

15th Annual Drug and Alcohol Program National Conference a Success

The FTA Drug and Alcohol Program held its annual conference virtually this year in an effort to provide transit industry professionals the opportunity to connect, engage, and learn while still addressing safety concerns regarding the COVID-19 public health emergency. The four-day conference attracted over 2,000 attendees from across the United States. Many participants were attending their first conference, and expressed they enjoyed the virtual environment and appreciated the ability to partake as they had been unable to

previously due to travel budget and time constraints. Participants appreciated the ability to virtually network with fellow Drug and Alcohol Program Managers (DAPMs) and transit professionals as well as the access to Federal staff and industry experts.

Conference sessions received positive feedback from attendees. Please visit the Drug and Alcohol Program [webpage](#) for links to the presentation slides, as well as a list of other upcoming Drug and Alcohol Program training events.



Oral Fluids Testing for Drugs Still Not Allowed by DOT

DOT-regulated employers and their service agents were authorized to use the revised custody and control form (CCF), which was modified mainly to accommodate the use of oral fluid specimens in the Federal drug test program, beginning September 1, 2020. However, in its August 2020 [Guidance on the Revised Federal Drug Testing Custody and Control Form \(CCF\)](#), the Office of Drug and Alcohol Policy and Compliance (ODAPC) recommended laboratories not

mail any revised CCFs to DOT-regulated clients or their service agents until after June 1, 2021, in order to avoid confusion regarding whether oral fluid testing is authorized. Although this date has passed, employers are reminded that oral fluid drug testing is not authorized in DOT's current drug testing program. At this time, drug tests other than on urine specimens are not authorized for testing under 49 CFR Part 40.

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U.S. Department of Transportation
Federal Transit Administration

Management Information System (MIS) Results

Each Federal Transit Administration (FTA) covered employer (i.e., recipient, subrecipient, or safety-sensitive contractor) is required by 49 CFR section 655.72 to annually submit a summary of the results of its Antidrug and Alcohol Misuse Testing Program. For calendar year 2020, FTA collected submissions from 3,304 FTA covered employers with 281,598 safety-sensitive employees. Data was submitted through the ODAPC electronic DAMIS application. The following are highlights of the data collected for calendar year 2020.

Like many industries, the transit industry experienced a workforce reduction in 2020. Therefore, number of employees subject to FTA drug and alcohol regulation decreased by 10 percent. Whether it was through furlough, temporary layoff, or service limitations, the result was a reduction in the number of

FTA authorized drug and alcohol testing.

As expected, the total number of FTA-authorized alcohol screening tests conducted significantly decreased in 2020, with a reduction of 38 percent.

Most likely, the number of FTA-authorized alcohol tests conducted was impacted by guidance from many organizations warning of testing material contamination and the dangers of forced exhalation when conducting a breath alcohol test. ODAPC required service agents (Breath Alcohol Technicians and Screening Test Technicians) to continue to provide services to DOT-regulated employers if possible, and to do so in accordance with State or local mandates related to COVID-19.

Indicative of workforce reduction, the number of alcohol pre-employment tests decreased by 40 percent. The total number of FTA authorized pre-employment

drug tests conducted in 2020 saw a reduction of 20 percent.

The total number of FTA-authorized drug tests conducted in 2020 saw a reduction of 20.5 percent.

THC continued to be the most prevalent drug used by safety-sensitive employees, as it was detected in 77 percent of verified positives compared to 73 percent in each of the previous two reporting years.

Breath Alcohol Technicians Must Complete All of Step 1 on ATFs

FTA auditors' reviews of alcohol testing forms (ATFs) have revealed that some breath alcohol technicians (BATs) do not ensure Step 1 of the ATF is complete. Specifically, Step 1-C is sometimes missing required information. In this step, the BAT must record the employer's name and address, and the DER's name and phone number. Auditors have observed that this information is sometimes abbreviated or omitted, especially when the information is already on file at the testing site. FTA employers are reminded to review their ATFs to ensure they are accurate and completed in their entirety.

Stand-by and On Call Employees and Random Testing

Safety-sensitive employees who are available for either on-call or stand-by service are still subject to random testing if and when they report for duty. An employee may not be notified of the impending random test when called into work. Per 49 CFR section 655.45(i), the employee may be notified of a random drug test when they go

on-duty and may be notified of a random alcohol test immediately before, during, or immediately following the performance of a safety-sensitive function. An employee waiting at the office or at home to be called cannot be tested until that employee is on duty. The employee cannot be called in solely for the purpose of conducting a random test.

