

Popular EBTs Removed from Conforming Products List

On June 14, 2012, the National Highway Traffic Safety Administration (NHTSA) published its latest Conforming Products List (CPL) of Evidential Breath Alcohol Measurement Devices (Federal Register Volume 77, No 115, pp 35747-35751). This list is made up of instruments that meet the standards defined in the NHTSA model specifications. Only the make and models listed therein may be used as Evidential Breath Testing Devices (EBTs) for DOT alcohol tests conducted under 49 CFR Part 40.

The CPL published in June added nine new instruments to the list; more importantly, four instruments were removed from the list. The instruments that were removed have been widely used in the past among DOT-covered employers and still remain in use by some collection sites.

The instruments that were removed are:

**Lifeloc Technologies, Inc.
PBA 3000B**

**Lifeloc Technologies, Inc.
PBA 3000-P**

**Lifeloc Technologies, Inc.
PBA 3000 C**

**Lifeloc Technologies, Inc.
Alcohol Data Sensor**

These instruments were removed from the CPL because they were determined to be obsolete and are no longer manufactured or supported by the manufacturer.

Covered employers should consult with their Breath Alcohol Technicians to ensure that these pieces of equipment

are taken out of use and that only EBTs that are on the current CPL are utilized to conduct DOT alcohol tests. Tests that may have been conducted on these instruments after the June 14, 2012, effective date should be CANCELED.

Random alcohol tests using this equipment will not be considered valid tests and therefore, additional random alcohol tests may need to be conducted in subsequent selections on valid devices in order to ensure the required testing rate is met. In addition, all return-to-duty and follow-up tests must be rescheduled. Post-accident and reasonable suspicion tests where more than 8 hours have elapsed must be canceled and appropriate documentation placed in the file. ●

The “Drug-Before-Alcohol” Problem in Testing

Conscientious collectors and Drug and Alcohol Program Managers (DAPMs) always strive to ensure that breath-alcohol tests precede urine drug tests to the “greatest extent practicable” (49 CFR Part 40.61 and 49 Part 40.241), a requirement that exists because alcohol is processed by the human body much more quickly than illegal drugs. FTA audits, however, reveal that this requirement is often overlooked.

To illustrate the problem, a small sample of random tests and post-accident tests from recent audits were examined for this column. In our sample of random tests, 13 percent of the drug tests were incorrectly performed before the alcohol tests. For our post-accident sample, the drug test was (Continued on page 2)

IN THIS ISSUE

- 4 What to Do When Your Collection Site Is *Unable* or *Unwilling* to Do It Right
- 6 Reasonable Suspicion Testing: Impairment vs. Diagnosis
- 9 U.S. DOT’s Stance on Medical Marijuana



Department of Transportation
Federal Transportation Administration

The “Drug-Before-Alcohol” Problem in Testing

(Continued from page 1) incorrectly performed first in 23 percent of the events examined. (Note: the sample is not intended to be statistically representative. No valid industry-wide conclusions may be drawn from this data).

Why is this a Problem?

Per 49 CFR Part 40.209(b)(4), the error of conducting a drug test before an alcohol test may be considered “a delay in the collection process.” Under most circumstances, such delays last only a few minutes and will not have a “significant adverse effect on the right of the employee to have a fair and accurate test.” However, in some cases delays can be extensive. For example, if a collector initiates a drug test and the donor is unable to produce sufficient urine, the donor is given up to three hours to provide an adequate specimen. If an alcohol test occurs after a drug test with this kind of “shy-bladder” event, a potentially intoxicated employee will have

“If a test is flawed, the unreliability of the test may swing the decision to the plaintiff.”

been given ample time to significantly lower their Blood Alcohol Content (BAC).

Whether or not there is a long delay between a drug test that is followed by an alcohol test, such errors can create significant problems for transit systems in arbitration or litigation involving challenged tests. If a test is flawed because of an unexplained delay in testing, the lack of employer oversight and the unreliability of the test may swing the decision to the plaintiff. In random testing, this may result in an employee being reinstated with back pay and damages. In post-accident testing, an aggrieved party could reasonably claim that the delayed alcohol test reduced their

right to a fair and accurate test that would determine whether a transit employee was impaired at the time of the accident.

