

## New Acting Program Manager of FTA Drug and Alcohol Program

Iyon Rosario has been named the Acting Program Manager of the Federal Transit Administration's (FTA) Drug and Alcohol Program. She replaces Jerry Powers, who left his position in late April to work for the Federal Railroad Administration's (FRA) Drug and Alcohol Program.

Ms. Rosario has been a federal employee in the transit industry for over 20 years; most of those years she has worked in the Office of Safety and Oversight, formerly the Office of Safety and Security at the FTA.

In her role as a transportation safety specialist, Ms. Rosario served on several U.S. Department of Transportation

(DOT) working groups. Her most recent appointment was on the DOT Distracted Driver working group.

Ms. Rosario has overseen several initiatives within the Office of Safety and Oversight, such as serving as the

**“Ms. Rosario began working with the FTA Drug and Alcohol program back in 1995, and was part of the original audit team with the program until February 2003.”**

Designated Federal Officer (DFO) for the Transit Rail Advisory Committee for Safety (TRACS) until April 2013, as well as the program manager for the Safety Awareness Campaign in partnership with Operation Lifesaver.

Ms. Rosario began working with the FTA Drug and Alcohol program back in 1995, and was part of the original audit team with the program until February 2003.

Ms. Rosario brings her strong commitment to public safety to the FTA's Drug and Alcohol Program. ●

---

## Keynote Speaker Swart Stresses DOT's Position on Medical Marijuana at National Conference

On April 9th, 2013, the Director of the Department of Transportation's Office of Drug and Alcohol Policy and Compliance (ODAPC), Jim Swart, spoke at the FTA Drug and Alcohol Program National Conference in Phoenix, AZ, to an enthusiastic crowd of transit, substance abuse, and industry leaders.

He spoke of the program's history and detailed the DOT's program goal to “Ensure Safety and Security of the traveling public.” Jim spoke of current issues, specifically those involving medical and legal marijuana use and the DOT's position. (Continued on page 2)

### IN THIS ISSUE

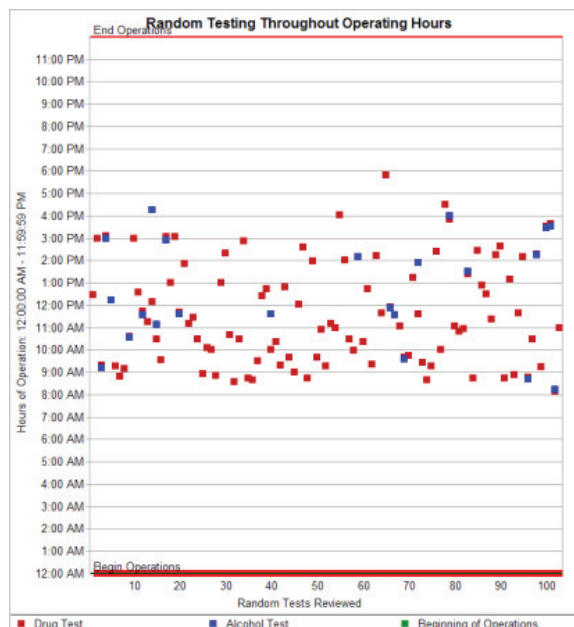
- 3** National Conference Attracts 500 Participants
- 5** Training Schedule
- 9** Reasonable Suspicion Must Be REASONABLE
- 10** Not All Evidential Breath Testing Devices Can Be Used For Dot Confirmation Tests



# Early Morning and Late Night Alcohol Tests – PART 1: Why They Are Important

The purpose of random testing is to provide a system to both deter and detect prohibited alcohol use and concentration levels, while performing safety-sensitive functions. Employees who arrive at work and perform safety-sensitive functions with an alcohol concentration at or above 0.02 will have a reduction of that rate through their day and work shift. A prohibited alcohol concentration level that exists while performing safety-sensitive duties means that an employee drank either before or during their shift. For early morning shifts, the same concentration levels can be either from sustained intoxication of the previous night, or new ingestion before the employee begins work.

