

FTA Drug and Alcohol REGULATION UPDATES

July 2020

Issue 69

FTA Provides Free Drug & Alcohol Program Tools

To assist employers, drug and alcohol program managers, and other company officials, FTA provides free drug and alcohol program tools and resources at <https://transit-safety.fta.dot.gov/drugandalcohol/tools/>. Proper use of these tools will help employers maintain compliance with Parts 40 and 655 requirements. These tools are intended to provide clarity to the public regarding existing requirements under the law or agency policies.

The most popular tools are:

- ◆ FTA's policy builder, which generates a concise and easily customizable drug and alcohol policy that fulfills the content requirements of §655.15
- ◆ A 60-minute drug awareness video, which can be used to train new employees in compliance with §655.14(b)
- ◆ The "Previous Employer Release of Information Form" for gathering drug and alcohol testing histories from an applicant's prior employer, as mandated by §40.25
- ◆ A notification for testing form, whose use ensures collection sites receive the testing information required by §40.14
- ◆ A sample reasonable-suspicion determination report to help employers make testing decisions compliant with §655.43 when they suspect an employee may be using drugs or misusing alcohol
- ◆ A post-accident decision making form that walks supervisors through the testing and documentation requirements of §655.44 in the event of an accident

COVID-19 Guidance

FTA has published Frequently Asked Questions from FTA Grantees Regarding Coronavirus Disease 2019 (COVID-19) to provide clarity regarding how COVID-19 preparations impact certain FTA program requirements.

FTA's website, <https://www.transit.dot.gov/coronavirus> provides other COVID-19 related information, including details about the Coronavirus Aid Relief, and Economic Security

(CARES) Act, and other FTA resources, a repository of press releases, blogs and announcements, and links to other federal resources.

The Office of Drug and Alcohol Policy and Compliance (ODAPC) has also issued guidance in response to the COVID-19 public health emergency regarding compliance with DOT drug and alcohol testing regulations and practices of substance abuse professionals

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U.S. Department of Transportation
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and service agents. This guidance is available at <https://www.transportation.gov/odapc>.

“Completely Discounting” the Operator after a Non-Fatal Accident

Should a non-fatal accident occur, FTA requires employers or their designees (e.g., supervisors or management staff) to decide whether to completely discount an operator's performance as a contributing factor to the accident, per 49 CFR Part 655 section 655.44(a)(2). The employer must always make this decision before the operator is potentially sent for post-accident testing under FTA authority.

If the employer cannot completely discount the operator's performance as contributing to a non-fatal accident, FTA requires post-accident drug and alcohol testing for the operator. If the employer determines that the employee's performance could not have contributed to the accident, post-accident testing under FTA authority is not



allowed, and they must document in detail the decision not to administer drug and alcohol tests.

FTA provides a sample form that can be used to compliantly

document post-accident decisions, available at <https://transit-safety.fta.dot.gov/drugandalcohol/tools/>.

Correcting Minor Errors on a CCF/ATF

Minor errors on testing forms can and do occur. However they do not cause a test to be cancelled and correcting them is a necessary part of maintaining a compliant drug and alcohol program.

Examples of such errors include incorrectly recording the test time or failing to name the courier service for a drug test.

To correct these errors, 49 CFR Part 40 section 40.205(b)(4) provides clear instructions: “You

must mark the CCF in such a way (e.g., stamp noting correction) as to make it obvious on the face of the CCF that you corrected the flaw.”

A compliant error-correction practice would be to use a pen to circle the error, then indicate nearby what the correct information should be. Initialing your correction adds additional custody information that can prove helpful. As you make

corrections, do not attempt to mark the form in a way that makes it appear the error did not occur (e.g. by inserting or altering numbers).

For information on more serious errors, see “Collector Errors & Affidavits” from Issue 63 of the *FTA Drug and Alcohol Regulation Updates*, which lists the errors that can cause a test to be cancelled and explains how to correct them.

Employees Randomly Selected for Both Drug & Alcohol Tests

When a random selection is made in accordance with 49 CFR Part 655 section 655.45(e), the list that is generated must indicate the employees selected for testing and whether their tests are for drugs, alcohol, or both.

If an employee is randomly selected for both drug and alcohol tests, many employers will pair these tests together, sending the employee for both tests at same time. While this is typically done for operational efficiency, there is no regulatory requirement that the

tests be performed together. Some drug and alcohol program managers (DAPMs) choose to send the employee for their drug test on one date, and then, later in the same selection period, will send the employee for their alcohol test.

