

FTA Drug and Alcohol REGULATION UPDATES

April 2021

Issue 71

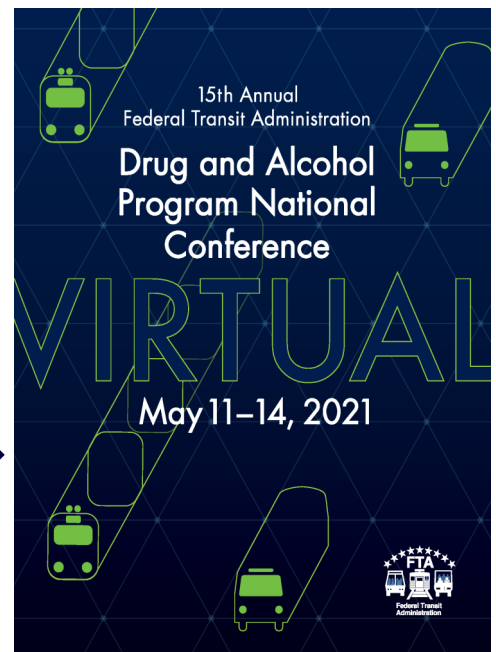
15th Annual FTA Drug and Alcohol Program National Virtual Conference

The FTA Drug and Alcohol Program National Conference will be held virtually from May 11 through May 14.

For more information about the virtual conference, session and speaker information, links to the Whoova platform, and to register, visit <https://www.transit.dot.gov/>

[regulations-and-programs/safety/annual-fta-drug-and-alcohol-program-national-conference.](#)

Registration and access to the virtual conference content are available on the Whoova web app or the Whoova mobile app for Apple and Android users.



Get Drug and Alcohol Management Information System (MIS) Data Before Contract Terminates

49 CFR Part 655 requires that each FTA recipient prepare a summary of results for its FTA-authorized drug and alcohol testing program for tests performed the previous calendar year. Section 655.72 states that each recipient is responsible for ensuring the accuracy and timeliness of each MIS report submitted by the recipient's safety-sensitive contractors.

The FTA recipient must ensure that each safety-sensitive contractor, acting on the recipient's behalf, provides to the

recipient all FTA-authorized drug and alcohol testing results performed in the previous calendar year. This requirement still exists even when a contract expires within the calendar year and the contractor performed duties for just a portion of the calendar year. Whether a contract expires as planned or suddenly due to unforeseen circumstances, it is the responsibility of the FTA recipient to ensure that FTA-authorized testing results have been collected and will be reported to FTA by March 15.

In this Issue

- 2 [Are Your Managers Really Safety Sensitive?](#)
- 3 [Positive Rate Remains High](#)
- 5 [Pre-Employment Tests Reminder](#)
- 6 [Saliva Specimens & Confirmation Tests](#)



U.S. Department of Transportation
Federal Transit Administration

Are Your Managers *Really* Safety-Sensitive?

Company officials are safety-sensitive only if they perform one of the functions defined in 49 CFR section 655.4. These safety-sensitive functions are:

1. Operating a revenue service vehicle, including when not in revenue service;
2. Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
3. Controlling dispatch or movement of a revenue service vehicle;
4. Maintaining (including repairs, overhaul, and rebuilding) a revenue service

vehicle or equipment used in revenue service (subject to some exceptions); or

5. Carrying a firearm for security purposes.

A common misperception is that supervisors of safety-sensitive employees should be subject to DOT testing. Unless a supervisor also performs one of FTA's defined safety-sensitive functions, they are not covered by 49 CFR Part 655 and are not subject to drug and alcohol testing under FTA authority.

Employers sometimes include a general manager or other company officials in their random

testing pools because they could hypothetically be called upon to drive a revenue service vehicle in an emergency. Unless these company officials actually perform a covered function as part of their regular job duties, they should not be considered safety sensitive.

DERs are reminded that employees who occasionally perform a safety-sensitive function may only be sent for random, reasonable-suspicion, and follow-up alcohol testing just before, during, or just after the performance of such functions.