What Can I Do about It?

To protect yourself and public safety, “as a collector, laboratory, MRO, employer or other person administering the drug testing process, you must document any errors in the testing process of which you become aware, even if they are not considered problems that will cause a test to be canceled.” (40.209(a)) As part of their oversight of collection sites, DAPMs should always check Alcohol Testing Forms (ATFs) and Custody and Control Forms (CCFs) and note the time of each test. If a drug test has occurred before an alcohol test, immediately contact the collector site to seek an explanation. If your collection site regularly conducts drug tests before alcohol tests, speak with a manager at the site to explain your concerns and request that collectors be properly trained. ●

To avoid delays in the collection process, collectors should perform an alcohol test first.



1

“Breath-alcohol tests precede urine drug tests because alcohol is processed by the body more quickly than illegal drugs.”



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Reclassified Tests Should Be Reported

Employers covered under the FTA regulations (49 CFR Part 655) are permitted to conduct additional testing under their own authority as long as employees are notified under whose authority the test is being conducted. The non-DOT tests need to be conducted completely separate from DOT tests in all respects. The non-DOT test can only be performed using a Non-Federal Drug Testing CCF using a separate void. You are prohibited from using a Federal Drug Testing CCF for non-DOT urine collections. Similarly, a DOT test can only be performed on a Federal CCF.

Occasionally, an error will be made and the wrong form will be utilized for

the type of test being conducted. In some cases, the collector simply picked the wrong form for the collection or the employer did not adequately notify the collector of the type of test to be performed. In these cases, the collector can correct the mistake through the use of a Correction Affidavit that explains the misuse of the forms. In the case of a Non-Federal Drug Testing CCF incorrectly used for a DOT test, the error can be corrected as long as the form that was used included the same information that is on the Federal Drug Testing CCF and was tested at a SAMHSA-approved laboratory.

If, at a later date, the employer

realizes that the circumstances that warranted the test did not actually meet the FTA criteria for a DOT test and the test is **non-negative**, the employer can only reclassify the test to a non-DOT test with the concurrence of **Jerry Powers** in FTA's Office of Safety and Security. Mr. Powers can be contacted at (617) 494-2395 or at Gerald.Powers@dot.gov.

Requests for reclassifications will be closely scrutinized to determine if the reclassification is warranted. Efforts to circumvent the FTA drug testing regulations by reclassifying DOT tests to non-DOT to avoid non-negative test consequences are not acceptable. ●

Ten Most Common Prescription Medications Used By Transit Employees

Data collected from 461 rural transit safety-sensitive employees in Indiana provided insight into the types and extent of prescription and over-the-counter medications used in the transit industry. The baseline data collected as part of the Indiana Medical Qualification Program Before and After Study completed in May 2012 showed that, on average, Indiana's rural transit employees reported the use of over 6.5 medications. Collectively, 494 individual medications in 81 classifications were disclosed; the 461 employees reported more than 3,000 medications used.

This list is not surprising given the prevalence of hypertension, allergies, arthritis, musculoskeletal problems, respiratory disease, and back pain that are common in the transit workforce. Some of these medications, including the antihypertensives, diuretics, antihistamines,

The top 10 classifications of medications reported were:

- 1 Antihypertensives
- 2 Antihyperlipidemics
- 3 ASA-Cardiac
- 4 Antidiabetic Oral
- 5 NSAIDS
- 6 GERD/H2 Blockers
- 7 Antihistamines
- 8 Antidepressants
- 9 Analgesics (non-narcotic)
- 10 Asthma/Bronchodilators

antidepressants, and bronchodilators, are known to have side effects that can impair driving ability. However, when taken as

directed and as part of a comprehensive treatment plan, the threat that most of these medications pose to the transit employee's ability to perform job duties safely can be mitigated. To do this employees must proactively work with their treating health care professionals (HCPs) to ensure that the course of treatment adequately takes into consideration the safety-sensitive nature of their job.

