FTA Drug and Alcohol
REGULATION UPDATES

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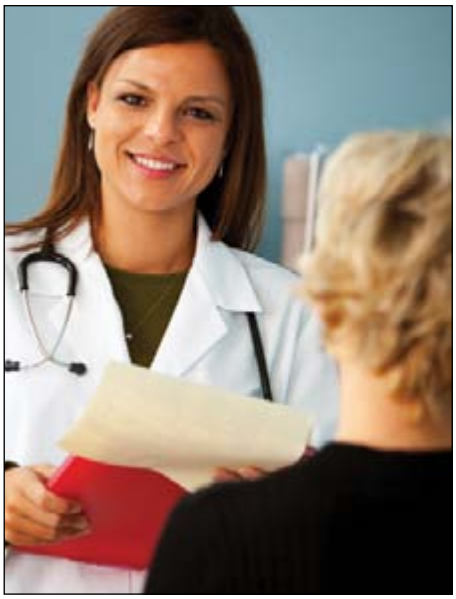
90-Day Pre-Employment vs. Return-to-Duty

One of the primary mechanisms by which the FTA assures the traveling public that covered employees are not performing safety-sensitive functions while under the influence of illegal drugs is the Department of Transportation's (DOT) pre-employment test. Where the random test acts as a deterrent to use and the post-accident and reasonable-suspicion tests act as detectors of use, the pre-employment test is a gatekeeper, showing that at the time of hire or transfer, the individual was not using illegal drugs.

"Return-to-duty tests are to be conducted using direct observation protocols."

The FTA declares the basic element of this requirement in 49 CFR Part 655, Section 41(a)(1), which states:



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"Before allowing a covered employee or applicant to perform a safety-sensitive function for the first time, the employer must ensure that the employee takes a pre-employment drug test administered under this part with a verified negative result." It is important to note that this is less about "hiring" an individual than it is about "allowing" someone (an applicant or employee) to begin performing actual safety-sensitive functions.

In order to further protect the public, the FTA reactivates this gatekeeper mechanism when a covered individual has been away from duty for an extended period, provided that they have been removed from the testing pool during that time. Section 655.41(d) states: "When a covered employee or applicant has not performed a safety-sensitive (Continued on page 2)

When is "No" a "Test Refusal"?

All applicants for employment in safety-sensitive positions or individuals being transferred into safety-sensitive positions must be given a pre-employment drug test and may not be assigned safety-sensitive functions unless the individual has a verified negative test result. Prior to conducting a pre-employment test, the employer must inform the applicant in writing of the testing requirement (§655.17).

If an applicant chooses not to go forward with the hiring process and therefore, chooses not to undergo the drug test, this is not a test refusal. However, if the applicant chooses to go forward with the test and the test commences (i.e., applicant accepts the collection cup from the collector), the applicant is required to comply with the testing procedures. Failure to do so at this time must be considered a test refusal.

To avoid confusion and possible loss of a good candidate, employers should explain the testing process to the applicant including the time commitment. The employer should inform the applicant that once the testing (Continued on page 3)

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Federal Tran it Ad i i tration

90-Day Pre-Employment vs. Return-to-Duty

(Continued from page 1) function for 90 consecutive calendar days regardless of the reason, *and* the employee has not been in the employer's random selection pool during that time, the employer shall ensure that the employee takes a pre-employment drug test with a verified negative result."

When a covered individual has violated a DOT testing regulation — by testing positive or refusing to test — the FTA and DOT have erected a much more potent gatekeeping process that must be passed before re-commencing safety-sensitive work. This is the DOT return-to-duty test.

The DOT, in Subpart O of 49 CFR Part 40, requires that an employee returning to safety-sensitive work after a violation "takes a return-to-duty test" and that he or she "must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties" (§40.305(a)).

In 2009, the Department enhanced the return-to-duty testing requirement by mandating that all DOT return-to-duty tests be conducted using direct observation protocols. In direct observation testing, a person of the same gender as the donor must physically watch the donor's urine leave the body and enter the collection cup. Because the individual submitting to the DOT return-to-duty (and follow-up) tests has previously violated federal anti-drug regulations, DOT believes (and the courts have upheld) that that person has a "diminished expectation of privacy," and may therefore be required to submit to this otherwise-intrusive observed testing.

