FTA Drug and Alcohol
REGULATION UPDATES
ISSUE 51

Collection Sites May Be Visited by "Undercover" Inspectors

The Federal Transit Administration's (FTA's) Clandestine Program for conducting undercover collection site inspections continues. Under this program, FTA inspectors and investigators perform inspections on collection sites offering customers U.S. DOT-regulated drug and alcohol tests. The FTA spearheaded the program in 2003 and developed it into a full effort in 2009, following several similar inspections by the Office of the Inspector General at DOT. Since its inception, the FTA has performed joint-operations with FMCSA and the U.S. Coast Guard, in locations around the country.

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Under the Clandestine Program, inspectors pose as U.S. DOT-regulated employees and are taken through the steps of an actual collection. Because the collector is unaware that they are under review, the inspector is able to learn: exactly what steps and protocols are in place on a daily basis, the security of the site and enclosure, and what degree of training has taken place.

The inspection always results in a formal FTA report, which enumerates the findings discovered during the collection process. The report is considered a Notice of Corrective Actions (NOCA), and is sent directly to the collection site manager or director, and has a 60-day deadline for a response. After the collection site responds with descriptions, documents, and photos detailing their process corrections, the FTA evaluates the changes described.

Based on the evaluations, a compliance letter is issued or the FTA will require (Continued on page 2)

Immediate Means Immediate

(Do Not Pass Go, Do Not Collect $200)

In a number of places the DOT drug and alcohol testing regulation (49 CFR Part 40) uses the word "immediately" to direct the actions of employers, collectors, Breath Alcohol Technicians (BATs), Medical Review Officers (MROs) and laboratories. In fact, Part 40 uses the term "immediate" or "immediately" seventy times. Service agents are required to notify the Designated Employer Representative (DER) immediately with test results, problems with testing, employee test refusals, or anything unusual. Service agents are also required to re-collect specimens immediately in certain circumstances. Employers are required to take immediate action to remove employees from safety-sensitive functions as soon as they are notified of a positive test or test refusal. Service agents and employers that do (Continued on page 2)

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U.S. Department of Transportation
Federal Transit Administration

Collection Sites May Be Visited

(Continued from page 1) additional documentation. If the collection site is non-responsive or many of the same findings are discovered in subsequent rechecks, the FTA will issue a Notice Of Proposed Exclusion (NOPE). A NOPE indicates that the FTA intends to prohibit the business from conducting any U.S. DOT-regulated drug or alcohol testing for up to five years.

The inspection of collection sites has resulted, as of this writing, in several businesses receiving NOPE letters from FTA. These collection sites have demonstrated repeated non-compliance with the regulations, and despite the owners or managers responding otherwise, have not installed adequate managerial or operational controls within their business to ensure Part 40 compliant urine collections. As a result, the FTA is pursuing Public Interest Exclusions (PIE) (as per 49 CFR Part 40 Subpart R) against these businesses.

"Because the collector is unaware that they are under review, the inspector is able to learn exactly what steps and protocols are in place."

If you are concerned about the collection site you use, the FTA always encourages you to visit the facility yourself to conduct a walk-through of the procedures and protocols, to talk with the collection site about the seriousness of the protocols, and to always monitor the paperwork that comes in from the collectors. If these measures are ineffective, transit systems can either switch collection sites or contact the FTA for assistance.

For instructions and guidance about conducting an inspection of your collection site, please view the U.S. DOT instructional video at the following link: http://www.dot.gov/odapc/dot-mock-collection-instructional-video

In addition, the Urine Collection Site Audit questionnaire is located at the following link: http://transit-safety.fta.dot.gov/DrugAndAlcohol/TechnicalAssistance/AuditQuestions/default.aspx

Immediate Means Immediate

(Continued from page 1) not comply with these requirements to take immediate action are in violation of the regulation.

Similarly, the FTA regulation (49 CFR Part 655) uses the term immediately ten times. Specifically, §655.45(h) states that employers must require each covered employee who is notified of selection for random drug or random alcohol testing to proceed to the test site immediately. What immediately means in terms of travel time must be established by the employer based on proximity to the collection site. However, when the employee is performing a safety-sensitive function at the time of the notification, the employer shall ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site immediately.

In each instance where the word "immediately" is cited, the regulation is directing the employer or service agent to act without delay, distraction, or intervention as the necessary action is required to protect the public safety.

According to the 2013 online edition of the Merriam-Webster dictionary, the word 'immediate" is defined as:

im-me-di-ate: acting without the intervention of another object, cause or agency ... occurring, acting, or accomplished without loss or interval of time.