Nighttime is the most common time for individuals to consume high levels of alcohol. Employees that do drink heavily may arrive on duty with an unacceptable alcohol concentration just as rush hour begins, people go to work, and children travel to school. Employees may feel they can “get away” with this behavior as



*Actual random testing spread from a recent compliance audit.*

there is typically less employer supervisory oversight during early morning and late night shifts.

While mid-shift alcohol testing is widely achieved throughout the industry, early morning-shift and end-of-shift testing is less common. Testing must be possible at all hours during which safety-sensitive

duties are performed. The detection and deterrent factor of early and late testing is very real, and lets employees know that there is not a time at which they are not subject to random testing. ●

## Keynote Speaker Swart Stresses DOT’s Position on Medical Marijuana at National Conference

(Continued from page 1) Jim reiterated “the Department of Transportation’s Drug and Alcohol Testing Regulation – 49 CFR Part 40.40 does not authorize the use of Schedule I drugs, including Marijuana, for any reason.”

In his address, Jim also highlighted a Substance Abuse and Mental Health Services Administration (SAMHSA) brief providing the following information:

- Less than 5 percent of “medical” marijuana card holders in the state of California are cancer, HIV/AIDS, or glaucoma patients.
- 90 percent are registered for illnesses such as headaches, generalized pain, and athlete’s foot.
- In California and Colorado:
  - Over 90 percent of cardholders are men between the ages of 17 and 35,

with no history of chronic illness. – Many have a history of alcohol and drug abuse. ●

**“Less than 5 percent of “medical” marijuana card holders in the state of California are cancer, HIV/AIDS, or glaucoma patients.”**

# National Conference Attracts 500 Participants

The 8th Annual FTA Drug and Alcohol Program National Conference, held in Phoenix, AZ, was the Program's largest to date, with over 500 participants. Attendees included Drug and Alcohol Program Managers (DAPMs), Designated Employee Representatives (DERs), Medical Review Officers (MROs), Substance Abuse Professionals (SAPs), Third Party Administrators (TPAs), employers, and representatives mainly from the FTA, but also included individuals from the Federal Motor Carrier Safety Administration (FMCSA), Federal Aviation Administration (FAA), United States Coast Guard (USCG), and the Pipeline and Hazardous Materials Safety Administration (PHMSA). Participants traveled from 49 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands to attend the conference.

The first day of the conference offered specialized training for new DAPMs, Reasonable Suspicion, and Post-Accident Training. The second and third days of the conference included four concurrent sessions providing a variety of sessions and gave participants the opportunity to customize their experience to their specific interests and needs. Jerry Powers, FTA's former Drug and Alcohol Program Manager and the Acting FTA Drug and Alcohol Program Manager, Iyon Rosario, presented. Ms. Rosario spoke about her background at FTA and welcomed all participants to the conference.

Copies of the conference presentations can be downloaded from the Office of Safety and Security website at: <http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training/NatConf/2013/sessions.aspx>.

Plans are already underway for the 9th Annual FTA Drug and Alcohol Program National Conference to be held in Little Rock, AR, April 2014. Visit our website (<http://transit-safety.fta.dot.gov>) in the fall and look to upcoming newsletters for more information! ●



*Participants listen intently during one of the well-attended national conference sessions.*

**LITTLE ROCK**

NINTH ANNUAL  
FEDERAL TRANSIT ADMINISTRATION  
DRUG & ALCOHOL PROGRAM  
NATIONAL CONFERENCE

**APRIL 2014**

<http://transit-safety.fta.dot.gov/DrugAndAlcohol>

**Registration begins in November 2013**

# Post-Accident Testing for Maintenance Personnel

Following an accident, the determination to order federally required drug and alcohol testing generally focuses on the driver, as the likelihood of direct involvement is often the clearest. Post-accident testing is required if there is a fatality, disabling damage to one or more vehicles involved, or any individual immediately receives medical treatment away from the scene or, with respect to an occurrence in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from operation. In cases of disabling damage and injuries, post-accident testing shall not be conducted if the responding company official determines the operator was not a contributing factor to the accident using the best information available at the scene. However, the responding official may not be able to completely discount other safety-sensitive employees as contributing factors. Therefore, evaluating employee involvement beyond the operator of the vehicle should follow the same steps as the operator, in determining whether or not to test maintenance personnel depends on the following factors:

- Using the information available at the scene, can you reasonably conclude



(© iStockPhoto)

mechanical issues contributed to the accident?

