

The 9th Annual FTA Drug and Alcohol Program National Conference

The 9th Annual FTA Drug and Alcohol Program National Conference, held in Little Rock, AR, was the Program's largest to date, with well over 500 participants. Attendees included Drug and Alcohol Program Managers (DAPMs), Designated Employee Representatives (DERs), Medical Review Officers (MROs), Substance Abuse Professionals (SAPs), Third Party Administrators (TPAs), and employers mainly from the FTA, but also included individuals from the Federal Motor Carrier Safety Administration (FMCSA), and Federal Aviation Administration (FAA), United States

Coast Guard (USCG), and the Pipeline and Hazardous Materials Safety Administration (PHMSA). Participants traveled from 47 States, the District of Columbia, and Puerto Rico to attend the conference.

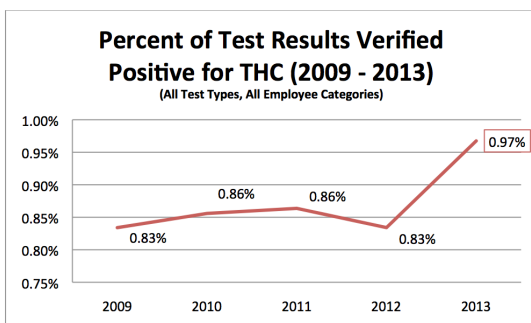
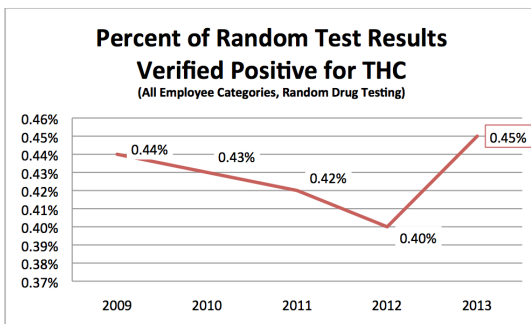
The first day of the conference offered specialized training for new DAPMs, Reasonable Suspicion and Post-Accident Training and a new session on How to Run a Second Chance Program. The second and third days of the conference included five concurrent sessions providing a variety of sessions and gave

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Photo credit: Volpe staff

Rise in the use of Marijuana by Safety-Sensitive Employees



Recent State initiatives have resulted in more than half the States and the District of Columbia allowing for comprehensive or limited medical marijuana and cannabis programs, and in two States permitting the use of marijuana for recreational purposes. Preliminary data from annual drug and alcohol testing results, collected as part of the 2013 MIS reporting requirement as compared to MIS

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U.S. Department of Transportation
Federal Transit Administration

The 9th Annual FTA Drug and Alcohol Program National Conference (Continued from cover)

participants the opportunity to customize their experience to their specific interests and needs. The keynote speakers this year were the Pulaski County Judge, Buddy Villines, and the Deputy Regional Administrator for FTA Region 6, Gail Lyssy. Iyon Rosario, FTA Drug and Alcohol Manager

also welcomed the crowd and spoke about FTA's mission.

Copies of the conference presentations can be downloaded from the Office of Transit Safety and Oversight website at: <http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training/NatConf/2014/sessions.aspx>.

Plans are already underway for the 10th Annual FTA Drug and Alcohol Program National Conference to be held in Atlanta, GA April 28–30, 2015. Visit our website (<http://transit-safety.fta.dot.gov>) in the fall and look to upcoming newsletters for more information! ●

Refusal Decision Makers

DOT carefully defines refusal behaviors in Sections 40.191 (drug tests) and 40.261 (alcohol tests). While MROs, evaluating physicians (charged with evaluating “shy lung” cases), employers, urine collectors, Screening Test Technicians (STTs) and Breath Alcohol Technicians (BATs) all play roles in determining refusals to test, not all of them make official refusal decisions. It is only MROs who evaluate physicians and employers have the final say as to whether or not a refusal occurred. The Office of Drug and Alcohol Policy and Compliance (ODAPC)

publication *What Employers Need to Know About DOT Drug and Alcohol Testing* (pages 26-29) provides clear guidance on which categories of refusal determinations these stakeholders are responsible for.

When the employer is responsible for making the final decision after being notified of a refusal event from a collector, BAT or STT, the employer must first immediately remove the employee from safety-sensitive duties. Next, the employer must carefully review documentation from the collector or technician before verifying if the employee refused to test.

