectly listed the telephone number of the Substance Abuse Program Administration Association. The correct number should be 1 (800) 672-7229.

The information presented on this page should be used to update Chapter 9 of the *Implementation Guidelines*.

MIS Reports

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 9 of the
Implementation Guidelines.

Avoid Common Mistakes on MIS Forms

The Volpe National Transportation Systems Center, which is under contract to FTA, is responsible for verifying the accuracy and validity of the information provided on the MIS forms by employers that are subject to the FTA drug and alcohol testing regulations. The Volpe Center has identified common reporting mistakes and has provided the following guidance to help you avoid those mistakes:

- ◆ **Initial Training.** Employers typically report all safety-sensitive employees that are trained. Instead, employers should only report the number of safety-sensitive employees that received their initial sixty minutes of training during the calendar year. Typically, the number will correspond to the number of new hires and transfers into safety sensitive positions, and new supervisors regardless of whether they perform safety-sensitive job functions. Employers should not include refresher training.
- ◆ **Covered Employees.** Employers often put revenue vehicle operators in the “CDL/ Non-Revenue” category because they have CDLs. Similarly, employers include non-transit personnel that have CDLs but who are covered by the FHWA regulation. Instead, all transit revenue vehicle operators should be reported as revenue vehicle operators regardless of whether they have a CDL or not, and regardless of whether they actually collect a fare or not. Only transit employees that are required to have CDLs, but do not operate a revenue service vehicle (e.g., a truck) should be reported in the “CDL/Non-Revenue” category.
- ◆ **Blank Spaces.** Many of the forms submitted only have data entered into the boxes where actual testing was done, or where totals are required. The other boxes are often left blank. To ensure that entries have not been mistakenly omitted, please use zeros if no tests were conducted.
- ◆ **Return-to-Duty Testing.** Some employers report all return-to-duty tests for employees who have come back to work after all absences (e.g., worker’s compensation). Instead, only tests performed for those returning to work following a positive drug/alcohol test or test refusal under the FTA rules should be recorded as a return-to-duty test. Tests that occur following a change in the individual employee status should be reported as pre-employment tests (see article on page 7, Issue 3 of the *Updates*).
- ◆ **Non-Safety-Sensitive Employees.** If an employer includes all employees in its testing program whether they are safety-sensitive or not, they often report test results for all employees. However, only tests performed on safety-sensitive employees covered by the FTA drug and alcohol regulations should be reported on the forms.
- ◆ **Coast Guard Employees.** Employers sometimes mistakenly complete the column for Coast Guard covered employees. If the agency has no Coast Guard covered employees, they should report zero in this column.

These issues and others are addressed in the instructions included with the reporting forms. Additionally, the electronic reporting “help files” provide detailed explanations. Be sure when completing your forms that you refer to the definitions and explanations provided. If you have any questions regarding completion of the forms, you should call the Volpe Center at (617) 494-6336.

Technical Assistance

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1997 Test Results Available

The transit industry-wide test results for calendar year 1997 have been summarized and published in an annual report. The 1997 report includes data from 2,317 individual employers representing 1,613 transit systems and 704 contractors. Approximately 71 percent of all employers reported no positive drug test results, and 96 percent of employers reported no alcohol test results of 0.04 or greater.

The industry-wide positive random drug test rate was 1.21 percent. Small operators had a higher rate than large operators (1.34 percent for small systems and 1.17 percent for large systems). Contractors had a higher positive rate at 1.50 percent than the transit systems with a 1.06 positive rate.

The industry-wide positive rate for random alcohol tests was 0.14 percent. When test refusals are included, the violation rate rises to 0.19 percent. The positive rate for transit systems was 0.15 percent while the rate for contractors was 0.09 percent.

The *Drug and Alcohol Testing Results: 1997 Annual Report* was published in December 1998 and can be obtained by calling (202) 366-2896.

FTA Interpretations Available on the World Wide Web

FTA's Website has been updated and expanded and provides a new way to get accurate and up-to-the minute information about the FTA drug and alcohol testing regulations and other topics. Various links are provided throughout the Website that will allow you to access information from different FTA offices. The general FTA Website address is www.fta.dot.gov. You can obtain information about FTA's mission statement, strategic plan, news releases, calendar of events, regional office information, and messages from the Administrator. You can also link to information by Office and the National Transit Library.

Under Offices you can visit the Office of Chief Counsel to view FTA's drug and alcohol testing letters of interpretation and *Federal Register* publications. Thus, you can download the exact text of relevant

regulatory changes and FTA interpretations. The interpretations provide clarification and explanation of FTA's regulatory intent in relation to actual practical and operational problems experienced by transit employers

Under Offices you can also obtain information directly from the Office of Safety and Security by accessing Program Management and then Safety. Or you can visit the National Transit Library that can be used to perform searches on key words or topics. Direct homepage addresses for these and other relevant Websites are provided within the Resource Materials listing found on the last page of the *Updates*.

TSI Course Availability

The Transportation Safety Institute course on Substance Abuse Program Self Assessment will be provided on a cost recovery basis during FY 1999. Transit systems, transit associations, State Departments of Transportation or others who are interested in attending, hosting, or funding a program should contact TSI at (405) 954-3682.

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

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.

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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/wahpl.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

Produced by:	Published by:	Edited by:	Illustrated by:
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FTA Drug and Alcohol Regulation Updates

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