FTA Drug and Alcohol Compliance Audits Continue Remotely

FTA has resumed its Drug and Alcohol Compliance Auditing

Program after a postponement due to the Coronavirus (COVID-

19) public health emergency. At this time, audits are being conducted remotely, which allows FTA to continue its safety program consistent with federal, state, and local public safety guidance. It is vital FTA continue its auditing program to ensure oversight and technical assistance is provided to transit operations while employers confront a variety of challenges presented by the COVID-19 public health emergency. If you have any questions, please contact the FTA Drug and Alcohol Compliance Senior Program Manager Iyon Rosario at (202) 366-2010 or iyon.rosario@dot.gov.



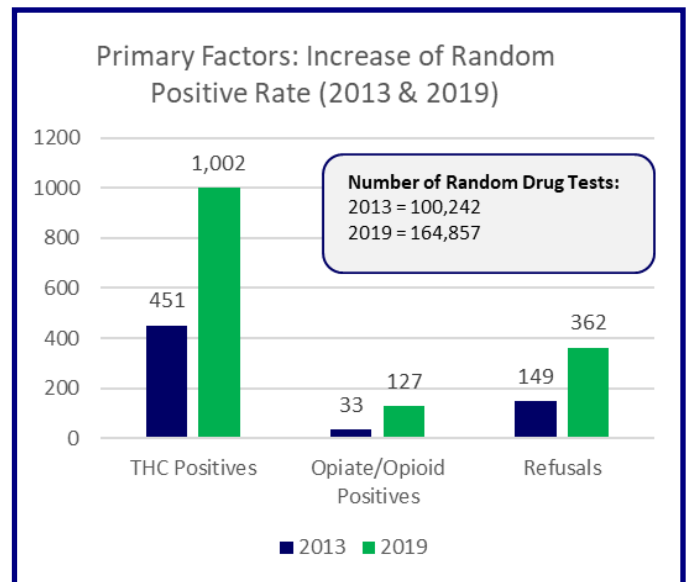
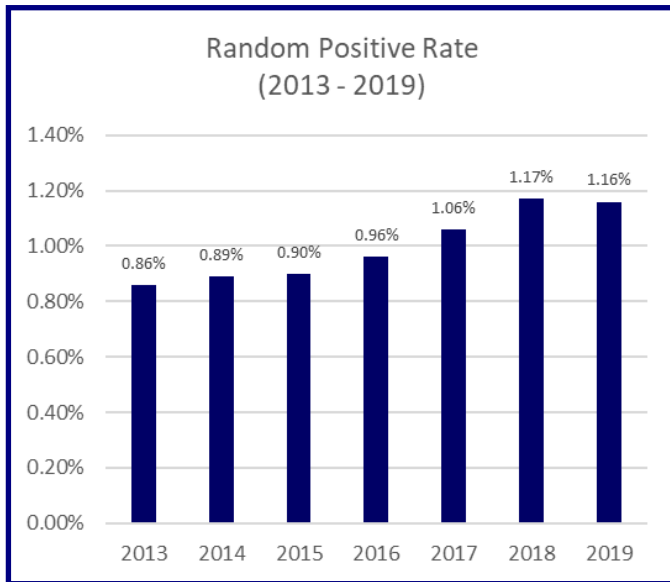
Credit: 123rf Techa Tungateja

Positive Rate Remains High

The transit industry’s random drug testing positive rate for 2019 is 1.16 percent. It is the third straight year that the positive rate has been above 1.0 percent, though it is the first time the rate has decreased from the previous year in seven years. Overall, the positive rate has increased by 35 percent since 2013 and there has

generally been an upward trend in the positive rate, though 2019 showed a slight decrease. The positive rate trended downward from an all-time high of 1.76 percent in 1995 for approximately 10 years before leveling off, and then began steadily increasing. Depicted in the second chart below are the primary causes of

the random positive drug rate increase. Since 2013, the number of random drug tests has increased by 64.4 percent, but the number of random drug tests positive for THC and opioids/opiates has increased by 122 percent and 142 percent, respectively, and random refusals have increased by 284 percent.



