



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

FTA Drug And Alcohol Regulation *Updates*

Summer 2000

Issue 15

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 fifteenth in a series.

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Dispatcher Issue Referred to Rulemaking

Since the FTA drug and alcohol regulations (49CFR Parts 653 and 654) were first published, there has been confusion and controversy over the inclusion of dispatching as a covered safety-sensitive function. The regulation specifically states that a safety-sensitive function includes "controlling dispatch or movement of a revenue service vehicle."

The confusion is due in part to the fact that the term dispatcher is widely used throughout the industry even though there is little commonality of job duties among those with the job title. Additionally, there is a common sentiment that dispatchers do not directly impact public safety.

Due to the complex nature of this issue, FTA will solicit comments on whether dispatchers should be considered safety-sensitive



through a formal rulemaking process. Originally, it was believed that this issue could be addressed through a Dear Colleague advisory letter, but upon review, it was determined that any changes to the safety-sensitive definition must be made through the rulemaking process. Thus, this issue, in addition to others, will be included in a Notice of Proposed Rulemaking (NPRM) that is due to be published in early fall.

This NPRM will combine 49 CFR Part 653 and Part 654 into one all-inclusive FTA regulation, 49 CFR Part 655. The new regulation will eliminate inconsistencies between the two existing regulations, provide additional clarification, and incorporate the many FTA formal interpretations that have been made since the promulgation of the regulations.

Still Time to Sign-Up For Seminars

The first two FTA sponsored drug and alcohol testing regulation seminars were delivered to large audiences in Kansas City and Las Vegas. The seminars received accolades from those in attendance for their "comprehensiveness and clarity of presentation." The seminars presented the regulatory requirements, current interpretations, and other

information necessary to facilitate grantees' self-assessment and compliance with the regulations.

Space is still available for the two remaining seminars. The seminar in Washington, D. C. will be held on August 16-17. The seminar in Atlanta, GA will be held on October 31 - November 1. For further information or to register for the

seminars, contact Jennifer Whalley of the Volpe Center National Transportation Systems Center at (617) 494-2686, or e-mail at Whalley@volpe.dot.gov. Don't miss this opportunity to get your questions answered, learn about common mistakes to avoid, and to network with others that have similar issues.

Meade Retires

Judy Meade, the author of FTA's drug and alcohol testing regulations, retired from the FTA on May 5, 2000 after 23 years of service.

At the time of her retirement Ms. Meade served as the Director of the Office of Safety and Security. Hiram J. Walker, Associate Administrator for Program Management, is serving as the Acting Director until a replacement is found. The position has been advertised and a

national search is being conducted. Mark Snider continues his role as the FTA Drug and Alcohol Program Manager.

During this time of transition, Mr. Walker re-emphasized FTA's commitment to the drug and alcohol testing program and provided assurance that FTA's oversight process and technical assistance efforts would continue.

Clarifications

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 61612-67613
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 4 of the *Implementation Guidelines*.

Policy Requirements Revisited

The FTA drug and alcohol testing regulations (49 CFR Part 653.25 and Part 654.71) clearly state the requirements for a policy statement and its contents. Previously, FTA required that FTA covered employers have extensive policies that defined in detail the testing procedures that will be used to test for the presence of drugs and alcohol. Upon revisiting this issue, FTA has determined that the intent and precise wording of the regulations only require that the policy include a detailed discussion of the procedures that will be used to test for the presence of drugs and alcohol, protect the employee and the integrity of the drug and breath testing processes, safeguard the validity of the test results, and

ensure the test results are attributed to the correct covered employee.

Rather than defining these procedures in detail, the policy need only refer to 49 CFR Part 40, as amended, and state that a copy of the regulation is available upon request. Employers should note, however, that if they include Part 40 by reference, they should make sure that a copy is readily available to their employees and employee representatives.

FTA acknowledges that policy statements are written for many different target audiences including employees, unions, legal systems, etc., and that the employer may choose to embellish and expand the policy as appropriate to address

these audiences. This is acceptable as long as the minimum FTA requirements are met and any provisions added under the employer's own authority are duly noted.

Thus, systems that have already established or feel the need to have extensive policies that describe the testing process in detail may continue the use of these policies if so desired. However, this level of detail is no longer required.

A revised policy checklist is provided on page 3 of this Update to help illustrate the change. There have been no other interpretive changes to the other policy requirements set forth in Part 653.25 or 654.71.