- If mechanical factors were contributors, were they directly linked to maintenance procedures within a reasonable amount of time (to where one can reasonably make a correlation), such as recent wheel repair, engine or break work?
- Can one or more safety-sensitive employees be reasonably linked to the maintenance work in question?

If FTA-covered employees must be sent for post-accident testing, the same time limits apply for these individuals just as vehicle operators. Remember, a valid FTA alcohol test should not exceed the eight hour window and a valid FTA drug test should not exceed the 32 hour window. Any alcohol testing occurring after two hours from the accident (but within eight) must include a notation explaining the delay.

Statistically speaking, the majority of maintenance personnel sent for post-accident testing are the result of (disabling) vehicle damage or injuries (immediate medical treatment away from the scene), which occurs during maintenance or yard maneuvers. These differ from the scenarios discussed above, in that the maintenance personnel are the direct, and often only, safety-sensitive employees involved in the accident. Examples can include buses or vehicles damaged in the yard, falling from a lift, or colliding with an overhead or support. ●

---

## MIS Late Letters Going Out

In accordance with 49 CFR Part 655, the FTA requires all grantees (and their contractors/subrecipients) to report their calendar year drug and alcohol testing program summary results no later than March 15th each year. The FTA has sent out late letters to those grantees who have not yet supplied their data this year. Failure to

submit the required annual testing results may constitute non-compliance, thereby jeopardizing future FTA funding. If your agency has not provided data for 2012, please submit your data immediately or contact the FTA Drug and Alcohol Project Office at [fta.damis@dot.gov](mailto:fta.damis@dot.gov) or call (617) 494-6336 if you have questions. ●

# Drug and Alcohol Training Schedule

The FTA will sponsor the following training sessions:

**FTA Substance Abuse Training Session.** This one-day, high-level seminar provides covered employers with key information to help them comply with drug and alcohol testing regulations (49 CFR Parts 655 and 40).

This free, one-day training is available on a first come, first-served basis and is led by FTA Drug and Alcohol Audit Program Team Leaders.

Host	City/State	Training Location	Date
Montana DOT	Helena, MT	Montana DOT, 2701 Prospect Ave., Helena, MT 59620	8/15/13
DART FirstState	Wilmington, DE	DART FirstState, 119 Lower Beach Street, Wilmington, DE 19805	10/29/13

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

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

---

## FTA Audits Only Performed by FTA

Recently, FTA was surprised to hear from FTA grantees, their subrecipients and contractors about concerns of too frequent auditing by FTA. In addition, recent attendees of a free FTA one-day training session expressed confusion that what was being instructed differed from what they had been told at a recent “FTA audit.” FTA was aware that those transit systems with issues had not recently undergone an FTA audit. Upon investigation, it was determined that these systems had been reviewed by private consulting firms, hired by oversight agencies to review their FTA drug and alcohol program.

FTA audits are scheduled by FTA Headquarters in Washington, DC and are conducted by a team of trained experts on the regulations. All FTA audit teams

include FTA or US DOT/Volpe Center personnel, as well as FTA-contracted consultants. Notification to FTA grantees and/or subrecipients selected for an FTA Drug and Alcohol Audit occurs approximately six (6) weeks prior to the audit start date in the form of an official FTA Notification Letter, on FTA letterhead, signed by the Acting FTA Drug and Alcohol Program Manager, Iyon Rosario, and a phone call from a FTA-contracted consultant.