For the first dozen years of FTA's testing regulations, it was quite common for Drug and Alcohol Program Managers (DAPMs) to inadvertently send an employee returning from an absence of more than 90 days for a "return-to-duty" test. The employee is, after all, "returning" from absence in order to go back to "duty." Until DOT implemented its direct-observation requirements in 2009, this was merely a paperwork oversight, its largest effect being a misallocation of test types in the annual Drug and Alcohol Management Information System (DAMIS) report. But with the introduction of direct-observation testing for return-to-duty tests, this error becomes much more significant. Now, when an employee returns from an absence of more than 90 days — be it for medical leave, a summer away, or a tour of duty overseas — a DAPM who inadvertently sends them for a "return-to-duty" test is also inadvertently requiring that someone watch them provide the urine sample for that test. Moreover, this policy or practice violates the Fourth Amendment of the U.S. Constitution, which states that the right of the People "to be secure in their persons … against unreasonable searches and seizures, shall not be violated …."

"In 2009, the Department enhanced the return-to-duty testing requirement."

In order to help prevent this serious oversight, DOT inserted into Part 40 a new section - §40.14 - requiring that the employer tell the collector "whether the test is to be observed or not" (§40.14(i)). This is in addition to §40.14(h), which requires that the type of test (e.g., return-to-duty) also be transmitted to the collector. These two pieces of information are intended to serve as mutually reinforcing instructions: if a "return-to-duty" test is requested, but the employer requests that it is "not observed," then the collector is prompted to investigate the discrepancy by contacting the employer.

As the employer, you can implement three practices to ensure that your employees are always subjected to the appropriate type of testing: first, adhere consistently to the requirements of §40.14 by informing the collection site every time you send an employee of the type of test and whether or not it is to be observed; the creation or adoption of a "notification" form or service-request form will go a long way in assisting with this requirement. A second method for preventing this type of critical error is implementing a procedure to consistently review incoming Custody and Control Forms (CCF). If you see in this review that "return-to-duty" was checked as the test type and/or the "Observed" box was checked, follow up with the collector to determine whether or not a breech occurred. Finally, be sure to closely review the statistical summaries that come from your Department of Health and Human Services (DHHS) approved laboratory every six months: if you have a no tolerance/no second chance policy or you see a number of return-to-duty tests in excess of your expectations, follow up. This goes for your Management Information System (MIS) report, too, as well as those of your safety-sensitive contractors. One of the first data sets that FTA analyzes in its review of MIS data is a correlation between return-to-duty and follow-up tests; if there are zero follow-up tests reported on your MIS, but one or more return-to-duty tests, there is evidence that you may be inadvertently sending employees for the wrong type of test and consequently, violating their right to privacy.

When is "No" a "Test Refusal"?

(Continued from page 1) process commences, he/she must complete the test regardless of other possible obligations or scheduling conflicts. The test is considered as started when the donor receives the sealed collection container, as per Part 40.63(d). Failure to do so will be considered a test refusal and will require disclosure to any future DOT-covered employers for the next two years (§40.25(j)).

Pre-employment Alcohol Testing Clarified:

Pre-employment alcohol testing is not required, but an employer may choose to conduct pre-employment alcohol testing under FTA authority if it is believed to be in the best interest of the transit system and public safety. Additionally, transit systems may choose to conduct pre-employment alcohol testing under FTA authority if encouraged to do so by a State or funding agency that requires pre-employment alcohol testing. The decision to conduct pre-employment alcohol tests must be consistent and reflect equal treatment for all covered employees.

If the employer chooses to conduct pre-employment alcohol testing, the testing must be conducted following procedures set forth in §655.42 and Part 40 Subparts J-N. The test can only be conducted after making a contingent offer of employment (or transfer to a safety-sensitive position) requiring a negative alcohol test result. The applicant must have a negative alcohol test (alcohol concentration of <0.02) before the individual is assigned safety-sensitive duties. The pre-employment alcohol test results must be reported on the employer's annual DAMIS report.

What Does It Mean to "Refuse a Urine Test?"

Applicants will be deemed to have refused a test if they do any of the following as defined in §40.191(a)(3-11) and §40.191(b):

- leave the collection site prior to completion of the test once the testing process has commenced;
- fail to permit the observation or monitoring of their specimen, if required;
- fail to provide a sufficient amount of urine without a valid medical explanation;
- fail to take an additional test, if required;
- fail to undergo a medical examination, if required;
- possess or wear a prosthetic device that could be used to interfere with the collection process;
- admit to the collector or Medical Review Officer (MRO) that they attempted to adulterate or substitute their specimen;
- fail to cooperate with any part of the testing process; or,
- MRO verification of an adulterated or substituted test result.