Given the extent of drug combinations reported, an additional concern is the significant impairing effect that could result when multiple medications are taken. It is imperative that safety-sensitive employees disclose all medications taken to their HCP to ensure that each medication, when viewed on its own and in combination with others, will not impact the employee's ability to perform safety-sensitive functions. ●

What to Do When Your Collection Site Is *Unable* or *Unwilling* to Do It Right

“Investigate alternate sites.”

As an employer covered under the FTA’s drug and alcohol testing program, you are ultimately responsible for ensuring that all aspects of the drug testing program comply with 49 CFR Part 40. Even though you may hire one or more service agents to perform the testing functions, you cannot delegate the responsibility for compliance. Neither can you assume that just because you have hired a seemingly reputable service that they are in fact performing these functions in compliance with the regulation. Experience has shown that employers’ compliance can be compromised by service agents that are unwilling or unable to perform testing functions as required by the regulation.

Have you fallen victim to a collection site that does not meet or who violates applicable requirements and procedures required in the regulation? The only way to know is by actively monitoring your collection site(s) including comprehensive review of the CCFs, reviewing collector credentials, ensuring proper corrective actions are taken when mistakes are made, investigating causes of canceled tests, and following up when things don’t seem right. Do not be intimidated by self-assured collection site personnel or defer to their expertise because they are “the professional” if you know or suspect that a procedure might not be followed



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correctly. Utilize the regulations, “[The Urine Specimen Collection Guidelines](#),” [U.S. DOT videos](#), and other available resources as support when discussing your concerns and/or requiring corrective actions be taken as appropriate.

If you determine that your collection site is unable or unwilling to conduct collections in compliance with the regulations, investigate alternate sites. Note that any restroom can be made into a collection site and that collection personnel have to be trained on the regulations but are not required to have any additional medical qualifications. In other words, your search for a collection site does not have to be limited to a hospital, clinic, urgent care facility, doctor’s office, or other medical facility. The following tips may help:

- Use an Internet search engine to look for DOT collectors in your community.
- Check local telephone directories for hospitals, clinics, occupational health specialists, urgent care facilities, etc. If they don’t conduct DOT collections, they might know who does.

- Check the National Registry for Medical Examiners. This new registry will list health care practitioners that are qualified to perform Commercial Driver’s License (CDL) physicals. Even though DOT collections are not a requirement to be on the Registry, it is likely that this would be an additional service that might be provided.
- Contact other employers within your area that are also required to have compliant DOT collections. Look for employers that have employees required to have CDLs such as trucking companies, intercity bus carriers, school bus companies, local state DOT district offices or maintenance facilities, or county or city public works departments. Also, local airport or railroad facilities could be an additional source.
- Check with your local health department or social service agencies (e.g., senior centers). Many have nurses or (Continued on page 5)

What to Do When Your Collection Site Is *Unable* or *Unwilling* to Do It Right

(Continued from page 4) health care providers on staff or on-call. These agencies may be willing to perform collection services for you.

- Identify retired or off-duty nurses that might be willing to be on-call and can come to your facility to conduct the tests.

- Utilize existing staff of the employer. Note that the immediate or direct supervisor of an employee may not serve as a collector for the employee being tested, but that other employer personnel outside of the direct chain of command may.

Often, employers feel helpless

when they find their current collection site is unsatisfactory and believe that they have few, if any, other options. Though alternatives may not be readily apparent, additional diligence and expanding the scope of your search to look beyond medical facilities will usually result in a workable option. ●

Cab Companies: Best Practices for Oversight

Many transit systems partner with taxi companies because such partnerships provide a practical and efficient means to improve the extent of local service. Profitable as these relationships may be, they often create puzzling questions for DAPMs charged with their oversight. Many of these questions are clarified under the Supplementary Information preamble to 49 CFR Part 655 and several interpretation letters from FTA's Office of Chief Counsel. <http://transit-safety.fta.dot.gov/drugandalcohol/regulations/regulations/default.aspx>

One of the most common questions is whether or not a cab company must conduct drug and alcohol testing under FTA's rules. Per the Part 655 preamble and other FTA rule interpretations, cab companies are required to administer covered testing only if they stand in the shoes of a transit system receiving federal transit funds. This provision applies to cab companies that have entered into a contract with a transit system to provide regular service. Cab companies are exempt from FTA's rules if they provide only incidental service. They are also exempt if patrons are able to select their own cab service at random and then pay for their ride with a subsidized voucher.

