FTA Drug and Alcohol
REGULATION UPDATES
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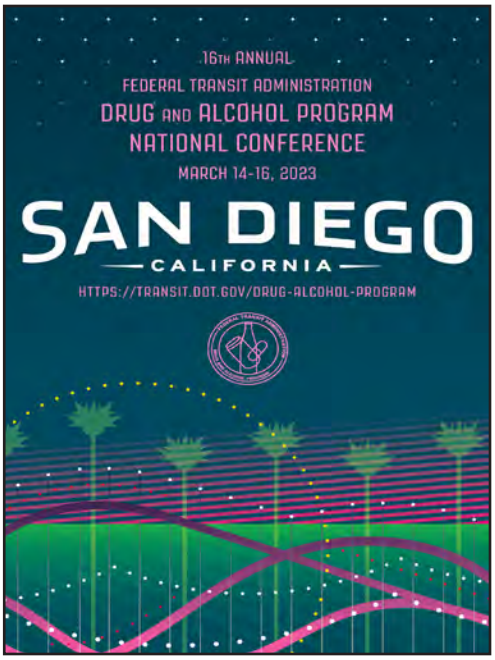
# 16th Annual FTA Drug and Alcohol Program National Conference

The 16th Annual FTA Drug and Alcohol Program National Conference will be held March 14-16, 2023, at the Wyndham San Diego Bayside, San Diego, CA. This year, the conference will be a hybrid event, with some sessions available to a remote audience. For more information and to register, visit the FTA Drug and Alcohol Program website at: https://www.transit.dot.gov/drug-alcohol-program.




## Management Information System (MIS) Reporting Began on January 1

MIS reporting of FTA-authorized drug and alcohol testing results from calendar year 2022 began on January 1, 2023, when the Drug and Alcohol Management Information System (DAMIS) reporting website (https://damis.dot.gov) went online.

MIS notification letters were mailed to FTA grantees at the end of December 2022 to the attention of the 'Certifying Official' as indicated in the previous year's MIS report. The letter contains current year DAMIS login information. MIS reports are due to FTA by March 15, 2023.

Upon receipt of the notification letter, each FTA grantee must log in and review their list of subrecipients and contractors, if applicable, which is based on the previous year's MIS submissions. Grantees must notify FTA of any necessary revisions (i.e., additions or deletions) to this list by emailing fta.damis@dot.gov.

FTA grantees are responsible for ensuring the accuracy of their MIS report as well as those submitted by their subrecipients and contractors. When reviewing reports, remember these common issues:

- The Certifying Official must be an employee of the employer for which the MIS is being submitted. The Certifying Official may not be a service agent.
- If you are a member of a consortium or use the services of a Third-Party Administrator (TPA), you must include this information in Section 1, the Employer section.

## In this Issue



U.S. Department of Transportation
Federal Transit Administration

# Reminder: Clearinghouse Requirements Do Not Apply to FTA Employers

In a Final Rule published on September 29, 2022, the Federal Motor Carrier Safety Administration (FMCSA) amended its drug and alcohol testing regulation, 49 CFR Part 382, to indicate that beginning January 6, 2023, a pre-employment Clearinghouse query will satisfy the requirement to investigate a prospective driver's previous drug and alcohol program violations, as set forth in 49 CFR § 391.23(e)(4) and § 382.413(b).

FMCSA Clearinghouse requirements are not applicable to employers covered only by FTA. Commercial Driver's License (CDL) drivers who ***only*** perform FTA-regulated safety-sensitive functions are exempt from Part 382, including any Clearinghouse requirements. Any positive drug tests, refusals to test, or alcohol results of 0.04 or greater on tests conducted under FTA authority should not be reported to the Clearinghouse, even if the employee has a CDL.

If an applicant was employed by any DOT-regulated employers, including FMCSA-regulated employers, in the two years preceding the date of the applicant's application, the FTA-regulated employer should continue to request drug and alcohol testing information directly from those employers, as required in 49 CFR § 40.25.

# Errors that May Cause Cancelled Tests If Not Corrected

There are some errors that may occur in the testing process that would cause a test to be cancelled if not corrected.