Drug and Alcohol Policies & 49 CFR Part 40

One of the most common issues FTA finds when conducting drug and alcohol audits is testing policies that are non-compliant because they describe provisions from 49 CFR Part 40 inaccurately, sometimes at length. For example, many policies describe in detail how urine specimens are processed by laboratories and define technical terms that may appear in 49 CFR Part 40 but have little practical use for covered employees.

While the employer has discretion when choosing what to include in a policy, any provisions from 49 CFR Part 40 must be written in a precise manner that is faithful to the language of the regulation. Additionally, because DOT updates 49 CFR Part 40

with some frequency, FTA-covered employers who choose to include technical details from that regulation in their policies must monitor regulatory changes closely, and then make any necessary revisions in a timely manner.

For those employers who prefer a succinct policy, FTA requires only a few key elements from 49 CFR Part 40 be conveyed. Specifically, the following four items must be covered in each policy:

- A statement indicating that all DOT testing will be conducted in accordance with 49 CFR Part 40.
- The employer's policy on the handling of dilute-negative test results, as discussed in 49 CFR

section 40.197(b)(2).

- For return-to-duty and follow-up testing, notice that all urine specimens will be collected under direct observation.
- A list of the behaviors that constitute a refusal to test, as found in 49 CFR section 40.193 and 49 CFR section 40.261.

The policy created by FTA's Policy Builder tool is an example of a simple and straightforward 49 CFR Part 655-compliant policy that maintains a streamlined approach to the discussion of 49 CFR Part 40 elements. This free resource is available at <https://transit-safety.fta.dot.gov/DrugAndAlcohol/Tools/PolicyBuilder/CreatePolicy.aspx>.

Pre-printing Step 1 of the DOT CCF

DOT requires in 49 CFR section 40.14 that employers provide urine collectors with nine specific pieces of information in order to conduct a DOT test, such as the employer name, Medical Review Officer (MRO) name, etc. DOT allows much of this information to be pre-printed on the CCF, and many laboratories and third-party administrators make use of this allowance to their clients' benefit. That said, when a pre-printed CCF has missing or incorrect information, all tests conducted with that batch of CCFs will have the same problem, potentially leading to numerous instances of non-compliance.

DOT allows the following five items to be pre-printed on the CCF:

1. Laboratory name and address.
2. Employer name, address, phone number, and fax number.
3. MRO name, address, phone number, and fax number.
4. DOT agency (checkmark in Step 1-D).
5. C/TPA name, address, phone, and fax number (if applicable).

DOT also requires in 49 CFR section 40.35 that the collector be provided the name and phone number for the designated employer representative (DER). This information can also be pre-printed in Step 1 of the CCF. FTA-covered employers are reminded to check their CCFs from time to time to ensure any pre-printed information is correct and current.

Referrals to Substance Abuse Professionals

After a DOT violation, employees and applicants must be provided a list of two or more locally available SAPs, as required by 49 CFR section 40.287. This is true even when employees are terminated after a violation or for applicants who won't be hired.

49 CFR section 40.281(a) lists the types of credentialed professionals who may seek to become SAPs (e.g., physician, social worker, psychologist). Besides having one of the required credentials, SAPs must have basic knowledge of and clinical experience in the

diagnosis and treatment of alcohol and controlled substances-related disorders; must be knowledgeable about the SAP function as it relates to safety-sensitive duties; and must be knowledgeable about 49 CFR Part 40, applicable modal regulations (e.g., 49 CFR Part 655) and ODPAC's SAP Guidelines. Finally, SAPs must also successfully complete the qualification training described in 49 CFR section 40.281(c) and fulfill the continuing education requirements set forth in 49 CFR section 40.281(d).

It is important to remember that not everyone with a qualifying credential is a legitimate SAP. Many counselors, therapists, and EAPs are not aware of DOT's rules and thus would be unable to compliantly serve as an SAP for 49 CFR Part 40's return-to-duty process. It is the employer's responsibility to verify that the professionals they refer employees and applicants to not only have an appropriate credential, but also have the required regulatory knowledge and qualification training.

Random Testing Excusals

Occasionally, an FTA-covered employer will find that they are unable to complete random testing for a selected employee. While FTA does not accept operational difficulties or inconveniences as suitable reasons for failing to conduct random tests, there are times where it is acceptable to "excuse" an employee from random testing. Generally, these include cases where the

employee's extended absence from work prevented the employer from testing them at any time during the selection period (e.g., extended vacation, medical leave). In cases where an employee is absent from work on the day the employer had initially planned to test them, FTA requires that further attempts be made to complete testing, as long as the employee returns to work—and the testing takes place—within

the random testing period for which the employee was selected. Should you find that you have a random test that cannot be accomplished because the employee is unavailable throughout the selection period, you must document the reason for the excusal, and maintain that documentation for at least two years, as required by 49 CFR section 655.71(b)(2).