Sixty-Minute Training Lacking

FTA regulation 655.14 requires that each covered employer establish an education and training program for all covered employees. Included in this regulation is the requirement that each covered employee receive at least 60 minutes of training on the effects and consequences of prohibited drug use and on personal health, safety, and the work environment, as well as the signs and symptoms that may indicate prohibited drug use. Covered employees are required to have this training one time, and there is no regulatory requirement for refresher training. These requirements however, should be considered minimum.

Recent FTA compliance audits have found even the minimum requirement to be lacking. Audit findings have been issued for non-existent training programs, training that does not meet the 60 minute minimum requirement, and training that does not contain the requisite subject matter (covered in the *Best Practices Manual: FTA Drug and Alcohol Testing Program* — Revised 10/09 Chapter 3 or in the *Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit* — Revised October 2009, Chapter 5). Covered employers should be able to document the training content and the time allotted for the training.

New Ways Prohibited Drug Users Are Fooling Collectors

Prohibited Drug Users continue to be innovative and persistent in their attempts to beat a DOT drug test, requiring continued commitment and diligence of collectors. There is an astounding variety of products that are available to help mask prohibited drug use with new items hitting the market on a daily basis. Most of these devices and products will be thwarted if the DOT collection procedures defined in the *Urine Specimen Collection Guidelines* (http://transit-safety.fta.dot.gov/publications/order/singledoc.asp?docid=123) for all testing scenarios, as well as DOT's *10 Steps to Collection Site Security and Integrity* (http://transit-safety.fta.dot.gov/publications/order/singledoc.asp?docid=703) and DOT's *Direct Observation Procedures* (http://transit-safety.fta.dot.gov/publications/order/singledoc.asp?docid=1063) are followed precisely.

"Donors have found a way to substitute fake temperature strips with in-range readings for actual strips."

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Since collectors are the first, and arguably the most important, line of defense against cheaters, they should be diligent in their efforts to stay informed on the new and most popular products available to beat a test. The most common methods include dilution, adulteration, urine substitution, and use of masking agents (i.e., invalid test results).

Paying careful attention to the donor throughout the collection process including listening at the privacy enclosure door, controlling access to water, ensuring donor empties pockets, removing possible adulterants from the privacy enclosure, inspecting the specimen for unusual color, sediment, and smell, and checking the specimen's temperature have been essential components of the urine specimen collection process.

Now, we can add deception to the list of ways to beat a test. Even the simple act of checking a specimen's temperature has become more challenging as donors have found a way to substitute fake temperature strips with in-range temperature readings for actual strips. This allows donors to submit cold, substituted specimens without the extra challenge of trying to keep it within the acceptable temperature range. Donors can substitute a urine specimen (i.e., actual or synthetic), pour it into the collection cup while in the privacy enclosure, peel off the original temperature strip and replace it with a fake temperature strip with a green dot indicating a temperature between 90°F and 100°F pre-printed.

Collectors should be aware of this possibility and if a specimen appears cold to the touch, the temperature strip should be inspected to ensure its authenticity. If something does not appear right about a specimen, it should be scrutinized and noted in the Remarks section of Step 2 on the CCF. If a fake temperature strip is found, a new specimen should be collected under direct observation procedures (as per 40.61(f) (5) (i)) and the Designated Employee Representative (DER) should be contacted.

ODAPC Issues Strong Reminder of Regulatory Requirement

The DOT Office of Drug and Alcohol Policy and Compliance (ODAPC) reiterated four regulatory requirements for MRO contact information, laboratory result reporting, and MRO staff supervision in a program reminder issued on April 10, 2012. The STRONG REMINDER was directed to MROs, Consortia/Third Party Administrators (C/TPAs), collectors, and employers regarding regulatory provisions that are often overlooked or ignored. The four requirements are:

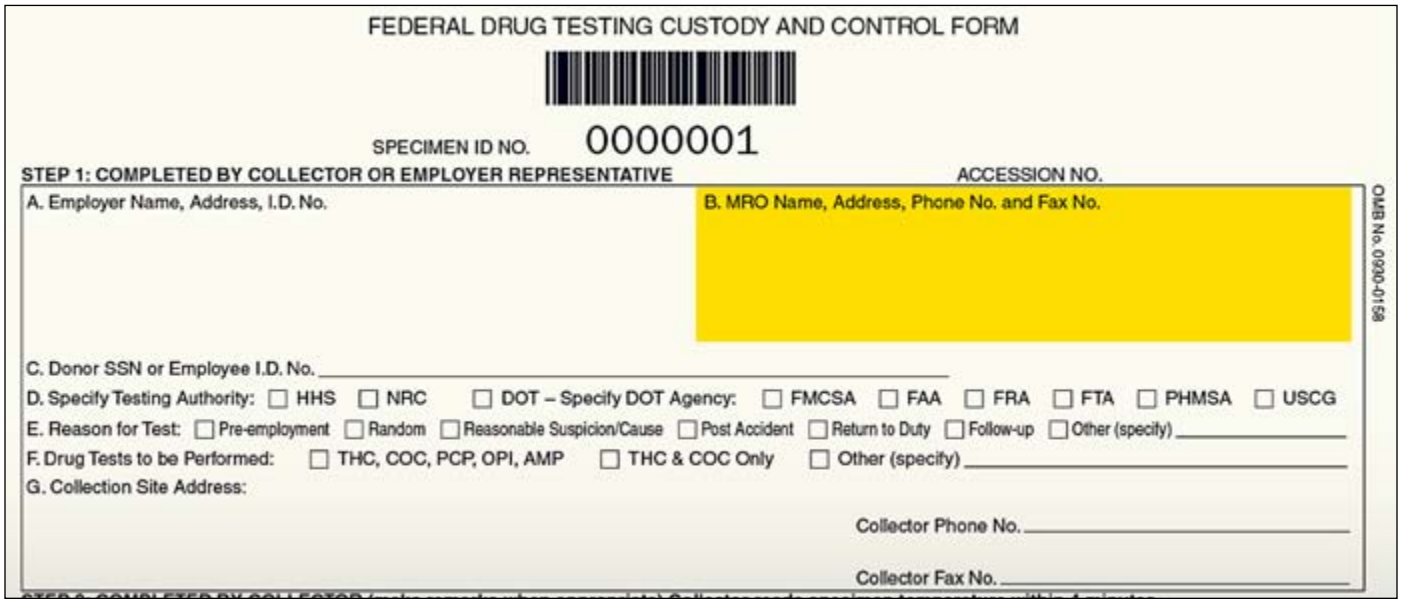
"Step 1B: make sure the correct contact information for the MRO is provided."

1. §40.14(f) and §40.45(c)(2) require that the MRO's name, address, phone number, and fax number must be provided in STEP 1B of the CCF and cannot be substituted with the C/TPA's information.
2. The MRO's address must include a number and street address. A post office box number can be provided in addition to the street address, but a post office box number only is not acceptable.
3. §40.355(b) and Part 40 Appendix F require that laboratory results go directly to the MRO and not through an intermediary or C/TPA.
4. The MRO's direct personal supervision of staff must be meaningful regardless of whether the staff are employed by the MRO or the C/TPA. The MRO must have hiring and firing authority over them for the work performed by the MRO. The preamble (§40.127) further explains that even though electronic communication is acceptable and supervision need not be physically face-to-face at all times, the MRO still must provide personal oversight of staff's work, have authority over staff decisions, and have regular contact and oversight concerning drug testing program matters. This responsibility cannot be delegated to anyone else.

Covered employers should purposefully review the employer copies of the CCF's they receive to ensure that all steps of the CCF are completed correctly. Specifically, Step 1B should be reviewed to make sure the correct contact information for the MRO is provided. Some common problems include the following:

- MRO services and TPA's have been listing P.O. boxes in step 1B;
- Incorrect or voicemail service phone numbers;
- TPA vendors listing their own information even though they are not directly affiliated with the MRO service;
- Listing the correct MRO name, address, and phone number, but the TPA's fax number.

In addition, employers should discuss laboratory result reporting procedures and MRO oversight procedures with their MRO or C/TPA to ensure compliance with these requirements.


FEDERAL DRUG TESTING CUSTODY AND CONTROL FORM

SPECIMEN ID NO. 0000001

STEP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

ACCESSION NO.

A. Employer Name, Address, I.D. No.

B. MRO Name, Address, Phone No. and Fax No.

OMB No. 0930-0158

C. Donor SSN or Employee I.D. No. _____

D. Specify Testing Authority: ☐ HHS ☐ NRC ☐ DOT – Specify DOT Agency: ☐ FMCSA ☐ FAA ☐ FRA ☐ FTA ☐ PHMSA ☐ USCG

E. Reason for Test: ☐ Pre-employment ☐ Random ☐ Reasonable Suspicion/Cause ☐ Post Accident ☐ Return to Duty ☐ Follow-up ☐ Other (specify) _____