The audit is complete after the FTA audit team presents its findings and details corrective actions. The audit team provides a Final Audit Report and Cover Letter from the FTA Drug and Alcohol Program Manager on FTA letterhead. The cover letter will include contact information for

assistance, not only in responding to audit issues but in creating and maintaining a compliant program.

Private consultants should never present themselves as FTA auditors and in fact, it should be clear as to their non-FTA sponsoring organization. FTA makes much of its audit materials public in order to promote self-review and oversight; however, use of FTA audit materials does not constitute an FTA audit. Oversight agencies, who procure the services of private consultants, should be aware that private consultants do not speak on behalf of the FTA or as agents of FTA. FTA auditors undergo training by FTA and receive periodic updates from the Office of Drug and Alcohol Compliance (ODAPC/OST). ●

# FTA Drug Testing Records-Security and Separation



*Attendees at the FTA Drug and Alcohol National Conference attend a session on Drug and Alcohol Testing records.*

When the U.S. Congress directed the FTA (among other modes) to require drug and alcohol testing in the 1991 Omnibus Transportation Employee Testing Act, one of the line-item directives was to “provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees (Section 6(d)(7)).” FTA implemented this mandate in Section 655.71(a), which states: “An employer shall maintain records of its anti-drug and alcohol misuse program as provided in this section. The records shall be maintained in a secure location with controlled access.”

The requirement for a “secure location with controlled access” is fairly self-evident: the records must be stored in a manner that limits access to only those persons designated by the employer as having a direct need to review and act upon those records.

This means the employer, in addition to guaranteeing the physical security of the testing records, must protect against incidental or inadvertent access. This is where FTA is often asked to elaborate on when and how records separation must take place.

Technically, FTA drug and alcohol records need not be kept separate from other records, provided there is no instance for a person or entity who has access to those other files is able to access federal drug and alcohol records (inadvertently or otherwise). For instance, if a state auditor inspecting HIPAA, OSHA or other records cannot have incidental access to co-located federal drug and alcohol records. Another case might be where the employer has designated a person from the risk management

department to review worker’s compensation claims. Were those claims to be co-filed with drug and alcohol records that are only available (in this hypothetical case) to the human resources department, inappropriate exposure would occur.

Accordingly, it is important that the employer’s duly-designated representative (e.g., the DAPM/DER), implements a clear records-keeping process that meets the technical requirements of Part 655, as well as the foundational mandate of the Omnibus Transportation Employee Testing Act. Additionally, FTA recommends the employer periodically review current practices to ensure compliance with requirements. ●

# Maintenance Contractors

One of the most common questions FTA answers for transit system managers, drug and alcohol program managers, and transit industry vendors, is whether specific maintenance contractors are or are not covered by the testing requirements of 49 CFR Part 655.

For rural systems who receive 5311 funding, the answer is simple: maintenance contractors are always exempted. For other systems, the answer is more nuanced. This is because much of the relevant work is performed by very small and/or specialized companies who have limited administrative staff. FTA has long agreed requiring coverage for these companies would be overly burdensome. In hopes of establishing a “middle ground” supporting public safety while minimizing administrative burden, FTA identified three sub-categories of maintenance contractors, to which

coverage applies differently depending on the grantee’s funding mechanism and the area served.

This first category is the maintenance subcontractor, defined as a contractor to a covered maintenance contractor. These companies are not covered by Part 655, provided the relationship does not exist for the sole purpose of circumventing FTA’s drug and alcohol testing rules (see FTA Legal Interpretation Campbell ’00).

The second category of maintenance contractor exempted from Part 655 is the vendor who only performs work on a one-time or limited, ad-hoc basis. As long as the work being performed is not regular, and there is no contractual relationship, whether formal or not, these companies are exempt for all recipients.

The third category is the repair/overhaul/rebuild contractor. These contractors are covered when the transit operator is a recipient of funds provided by the 5307 or 5309 grant types, except when that recipient is operating in an area with a population of less than 200,000 persons. In this case, maintenance contractors are not required to comply with Part 655.