In the rare instance where the employer determines such an event is not a legitimate refusal, they must document their decision and the sound reasoning behind it. Employers making determinations on collection site refusals are encouraged to consult with their MROs to ensure the correct decision is made.

This article clarifies “Administrative vs. MRO-Produced Refusals,” which appeared in issue 53 of FTA Drug and Alcohol Regulation Updates. ●

2014 CCF Used as Paper or Electronic (eCCF)

The Office of Management and Budget (OMB) has approved the 2014 Federal Custody and Control Form (CCF). The 2014 Federal CCF may be used in paper or electronic form (Federal eCCF). The effective date of the Federal CCF is May 31, 2014, and the expiration date is May 31, 2017.

Before a Federal eCCF can be used for regulated specimens, an HHS-certified test facility must submit a detailed plan and proposed standard operating procedures (SOPs) for the eCCF system to

the National Laboratory Certification Program (NLCP) for review and approval, and undergo an onsite inspection.

The Division of Workplace Programs (DWP), Substance Abuse and Mental Health Services Administration (SAMHSA), has released documents associated with the 2014 Federal CCF, effective May 31, 2014.

These documents include the 2014 Federal CCFs, “Guidance for Using the 2014 Federal Custody and Control Form (CCF),” the HHS Medical Review Officer

Manual, and the HHS Urine Specimen Collection Handbook.

The documents are available from FTA at: transit-safety.fta.dot.gov/DrugAndAlcohol/TechnicalAssistance/CCF2014.

If you have any questions concerning this Notice, please contact the NLCP staff by email NLCP@rti.org or phone (919) 541-7242. ●

Mid-Period Random Selections Not Allowed

Please Note: A regulatory interpretation was made after Issue 53's article: "Alternate Selections in Random Testing." This article articulates FTA's correct stance on the issue of mid-period selections.

Many employers desire to conduct the minimum amount of random testing (FTA's current rates are 25 percent for drug tests and 10 percent for alcohol tests) and create their selection lists accordingly. Thus, an employer with 80 safety-sensitive employees (required to perform at least 20 random drug tests and 8 random alcohol tests each year) might produce quarterly selection lists with 5 employees selected for drug testing and 2 employees selected for alcohol testing.

A common problem with this approach is what to do when one or more selected employees are genuinely unavailable to be tested during what would ordinarily be the last selection period of the year (for example, they might resign from their job or they might go on extended medical leave). If the employer were to take no action, the minimum testing rate would not be met, raising compliance issues and undermining the deterrent effect of random testing.

Many employers avoid this problem entirely by testing at rates that are somewhat higher than the minimum, especially in earlier periods of the year (because the number of selections need not be even across selection periods, rates can also later be increased to make up for shortcomings in prior periods). Other employers make use of alternates. If alternates are used, they must be drawn at the same time other employees are selected at the beginning of each testing period.

For those employers not taking such precautions, it is not allowable to generate

a "make-up" selection list (for alternates or for additional employees) during an active testing period. The employer may not have two concurrently active selection lists, because generating a new list automatically nullifies the prior list.

Employers in this predicament should complete all random tests for those employees legitimately available during the original period, leaving enough time to conduct an additional random draw in order to meet the minimum rate by year's end. ●



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FMCSA National Clearinghouse on Drug and Alcohol Program Violators—Proposed Rule

The Moving Ahead for Progress in the 21st Century Act (MAP-21) mandated the Secretary of Transportation to establish a national clearinghouse for controlled substance and alcohol test results of commercial motor vehicle operators by October 1, 2014. Subsequently, on February 20, 2014, the Federal Motor Carrier Safety Administration (FMCSA) published a Notice of Proposed Rule Making (NPRM) in the Federal Register (Vol. 79, No. 34, pgs. 9703-9727). The NPRM proposes to

establish a Commercial Driver's License Drug and Alcohol Clearinghouse containing drug and alcohol test result information for holders of commercial driver's licenses (CDLs) covered under 49 CFR Part 382. The NPRM does not cover employers and CDL holders covered solely under the FTA drug and alcohol testing regulation (49 CFR Part 655).