Thus, FTA gives grantees the option to test taxi operators based on how the service is selected.

DAPMs working with covered taxi companies regularly contend with practical difficulties in their oversight efforts. High turnover, limited training resources, unpredictable or infrequently covered trips, and the prevalent use of indepen-

“The most successful cab companies have someone on staff who understands the seriousness of drug and alcohol testing.”

dent drivers all create challenges for the successful implementation of drug and alcohol programs. Common problems include sending employees for pre-employment tests when they never perform FTA-covered work, dispatchers who are unaware of when employees are performing safety-sensitive duties, sending employees for random tests in a timely fashion, post-accident testing determinations, and failure to distribute compliant drug and alcohol policies to

relevant personnel.

FTA audits have consistently shown that compliant taxi companies enjoy collaborative oversight from their transit systems. The most successful cab companies have someone on staff who understands the seriousness of drug and alcohol testing and who takes on the responsibility to run an effective program. The best transit systems ensure that such a person is in place before finalizing any new contracts. Once a new program is established, it is essential to actively monitor it. It is also beneficial to share knowledge, such as when a transit system reviews their taxi company's drug and alcohol policy statement to make sure it is appropriately updated to address new FTA requirements. Another best practice is to share resources. For example, any time a transit system conducts safety trainings, it is worthwhile to give advance notice to the taxi company and invite them to have their covered employees or supervisors attend. Proactively engaging taxi companies in this way enables them to more easily operate in compliance, underscores the transit system's concern for safely transporting the public, and serves as a reminder that the cab company's performance is being monitored. ●

Reasonable Suspicion Testing: Impairment vs. Diagnosis

If you have been involved with transit for any length of time, you will have heard of reasonable suspicion testing, not only from the regulations (49 CFR Part 655.43), but anecdotally as well. While most Designated Employer Representatives (DERs) and DAPMs have heard of reasonable suspicion tests being conducted, an actual referral to test is statistically rare. For example, in 2011 over 95,000 random tests were conducted nationwide for FTA-regulated employers, but during the same period, only about 530 reasonable suspicion tests were conducted.

Because reasonable suspicion tests are not part of the predictable day-to-day (or even annual) operations of a transit system, they can often be overlooked. Reasonable suspicion training also tends to focus on the specific effects of each drug in the DOT five-panel test. While this is required training outlined in the regulations, it should be considered a component in your overall safety program. 49 CFR Part 655.14(b)(2) states: "Supervisors and/or other company officers authorized by the employer to make reasonable suspicion determinations shall receive at least 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use and at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse."

Knowing the signs and symptoms of drug use and alcohol misuse is the foundation to the reasonable suspicion program, and implementing an effective and fair program requires some planning.

The reasonable suspicion testing category is designed to provide a mechanism for preventing impaired (or reasonably

suspected as impaired) employees from performing safety-sensitive functions. As a DAPM, you are a central component in this effort, and your supervisors and other company officials are the front line. If an employee is behaving oddly and you suspect impairment, a face-to-face evaluation is required. During that evaluation, if you are unable to match their signs, symptoms, or behaviors to those you learned about in training, the reasonable suspicion test may still be ordered. Your focus should be detecting impairment, and not attempting to accurately diagnose which of the five substances an employee may have used. An employee's impairment can be from cocaine, marijuana, phencyclidine, opiates, amphetamines, or alcohol. Also likely, is that the impairment can come from fatigue, prescription or over-the-counter drugs, allergies, severe personal distraction, or mental or physical health issues. You should not feel obligated to determine from your evaluation the exact cause, though it may reveal itself during the discussion. Your primary concern should be determining if the employee is impaired, and thus unable to perform a safety-sensitive function properly. If during your evaluation, you

are unable to pinpoint the cause of the impairment, you must still order the test. The laboratory will determine the impairing/illicit substance, if present, but your determination of impairment is reasonable enough to order the test.