As always, contractors who perform regular, ongoing maintenance work for a recipient or sub-recipient who do not fall into one of the categories must have testing programs fully complying with Parts 655 and 40. The table below may be helpful in analyzing your own environment to determine coverage requirements for various vendors. ●

Applicability Matrix	Grantee/Recipient Type			
	5307	5309	5311	5307/5309, UZA<200k
Contractor Type				
Maintenance — Ad-hoc	N	N	N	N
Maintenance — Subcontractor*	N	N	N	N
Maintenance — Repair/Overhaul/Rebuilding	Y	Y	N	N

\*Contractor to a covered maintenance contractor

# Blood Alcohol Content Greater than or Equal to 0.02, but Less than 0.04—Now What?

The FTA regulation prohibits any covered employer from allowing an employee with an alcohol concentration of 0.04 or greater to perform any safety-sensitive duties. Upon notification by the Breath Alcohol Technician (BAT) of a 0.04 or greater confirmation test result, the employer must immediately remove the employee from duty, refer him/her to a SAP, and follow their employer's policy regarding consequences. In no circumstances should the employee be allowed to return to duty performing safety-sensitive functions until he/she has been evaluated by a SAP and passed a return-to-duty test. A test result of 0.04 or greater is considered a positive test result under the FTA regulation (§655.31).

The regulation (§655.35) also includes a provision for other alcohol-related conduct and subsequent consequences. This provision requires employers to immediately remove employees from safety-sensitive duties any time an employee is found to have an alcohol concentration of 0.02 or greater, but less than

0.04 for an alcohol confirmation test. Even though not considered a positive test, the employer may not allow the employee to resume safety-sensitive duties until the start of the employee's next regularly scheduled shift, but not less than eight hours following the test or until the employee's alcohol concentration is less than 0.02.

Any test result with an alcohol concentration of less than 0.02 is considered a negative test with no consequences under this regulation.

These last two provisions have caused some confusion among transit employers, as some have expressed concern the presence of any alcohol should be considered unacceptable and should result in significant consequences, including termination. It is imperative employers know the regulation prohibits any action under the regulation against an employee based solely on confirmation test results showing an alcohol concentration less than 0.04. However, employers should also be aware there is nothing in

the regulation prohibiting employers from acting under their own authority and establishing additional consequences for these behaviors as long as it is clear such action is taken under their own authority and not considered a violation of the regulation.

Employers should also be cautioned to ensure any action taken under their own authority is consistent with federal, state, and local law. This is especially true since alcohol is a legal substance, available in a variety of forms, and employees may be subject to incidental consumption of minimal amounts through food, medicines, toiletries, etc. Also, before establishing a policy with consequences for alcohol concentration less than 0.02, employers should be sure the testing equipment utilized is defensibly accurate at low concentrations. Most experts agree test results of less than 0.02 are the equivalent of zero. ●

**“Any test result with an alcohol concentration of less than 0.02 is considered a negative test with no consequences under this regulation.”**



# Reasonable Suspicion Must Be REASONABLE

Any time an employer has a reasonable suspicion a safety-sensitive employee has used a prohibited drug or misused alcohol, the employer is required to immediately remove the employee from their safety-sensitive functions and require them to submit to a reasonable suspicion test. A reasonable suspicion determination must be based on specific, contemporaneous, and articulable observations concerning the appearance, behavior, speech, or body odor of the safety-sensitive employee.

As such, the determination must be made based on specific facts directly observed in the here and now.

- A test cannot be performed based on a hunch or “gut feeling” unless the feeling can be translated into the specific facts causing the uneasiness (i.e., Why do you feel something is wrong?). What are you seeing, hearing, and smelling? Stick to the facts. Stay away from statements like “I believe” or “I feel.”
- Reasonable suspicion tests cannot be conducted today for something that occurred yesterday. A reasonable

suspicion test cannot be planned, anticipated, or scheduled in advance.

A test can only be conducted based on immediate observations.