As proposed, the rule would require FMCSA-regulated motor carrier employers, MROs, SAPs, and consortia/Third Party

Administrators (C/TPAs) to report verified positive, adulterated, and substituted drug test results, positive alcohol test results, test refusals, negative return-to-duty test results, and information on follow-up testing for inclusion in the Clearinghouse database. The proposed rule would also require FMCSA-regulated employers to report actual knowledge of traffic citations for driving a commercial motor vehicle while under the influence of alcohol or drugs. In addition

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Drug and Alcohol Testing for Employees with Disabilities

Public transportation systems often hire and employ individuals with disabilities to perform various job functions within the agency. Employees with disabilities who perform safety-sensitive job duties are required to comply with FTA's drug and alcohol testing regulation (49 CFR Part 655) without exception.

However, there are a few circumstances where procedural modifications have been incorporated into the regulations to address special needs of some individuals with disabilities.

Some disabilities may preclude an individual from providing a sufficient urine specimen for drug testing or sufficient breath for alcohol testing and may require additional procedures to obtain a required negative test result for pre-employment (drug test only), return-to-duty, and follow-up tests. As stated in §40.195, the additional procedures should only be followed if there is a permanent

or long-term medical condition defined as a physiological, anatomic, or psychological abnormality documented as being present prior to the attempted collection, and

Some disabilities may preclude an individual from providing a sufficient urine specimen for drug testing or sufficient breath for alcohol testing and may require additional procedures...

considered not amenable to correction or cure for an extended period of time, if ever.

Examples would include destruction of the glomerular filtration system leading to renal failure, unrepaired traumatic disruption of the urinary tract, or a severe psychiatric disorder focused on genito-urinary matters. Acute or temporary medical conditions, such as cystitis, urethritis, prostatitis, situational anxiety, or hyperventilation are temporary and are not considered permanent or long-term conditions that justify use of the additional procedures.

In the instance where an employee/applicant is required to have a negative drug test result (i.e., pre-employment, return-to-duty, and follow-up tests) and is unable to provide a sufficient amount of urine to permit a drug test (i.e., 45 mL), the collector must follow the "insufficient volume" procedures defined in §40.193. If after three hours the applicant is still unable to provide a sufficient specimen,

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Random Selection Draws for Very Small Employers

FTA's requirements mandate a minimum annual percentage rate for random drug testing of 25 percent of the number of each covered employer (or consortium's) safety-sensitive employees, and 10 percent for alcohol. Selections are required to be made no less frequent than quarterly, meaning at least four random selections per year must be conducted.

For example, when an employer has few covered-employees (five through eight), the annual random testing minimums mean two random drug and one random alcohol test are required to be reasonably spread throughout the calendar

year to be compliant. However, the requirement for quarterly selections would require four selections be made. Small employers seeking to conduct the minimum testing have three options. First, they can join a consortium and be added to a larger testing pool. Second, they can conduct the selections themselves, and test above the minimum rate to ensure at least one selection is made each quarter. Third, they can combine the grantee and any, contractors and subrecipients in a single testing pool, if applicable.

In determining the minimum random tests required, it should be noted to 'round-up' when determining the required mini-

mums. For alcohol, which has a required minimum of 10 percent, if you have 11 covered employees, (10 percent of 11 = 1.1), you would be required to test two covered employees.

Members of a consortium regularly have periods with no employees selected at all. This is compliant, as long as the consortium as a whole meets FTA's minimum random testing rates each year. Asking your consortium or grantee to verify this annually is not only within your rights, but a component of prudent management of your program. ●

Drug and Alcohol Testing for Employees with Disabilities *(Continued from page 4)*

the employer must direct the applicant to obtain an evaluation within five (5) days from a licensed physician. The employer may facilitate the selection of the physician, and the physician must be acceptable to the MRO and have expertise in the relevant medical field. The physician must ascertain if there is a medical condition that, with a high degree of probability, precluded the applicant from providing a sufficient amount of urine. Additionally, the physician must determine if the applicant's medical condition is the result of a serious, permanent, or long-term disability. If so, the MRO or evaluating physician must determine if there is clinical evidence of illicit drug use. The MRO/physician may conduct an alternative test (e.g., blood test) as part of the medical evaluation. If there is no evidence of illegal drug use, the MRO must report the test result as negative, thereby allowing the applicant to be assigned safety-sensitive duties. For a pre-employment test, the employer must make the applicant a conditional offer of employment before the medical evaluation, consistent with provisions of the Americans with Disabilities Act (ADA).