Separating tests in this manner provides further unpredictability for random testing programs. It is also helpful in the event an error is made and the collection site only conducts one of the two tests. If such a mistake occurs, the

employer should send the employee back for the missing test at a time and date of the DAPM's choosing, but before the selection period expires.

Follow-up Alcohol Testing & Policies

As described in detail in the article "FTA Follow-up Alcohol Test Timing" from Issue 68 of the *FTA Drug and Alcohol Regulation Updates*, follow-up alcohol testing under FTA authority may only occur just before, during or after the performance of safety-sensitive duties. As 49 CFR Part 655 section 655.15(d) requires employers' policies to include specific circumstances under which covered employees will be tested, all policies describing FTA follow-up testing must state this provision.

recommendation, the MRO ultimately makes the determination either: 1) that there is an adequate medical explanation for the employee's failure to provide a specimen and cancels the test; or, 2) there is no adequate medical explanation and rules the testing event a refusal.

MRO is the Decision-Maker in "Shy Bladder" Cases

When the collector informs the designated employer representative (DER) that an employee has not provided a sufficient amount of urine, 49 CFR Part 40 section 40.193 requires the DER to direct the employee to obtain a medical evaluation by a physician, who is acceptable to the Medical Review Officer (MRO), within five business days. The referring physician must have expertise in the medical issues raised by the employee's failure to provide a sufficient specimen, and when possible, should not be the employee's primary care

physician, as this person would likely lack the neutrality and objectivity desired for this task. Alternatively, the MRO may perform this evaluation if he or she has the appropriate expertise.

After conducting the evaluation, the referring physician must make a recommendation to the MRO regarding whether there is an adequate basis for determining a medical condition has, or very likely has, precluded the employee from providing enough urine.

After considering the referring physician's assessment and

Pre-employment Testing After an Extended Absence

When an FTA-covered employee has not performed a safety-sensitive function for 90 consecutive calendar days **and** the employee has not been in the random selection pool during that time, the employee must take a DOT/FTA pre-employment drug test with a verified negative result before they can perform safety-sensitive functions, per 49 CFR Part 655 section 655.41(d). FTA audits of covered employers'

testing procedures and practices often find that employers improperly conduct pre-employment testing under DOT authority when an employee has not performed safety sensitive duties for 90 or more days even when the employee has remained in the random selection pool during that time.

Before performing a pre-employment test under FTA

authority, the employer must ensure the employee did not perform any safety sensitive functions **and** was not in the random selection pool for at least 90 consecutive days. If the employer opts to conduct pre-employment testing in cases where **both** these criteria have not been met, such tests must be conducted under the employer's own authority, using non-federal testing forms.

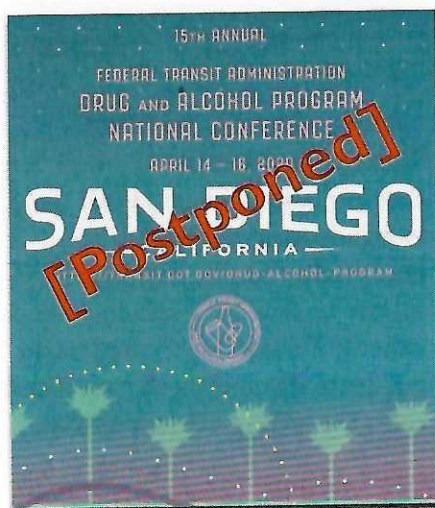
Employers Must Ask Applicants about Pre-employment Test Failures and Refusals

FTA commonly finds most FTA-covered employers make previous -employer information requests as required by 49 CFR Part 40 section 40.25. However, FTA finds that many employers have not implemented procedures to

meet the specific requirements of subsection (j) which requires the employer to ask applicants/transferees if they have tested positive, or refused to test, on any DOT *pre-employment* drug or alcohol test in the previous two

years. FTA's sample "Pre-Employment Notification and Acknowledgement Form", available at <https://transit-safety.fta.dot.gov/DrugAndAlcohol/Tools>, may be used to meet this requirement.

15th Annual FTA Drug and Alcohol Program National Conference Update



The 15th Annual FTA Drug and Alcohol Program National conference, originally scheduled for April 14-16, 2020, has been postponed due to COVID-19 Public Health Emergency-related restrictions on large gatherings. FTA is committed to rescheduling the conference once these restrictions have been lifted. The new date and location will be announced later in 2020; continue to check the FTA Drug and

Alcohol Program website, <https://transit.dot.gov/drug-alcohol-program>, for updates.

The FTA Drug and Alcohol Program Manager is available to answer any program-related questions. Contact Iyon Rosario, at iyon.rosario@dot.gov or 202-366-2010, or the FTA Drug and Alcohol Project Team at fta.damis@dot.gov or 617-494-6336.