As such, employees who are instructed to proceed to a collection site immediately must proceed directly to the collection site without delay. All the employee's subsequent actions must lead to an immediate specimen collection. Employees who stop along the way at their home, store, or other location for any purpose (i.e., food or drink, child care, personal errands, changing clothes), stop to talk with family, friends, or co-workers, or do anything else that interferes with or delays the test should be deemed in violation of the requirement to proceed to the collection site immediately.

Employees are required to adhere to these regulations as a condition of employment. Any time an employee refuses to follow these regulations (i.e., proceed to the collection site immediately) and submit to a drug or alcohol test, the employee will be deemed to have refused the test and subject to the consequences outlined in the regulations and the employer's policy.

National Focus on Prescription Drug Abuse Epidemic

The Office of National Drug Control Policy (ONDCP) reports that prescription drugs are the second-most abused category of drugs in the United States following marijuana. Prescription drugs, when taken for non-medical reasons, can be just as dangerous and deadly as illegal drugs. When taken for legitimate purposes, these drugs can be safe and effective in the treatment of the condition for which they were prescribed. Even legitimate use, however, can result in side effects that impact a safety-sensitive employee's ability to perform his/her job functions safely.

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Because prescription drugs are legal, they are readily accessible from prescribing health care professionals and the medicine cabinets of family and friends. In fact, the 2009 National Survey on Drug Use and Health reports that only five percent of individuals that abuse pain relievers obtained the drug from a drug dealer or other stranger, and less than one half of one-percent bought the drugs on the Internet. The survey found that 18 percent reported getting the drug from a single doctor, while 70 percent indicated they got the medication from family or friends who obtained them from a single prescribing doctor. Because these drugs are prescribed by a healthcare professional and usually obtained free from a friend or relative, many users believe them to be safe.

ONDCP reports that the most commonly misused prescription drugs fall into three classes:

- Opiods including: oxycodone (sold as Percocet, Tylox, and OxyContin), hydrocodone (sold as Vicodin and Lortab), and methadone (sold as Dolophine).
- Central Nervous System depressants including: butalbital (sold as Fiorinal/Fioricet), diazepam (sold as Valium), and alprazolam (sold as Xanax).
- Stimulants including: methylphenidate (sold as Ritalin) and amphetamine/dextroamphetamine (sold as Adderall).

In an effort to combat this epidemic, the 2011 Prescription Drug Abuse Prevention Plan expands upon President Obama's National Drug Control Strategy and calls for action in four major areas to reduce prescription drug abuse. The four areas are:

1. **Education.** Efforts need to be made to educate the American public about safe use, storage and disposal of prescription drugs and the dangers of abusing prescription drugs.
2. **Monitoring.** Implement prescription drug monitoring programs to reduce "doctor shopping" and drug diversion.
3. **Proper Medication Disposal.** Develop convenient and environmentally responsible methods of disposal to rid home medicine cabinets of unused drugs.
4. **Enforcement.** Provide law enforcement with the tools necessary to eliminate improper prescribing practices and stop "pill mills."

"Because these drugs are prescribed by a healthcare professional ... many users believe them to be safe."

Mirroring this concern, the Substance Abuse and Mental Health Services Administration's (SAMHSA's) Drug Testing Advisory Board (Continued on page 4)

National Focus on Prescription Drug Abuse Epidemic

(Continued from page 3) (DTAB) recommended the expansion of the opiate panel of the Federal Workplace Drug Testing Program to include the Schedule II prescription medications oxycodone, oxymorphone, hydrocodone, and hydromorphone. Even though these changes have not been incorporated into the DOT program yet, the DOT and Department of Health and Human Services are diligently working together to initiate the rule-making process that will ultimately address the use of these substances in the transportation industry and expansion of the opiate drug testing panel. Progress on this rule-making process will be reported in this newsletter, and the official announcements will be published on FTA's (http://transit-safety.fta.dot.gov) and ODAPC's (http://www.dot.gov/odapc) websites.

In the meantime, transit employers should take the necessary measures it sees fit to educate its safety-sensitive employees about the safe use, storage and disposal of prescription drugs and the dangers of abusing prescription drugs. Additionally, employers can work with local anti-drug coalitions, pharmacies, environmental agencies and health care providers to support community-based medication disposal programs.