In the instance where an employee is required to have a negative alcohol test result (i.e., return-to-duty and follow-up tests) and is unable to provide a sufficient breath specimen, the BTT/STT may give the employee additional attempts, operate the Evidential Breath Testing Device (EBT) in manual mode, use another EBT, or change to a saliva Alcohol Screen Device (ASD) if in the screening test stage. If these methods are not successful, the employer should direct the employee to obtain an evaluation from a licensed physician within five (5) days to determine if a medical condition precluded the employee from providing a sufficient amount of breath. If the inability to provide sufficient breath is due to a

long-term or permanent medical condition, the procedures would be the same as those described above except that for insufficient breath, the employer would perform the role of the MRO.

In instances where an employee is not required to have a negative drug or alcohol test result (i.e., random, reasonable suspicion, and post-accident), an individual with insufficient volume of breath or urine must still be directed to obtain an evaluation from a licensed physician within five (5) days to ascertain if there is a medical condition that precluded the employee from providing a sufficient amount of urine or breath. If the physician concludes that a medical condition exists, there is no need for the additional examination to determine if the medical condition is long-term or permanent or to look for evidence of illicit use as the test will be cancelled.

In the instance where a safety-sensitive employee normally voids through intermittent or self-catheterization, the employee is required to provide a specimen in that manner if he or she is required to produce a specimen for a DOT test. If able, the employee may provide the specimen directly from the catheter into the collection container in the privacy of the restroom. The rest of the collection procedures including completion of the CCF, checking the temperature, and splitting the specimen are the same. If the individual is able, but refuses to provide a specimen, this would constitute a refusal to test. If the temperature is out of range or there are signs of adulteration, the specimen should be recollected under direct observation.

If an employee has a medical condition requiring an indwelling catheter, the employee may provide a freshly voided specimen by urinating directly into a collection container. If an employee excretes urine into an external bag, the employee should be

asked to provide a fresh void by emptying his or her bag in a privacy enclosure, show the empty bag to the collector, and then drink sufficient fluids at the collection site to provide 45 mL of urine. The employee should subsequently pour the specimen from the bag into a collection container in the privacy enclosure. In this case, the temperature of the specimen is not critical, but all other procedures should remain the same. The collection procedure should be noted in the remarks section.

Safety-sensitive employees unable to provide a specimen due to a pre-determined medical condition must still go through the testing process each time (random, reasonable suspicion, post-accident, return-to-duty) and undergo a medical examination to determine if the medical condition which prevents the employee from providing a specimen still exists. Even though it may be unlikely that the individual may ever be able to provide a sufficient specimen, no safety-sensitive employees are exempt from the regulation, and the employer must be assured that the individual's medical condition still prevents the ability to provide a sufficient specimen. In subsequent random, reasonable suspicion, or post-accident tests, an individual must still go through the insufficient volume procedure in its entirety, including the medical examination, even if the inability to provide the specimen is due to a long-term or permanent disability.

The DOT Urine Specimen Collection Guidelines revised on October 1, 2010 should be consulted for further information on these testing protocols. The Guideline can be obtained from the DOT ODAPC website at www.dot.gov/ost/dapc. ●

Drug and Alcohol Training Schedule

The FTA will sponsor the following training sessions:

FTA Substance Abuse Training Session. This one-day, high-level seminar provides covered employers with key information to help them comply with U.S. DOT and FTA drug and alcohol testing regulations (49 CFR Parts 40 and 655). This free training is available on a first-come, first-served basis and is led by FTA Drug and Alcohol Audit Program Team Leaders.

Host	City/State	Training Location	Date(s)
Heart of Iowa Regional Transit Agency (HIRTA)	Urbandale, IA	HIRTA Public Transit 2840 104th Street Urbandale, IA 50322	8/27/14
Red Rose Transit Authority	Lancaster, PA	Red Rose Transit Authority 45 Erick Road Lancaster, PA 17601	9/16/14

For more information and to register, go to: <http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training>.

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

The Transportation Safety Institute Training Schedule

FTA's strategic training partner, the Transportation Safety Institute (TSI) will offer the following upcoming courses:

- **Substance Abuse Management and Program Compliance** This 2½-day course for DAPMs and DERs shows how to evaluate and self-assess an agency's substance abuse program and its compliance with FTA regulations.
- **Reasonable Suspicion Determination for Supervisors** This half-day seminar educates supervisors about the FTA and DOT regulations requiring drug and alcohol testing of safety-sensitive transit workers and how to determine when to administer reasonable suspicion drug and/or alcohol tests.