F. Drug Tests to be Performed: ☐ THC, COC, PCP, OPI, AMP ☐ THC & COC Only ☐ Other (specify) _____

G. Collection Site Address:

Collector Phone No. _____

Collector Fax No. _____

K2/Spice: Education is the Key

Spice is a generic name for a number of herbal mixtures coated with a chemical compound that are known as "fake pot." K2 is the most common name, but it can also be sold as fake marijuana, Yucatan Fire, Skunk, and Moon Rocks, among other names. Sold as incense or potpourri online or in smoke shops, K2/Spice is a psychoactive chemical that is sprayed on a mixture of leafy herbs and spices and sold in three gram bags. The spiked herbal mixtures can come in several flavors including strawberry, watermelon, cotton candy, and pineapple.

Even though the effect of smoking K2/Spice may be similar to the effects associated with smoking marijuana, the substances are not related. The psychoactive ingredients are not natural and the full extent of toxicity to humans is not known.

Users experience rapid heart rates, drastically raised blood pressure, paranoia, vomiting, and hallucinations. A spice high can result in "couchlock" or the inability to move. It can also result in persistent

(© iStockPhoto/Burwell and Burwell Photography)

body numbness, lung irritation, severe and persistent headaches, blacking out, blurred vision, and anxiety. The drug can affect some users' neurological systems and can cause changes in behavior and perception. Users can also be very agitated. Extreme cases have resulted in seizures, trips to the emergency room, and death. Regular users report withdrawal and additional symptoms.

The dramatic difference and unexpected effects that users experience associated with these substances is due in large part to the unknown and varied composition of the chemical compositions sold as K2 and Spice. There is also the concern that some of these K2/Spice chemical compounds contain harmful heavy metal residues.

Since these substances are touted as safe and undetectable in a drug test, use of these products is escalating. Even though many states have banned these substances and the U.S. Drug Enforcement Agency (DEA) has listed five chemical compositions known to be used in K2/Spice in Schedule I of the Controlled Substances Act, new compositions are being created and the market is expanding. Education and communication continue to be our best strategy for combating this new danger to our employees and the riding public.

Sources of information, videos, webcasts, brochures, and other training aids are available at no cost or low cost from a variety of sources. Good sources include: www.drugabuse.gov; www.drugfreeworld.org; www.streetdrugs.org, and www.drugfree.org to name a few.

DOT Unveils Mock-Collection Video

The Office of the Secretary's Office of Drug and Alcohol Policy and Compliance (ODAPC) announced the release of a new video that demonstrates the steps necessary to conduct a mock urine collection. The video, titled "DOT's Mock Collection," can be viewed and/or downloaded from http://www.dot.gov/odapc/mock-collection.html.

Primarily intended for use by those who administer collection sites and conduct mock collections as a means of evaluating collection sites, this video also has merit as a training tool for collectors, DAPMs, safety-sensitive employees, and others who need to understand the collection process. The video demonstrates the steps necessary to conduct a urine specimen collection that complies with 49 CFR Part 40 Subpart E, including the preliminary steps in the collection process, completion of the CCF, specimen inspection, specimen preparation, and completion of the collection process. The video also address the procedures for non-normal collections: specimens with temperature out of range, specimens of insufficient volume, and collections requiring direct observation, as well as methods to detect donor efforts for beating a drug test.

Viewers of this video will be better equipped to assess the quality and compliance of collections and will be able to identify the need for corrective actions. The video also provides definitive video guidance on the required collection process; eliminating any perceived ambiguity or misinterpretation of procedures that may have clouded the evaluation process in the past.

The full complement of materials available for (Continued on page 7)

Second Chance vs. Zero Tolerance

The regulations that govern drug and alcohol testing in the transit industry (49 CFR Parts 40 and 655) allow each transit system to decide whether or not a zero-tolerance policy is adopted. Throughout the industry, there exist several different models to the approach.

First, zero-tolerance policies require that any employee who tests positive to either a drug or alcohol test be terminated. A second-chance policy allows an employee to remain employed, and allows them to return to safety-sensitive duties pending the fulfillment of an evaluation (by a Substance Abuse Professional (SAP)), the completion of the SAP's prescribed treatment, and the receipt of a negative return-to-duty test.

In a third category, transit systems are sometimes forced into a de facto second-chance program when the termination of the employee is based on a positive test, but a judge, arbitrator, or out-of-court settlement or agreement requires that an employee be returned to work, despite a positive drug test. In these cases, the employee must still be referred to a SAP, take and pass a return-to-duty test, and be placed into a follow-up testing program, and may be allowed to resume safety-sensitive duties pending satisfactory test outcomes and participation. While an employee may be ordered back to work by a judge, etc., only the ODAPC can overturn a test result certified as positive by an MRO. In some cases, the MRO may also overturn their own positive test result if additional information is brought to light, such as information confirming a prescription.