For more information on the OND-CP initiatives and what employers can do to combat this epidemic, go to the Office's website at: http://www.whitehouse.gov/ondcp/prescription-drug-abuse or http://www.WhiteHouseDrugPolicy.gov

The 8th Annual FTA Drug and Alcohol Program National Conference

Presentations from the conference are available at http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training/NatConf/2013/

When EBTs Fail to Print Confirmation Tests

In the breath-alcohol testing process, the test is divided into two breath-specimens events. The first is the initial screening test. The word "screening" is important, which means a test that requires no further action in the case of a negative result (.019 or below), or which requires a confirmation test in the case of any result of .02 or higher.

A screening test is not required to be evidentiary (scientifically sufficient to enter as evidence), which means that the results need not be printed. Such results may be displayed digitally or indicated by other means such as a color-coded result of range. Since the overwhelming majority of breath-alcohol tests have a negative result (.019 or lower), screening tests comprise roughly 99% of all tests performed.

If the test results are .02 or higher, the regulations require the breath-alcohol technician to conduct a second test, called a confirmation test, using an evidentiary testing device (one that prints the result). This second test becomes the test result of record.

49 CFR Part 40.267(a)(4) states that if the confirmation test fails to produce a printout, the test must be canceled. This does not mean that the entire testing episode must be canceled, rather, just the single testing event. If a printer error occurs, causing the confirmation test to be canceled, the test technician can repair or otherwise make the printer operable and immediately perform a new test.

The collector's first action should be to attempt to make the printer operable in the presence of the donor. If the printer is unable to be repaired, the test is cancelled. If the breath-alcohol technician is able to secure a second device, a confirmation test may be conducted. Although the second testing device (EBT) will produce a test that the device itself considers an initial test, the results may be used as confirmatory and attached to the existing alcohol testing form (ATF) with an explanation in the remarks section.

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	Location	Date*
Washington State Transportation Training Coalition	Everett, WA	TBD	May 1, 2013
Oregon DOT	Salem, OR	Best Western Plus Mill Creek Inn 3125 Ryan Drive	May 8, 2013
AppalCART	Boone, NC	AppalCART 305 NC HWY 105 BYP	May 14, 2013
City of Sioux City	Sioux City, IA	SiouxCity Convention Center	May 30, 2013
New Hampshire DOT	Concord, NH	New Hampshire DOT 7 Hazen Drive	June 6, 2013
Corpus Christy Regional Transit Authority	Corpus Christy, TX	TBD	June 17, 2013
Wichita Transit	Wichita, KS	Wichita Transit 777 E. Waterman Building 200	July 11, 2013
Montana DOT	Helena, MT	Montana DOT 2701 Prospect Ave.	August 15, 2013

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 or call **(617) 494-6336** for more information.

Transportation Safety Institute (TSI) Training Schedule

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

- **Substance Abuse Management and Program Compliance** for (2½ days). This two-and-a-half 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

Title	Location	Date*
Substance Abuse Management and Program Compliance	Sioux Falls, SD	March 12 – 14, 2013
Substance Abuse Management and Program Compliance	Baltimore, MD	May 21 – 23, 2013
Reasonable Suspicion Determination for Supervisors Seminar	Baltimore, MD	May 24, 2013
Reasonable Suspicion Determination for Supervisors Seminar	Grand Rapids, MI	June 14, 2013
Substance Abuse Management and Program Compliance	Jackson, MS	June 25 – 27, 2013
Reasonable Suspicion Determination for Supervisors Seminar	Jackson, MS	June 28, 2013
Substance Abuse Management and Program Compliance	Birmingham, AL	July 16 – 18, 2013
Reasonable Suspicion Determination for Supervisors Seminar	Birmingham, AL	July 19, 2013

** Schedule Subject to Change*

Marijuana Class I Appeal Rejected By Federal Court, Still Dangerous With No Accepted Medical Use

WASHINGTON – As reported in the Huffington Post, a federal appeals court Tuesday, January 22, 2013 rejected a petition to reclassify marijuana from its current federal status as a dangerous drug with no accepted medical use.

The appeals court panel denied the bid from three medical marijuana groups, including Americans for Safe Access, and several individuals. In 2011, the Drug Enforcement Administration had rejected a petition by medical marijuana advocates to change the classification.

In his majority opinion Tuesday, Judge Harry T. Edwards wrote that the question wasn't whether marijuana could have some medical benefits, but rather whether the DEA's decision was "arbitrary and capricious." The court concluded that the DEA action survived a review under that standard.

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DOT OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE NOTICE

December 3, 2012

Recently, some states passed initiatives to permit use of marijuana for so-called "recreational" purposes.