There is a small attendance/materials fee. For more information, please call **(405) 954-3682**.

To register, go to: <http://www.tsi.dot.gov> or <http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training>.

Rise in the use of Marijuana by Safety-Sensitive Employees *(Continued from cover)*

reporting for the calendar years 2009 through 2012, indicate a measurable rise in the percent of drug tests with a verified positive result for Tetrahydrocannabinol (THC).

State initiatives have no bearing on the U.S. Department of Transportation's regulated drug testing program. The Department of Transportation's Drug and Alcohol

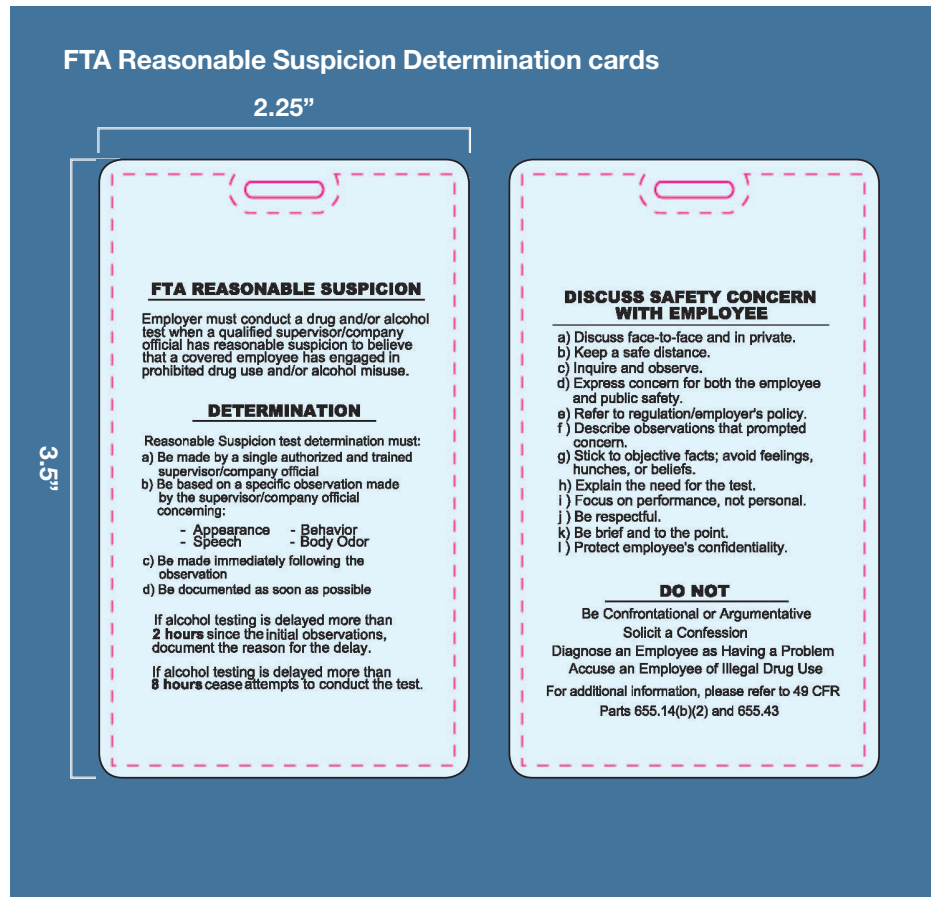
Testing Regulation – 49 CFR Part 40 – does not authorize the use of Schedule I drugs, including marijuana, for any reason. ●

FTA Reasonable Suspicion Determination Cards are Available to Order

The FTA Reasonable Suspicion Determination cards are a 3.5" by 2.25" laminated card serving as a guide for supervisors and other company officers trained to make reasonable suspicion determinations in conjunction with FTA drug and alcohol testing regulations and requirements under 49 CFR Parts 655.14(b)(2) and 655.43.