Former Employees with Violations

At times, a Designated Employer Representative (DER) will learn that a former employee who violated an FTA drug or alcohol prohibition has been hired into a new safety-sensitive position with a different employer. While the DER may be tempted to reach out to the new employer to advise them of the past violation, they are prohibited from doing so without the employee's specific

written consent, per 49 CFR section 40.321.

In cases when the DER does not have the consent required to release information about a violation to a gaining employer, the DER should contact Ms. Iyon Rosario, FTA Senior Drug and Alcohol Program Manager, at 202-366-2010 or via email at iyon.rosario@dot.gov.

DOT Agency MIS Data

The Office of Drug and Alcohol Policy and Compliance (ODAPC) has published the annual aggregate DOT agency drug and alcohol testing results. The data provided is aggregated to protect any commercially sensitive data or personally identifiable data furnished by an employer.

This information can be viewed or downloaded in an Excel spreadsheet by year and by DOT Agency from ODAPC’s website at https://www.transportation.gov/odapc/DOT_Agency_MIS_Data.

Non-Contact Responsibilities for DERs

As part of the verification process following a report of a positive, adulterated, substituted, or invalid drug result from a laboratory, a Medical Review Officer (MRO) may occasionally have difficulty contacting the employee. When this happens, the MRO's office will reach out to the DER and have the employee contact the MRO, as described in 49 CFR section 40.131(c).

DERs who receive such instruction must attempt to contact the employee immediately. In doing so, DERs must, to the greatest extent possible, keep the MRO's request confidential. A DER who successfully contacts the employee (i.e., actually speaks to them) must direct the employee to contact the MRO immediately. The DER must advise the employee, per 49 CFR section 40.131(d), that failing to contact the MRO within the next 72 hours could result in a verified positive result or a determination that the employee refused to test. The



Credit: 123rf Sebastian Gauert

DER must also document the date and time they contacted the employee and report this information to the MRO.

DERs must not inform any colleagues that they are seeking to contact the employee on behalf of the MRO. If the DER makes all reasonable efforts to contact the employee but fails to reach them, they may place the employee on temporary medically unqualified status or medical leave.

Reasonable efforts include a minimum of three attempts,

spaced over a 24-hour period, to reach the employee. The date and time of each attempt to contact the employee must be documented.

If the DER is unable to contact the employee within this 24-hour period, they must leave a message for the employee by any practicable means (e.g., voice mail, e-mail, letter) to contact the MRO, and then inform the MRO of the date and time of this attempted contact.

Virtual FTA Substance Abuse Seminars Available

FTA Substance Abuse Training Seminars are being held virtually via MS Teams. These free half-day training sessions provide an overview of FTA Drug and Alcohol regulations, program requirements, and current issues covering 49 CFR Part 655 and Part 40. The presenter is also available to take questions from attendees. The targeted audience for the seminars is anyone who administers and/or assists in administering an FTA-authorized testing program, with the goal of providing essential information to facilitate compliance with drug and alcohol testing regulations.

Scheduled trainings will be posted at <https://transit-safety.fta.dot.gov/DrugAndAlcohol/Training/> and interested attendees may register to attend.

If you are unable to attend the current schedule of sessions and are interested in scheduling a half-day training session, contact the FTA Drug and Alcohol Project Office at fta.damis@dot.gov or 617-494-6336.

FTA Drug and Alcohol Management Information System (DAMIS) Reporting

As a reminder, DAMIS reports with 2020 testing results should have been submitted by all FTA-covered employers by March 15, 2021. The FTA Drug and Alcohol Program Office will begin

contacting FTA grantees with incomplete submissions, or those who have contractors/subrecipients who have not reported.

If you need assistance completing your MIS submission, contact the FTA Drug and Alcohol Program Office at fta.damis@dot.gov or 617-494-6336.

DOT Prohibitions & State Drug Decriminalization

Several states have passed laws allowing for the medical or recreational use of marijuana. Oregon recently became the first state to decriminalize the possession of small amounts of heroin and methamphetamine, along with other drugs banned by the federal government. FTA reminds all stakeholders that these state laws do not in any way change DOT's prohibitions on drug use.