Transit systems must decide their position on second-chance/zero-tolerance policies and clarify that stance in their written policies. A common misconception among employers with a zero-tolerance position is that having a DOT-qualified SAP is not required. While it is true that an employee with a positive test can be terminated, the employer is still required to provide that employee with the contact information for a DOT-qualified SAP. Employers should note that there is no such thing as a DOT-certified SAP, only a DOT-qualified SAP. The FTA and U.S. DOT do not issue such certifications.

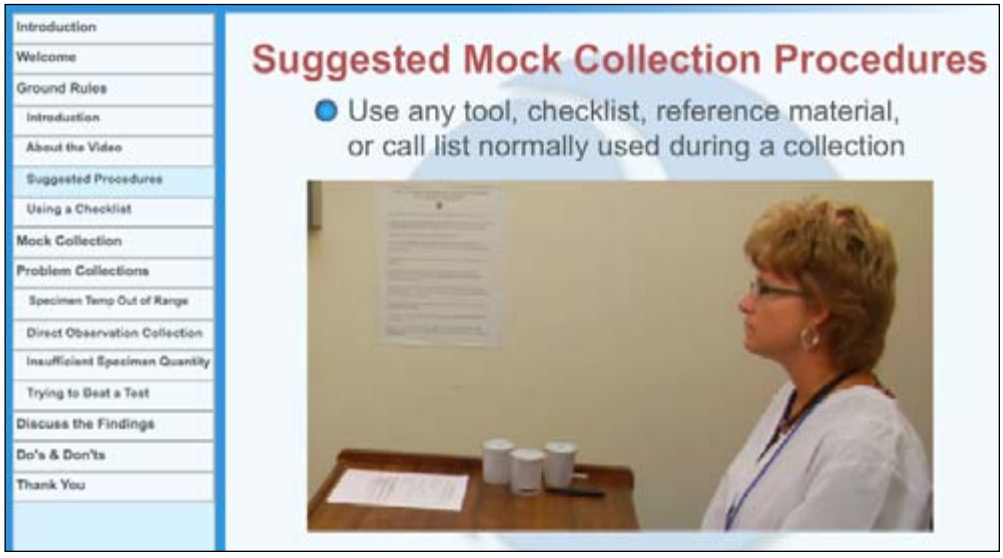
Employers adopt their various second-chance or zero-tolerance policies for any number of reasons. Some local boards and governing bodies carry over city, town, or county mandates requiring zero-tolerance. At other transit systems, a second-chance policy can be an element encouraged by local government or specifically by transit management. Individual philosophies guide each local employer, and the FTA is silent regarding each system deciding which program is best for them.

Transit systems may also change their position based on local changes in philosophy or direction. The FTA audit team has found transit employers who have switched from zero-tolerance to having a second-chance program, and others who have adopted a zero-tolerance program after decades of having a second-chance program.

DOT Unveils Mock-Collection Video

(Continued from page 6) those who evaluate collection sites include:

- 49 CFR Part 40 Procedures for Transportation Workplace Drug and Alcohol Testing Programs
- Urine Specimen Collection Guidelines
- DOT's 10 Steps to Collection Site Security and Integrity video
- DOT's Direct Observation Procedures



7th Annual Conference Another Success!

This year's participants to the 7th Annual FTA Drug and Alcohol Program National Conference was a mix of newcomers and regulars, including DAPMs, DERs, MROs, SAPs, TPAs, companies and representatives from Federal Motor Carrier Safety Administration (FMCSA), Federal Aviation Administration (FAA), United States Cost Guard (USCG), and Pipeline and Hazardous Materials Safety Administration (PHMSA). Participants traveled from 44 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands to attend the conference.

The first day was the pre-conference which offered specialized training for new DAPMs and Reasonable Suspicion Training. The second and third days of the conference included a variety of sessions giving the participants the opportunity to customize their conference experience to their specific interests and needs. Judging by the evaluations and verbal feedback speakers and conference staff have received, the participants were incredibly pleased with this conference, finding it highly informative and a great opportunity to meet and network with others in the industry.

Copies of the conference presentations can be downloaded from the Office of Safety and Security website. *http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training/NatConf/2012/sessions.aspx*

The FTA Drug and Alcohol Team is in the planning phases for the 8th Annual FTA Drug and Alcohol Program National Conference and are happy to announce that next year's conference will be in Phoenix, AZ!