The following are "correctable flaws":

- The collector's signature is missing on the Custody and Control Form (CCF).
- The employee's signature is missing on the CCF, and the employee's failure/refusal to sign is not noted in the Remarks section.
- A non-DOT or an expired DOT CCF is used.
- The BAT/STT does not sign the Alcohol Testing Form (ATF).
- The employee fails to sign Step 4 of the ATF, and the employee's failure/refusal to sign is not noted in the Remarks section.
- A non-DOT ATF is used.

Employers should have a procedure in place to review ATFs and CCFs upon receipt so that tests with errors are corrected promptly so they are not cancelled.

# Dual Mode Employers & MIS Reports

Issue 73 of *FTA Drug and Alcohol Regulation Updates* provided guidance on how to implement DOT drug and alcohol testing for employers with employees whose safety-sensitive work is covered variably by both FTA and FMCSA. The newsletter discussed how the regulating modal authority is either dependent on the work function employees primarily perform on a day-to-day basis (for pre-employment and random testing) or on an ad-hoc basis (post-accident, reasonable suspicion testing).

As a corollary to that article, Drug and Alcohol Program Managers (DAPMs) who manage employees covered by more than one modal administration are encouraged to contemplate their MIS reporting before the deadline (March 15 for both FTA and FMCSA) to ensure testing information is submitted accurately. To that end, the following information may prove helpful:

- A pre-employment test should be reported (via MIS) to the modal administration who will cover 50% or more of the employee's safety-sensitive labor.
- A random test should be assigned, similarly, to the modal administration covering 50% or more of the employee's covered safety-sensitive labor.
- Both post-accident and reasonable suspicion tests must be reported and assigned to the MIS statement for the modal administration (e.g., FTA, FMCSA) covering the employee at the time of the accident/observation.

# Correcting Errors When A Collector Is Unavailable

When a collector makes an error on a CCF requiring correction, they must remedy the mistake by submitting a Memorandum for the Record (MFR) to the laboratory or Medical Review Officer (MRO). Occasionally, the collector may not be available (e.g., on vacation or terminated) to sign an MFR.

The Office of Drug and Alcohol Policy and Compliance (ODAPC) Q&A for 49 CFR § 40.203 provides guidance on these occasions and describes two specific circumstances when supervisors may sign an MFR on behalf of a collector who is unavailable. In cases when the collector mistakenly uses a non-DOT form to conduct a DOT test, a supervisor may sign an MFR explaining why a non-DOT form was used (following the procedures outlined in 49 CFR § 40.205(b)(2)). In cases when a CCF contains the printed name of the collector, but the signature is missing, a supervisor may provide an MFR attesting that the collector performed the collection but did not sign their name.

ODAPC's Q&A further specifies that, if the employee's signature is missing and there is no remark explaining why, only the collector – and never their supervisor – can provide the needed corrective statement.

## Drug and Alcohol Substance Abuse Trainings Available

Free FTA sponsored drug and alcohol training sessions 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 one-day 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 those unable to travel or host, virtual sessions will continue to be offered. For a schedule of upcoming trainings and to register, please visit the training website. If you are interested in hosting a training session, contact the FTA Drug and Alcohol Project Office at fta.damis@dot.gov or 617-494-6336 for more information.

# Clarifying FTA's Post-Accident Time Limits

Following an FTA-defined accident, post-accident drug and alcohol testing must be completed within thirty-two and eight hours respectively, per 49 CFR § 655.44. If required post-accident testing is not conducted within these limits, employers must create a record explaining why no testing was performed. Employers must also document delays in alcohol testing when more than two hours elapse between the time of the accident and the time of the alcohol test.

A common misconception is that a determination to send an employee for post-accident testing can be made at any time, as long as the test is completed within the prescribed time limits. In fact, FTA post-accident tests must be completed as soon as practicable. As discussed in "Situation Changes After Post-Accident Determination" in Issue 74 of *FTA Drug and Alcohol Regulation Updates*, post-accident decision-makers must promptly determine if a test is required based on the information available at the scene of the accident.

The eight and thirty-two hour time allowances enable employers to complete post-accident testing in situations where an employee cannot be immediately tested. For example, the employee may be receiving medical attention or responding to an emergency. The time allowances do not allow decision-makers to delay making a testing determination or to send an employee for testing after the employee has been dismissed from the accident scene.