FTA Reasonable Suspicion Determination cards can be ordered free of charge (please indicate the number of cards you would like in the comments section of the order form) at the following link:

<http://transit-safety.fta.dot.gov/publications/order> ●



FMCSA National Clearinghouse on Drug and Alcohol Program Violators—Proposed Rule *(Continued from page 3)*

to reporting drug and alcohol testing rule violations, the proposed rule also defines the conditions under which information would be submitted, accessed, maintained, updated, and removed from the database, as well as procedures for releasing information to prospective employers, current employers, and other authorized entities.

The comment period for the NPRM closed on May 21, 2014. The NPRM and comments to the docket may be viewed

at <http://www.regulations.gov> under docket number FMCSA-2011-0031. All comments will be reviewed and evaluated with the final rule published in the Federal Register sometime thereafter. Even though the regulation as proposed only applies to employers and CDL holders covered under FMCSA, FTA-regulated employers should be aware of the NPRM and subsequent final rule to understand and accurately

communicate the applicability of the regulation to system management, FTA-covered CDL holders, and service agents. Similarly, FTA-regulated employers should take action to minimize likely confusion by distinguishing between FMCSA-covered CDL holders and FTA-covered CDL holders. ●

When Does A Drug or Alcohol Test Commence?

A DOT-regulated drug collection commences at the time the donor selects or accepts the collection cup. In cases with breath specimens, DOT-regulated alcohol screens begin when the individually wrapped mouthpiece is accepted or selected. If saliva is used, an alcohol screen begins when the sealed package containing the screening device is opened in the presence of the employee. While it is possible to refuse testing before these points, receipt or selection of the collection cup, mouthpiece or testing device is when collections technically begin.

For random, post-accident, reasonable suspicion, follow-up and return-to-duty testing, the process begins at the point of notification. Failure to follow the instructions of a company official to proceed immediately to the collection site is considered a refusal. Other refusals might occur before a drug collection commences. An example of such a refusal is when an employee refuses to cooperate with the collector's instructions to empty their pockets or to wash their hands; required procedures taking place before the donor is handed the cup. For an alcohol screening test, failure

to sign Step 2 of the Alcohol Testing Form (ATF) is a refusal and can occur before the mouthpiece is selected or accepted, or before the saliva screening device is opened. For a complete list of refusals, see sections 40.191, 40.261 and 655.44(c).

For pre-employment testing, it is not possible for the applicant or covered employee to refuse until the collection has commenced. In other words, the applicant or employee can arrive late or not at all to the collection site without being deemed to have refused the pre-employment test. Further, they can begin the initial steps of the testing process (40.61 and 40.241) up to the point where the cup is handed to them (40.63(c)) or when the mouthpiece is selected (40.243(a)) and

still decide they do not want to participate in the collection without it being called a refusal. It is important to remember this allowance is for pre-employment testing only. ●



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Retention of Annual Drug and Alcohol Management Information System (MIS) Reports

Over the last year, the FTA Drug and Alcohol Project Office have received an increasing number of inquiries from FTA-covered employers who would like

previous years' copies of their annual MIS reports. The regulations, specifically, 49 CFR Part 655.71(b)1, states that copies of annual MIS reports submitted must be

maintained for five years. The FTA Drug and Alcohol Project Office will no longer be providing lost or discarded MIS forms. ●

Updating Drug and Alcohol Policies—“Public Transportation” vs. “Mass Transportation”

Recent revisions to 49 CFR Part 655 replaced the terms “mass transportation” and “mass transit” with the term “public transportation.” These changes were made to 655.4 (the section of the rule providing definitions) and 655.44 (the section governing post-accident testing) for consistency with the statutory meaning of public transportation as defined in 40 U.S.C. 5331.

Covered employers have asked whether or not they must revise their drug and alcohol policies, and subsequently have them adopted by their governing body to reflect this change in terminology. All covered employers must update their FTA Drug and Alcohol policies so the term “public transportation” is now used. However, if a policy is otherwise

fully compliant and accurately describes an employer’s drug and alcohol practices, then FTA is not compelling such employers to have these nominally revised policies formally adopted by their governing board or official. Rather, employers are allowed to wait until other revisions are needed before undertaking the adoption process. ●

Tasers and Stun Guns Are Not Considered a Firearm

The list of safety-sensitive functions covered under the FTA’s drug and alcohol testing regulation (§655.4) includes “carrying a firearm for security purposes.” A firearm is a weapon from which a shot is discharged by gunpowder and does not include a Taser, stun gun, or any other self-defense product. FTA covered-employees carrying these other self-defense products are not considered safety-sensitive under the FTA regulation. ●



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FTA 5311 Tribal Transit Program

Tribes can receive FTA 5311 funds in two ways: through the Section 5311 program and/or through the Section 5311(c) Tribal Transit Program (tribes can receive funding from both programs in the same fiscal year).