We have had several inquiries about whether these state initiatives will have an impact upon the Department of Transportation's longstanding regulation about the use of marijuana by safety-sensitive transportation employees—pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others.

We want to make it perfectly clear that the state initiatives will have no bearing on the Department of Transportation's regulated drug testing program. The Department of Transportation's Drug and Alcohol Testing Regulation – 49 CFR Part 40 – does not authorize the use of Schedule I drugs, including marijuana, for any reason.

Therefore, Medical Review Officers (MROs) will not verify a drug test as negative based upon learning that the employee used "recreational marijuana" when states have passed "recreational marijuana" initiatives.

We also firmly reiterate that an MRO will not verify a drug test negative based upon information that a physician recommended that the employee use "medical marijuana" when states have passed "medical marijuana" initiatives.

It is important to 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 Department of Transportation's drug testing regulations to use marijuana.

We want to assure the traveling public that our transportation system is the safest it can possibly be.

Jim L. Swart

Director
Office of the Secretary of Transportation
Office of Drug and Alcohol Policy and Compliance
Department of Transportation

Notification Forms: **Accuracy is Key**

DOT regulations mandate that employers supply collectors with standardized information for each covered test. Providing this information to collectors serves several purposes: it ensures that the correct type of test is performed; it streamlines the collection process; and it significantly reduces paperwork errors and therefore mitigates the need to seek corrections.

The recommended method of supplying collectors with the remaining pieces of information is through the use of a notification form. Such forms not only give collectors the information they need to properly conduct a test, but they can also be used to track the times that employees are notified for a test and the time that they arrived at your collection site.

"Providing this information to collectors serves several purposes."

Ensure that those responsible for completing notification forms understand how to fill them out accurately, and that they are familiar with testing terminology. This will help to ensure that the correct test is ordered and will reduce the chance of errors in testing. Some audits have revealed DERs marking forms and inadvertently ordering return-to-duty tests (mandatory direct observation) instead of 90-day pre-employment tests. In these cases, seemingly insignificant mistakes created events where employers seriously violated the privacy of their employees. Avoid these and lesser mistakes by taking the time to discuss the importance of accurately filling out testing forms with your staff.

Information Provided to Collector

- Full name of the employee tested
- Social Security Number or Employee ID number
- Laboratory name and address
- Employer's name, address, phone number, and fax number
- Name and telephone number of the contact DER (C/TPA, where applicable)
- MRO name, address, phone number, and fax number
- DOT agency regulating the employee's safety-sensitive duties (e.g., FTA)
- Test reason (e.g., Post-Accident)
- If the test is to be observed

Suggestion: pre-print contact information (employer, laboratory, and MRO) and the DOT agency on the CCF. Pre-printing information not only makes testing more efficient, it ensures fields on the CCF are accurate and error-free.

Drug & Alcohol Testing Notification Form

Employee Information

Name: _____

Number: _____

Supervisor Authorizing Test: _____

Collection Site: _____

Transported: ___ Yes ___ No

Date & Time Notified: _____ (Date) _____ (Time)

Testing Authority: ___ DOT ___ Non-DOT ___ Other (Specify)

U. S. DOT Mode: ___FTA ___FMCSA ___FAA ___USCG ___ PHMSA ___FRA

Test Type: ___ Drug ___ Alcohol

Test Category:

___ Pre-employment ___ Random ___Post-Accident

___ Reasonable Suspicion ___ Return-to-Duty ___ Follow-up

___ Retest

Observed Collection: ___ Yes ___ No

Other: _____

_____

Date & Time Arrived at Collection Site: _____ Date _____ Time

Date & Time of Test: _____ Date _____ Time

Reviewing Collector Credentials?
Check Out Proficiency Demonstrations

As stated in §40.15(b), FTA-covered employers are responsible for ensuring that their service agents, including urine specimen collectors, meet the qualification requirements specified in Subpart C of Part 40. To be considered a qualified collector, an individual must meet the minimum requirements in five areas: basic information, qualification training, initial proficiency demonstration, refresher training, and error-correction training. Each of these components is an essential part of the qualification determination.

In most cases when an employer's Designated Employer Representative (DER)/Drug and Alcohol Program Manager (DAPM) monitors a collection site, a mock collection is performed and the collector's credentials are reviewed. The focus of the credential review is primarily on the collector's training documentation that is usually in the form of a certificate. It should be noted that these certificates are self-produced and that U.S. DOT does not certify collectors. A critical part of the review that may be missing is a review of the collector's proficiency demonstration documentation.