- A reasonable suspicion determination is usually based on more than one fact. Even though there may be one predominant factor or one factor initially catches the supervisor’s attention, upon contact with the employee, additional observations will usually result in additional documentable facts. If when combined together a trained supervisor concludes when viewed in its entirety the employee’s appearance, behavior, speech, and odor are consistent with possible drug use or alcohol misuse, a reasonable suspicion test should be performed.
- Bad behavior or performance issues by themselves do not constitute reasonable suspicion. Being moody, having a bad attitude, or fighting does not constitute reasonable suspicion alone. Only when these actions happen in concert with a supervisor’s observations of facts (i.e., smell of alcohol, bloodshot eyes,

unstable walk) are they attributable to drug use or alcohol misuse and relevant to a reasonable suspicion determination. Address performance issues as performance issues and attitude issues as attitude issues.

A supervisor is unlikely to have absolute proof or knowledge with 100 percent confidence that an employee’s appearance or behavior is related to alcohol or illegal drugs. This is an unrealistic expectation and is not required by the regulation. Instead, the regulation requires a supervisor be trained to identify the signs and symptoms of drug and alcohol use, and if he/she reasonably concludes the objective facts are consistent with drug use or alcohol misuse, there is sufficient justification for testing. The supervisor’s decision should pass the “reasonable prudent individual” test, which simply means a similarly trained and experienced supervisor, being reasonable and prudent and having observed and noted the same facts, signs, and circumstances, could have reached the same conclusion. ●

**“As such, the determination must be made based on specific facts directly observed in the here and now.”**

# Not All Evidential Breath Testing Devices Can Be Used For DOT Confirmation Tests

FTA requires all covered employers to conduct alcohol testing on safety-sensitive employees consistent with 49 CFR Part 40, Subparts J through N. The alcohol test consists of an initial test that if the result is not less than 0.02, must be followed by a confirmatory test. The confirmatory test can only be conducted using an Evidential Breath Testing (EBT) device that meets the additional DOT requirements specified in §40.231.

An EBT is a device measuring an employee's alcohol concentration. It must be able to distinguish alcohol from acetone at the 0.02 alcohol concentration level. In



(© iStockPhoto/beetle8)

order to be used for DOT initial alcohol tests, the specific make and model of the device must be approved by the National Highway Traffic Safety Administration (NHTSA) and placed on the conforming products list (CPL). Only those EBTs listed on the CPL without an asterisk (\*) are authorized to conduct alcohol confirmation tests under 49 CFR Part 40, as amended. In addition to being on the CPL, the EBT used to conduct confirmatory tests must also meet additional DOT requirements defined in §40.231. Specifically, the EBT must:

- Provide a printed triplicate result (or three consecutive identical copies of a result) of each breath test;
- Assign a unique number to each

completed test, which the BAT and employee can read before each test, and which is printed on each copy of the result;

- Print the manufacturer's name for the device, its serial number, and time of the test on each copy of the result;
- Distinguish alcohol from acetone at the 0.02 alcohol concentration level;
- Test an air blank; and
- Perform an external calibration check.

Not all EBTs on the CPL meet these additional requirements. As a consequence, employers and others responsible for determining the DOT compliance of alcohol testing equipment to conduct alcohol confirmation tests must ensure the §40.231 requirements are met in addition to being on the CPL.

Employers utilizing law enforcement agencies, hospitals, or other agencies (to conduct alcohol testing) whose major focus is other than DOT testing should be especially diligent about ensuring the equipment used to conduct their alcohol confirmation testing meets all of the DOT requirements as these entities may utilize other standards for their equipment configuration. ●

**“An EBT is a device that measures an employee's alcohol concentration.”**

## Regulation Updates is Produced By:

Federal Transit Administration  
Office of Safety and Security  
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

MacroSys, LLC  
55 Broadway  
Cambridge, MA 02142

Cahill Swift, LLC  
240 Commercial Street  
Boston, MA 02109

RLS & Associates, Inc.  
3131 South Dixie Highway/Suite 545  
Dayton, OH 45439