

New Acting Director of Office of Drug and Alcohol Policy and Compliance

Patrice Kelly has been the Acting Director of the Office of Drug and Alcohol Policy and Compliance (ODAPC) in the Office of the Secretary of the U.S. Department of Transportation (DOT) since late 2013. ODAPC's mission is to enhance public safety within transportation industries across the United States by issuing regulations to prevent alcohol misuse and illegal drug use in transportation systems and ensuring that DOT's drug and alcohol policies are implemented in a consistent, fair, and efficient manner.

Patrice has served in ODAPC since 2007, and in 2008 she was named Deputy Director. She serves as the lead expert on a highly experienced team of antidrug and alcohol misuse prevention policy advisors.

Before joining the Office of the Secretary, Patrice served at the Federal Aviation Administration (FAA) as the Deputy Division Manager of the FAA's Drug

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Abatement Division, as the Senior Attorney for Aerospace Medical Issues, and as an FAA attorney. Patrice began working with FAA's industry drug and alcohol testing regulations as an FAA enforcement attorney more than 20 years ago. She was the first FAA attorney to

revoke an air carrier's certificate for failure to implement drug and alcohol testing, and she initiated the FAA's first civil penalty cases enforcing the drug and alcohol testing regulations.

In her roles at the FAA and the Office of the Secretary, Patrice has worked extensively on the changes to the drug and alcohol testing regulations since 1996. Patrice has been instrumental in policy making, litigation, intergovernmental agency working groups, and advising foreign governments regarding drug testing. In her role as the Department's decision maker, she issued the first Public Interest Exclusion against a noncompliant service agent issued in the history of the DOT's drug and alcohol testing regulations. In addition, she has been a featured speaker
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Post-Accident – Definition of Operation of Vehicle Lifts/Doors on Light Rail

Accidents can and do happen on light-rail vehicles. Post-accident testing after a non-fatal accident is required if an individual, because of the accident, suffers bodily injury receiving medical attention away from the scene, the rail vehicle is “removed from operation” because of the “occurrence” and, the operator and any other covered employee whose performance cannot be completely discounted as a possible contributory factor.

Many covered employees contribute to the operation of light-rail vehicles and are all theoretically subject to post-accident testing if an “occurrence,” e.g., a derailment or striking a vehicle at a grade crossing results in the public transportation vehicle being “removed from operation.” It is up to the transit system to determine whether any
(Continued on page 3)

IN THIS ISSUE

- 2 Oversight Responsibility
- 4 Efforts to Improve Collection Process May Violate Rule
- 6 Drug-Free Workplace Act—25th Anniversary
- 9 Ferry Boat Operators Must Submit MIS



Department of Transportation
Federal Transit Administration

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(Continued from cover)

at many industry association meetings.

Patrice has a passion for management and for mentoring others. In her second year as a manager at the FAA, she was nominated for “Manager of the Year” in an organization of more

than 700 employees. In addition, Patrice brought more than 120 unpaid interns from law schools across the United States to serve in the FAA’s Office of the Chief Counsel in a well-recognized internship/seminar program that she developed. One of her proudest accomplishments was

being named “Mentor of the Year” by the FAA’s Chief Counsel’s Office during a time when she was not an employee of that office. She firmly believes that true leadership is inspiring others to lead and not to follow! ●



A recipient of assistance under sections 5307, 5309, or 5311 must ensure its compliance with all requirements of FTA’s drug and alcohol testing regulation, and must also ensure—in most cases—any sub-recipient or contractor it engages for the provision of transportation service complies with the regulation as well (maintenance contractors to section 5311 sub-recipients need not comply, nor do maintenance contractors to section 5307/5309 recipients in areas of fewer than 200,000 in population). Additionally, DOT requires each covered employer remains responsible for compliance with the requirements of Part 40, regardless of its use of professional service agents (Third Party Administrators (TPA), Medical Review Officers (MROs), etc).