During the course of the FTA's audits it has been determined that, in some cases, supervisors were reluctant to order reasonable suspicion testing because they were unable to determine with certainty what substance may have been the cause of the impairment. It is important to remember that the test is called reasonable suspicion and not empirical determination. Uncertainty can and will be a legitimate part of the evaluation process because DAPMs and supervisors rarely have the luxury of an open-and-shut case. Documenting what you see, hear, and what you are told by the employee is the second step in the process.

In general, reasonable suspicion tests have mostly been conducted at large, urban, transit agencies and rarely conducted at small, urban or non-urban agencies. In fact, only 200 entities reported reasonable suspicion testing results in their management information system (MIS) annual reporting, out of 3,400 reporting entities. Overall, reasonable suspicion positive rates run at approximately 10 percent for drugs and 16 percent for alcohol, from year to year. However, the test can often lead to fitness-for-duty medical qualification rechecks and MRO safety warnings to the employer due to downgrades as a result of valid prescription use. Regardless, all of these results will have a positive effect on both safety and employee wellness. ●



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Weekend and Off-Hours Testing

Creative Solutions:

If you have ever attended an FTA one-day training, the National Conference, or have participated in an FTA Drug and Alcohol Program Audit, you are aware of the importance of spreading random testing throughout the year, days of the week, and hours of the day during which safety-sensitive duties are performed. The FTA emphasizes this requirement because it is pivotal both in providing a deterrent as well as detecting use in the safety-sensitive population. Also, spreading tests out is possible in transit as operations are local as opposed to long-haul trucking or maritime operations.

49 CFR Part 655(g) states:

“Each employer shall ensure that random drug and alcohol tests conducted under this part are unannounced and unpredictable, and that the dates for administering random tests are spread reasonably throughout the calendar year. Random testing must be conducted at all times of day when safety-sensitive functions are performed.”

While it is easy for the regulations (and the auditors) to require this, many transit systems are at the mercy of their local providers to offer these services, and when the collection site closes, testing will not occur. Transit systems cannot require that a private business remain open late, open early, or be available on weekends. FTA recognizes that this can impact a transit system’s drug and alcohol program compliance.

Throughout the history of the audit program, the audit team has found that collection sites and transit systems have

come up with numerous creative fixes for this limitation.

1 Scheduling random tests for early/late hours and weekends

If a transit system determines that it will require several late night, early, or weekend tests per year, many collection sites are willing to accommodate this if they are scheduled ahead of time. With as much notice as possible (including when you receive your selection list), you can alert the collection site that you will need one or more off-hours tests during that quarter. Generally, a collection site will accommodate a specific request with advance notice.

2 Offer a higher rate for the off-hours and weekend tests

If the collection site is hesitant to provide this service, transit systems have been successful in offering an additional fee for the scheduled tests. For the majority of smaller transit systems, one to three early or late tests per year is often adequate, so the increased cost will be minimal.

3 Mobile collections

Seek out a bid or estimate from a mobile collector. If one is not in your area, contact the closest one, even if they are far away. Many transit systems have explained their situation to mobile collectors, only to find that the collector regularly makes weekend or evening stops nearby thus solving the problem. The price of mobile collection may be high, but the deterrent effect of last-hour or first-hour random testing will be substantial.

4 Create the service by special arrangement

Your collection site facility is not trained to conduct drug or alcohol tests,

it is the individuals who are trained. Some transit systems have been successful in approaching an individual collector with whom they feel comfortable and asking if they, and not the business, would be willing to be on-call or to provide weekend or first or last-hour random testing at the transit system, effectively making the collector an on-site drug testing contractor. The transit system pays the collector directly, and the collector only needs to secure the bathroom/enclosure. For a drug test, there are no facility requirements that cannot be met, and the only equipment needed is a water source for washing hands, a toilet, a clean surface for writing, Federal CFCs, the testing kit, a pen, and access to a shipping drop box. Many collectors would be happy to provide private service if their employer is unwilling. This arrangement has actually led to several very successful mobile collection businesses getting their start.