Post-accident Testing for Mechanics

A mechanic is tested under 49 CFR Part 655 if he or she is involved in an accident while driving a public transportation vehicle, unless, in the case of a non-fatal accident, the employer determines the mechanic's performance was not a contributing factor to the accident and makes a decision not to test the mechanic. This requirement includes accidents that occur while moving the vehicle from one location to another, even if the vehicle is not in "revenue service."

When a public transportation vehicle not operated by a mechanic is involved in a fatal or a non-fatal accident, an employer would test the mechanic if, using the best information available at

the time of the decision, they determined the mechanic's performance could have contributed to the accident. In making this determination, employers should consider

whether a particular mechanic recently worked on the vehicle involved in the accident and whether negligent maintenance may have been a causal factor in the accident.



Drug and Alcohol Training

FTA sponsors free training sessions to provide essential information to facilitate covered employers' compliance with the drug and alcohol testing regulations (49 CFR Part 655 and Part 40). FTA provides these trainings at a host site and they are open to the public. Trainings are led by the FTA Drug and Alcohol Program and Audit Team Members.

For a schedule of upcoming trainings and to register, go to: <http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training>.

If you are interested in hosting a one-day training session, contact the FTA Drug and Alcohol Project Office at fta.damis@dot.gov or 617-494-6336 for more information.

The Transportation Safety Institute (TSI) Training Schedule

FTA's strategic training partner, TSI, will offer the following upcoming courses:

Substance Abuse Management and Program Compliance. This three-day course for DAPMs and DERs will show how to evaluate and self-assess an agency's substance abuse program and its compliance with FTA regulations.

Reasonable Suspicion and Post-Accident Testing Determination. This half-day seminar is designed to educate participants on DOT/FTA regulations requiring drug and alcohol testing of safety-sensitive transit workers. The focus will be specific training requirements for those employees (e.g., dispatchers, supervisors, managers, etc.) who will be making the determination of when to administer reasonable suspicion and post-accident drug and/or alcohol tests for safety-sensitive employees. This seminar meets and exceeds the requirements under 49 CFR Part 655.14(b)(2).

There is a minimal attendance/materials fee. For more information, please call 405-954-3682. To register, go to: <http://www.tsi.dot.gov>.

Revenue Vehicle Operators vs. Non-Revenue Vehicle Operators with a CDL

Through review of annual MIS submissions, FTA finds many employers who provide transit services that are 'fare free' (i.e., the employer chooses not to collect fares) incorrectly categorize their vehicle operators as "non-revenue vehicle operators", instead of revenue vehicle operators.

Revenue Vehicle Operators drive vehicles used to provide revenue service for passengers. Revenue service means when the vehicle is

available to the general public and there is a reasonable expectation of carrying passengers who directly pay fares, are subsidized by public policy, or provide payment through some contractual arrangement. Vehicles operated in 'fare free' service, which carry passengers, are also considered to be in revenue service, according to FTA's Legal Interpretation from September 16, 1996 and the FTA/NTD Glossary of Transit Terms.

The description above does not include vehicles used to keep revenue vehicles in operation, such as a tow truck or a snow plow; those vehicles are non-revenue vehicles. Operators of non-revenue vehicles are safety-sensitive when they are required to hold a CDL in order to legally operate the vehicle. Non-Revenue Vehicle Operators, who hold a CDL in order to operate the vehicle, generally do not provide transit service for passengers.

CCFs & Employee ID Numbers

With the implementation of the Federal Motor Carrier Safety Administration's (FMCSA's) Clearinghouse requirement, many

collectors are beginning to routinely request employees' CDL numbers when they complete Step 1 of the CCF. The CDL number requirement only applies to drivers who are sent for tests under FMCSA authority.

must be provided to the collector. CDL numbers are not collected, however employee ID numbers or employee social security numbers must be provided to the collector. An employee ID number is a number determined by the employer, not the collector, Third Party Administrator (TPA), or MRO.

Regulation Updates

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FTA-covered employees are broadly exempt from the Clearinghouse rule. The use of a CDL number on the CCF is not allowed for employees taking tests under FTA authority, even if they have a CDL. FTA-covered employers are reminded that 49 CFR Part 40 section 40.14 has a complete list of information that

To ensure Step 1 is completed accurately, employers can send reminders of their ID preferences (e.g., the use of an employee's company ID number or social security number) to their collection sites.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. Employers should refer to applicable regulations, 49 CFR Part 655 and Part 40 for Drug and Alcohol Program requirements.