# Employer Consequences for Violations

FTA covered employers are encouraged to periodically review their drug and alcohol testing policies to verify that the employer's consequences set forth for violations accurately reflect current management goals and practices. With the current worker shortage, many transit employers pivoted to a discipline structure that allows them to retain employees who violate the prohibitions of FTA's 49 CFR Part 655 (i.e., a "Second Chance" policy), rather than terminating them automatically (a "Zero-Tolerance" policy).

While policy changes of this nature – and vice-versa – are allowable within the context of FTA-required drug and alcohol testing programs, employers are reminded that these changes are substantive, and therefore require formal re-adoption by the company's board or management (or their designee, as appropriate). Written notice of the revised and re-adopted policy must be provided to all covered employees, as required by 49 CFR § 655.16. Note that the federal consequences for violations of FTA prohibitions – immediate removal from safety-sensitive duty, Substance Abuse Professional (SAP) referrals, etc. – are fixed, and may not be removed or diminished by a covered employer or by a cooperative bargaining process.

## Reminder: DOT Does Not Authorize the Use of Marijuana

FTA would like to remind employers that although many states have legalized the use of recreational and medical marijuana, these state initiatives do not have any bearing on DOT's regulated drug testing program. DOT's Drug and Alcohol Testing Regulation – 49 CFR Part 40 – does not authorize the use of Schedule I drugs, including marijuana, for any reason.

ODAPC has several public notices addressing marijuana use by DOT covered employees. These notices are available to view and download on ODAPC's website.

# Alcohol Confirmation Tests Must Have A Printed Result

All DOT alcohol tests begin with a "screening" test to determine whether an employee may have a prohibited concentration of alcohol in their breath or saliva specimen. The result of the screening test is not required to be evidentiary, meaning the breath alcohol technician (BAT) or screening test technician (STT) may hand-write the information for the screening test and the test result at Step 3 on the ATF. For a breath testing device that prints the result, this information should be printed directly onto the ATF or, if printed on a separate printout, affixed to the ATF in a tamper-evident manner. Note, the BAT or STT should never hand-write the result in addition to printing the result.

If the screening test result is 0.02 or higher, 49 CFR § 40.247(b) requires the BAT to conduct a second "confirmation" test using an Evidential Breath Testing device (EBT), which becomes the test result of record. The confirmation test result must be printed. If the EBT fails to print the test result, this is a "fatal flaw," and the test is cancelled.

If a printer error occurs causing the confirmation test to be cancelled, the BAT should try to repair the printer in the presence of the donor and immediately perform a new confirmation test. If the printer cannot be repaired, the test is cancelled. The BAT may also use a different EBT, if available, to perform another confirmation test. In this case, the BAT should include explanatory remarks on the ATF. If another EBT is not available, the BAT must immediately notify the Designated Employer Representative (DER) that the test could not be completed. The DER must then make all reasonable efforts to ensure the test is conducted at another testing site as soon as possible.

# Service Agents Must Individually Subscribe to ODAPC List-Serve

The FTA Drug and Alcohol Compliance Auditors have discovered several companies that have subscribed to the ODAPC List-Serve through a general company email, and not through each individually qualified service agent's email address. Part 40 describes the specific requirements each individual must have to be a Collector, Medical Review Officer (MRO), Breath Alcohol Technician (BAT)/ Screening Test Technician (STT), and Substance Abuse Professional (SAP). Each of these sections requires that the individual must subscribe to the ODAPC List-Serve to ensure each person is informed of the most up-to-date information available. If you are a service agent and are not currently subscribed to the ODAPC List-Serve, information can be found at https://www.transportation.gov/odapc/get-odapc-email-updates.

## MIS Training Sessions Available via Teams

The FTA Drug and Alcohol Program Office will host virtual training sessions this winter to provide an overview of the DAMIS reporting system. These free training sessions will run approximately 90 minutes. The sessions will outline reporting instructions and expectations and will feature a live demonstration using the DAMIS website. The presenter will also be available to answer questions. Individuals who submit MIS reports for their organization are the target audience.

For more information and to register for one of the sessions, please visit the Drug and Alcohol Program's training website.