5 Become a collector yourself

As long as you are not a direct supervisor (49 CFR Part 40.31(c)), you or another company official may be trained to provide the collections. This has been especially effective when employing saliva swabs for random alcohol screening, as the training route for Saliva Test Technician is relatively simple. While this requires training, it may occasionally allow you to provide coverage for not only off-hours and weekend random testing, but also post-accident testing during times when all of your collection facilities are closed.

Having a compliant program means being able to provide testing anytime safety-sensitive duties are being performed. If you are limited in your ability because of a collection site, you may be able to use the above tips to fulfill the requirement. ●

Consistency Is Critical

Every employer covered under FTA's drug and alcohol testing regulation must have a compliant policy on prohibited drug use and alcohol misuse, including the consequences associated with both (§655.12). Your policy should provide you with directions on how to administer your drug and alcohol testing program and should inform each covered employee of the required procedures, elements, prohibited conduct/behavior, and consequences of the drug and alcohol testing program.

Care should be taken when creating and updating your policy to ensure that the consequences defined in the policy reflect and are consistent with the employer's philosophy, past practice, and other employee handbook and human resource policies. Additionally, DAPMs should make sure that system management understands and is in agreement with the practical realities of the provisions set forth. All decisions regarding the administration of the drug and alcohol testing procedures with your agency must be made in accordance with your local substance abuse policy and be consistent.

Avoid making exceptions to your policy in any case as these decisions may be perceived as arbitrary or biased.

Management should avoid making exceptions to your policy in any case as these decisions may be perceived as arbitrary or biased. A zero-tolerance policy that requires the discharge of an employee who tests positive or refuses a test should be followed consistently regardless of the operational or political implications of the decision. To retain an employee who tested positive because he or she is well liked, has special skills, or would be hard to replace (i.e., a specialized mechanic) while discharging

others, compromises the integrity of your program and could result in claims of unfair labor practices. This could also establish a past practice making it difficult to enforce your zero-tolerance policy in the future.

Similarly, additional provisions should not be added to your program without first being formally added to your policy, adopted by your governing board, and communicated to your employees and representatives of employee organizations.

Your policy should be reviewed periodically to ensure that it remains compliant with the regulation, but also to ensure that it accurately reflects the current philosophy of management, human resources, the governing board, current collective bargaining agreements, past experience, and operating environment. Policy issues can often be avoided if the governing board, transit management, and covered employees understand the policy and its implications for day-to-day operations and are committed to consistent, fair, and impartial implementation. ●



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U.S. DOT's Stance on Medical Marijuana

Although some states allow the use of medical marijuana, the U.S. DOT finds it is not a valid explanation for a safety-sensitive employee's positive drug test. Transit agencies that reside in states that allow medical marijuana often call the FTA Drug and Alcohol Project Office about this issue, but US DOT/OPDAC remains firm in its stance.

The DOT's Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) – does not authorize medical marijuana under a state law to be a valid medical explanation for a transportation employee's positive drug test result.

Therefore, MROs will not verify a drug test as negative based upon information that a physician recommended that the employee use "medical marijuana." Please note that marijuana remains a drug

listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety sensitive employee subject to drug testing under the DOT's drug testing

regulations to use marijuana.

For the full notice, please see <http://www.dot.gov/odapc/documents/medicalmarijuanainotice.pdf>. ●



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How to Update Your Contractor List for Annual MIS Reporting

As an FTA grantee, your safety-sensitive contractors (should you have them) may change from year to year. When the FTA Drug and Alcohol Project Office sends your annual reporting package in December of each year, you are provided a user name and password to submit Drug and Alcohol MIS (DAMIS) testing results online at <http://damis.dot.gov>. From this site, you may also view and download the user names and passwords of your safety-sensitive contractors.

The FTA Drug and Alcohol Project Office bases your contractor list on your previous year's reporting submission. If your contractor list has changed, you must provide our office with this information so we can update your information in the database and provide you with user names and passwords for new contractors and deactivate those contractors for whom you no longer had an agreement. You may do this by emailing us at fta.damis@dot.gov or by calling our hotline at (617) 494-6336. ●