Per 49 CFR section 40.85, DOT continues to test for marijuana metabolites, cocaine metabolites, amphetamines, opioids, and phencyclidine (PCP). There are no changes at the federal level for drug testing, specimen analysis, and drug test verifications. A

laboratory's reporting of the presence of a prohibited drug or metabolite still requires the MRO to verify the results as they normally would, regardless of state laws. Drug and Alcohol Program Managers (DAPMs) must still treat all MRO-verified positive tests as DOT violations, requiring the immediate removal of an employee from the performance of safety-sensitive functions and referral to a list of Substance Abuse Professionals (SAPs).

For more on this subject, see ODAPC's Medical Marijuana Notice, available at <https://www.transportation.gov/odapc/medical-marijuana-notice>, and ODAPC's Recreational

Marijuana Notice, at <https://www.transportation.gov/odapc/dot-recreational-marijuana-notice>.

FTA Testing & Temporary Workers

49 CFR section 655.4 states that a "covered employee is considered to be performing a safety-sensitive function any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions." This definition would include those employees who perform safety-sensitive functions on a temporary or short-term basis. The safety-sensitive nature of work, while temporary or short-lived, still requires that the employee be subject to the requirements of 49 CFR Part 655.

Pre-Employment Tests Reminder

As transit systems begin operating at normal service levels and bringing back furloughed employees, the FTA Drug and Alcohol Program Office would like to remind employers to

ensure pre-employment testing is being correctly administered. Furloughed employees returning to duty who have not performed a safety-sensitive function **AND** who were removed from the

random testing pool for 90 or more consecutive days must have a negative DOT pre-employment drug test result prior to performing safety-sensitive functions.

Software-Generated Random Test Dates and Times

Many employers, or their Third-Party Administrators (TPAs), use a software program to make their random selections as required by section 655.45(e). In some cases, this software will also generate a suggested date and time for each

random test to occur in order to accomplish a reasonable and unpredictable testing spread. While these dates and times may be used as a guide to spread tests throughout the week and hours of the day in which safety-sensitive

functions are performed, it is important to note that they are suggestions. The DAPM should review each selected employee's work schedule and plan testing for that selection period accordingly.

Saliva Specimens & Confirmation Tests

Many employers and collection sites have increased their use of saliva specimens for alcohol tests during the COVID-19 public health emergency. Part 40's Subpart L mandates that saliva specimens only be used for alcohol screening tests. Should the result of a screening test indicate an alcohol concentration of 0.02 or greater, the employee

must take a confirmation test on an approved Evidential Breath Testing device (EBT), per 49 CFR section 40.253. A saliva specimen may never be used for a confirmation test.

Employers should have a plan in place to ensure any required confirmation tests can be conducted promptly. An employer whose primary collection site does not offer breath collections on an approved EBT should know ahead of time where a confirmation test would occur and how the employee would be transported to that location.

After waiting at least 15 minutes, the confirmation test must be conducted as soon as possible, but not more than 30 minutes after the screening test, as

described in 49 CFR section 40.251. If the confirmation test occurs at a different location other than the screening test, the travel time between sites counts towards the waiting period as long as the original technician documented on the Alcohol Testing Form (ATF) that they instructed the employee to not eat, drink, belch, or put anything in their mouth (e.g., gum) during the waiting period. If the technician performing the confirmation test did not conduct the screening test, they must require positive identification of the employee at the outset of the test, explain the confirmation procedures, and use a new ATF. They must also include a remark that a different technician conducted the screening test.

Regulation Updates

Produced By:

Federal Transit Administration
Office of Transit Safety & Oversight
1200 New Jersey Avenue, SE
4th Floor, East Building
Washington, DC 20590

Written by:

U.S. Department of Transportation
John A. Volpe National
Transportation Systems Center
55 Broadway
Cambridge, MA 02142

Cahill Swift, LLC
240 Commercial Street
Boston, MA 02109

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.