In situations where a recipient uses a contractor to provide some or all of its safety-sensitive activities, the recipient has the responsibility to ensure its providers are maintaining compliance with Part 655. At a minimum, this means ensuring annual Drug and Alcohol Management Information System (MIS) reports are submitted by the contractor by March 15 of each year. It is important to note FTA requires not just

that these reports be submitted in a timely fashion, but also the recipient “ensures the accuracy” of each report submitted (section 655.72(c)). This means the recipient—even if simply acting as a funding “pass-through”—must review each report submitted to certify the accuracy of the data being reported.

This requirement to ensure the accuracy and timeliness of MIS reporting is in addition to each recipient’s responsibility to certify its full compliance with Part 655 on an annual basis. In June of 2013, FTA added to Part 655 section 655.83(c), each recipient “shall annually certify compliance with the requirements of this part, on behalf of its applicable subrecipient or contractor,” and further explicitly authorizes recipients to suspend a subrecipient/contractor who is noncompliant.

While the above actions represent the “bare-minimum” elements of compliant oversight practices, many recipients seek to safeguard their own compliance by building conforming requirements into contracts and service agreements.

Best practices for oversight include periodic on-site audits of the programs

(Image: Volpe Staff)

in place at contractors and sub-recipients, periodic training sessions, and on-demand technical assistance.

As for the requirements of section 40.15, wherein each covered employer assumes responsibility for the performance of the vendors it uses, the minimal oversight requirements are not dictated by regulation. However, DOT extends to each employer the authority to require a vendor offering DOT services provide “documentation they meet the requirements of this part.” This means, for example, an FTA-covered employer could require its collection site provide copies of all collector qualification documents, an MRO provide their exam certificate, and so forth.

Though minimal oversight activities are not prescribed by DOT, it is critical to note the employer remains responsible—and therefore liable—for non-compliant service provided by vendors on its behalf. Because of this, many employers choose to exercise oversight that may range from simply reviewing testing records and requiring correction/cancellation as appropriate, all the way up to performing periodic on-site inspections of a vendor’s practices. ●

Post-Accident – Definition of Operation of Vehicle Lifts/ Doors on Light Rail



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operating, maintenance, scheduling, train control, or security personnel may have contributed. The decisions must be made promptly—with no testing after 8 hours for post-accident alcohol testing and 32 hours for post-accident drug testing.

More concretely, consider two plausible scenarios leading to a light-rail post-accident testing decision—a passenger whose hand

is caught in the door and injured, or a passenger injured because of lift or ramp misuse or malfunction. The public transit vehicle is in operation and there is an injury, so testing may be required. The first question considers the operator’s performance. Was the operator relying totally on the instructions of a starter to turn a switch which closed the doors or operated the ramp? Was the operator blind to the event as it happened?

And did the operator respond immediately and appropriately when alerted to the emergency? If so, the operator may not have contributed. The next set of determinations concern the performance of the other covered employees, especially including the starter, train attendant, and possibly including maintenance personnel if the lift, ramp, or door mechanisms were repaired or recently serviced. The last set of determinations concern the behavior of the passenger as possibly causing the occurrence. For instance, did the passenger try to pry the doors open after they were closed to get into or out of the public transportation vehicle? If the passenger’s behavior was the root cause of the occurrence and the covered transit employees responded appropriately, then federal testing is prohibited under the FTA rule.

As with all post-accident testing determinations, it is incumbent on transit system personnel to carefully, and in detail, document their decision-making process leading to a test/no-test determination. ●

Refusals Recognized by FTA

- » Failure to appear at all or in a timely manner to the collection site (except for pre-employment)
- » Failure to remain until the testing process is complete
- » Failure to provide a breath or urine sample
- » Failure to provide a sufficient specimen without medical explanation
- » Failure to undergo a medical evaluation
- » Failure to cooperate with any part of the testing process or confrontational behavior
- » Failure to permit monitoring/observation
- » Failure to comply with observation protocols (raise, drop, and turn)
- » Possessing or wearing a prosthetic or other device
- » Failure to take a second test
- » Admitting to the collector or MRO the specimen has been substituted/adulterated
- » Verified adulterated/substituted specimen
- » Failure to sign Alcohol Testing Form (ATF) Step 2

Efforts to Improve Collection Process May Violate Rule

Procedures for conducting DOT drug and alcohol testing are defined in detail in 49 CFR Part 40. The drug testing procedures include responsibilities, service agent responsibilities, and methodologies to be followed by qualified collectors and collection sites. The regulation defines requirements for

personnel, materials, equipment, facilities, specimen storage, recordkeeping, specimen handling, collection, analysis, and verification processes.