Following a collector's completion of qualification training, the collector must demonstrate proficiency in collections by completing five consecutive error-free mock collections. The five mock collections must include two uneventful collection scenarios, one insufficient quantity of urine scenario, one temperature out of range scenario, and one scenario in which the employee refuses to sign the Chain of Custody and Control Form (CCF) and initial the specimen bottle tamper-evident seal. The mock collections must be monitored and evaluated by a qualified collector that meets requirements specified in §40.33(c)(2), the qualified monitor must attest in writing that the mock collections are "error-free." This documentation must be maintained for a minimum of two years.

The proficiency demonstration process allows the monitor to evaluate the collector's grasp of the collection procedures, process for completing the CCF, and knowledge of what to do in problem situations. The proficiency demonstration process is both a training tool and an assessment tool. A collector who is able to complete five consecutive, error-free collections in their entirety is expected with a reasonable level of assurance to be able to collect specimens as specified in the regulation. Collectors, who do not complete their proficiency demonstrations, perform only partial collections, or make errors should not be considered qualified collectors since they have not met the regulation's proficiency demonstration requirement.

When conducting reviews of their collection sites, DAPMs should not only inquire about the collector's qualification training, but should also inquire into the nature of the proficiency demonstration process. The collector must also be able to provide documentation, in the form of the qualified monitor's statement, of the demonstrations. If the mock CCFs are provided, the DAPM should review them to see if the mock collections were accurately performed in their entirety. If not, the DAPM should bring this to the attention of collection site management so corrective action can be taken.

How to Revise a Submitted Annual MIS Report

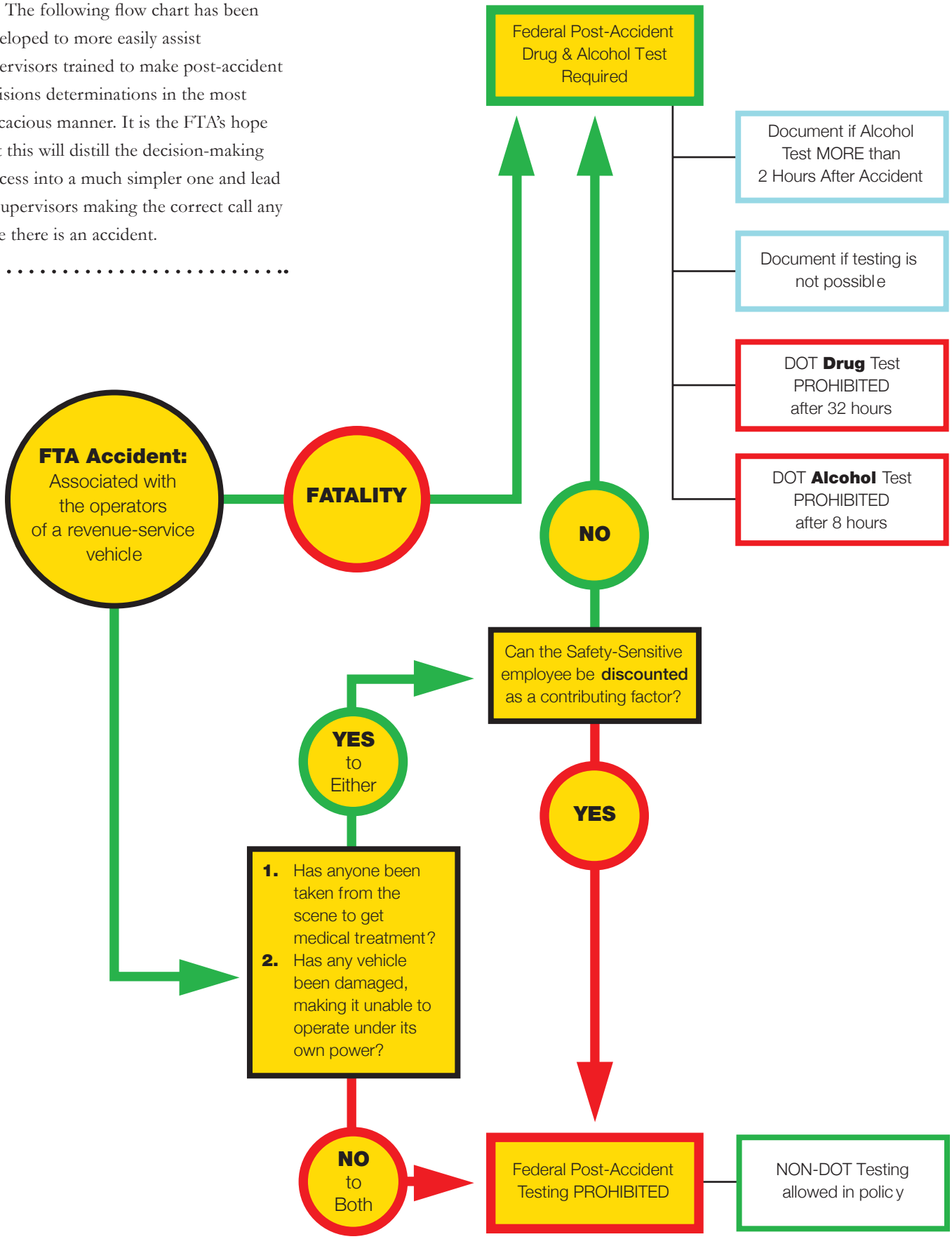
If you submit your Management Information System (MIS) report and subsequently realize an error has been made on the report, you may easily make a change.