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.

Towing and Post-Accident Testing

FTA has noted a misconception that the act of towing a vehicle after an incident is in-and-of itself a threshold for post-accident testing. One common example is the case where a vehicle's headlights are damaged at night



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and the vehicle is consequently towed from the scene because it is not drivable in the dark. While a tow truck is indeed usually involved in accidents where "disabling damage" is met as a threshold for post-accident testing, it is important to note that 49 CFR section 655.4 defines "disabling damage" as damage that prevents the vehicle from moving "in its usual manner in daylight after simple repairs."

The full definition of "disabling damage," found in 49 CFR section 655.4, also states the following:

"(1) Inclusion. Damage to a motor vehicle, where the vehicle could

have been driven, but would have been further damaged if so driven.

(2) Exclusions.

(i) Damage that can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlamp or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers, which makes the vehicle inoperable."

Electronic Records Must be Legible

49 CFR 40.33(e) allows for employers, TPAs, and service agents to maintain drug and alcohol testing records electronically. It is important to note that 49 CFR Part 40 emphasizes that all electronic records must be easily accessible, legible, and formatted and stored in an organized manner. If you, as an employer, are receiving testing records that are not legible, you should work with your service agents to ensure all information on the testing records is readable. 49 CFR section 40.33(e) also states, "if electronic records do not meet these criteria, you must convert them to printed documentation in a rapid and readily auditable manner, at the request of DOT agency personnel."

Alcohol Test Below 0.04 Not a DOT Violation

Having a DOT alcohol test result of 0.04 or greater is a DOT violation that requires the employee to be removed from safety-sensitive duty and referred to a Substance Abuse Professional (SAP). However, having a DOT alcohol test result of 0.02 to 0.039 is not a DOT violation. 49 CFR section 40.23 and 49 CFR section 655.35 require an employee with an alcohol result of 0.02 to 0.039 be temporarily removed from safety-sensitive duty. 49 CFR section 655.35 allows the employee to return to safety-sensitive duties once their alcohol concentration measures less than 0.02 or the start of their next regularly scheduled shift, as long

as it is not less than 8 hours from the time of the original test.

Employers are not prohibited from acting on alcohol test results of 0.02 to 0.039; however, this must be done under company authority and clearly stated in the policy.

It should also be noted that an employee with a result falling in this range must not be referred to an SAP, but may be referred to an Employee Assistance Program (EAP) or Substance Abuse Counselor. SAP is a term specific to DOT, and a referral, in this case, would inappropriately imply that the employee has violated a DOT regulation.

Contactless Dispatch

Due to the COVID-19 public health emergency, many businesses are shifting to contactless technologies, whether it be for delivery, payment, or some other transaction. The same is true with transit, where some employers have integrated “contactless dispatch” into their standard operating procedure. “Contactless dispatch” may allow an operator to check-in, access routes, keys, and vehicles and drive their vehicle out of the yard, with limited or no contact with dispatchers and supervisors. This model is beneficial in maintaining social distancing, but may have

an adverse effect on the ability to detect situations warranting a reasonable suspicion test.

49 CFR Part 655 has no restrictions with the “contactless” model as long as the employer adheres to the stated purpose of the regulation, which is to “prevent accidents, injuries, and fatalities resulting from

the misuse of alcohol and use of prohibited drugs by employees who perform safety-sensitive functions.”



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Security Cars Subject to Post-Accident Only When Carrying Passengers

49 CFR Part 655 defines “carrying a firearm for security purposes”

as a safety-sensitive function. Employees who perform this safety-sensitive security function may operate a security vehicle in the performance of their duties. In the past, FTA classified a security vehicle as an ancillary vehicle (a vehicle used in connection with keeping a revenue service vehicle in operation) thus subjecting the safety-sensitive operators of these security vehicles to DOT post-accident testing, should the security employee be involved in

an accident, as defined by 49 CFR section 655.4.

FTA has reviewed the definition of a typical security vehicle and determined it does not qualify as an ancillary vehicle and, as such, is not subject to post-accident testing requirements. The sole exception being if the security vehicle, when operated by the armed security employee, is transporting passengers and is involved in a FTA-defined accident.

Regulation Updates

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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.