Strictly following the procedures as defined is critical to ensure balance is maintained and is a critical component of the regulation. Any deviations to the

procedures whether due to an effort to improve the process, catch cheaters, insufficient training, or lack of regulatory knowledge are violations of the regulation and strictly prohibited.

Specimen collectors are sometimes overzealous in their attempts to improve the process by adding additional steps into the collection process meant to catch “cheaters.” A prevalent example of collectors exceeding the defined procedure includes the practice of requiring donors to remove their footwear or raise their pant legs so feet and ankles can be inspected. Though this desire to improve the process is noteworthy, unless the collector has observed something about the employee’s appearance or behavior warranting this additional inspection, then it is a violation of the regulation. ●



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Testing Above the Federal Minimums

The 2014 FTA minimum random testing rate remains at 25 percent of covered employees for drugs and 10 percent for alcohol. This describes the numbers of random tests that must occur, and does not describe the number of individual employees who need to be tested. The actual minimum number of required random tests is determined by averaging out the number of safety-sensitive employees in the random pool each time a random selection is made for a calendar year. For instance, if you make random selections

quarterly, you would average out the number of covered employees in the random pool at the time those four selections are made. If you make monthly selections, you would take the average of the random pool size when those 12 selections were made. In each case, the resulting average would be multiplied by 25 percent and 10 percent to calculate the actual minimum number of random drug and alcohol tests required by FTA, respectively.

If the random pool includes covered employees of other DOT agencies for

which the minimum rate is 50 percent for drugs, such as the Federal Motor Carrier Safety Administration (FMCSA), then the entire random pool must be tested at that higher rate.

FTA establishes a minimum random testing rate; however, there is no maximum number in 49 CFR Part 655. If an FTA-covered employer chooses to random test above 25 percent for drugs and/or 10 percent for alcohol, it is perfectly within their rights to do so. A best practice is for your FTA Drug and Alcohol policy to state the FTA minimums will be met, but the policy does not need to state the exact percentage. This policy statement will remain accurate even if the required minimums are exceeded by the covered employer or raised by the FTA. ●

RANDOM TESTING RATES FOR 2014

Drug	25%
Alcohol	10%

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 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(s)
VIA Metropolitan Transit	San Antonio, TX	San Antonio Office of Emergency Management (SAOEM), Emergency Operations Center (EOC), 8130 Inner Circle, San Antonio, TX 78235	5/7/14 and 5/8/14 (2 trainings)
Yuma County Intergovernmental Public Transportation Authority (YCIPTA)	Yuma, AZ	Yuma County Main Library 2951 S. 21st Drive, Yuma, AZ 85364	5/13/14
Choctaw Nation of Oklahoma	Durant, OK	Durant Choctaw Casino RV Park 3650 Enterprise Blvd., Durant, OK 74701	6/24/14
Heart of Iowa Regional Transit Agency (HIRTA)	Urbandale, IA	HIRTA Public Transit, 2840 104th Street, Urbandale, IA 50322	8/27/14

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/Volpe Drug and Alcohol Project Office at: fta.damis@dot.gov or call **(617) 494-6336** for more information.

The Transportation Safety Institute Training Schedule

FTA's strategic training partner, the Transportation Safety Institute (TSI) will offer the following upcoming courses:

- **Substance Abuse Management and Program Compliance** (2½ days). This 2½-day course for DAPMs and DERs shows how to evaluate and self-assess an agency's substance abuse program and its compliance with FTA regulations.
- **Reasonable Suspicion Determination for Supervisors** (half-day seminar). This half-day seminar educates supervisors about the FTA and DOT regulations requiring drug and alcohol testing of safety-sensitive transit workers and how to determine when to administer reasonable suspicion drug and/or alcohol tests.