Requesting Previous Test Results

The Federal Motor Carrier Safety Administration (FMCSA) regulations (49 CFR Part 382) require that motor coach employers must request information regarding a driver/applicant's participation in a controlled substances and alcohol testing program for the preceding two years. This is not an FTA requirement and thus, transit employers cannot cite the FTA regulations as the basis for a request of information from previous employers.

The FTA regulations (49 CFR Part 653.75 (f) and Part 654.55 (f)) allow the previous employer to release testing records to subsequent employers upon receipt of a written request from the covered employee and as expressly authorized by the terms of the employee's request. Thus, the FTA regulations allow transit employers to request test records from previous employers, but do not require it. Transit employers should be cautious in the wording of their records request to avoid the implication that the request is made as part of an FTA regulatory requirement.

Accidents Involving Ancillary Equipment

The FTA regulations define a mass transit vehicle as "a vehicle used for mass transportation or for ancillary services." Thus, the definition of a mass transit vehicle includes not only buses, vans and sedans used in revenue service, but also non-revenue service commercial motor vehicles and vehicles used by armed security personnel.

If an accident occurs involving a vehicle used to provide ancillary services, an FTA post-accident test must be performed on the operator and any other covered employee who could have contributed to the accident if the

circumstances meet the FTA definition of an accident (49 CFR Parts 653.45 and 654.33).

Revised Policy Checklist

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Revised FTA Substance Abuse Policy Checklist

Issue 8 of *Updates* (page 3) provided a policy checklist designed to assist transit employers assess the compliancy of their respective programs. Since a detailed description of the testing procedures is no longer required (see article Page 2) as part of the policy statement, FTA has revised the checklist to illustrate the change. The FTA minimum requirements of a policy as defined in 49 CFR Parts 653.25 and 654.71 are listed below:

- Proof of policy adoption by the appropriate governing body with effective date indicated.
- Identity of the person designated by the employer to answer employee questions about the anti-drug and alcohol misuse program.
- Categories of employees who are subject to testing.
- Period of the work day covered employees are required to be in compliance and when employees maybe tested.
- 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).
- Drug and alcohol testing procedures will be consistent with 49 CFR Part 40, as amended.
- Description of the behavior and circumstances that constitute a refusal to take a drug and/or alcohol test and a statement that refusals constitute a verified positive test result.
- Description of the consequences for a covered employee who has a verified positive test result. 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, and 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. Any such additional policies or consequences shall be clearly and obviously described as being based on the employer's authority independent of FTA authority.

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 4 of the *Implementation Guidelines*.

Part 40 Update

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 7 and 8 of the *Implementation Guidelines*.

PART 40 NPRM Comments Received

The Department of Transportation published a Notice of Proposed Rulemaking (NPRM) in December 1999 to revise 49 CFR Part 40, the regulation that defines detailed procedural requirements for drug and alcohol testing. The comment period expired on April 7, 2000.

The commentors represent a wide variety of individuals and organizations most of which represent individual service agents (MROs, SAPs, laboratories and collection sites), trade associations, third party administrators, and employers. In all nearly 400 commentors responded making in excess of 3800 individual comments. Commentors from the transit industry represented a very small proportion of the

overall comments.

The comments addressed a number of issues often reflecting conflicting points of view. Among the issues that generated the most interest were the training requirements for collectors, MROs, BATs and SAPs. Additionally, the proposed provision requiring mandatory adulteration and substitution testing received many comments, as did the "stand down" provision that would require an employee that has a laboratory-confirmed positive to be removed from his/her safety-sensitive position while awaiting the MRO verification. The conflict of interest restrictions and Public Interest Exclusion provisions were among the most controversial.

A summary of the proposed provisions were summarized on pages 5-6 of Issue 14 of the *FTA Drug and Alcohol Regulation Updates*. Those who would like to view the docket comments in their entirety are directed to <http://dms.dot.gov/search/> and to look under docket code number 6578.

The final rule is expected to be published by the end of the year or shortly thereafter. Mary Bernstein, director of the DOT's Office of Drug and Alcohol Policy and Compliance stated "the regulation will be published as soon as possible, but that the quality of the rule will not be compromised to meet this timeline. If additional time is needed, then so be it."

Supreme Court Agrees to Hear Case

The Supreme Court has agreed to clarify when courts can overrule arbitrators who require a company to keep an employee in a safety-sensitive job despite testing positive for illegal drug use.