Drug and Alcohol Training Schedule

The FTA will be sponsoring 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). These free one-day trainings are available on a first come, first served basis.

Location	Date*
Lincoln, NE	June 28, 2012
Anchorage, AK	August 8, 2012

For schedule information and to register for a training session 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.

Transit Safety Institute (TSI) Training Schedule

The Transportation Safety Institute (TSI) will offer the following upcoming courses: Substance Abuse Management and Program Compliance and the Reasonable Suspicion Determination for Supervisors. These courses will be offered on a cost-recovery basis. To receive more information about their courses, please call (405) 954-3682 and to register go to http://www.tsi.dot.gov or http://transit-safety.fta.dot.gov.

Title	Location	Date*
Reasonable Suspicion Determination for Supervisors Seminar	Birmingham, AL	June 22, 2012

** Schedule Subject to Change*

Semi-Annual Statistical Summary from the Laboratory

If you are a safety-sensitive employer who conducts more than five DOT drug tests each half year, you should be receiving a semi-annual statistical summary from each laboratory that analyzed at least five specimens for your company in that six-month period. Per 49 CFR Part 40.11, the due dates are January 20 and July 20 for reports covering the preceding six months. The format for the report is shown in the sample table to the right (see Appendix C of Part 40). ODAPC also receives an aggregate semi-annual master summary of testing activity from each of the HHS-certified laboratories.

As an employer, you may also wish to compare the number of laboratory positives against the number of MRO positives. If there are downgrades, you may wish to discuss with your MRO the requirement that the MRO inform the employer, "without the employee's consent" if medical information gathered in the verification process was (1) "likely to result in the employee being determined to be medically unqualified" or (2) if the medical information suggests that "the continued performance by the employee of his or her safety-sensitive position is likely to pose a significant safety risk." *(49 CFR Part 40.327 (a)(1) and (a)(2))*

Reporting Period: (inclusive dates)			
Laboratory Identification: (name and address)			
1. DOT Specimen Results Reported			(total number)
2. Negative Results Reported			(total number)
(a) Negative		(number)	
(b) Negative-Dilute		(number)	
3. Rejected for Testing Results Reported			(total number)
By Reason			
(a) Fatal Flaw		(number)	
(b) Uncorrected Flaw		(number)	
4. Positive Results Reported			(total number)
By Drug			
(a) Marijuana Metabolite		(number)	
(b) Cocaine Metabolite		(number)	
(c) Opiates		(number)	
(1) Codeine	(number)		
(2) Morphine	(number)		
(3) 6–AM	(number)		
(d) Phencyclidine		(number)	
(e) Amphetamines		(number)	
(1) Amphetamine	(number)		
(2) Methamphetamine	(number)		
(3) MDMA	(number)		
(4) MDA	(number)		
(5) MDEA	(number)		
5. Adulterated Results Reported			(total number)
By Reason		(number)	
6. Substituted Results Reported			(total number)
7. Invalid Results Reported			(total number)
By Reason			

Correcting your DAMIS Submission Until August

If you realize that your DAMIS submission needs to be corrected after it was submitted, you may still correct it until the database is closed in late August of this year.

To correct data, log back into DAMIS at http://damis.dot.gov using this year's user name and password and click on "Enter or Edit Your Data." A message will show that says "You have entered and signed the report. If you chose to edit the report, you have to re-sign it." Click on "Enter or Edit Your Data and Re-Sign it."

Then, make any necessary corrections in any of the sections. When completed, go to the Wrap Up tab and re-sign your agency's data.

Contractors and subrecipients making changes must notify their grantee that changes to the data have been made. The grantee will need to log back in to review and accept the newly submitted data.

DTAB Recommendations Have No Immediate Impact on DOT Drug Testing Programs

The Substance Abuse and Mental Health Services Administration (SAMHSA) established a Drug Testing Advisory Board (DTAB) to advise the SAMHSA Administrator and review SAMHSA's program for national laboratory certification for Federal workplace drug testing programs. This scientific council recommends areas of emphasis, proposes new directions and approaches for implementing recommended program changes. The DTAB also reviews specific science areas on new drugs of abuse and the methods necessary to detect their presence.