There is a small attendance/materials fee. For more information, please call **(405) 954-3682**.

To register, go to: <http://www.tsi.dot.gov> or <http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training>.

Drug-Free Workplace Act—25th Anniversary

On November 18, 1988, President Ronald Reagan signed the Drug-Free Workplace Act into law. The Drug-Free Workplace Act of 1988 requires some federal contractors and all federal grantees to agree they will provide drug-free workplaces as a condition of receiving a contract or grant from a federal agency.

All FTA-covered employers must meet the following six requirements of this Act:

1 Publish and give a **policy statement** to all covered employees (either a standalone policy or as a part of your agency's drug and alcohol testing policy) informing them that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the covered workplace and specifying the actions

taken against employees who violate the policy. Please note it is the policy violation consequences that are sometimes omitted from the Drug-Free Workplace Act policy statement.

2 Establish an ongoing **drug-free awareness program** to make employees aware of a) the dangers of drug abuse in the workplace; b) the policy of maintaining a drug-free workplace; c) any available drug counseling, rehabilitation, and employee assistance programs; and d) the penalties imposed upon employees for drug abuse violations. Note: The requirement for the program to be ongoing exceeds the Part 655 education and awareness training requirements.

3 **Notify employees** as a condition of employment on a federal contract or grant, the employee must a) abide by the

terms of the policy statement; and b) notify the employer within five calendar days if he or she is convicted of a criminal drug violation in the workplace.

4 Notify the **contracting or granting agency** within 10 days after receiving notice that a covered employee has been convicted of a criminal drug violation in the workplace.

5 **Impose a penalty on—or require satisfactory participation** in a drug-abuse assistance or rehabilitation program by—any employee who is convicted of a reportable workplace drug conviction. The consequence must be imposed within 30 days of the employee's conviction.

6 Make an ongoing, good faith effort to maintain a **drug-free workplace** by meeting the requirements of the Act.

Note: A contractor or grantee who fails to comply with these requirements is subject to certain penalties.

For additional information and assistance access the U.S. Department of Labor website at www.dol.gov or <http://workplace.samhsa.gov/pdf/workplace-kit.pdf>. ●



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What Do You Have Hanging On Your Walls?

Training and education of your safety-sensitive workforce is a critical component of an effective drug and alcohol testing program. Sending a clear and reoccurring message, substance abuse and alcohol misuse will not be tolerated makes employees aware of the agency's expectations and conveys management's commitment to the drug and alcohol testing program.

The FTA drug and alcohol testing regulation (§655.14) require each covered

employer to establish an education and training program for all covered employees. The general education component requires each employer displays and distributes informational material and a community service hotline telephone number to help employees who may be experiencing problems with drug use or alcohol misuse.

The regulation does not dictate the format or method of display or distribu-

tion as each employer should determine the best methods of communication for their unique circumstance, workforce composition, and access to safety-sensitive employees. In order to be compliant websites, hotlines and contact info displayed must be current, working, and up-to-date.

Many sources of informational materials exist; the following websites provide materials to help meet the regulatory requirements at no or minimal cost. ●