The case that will be brought before the court is *Eastern Associated Coal v. United Mine Workers of America*. In this case, an arbitrator reinstated a coal-company truck driver to his safety sensitive position on two separate occasions following positive drug tests for marijuana. In the case, the company argued that there was a "well defined and dominant public policy" against performing safety-sensitive jobs under the influence of illegal drugs. The 4th U.S. Circuit Court of Appeals, however, ruled that courts "overwhelmingly defer" to arbitrators' decisions in

labor disputes (<http://www.uscourts.gov./links.html> click on 4th Circuit).

Federal appeals courts have disagreed over when courts can overturn such arbitration awards, and thus, the Supreme Court has agreed to take up the case in their 2000-01 term that begins in October.

Reprint of Video Available

In 1997, FTA sponsored the development of a training program for transit supervisors entitled "Reasonable Suspicion Referral for Drug and Alcohol Testing". The program included a leaders guide and a video. Due to its popularity, the supply of materials including the video was soon exhausted.

In response to the on-going demand, FTA has reprinted the program including the video. The program is available by contacting the FTA Office of Safety and Security at (202) 366-2896.

Prescription & OTC Drugs

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FTA Encourages Education On Dangers of Prescription and Over-the-Counter Drugs

Nuria Fernandez, Acting Administrator of the Federal Transit Administration issued a Dear Colleague letter to all grant recipients encouraging them to educate transit operators about the risks associated with the use of prescription and over-the-counter medications. Specifically, grantees were encouraged to 1) review current policies with regard to operators' use of over-the-counter and prescription medications which could result in public safety being jeopardized and 2) institute educational programs that address the potential dangers of taking certain types of medications. Ms. Fernandez re-emphasized the FTA's commitment to safety and requested that the educational programs be implemented immediately.

The educational programs should address medications that cause drowsiness or

could impair the operator's cognitive or mental abilities. As part of the educational program it is recommended that safety-sensitive employees be encouraged to enter into a dialogue with their physician or pharmacist regarding the side effects of medications and to inquire into potential alternative treatments that will not jeopardize the individual's ability to safely perform their job functions.

A list of some of the medications that have been identified by the National Transportation Safety Board and FTA as medications of concern is provided below. This list is not definitive or all-inclusive, but is provided as a starting point. The best source of additional information on these or other prescription and over-the-counter medications is your Medical Review Officer.

Analgesics

Aspirin w/codeine, Codeine, Darvocet, Darvon, Demerol, Dilaudid, Empirim Compound w/codeine, Levo-Dromoran, Methadone, Morphine, Percocet, Percodan, Soma Compound s/codeine, Talacet, Talwin, Tylenol w/codeine, and Vicodin.

Anti-Motion Sickness

Antivert, Dramamine, Marezine, Phenergan, Transderm-Scop

Tranquilizers & Sedatives

Ativan, Denadryl, Centrax, Compazine, Dalmane, Diazepam, Equani, Halcion, Haldol, Libritabs, Librium, Limbitrol, Paxipam, Phenergan, Prolixin, Serax, Stelazine, Thorazine, Tranxene, Valium, Vlarelase, Xanax.

Antidepressants

Adapin, Amitriptyline, Asendin, Deprol, Desyrel, Elavil, Endep, Etrafon, Limbitrol, Lithium, Ludiomil, Marplan, Nardil, Norpramin, Pamelor, Parnate, Petrofrane, Sinequan, Surmontil, Tofranil, Triavil, Vivactil.

Barbiturates

Alurate, Butisol, Dilantin, Mebaral, Nembutal, Pentobarbital, Phenobarbital, Secobarbital, Seconal, Sedapap, Tuinal.

Skeletal Muscle Relaxants

Flexeril, Parafon, Soma

Non-Prescription Cough & Cold Remedies, Antihistamines

Bendadryl, Bromfed, Chlrotrimetron, Comtrex, Contac, Deconamine, Dimetapp, Dristan, Drixoral, Externdryl, Fedahist, Kronofed, Naldecon, Nolamin, Novafed, Ornade, Phenergan, Rondec, Rynatan, Sinubid, Sinulin, Tavist-D.

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

Notice of Proposal Rulemaking
December 9, 1999
Federal Register Vol. 64
Pages 69075 - 69136.
Primary Topic: Enhance testing procedures and incorporate past interpretations and guidance.

The information presented on this page should be used to update Chapter 5 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 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, 1997, and 1998 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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