# TPA Reports & Laboratory Statistical Summaries for Employers

Employers are often confused when asked by FTA to provide "statistical summaries" covering their DOT drug testing efforts. Specifically, DAPMs are frequently unaware that DOT requires each Department of Health and Human Services (HHS)-approved laboratory to report to each employer on a semi-annual basis a breakdown of all tests and test results the lab has processed for the employer during the preceding six months. FTA has found that, frequently, these data are being reported only to third-party administrators (TPAs) and are often aggregated by the TPA rather than by the employer. FTA has also found that TPAs commonly respond to an FTA request for statistical summaries by providing *billing*-related summaries, rather than actual statistical documents.

Title 49 CFR § 40.111(a) (emphasis added) details reporting requirements: "As a laboratory, you must transmit an aggregate statistical summary, *by employer*, of the data listed in Appendix B to this part *to the employer* on a semi-annual basis. (1) The summary must not reveal the identity of any employee. (2) In order to avoid sending data from which it is likely that information about an employee's test result can be readily inferred, you must not send a summary if the employer has fewer than five aggregate tests results. (3) The summary must be sent by January 20 of each year for July 1 through December 31 of the prior year. (4) The summary must also be sent by July 20 of each year for January 1 through June 30 of the current year."

FTA's auditing team often finds that employers are presented with testing summaries developed by a TPA (or via their software system/ portal). While information from these summaries can be useful, they are categorically different from the laboratory statistical summary required by 49 CFR § 40.111. Employers are therefore reminded to ensure that each HHS-approved laboratory they use sends a summary of tests to their DAPM twice each year. If you find that you are missing recent HHS-approved lab statistical summaries, you can reach out to your laboratory directly via the phone numbers posted by HHS on their HHS-Certified Laboratory List for Drug Testing.

# Post-Accident Testing: "Removed from Service" Applies Only to Rail Cars, Trollies, and Vessels

Per item 4 in the 49 CFR § 655.4 definition of an "accident," removal from service applies only to rail and other fixed-guideway vehicles and to vessels (e.g., ferries). Removal from service cannot be used as a threshold for FTA testing after an event associated with the operation of a rubber-tire vehicle (e.g., bus, van, automobile). To avoid confusion by supervisors who make post-accident testing determinations, it is a best practice for employers who do not operate rail cars, trolley cars, trolley buses, or vessels, to exclude this criterion from any forms used to document the post-accident decision-making process.

# Previous Employer Inquiries (49 CFR § 40.25) and Background Check Companies

49 CFR § 40.25 requires all employers to check on the DOT drug and alcohol testing record of applicants it is intending to use to perform safety-sensitive duties.

49 CFR § 40.25(h) states, "If you are an employer from whom information is requested… you must, after reviewing the employee's specific, written consent, immediately release the requested information to the employer making the inquiry."

As long as the employee/applicant has provided proper written consent to release the records, the requirement is that the previous DOT-regulated employer release the requested information immediately to the hiring employer. The regulation does not allow the previous employer, who is providing the information, to direct the hiring employer to a third-party company that performs background checks or maintains employee records.

# Arbitration

Employers may terminate an employee due to a positive drug test, refusal to test, or an alcohol confirmation test result of 0.04 or higher, but then find themselves required to return the employee to work based on a settlement or agreement handed down by a judge or arbitrator. In these cases, the employee must still be referred to a SAP, successfully complete the SAP's prescribed education and treatment, and take and pass an observed return-to-duty test, before they may be allowed to resume safety-sensitive duties. The employee must also participate in a follow-up testing program, as prescribed by the SAP. While an employee may be ordered back to work by an arbitrator, judge, etc., the MRO is the only person authorized to change a verified test result (see 49 CFR § 40.149(c)). The arbitrator, judge, etc. cannot overturn a decision of the MRO concerning a test verification. The MRO can only overturn a verification decision he or she has made.

The arbitrator can determine that a test result should be cancelled because of a defect in the drug testing process involving the MRO (e.g., that the MRO failed to afford the employee the opportunity for a verification interview).

In such grievance processes, union representatives may not have access to employee drug or alcohol test results without the written consent of the employee. However, employers and service agents may disclose information to an arbitrator if the employee files the grievance that goes to arbitration. Any time an employer or service agent releases information to a third party without the employee's specific written consent, the employer or service agent must immediately notify the employee in writing of the release.


***Regulation Updates***

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