Training

informational material

Education

<http://www.drugabuse.gov/publications/term/224/Posters>

<http://drugpubs.drugabuse.gov/publication-series/nida-posters>

http://www.sapaa.com/page/wp_dfwp_materials

<http://workplace.samhsa.gov/pdf/workplace-kit.pdf>

<http://www.drugfree.org>

<http://www.drugfreeworld.org/download.html>

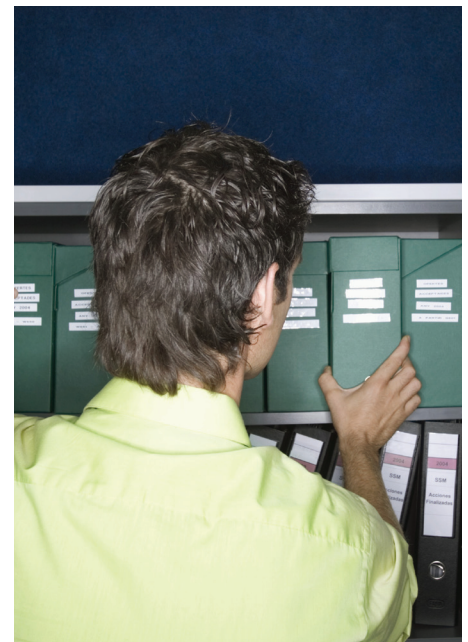
FTA Grantees Have Access to Contractor/ Subrecipient Records

Subpart P of Part 40 and §655.71 of Part 655 specifies the type of testing records FTA-covered employers must maintain, the minimum length of time they must be maintained, and the requirements for record confidentiality and access to records. The general confidentiality rule for drug and alcohol test information (§40.321) explicitly states employers are prohibited from releasing individual test results or medical information about an employee to third parties without the employee's specific written consent.

In certain specific, narrowly defined situations, the employer must release employee test information without the

employee's written authorization, 655.73 details those situations. As stated in 655.73(I): "An employer may disclose drug and alcohol testing information required to be maintained under this part, pertaining to a covered employee, to the State oversight agency or grantee required to certify to FTA compliance with the drug and alcohol testing procedures of 49 CFR Parts 40 and 655."

This requires all subrecipients, contractors, and TPAs who maintain and store drug and alcohol records to grant access to those records upon request by the FTA Grantee/Recipient and State Agency, without an employee's written authorization. ●



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DAMIS Packages Mailed in December



Reminder!

Drug and Alcohol Management Information System (DAMIS) packages were sent out in late December for 2013 annual reporting. MIS reports were due March 15th, 2014, and every effort to report online at <https://damis.dot.gov> should be made. New user names and passwords for Federal Transit Administration

(FTA) grantees were included. If you are an FTA grantee and did not receive your reporting package, please contact the FTA Drug and Alcohol Project Office at fta.damis@dot.gov or 617-494-6336. Please note: user names and passwords change each year. ●

2012/2013

In 2013, for calendar year 2012 Drug and Alcohol Management Information System (DAMIS) data, more than 96 percent of all completed submissions by FTA-covered employers were submitted electronically via <http://damis.dot.gov>. The average time to complete the DAMIS reporting requirement online from log on to 'Sign and Submit' is just 19 minutes and 36 seconds for FTA-covered employers.



Electronic CCFs Not Permitted

In July, the Substance Abuse and Mental Health Services Administration (SAMHSA) published a Federal Register Notice requesting comment on its proposal of a new Federal Custody and Control Form (CCF) and electronic CCF (eCCF) be used in federal workplace drug testing programs. The Office of Management and Budget (OMB), however, determined the privacy and security issues surrounding

the use of eCCF information collections were not resolved and additional evaluation was required.

As of this writing, the OMB has not approved the use of an eCCF. The OMB has authorized the continued use of the current five-part carbonless CCF, and it remains the only approved CCF that may be used for DOT drug tests. ●



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Ferry Boat Operators Must Submit MIS



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FTA-funded ferry boat operators are required to comply with FTA's random alcohol testing requirements. The United States Coast Guard (USCG) does follow Part 40 requirements; however, ferry boat operators are subject to random alcohol testing because the USCG does not have similar Part 655 requirements.

In regard to the MIS, FTA funded ferry boat operators must report annual random alcohol test results under the employee category "ferry boat." FTA has made an effort to identify FTA-funded

ferry boat employers and provide a separate method ('ferry boat' on employee category tab) for only those employers. If you are an FTA grantee or subrecipient with a ferry boat operation and you do not have the capability through DAMIS to submit ferry boat random alcohol test results, contact the FTA Drug and Alcohol Project Office at **(617) 494-6336** or at **fta.damis@dot.gov**. ●