On July 13, 2011, the DTAB made two recommendations to expand the Federal Workplace Drug Testing Program. First, the DTAB recommended that SAMHSA include oral fluid as an alternative specimen to urine in the drug testing program. Second, the DTAB recommended the inclusion of additional Schedule II prescription medications (e.g., oxycodone, oxymorphone, hydrocodone, and hydromorphone) as part of the opiate portion of the five panel drug test. The expansion of the opiate panel to address the illicit use and abuse of these medications promises to limit their misuse and improve public safety. After the DHHS review, the SAMHSA Administrator approved both DTAB recommendations on January 26, 2012. As a result, the Mandatory Guidelines for Federal Workplace Drug Testing Programs will be modified to reflect these changes.

"DOT covered employers will not see the impact until the DOT completes the rule-making process and the changes are incorporated."

Even though the DOT is required by law to follow HHS procedures for controlled substances testing, DOT covered employers will not see the impact of these modifications until the DOT completes the rule-making process to conform with DHHS changes, and the changes are incorporated into the DOT regulation (49 CFR Part 40). The DOT process will include the publication of a Notice of Proposed Rulemaking (NPRM), comment period, review of comments, subsequent publication of a final rule, followed by an implementation period. This process is expected to take several months with a final rule not anticipated before 2013 or later.

Many in the industry welcome these changes and are anxious for their implementation. However, employers should note that efforts to implement these changes prior to publication of a final rule will make your program noncompliant. Updates on the rulemaking process will be provided in subsequent editions of this newsletter and can be found on FTA (http://transit-safety.fta.dot.gov) and ODAPC (http://www.dot.gov/odapc) websites.

When is a Vehicle in "Operation"? What is an "Accident"?

The FTA's drug and alcohol compliance has recently noted employers that believed that slip-and-fall accidents were excluded from the definition of an "accident" in regards to post-accident testing. As defined in the FTA regulation 49 CFR Part 655.4 Definitions, an "Accident means an occurrence associated with the operation of a vehicle, … (leading to death, injury, disabling damage to any involved vehicle, or the removal from service of a rail car, trolley car, trolley bus, or vessel)."

"The key word is 'operation,' and this word has never been completely defined."

The key word in the definition is "operation," and this word has never been completely defined but is not solely restricted to collisions. It is easier to define when a vehicle is not in operation than when it is. For instance, a vehicle is not in operation if it is in the shop for maintenance, and one of the mechanics suffers an injury during the process of vehicle maintenance. Such injuries are covered by Workers' Compensation but do not evoke DOT/FTA Post-Accident drug and alcohol testing requirements.

On the other hand, a vehicle is in "operation" if the operator makes a "short stop," avoids a collision, but a passenger slides (Continued on page 11)

When is a Vehicle in "Operation"? What is an "Accident?"

(Continued from page 10) off a seat, or falls while standing, and is injured and transported away from the scene. Post-accident testing would be required unless the responding supervisor determines "using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident." (49 CFR 655.44(2)(i)) If the supervisor reaches that decision, the decision "must be documented in detail, including the decision-making process used to reach the decision not to test." (49 CFR Part 655.44(d))

We can assume that a vehicle is in operation while en route in revenue service. Important in the definition, the accident must be "associated" with the operation of the vehicle. Thus, if an improperly parked bus is struck while it is stopped, resulting in injury or disablement, the accident is probably covered. The accident is "associated with the operation," i.e., the improper parking of the vehicle. The operator's performance is the "associating" factor and cannot be completely discounted as a contributing factor to the accident.

However, if a bus is properly stopped at a bus stop, and a passenger slips and falls boarding or alighting, then the personal casualty accident is not "associated" with the operation of the bus. Also the operator's performance could not have contributed. In this case, post-accident testing is not authorized under FTA regulations.

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The Status of Drug and Alcohol Management Information System (DAMIS) 2011 Reporting

The annual DAMIS reports for grantees, their contractors, States, and their subrecipients for the 2011 calendar year were due on March 15, 2012. On that date, approximately 90 percent of roughly 3,500 employers had submitted their data, the vast majority of data was submitted online (the preferred method of reporting).

Grantees and States who have not yet submitted their reports or who have not reviewed and accepted their contractor's and subrecipient's reports will receive late letters. The late letters will state that grantees and States are in non-compliance and that future funding may be subject for review if the data is not reported immediately.

If you have contractors or subrecipients that did not provide service in 2011, please contact the FTA Drug and Alcohol Project Office at (617) 494-6336 to remove the contractors and subrecipients from the database. Also, if you did not receive a reporting package this year with a new user name and password, please contact the number above. All FTA grantees and States that received applicable grant funding in 2011 are subject to report their DAMIS data.