Federally-recognized tribes are eligible to be a direct recipient under the Section 5311(c) Tribal Transit Program. As a direct recipient through the Tribal Transit Program, the requirements you would be responsible for are slightly different from those under the Section 5311

program; however, FTA does apply Drug and Alcohol Testing requirements (49 CFR Part 655) to tribes as they would to any other direct recipient. Tribes requiring assistance or additional information should contact the FTA Drug and Alcohol Project Office at 617-494-6336. ●

Previous DOT-Covered Employer Records— What Constitutes a Good Faith Effort?

All DOT-covered employers are required (§40.25) to obtain an applicant's written consent in order to get drug and alcohol test results from DOT-covered employers who previously employed the applicant during any period during the preceding two years. The applicant's written consent and request for information must be sent to each identified DOT-covered employer and a good faith effort must be made to obtain the information. If possible, this information should be obtained prior to the applicant's first performance of safety-sensitive functions. If not possible, the employer should make a good faith effort for at least 30 days from the date on which the applicant first performed safety-

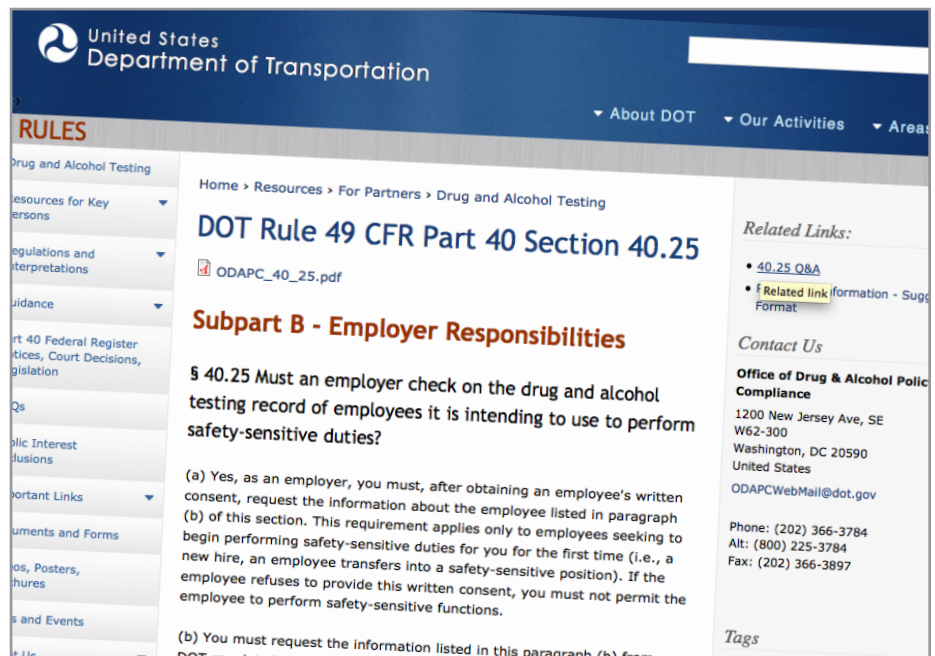


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sensitive functions unless the information has already been obtained. The good faith effort must be documented and maintained for a period of at least three years.

Should a previous DOT-covered employer be defunct, out-of-business, or otherwise unable to be located using information provided by the applicant, the employer should document all efforts used to obtain the information. Should these efforts fail, documentation of these efforts should be maintained for three years.

If an address, email address, website, or telephone number of the previous employer is provided, the previous employer should be contacted to find a current mailing address, since the request for information and employee's written consent must be provided to the previous employer. The regulation does not specifically describe

what constitutes a good faith effort, but a single attempt within the 30-day period following the applicant's hire is sufficient. If the previous employer fails to reply to the good faith effort within 30 days, no further effort is required. Every telephone call log, email, or written correspondence should be maintained as documentation of the good faith effort.

If a previous employer fails to respond and previous interaction indicates that this employer is notoriously unresponsive, you may contact the FTA Drug and Alcohol Program Manager to request assistance. ●