1. Log into http://damis.dot.gov using your current year's user name and password.
2. Click the option to edit your data and make your changes. Important: you must re-sign that you are resubmitting your data.
3. Click the Wrap-Up screen and certify your data, otherwise your MIS submission will be considered incomplete.
4. If you are a Subrecipient or a Contractor, you must notify your Grantee of the change since they will need to log back in with their user name and password to review and accept the revised data submission.

If you are a Grantee and need to add or remove a contractor or subrecipient, contact the FTA Drug and Alcohol Project Office at 617-494-6336 or e-mail us at DAMIS@dot.gov

Post-Accident Flow Chart

The following flow chart has been developed to more easily assist supervisors trained to make post-accident decisions determinations in the most efficacious manner. It is the FTA's hope that this will distill the decision-making process into a much simpler one and lead to supervisors making the correct call any time there is an accident.



Why File Management is Critical to Compliance

File management is a critical component of a compliant program and can be a challenge for even the best Designated Employer Representatives (DERs)/ Drug and Alcohol Program Managers (DAPMs). FTA-covered employers must maintain certain records documenting their testing program that is consistent with the requirements set forth in Subpart P of Part 40 and §655.71. These DOT and FTA requirements specify the type of records that must be kept and the corresponding length of time they should be maintained. These requirements should be considered minimums as additional records are sometimes needed to complete a paper trail and to thoroughly document a decision making process.

Diligence is required by the DAPM to ensure that all documents generated as part of the testing program are collected and appropriately maintained in a file structure that allows for easy access and administration of the FTA drug and alcohol testing program. Procedures should also be put into place to allow the DAPM to monitor the status of files and identify situations where receipt of records is delayed or where they might be misplaced, misfiled, or missing altogether. This need has become especially evident in situations where records are maintained by different individuals in different locations within the same employer.

Depending on the complexity of an employer, it is not uncommon for various functions of the drug and alcohol testing program to be spread among various departments. In small municipal transit systems for example, it is common practice for some administrative functions (i.e., pre-employment testing associated with the hiring process) to be performed by the city's human resources department while the day-to-day administration of the random testing program falls to the transit department's DER/DAPM. In larger transit systems, record keeping responsibilities may be spread among human resources, operations, risk management, medical and other departments. Often times the situation is exacerbated when these functions are performed in different physical locations.

(© iStockPhoto/beetle8)

The end result of the decentralization of record keeping functions is that records can be misplaced, misfiled, or lost altogether. In some cases, confidentiality of records is compromised. It may also be difficult for the DER/DAPM to know if service agents are failing to provide documentation in a timely manner or at all. In these instances, communication and cooperation between all of the participants is essential. Employers should have well thought out standard operating procedures for records management that are strictly adhered to.

A highly encouraged best practice is to designate one person (usually the DER/DAPM) with the ultimate responsibility for all record keeping, and if possible maintain all records in one secure location. By doing this, the DER/ DAPM has the responsibility and authority to track records through the various channels within its organization to ensure all necessary documentation is generated and subsequently maintained in a secure, organized, complete, and accessible manner. The use of master logs to record pertinent information about individual testing events has been helpful to many DERs/DAPMs in their efforts to monitor and provide oversight to their testing program.

The best file management system for an employer is the one that reflects the style and preferences of the file administrator, the size of the organization, space availability, and administrative needs of the program. A properly maintained file management system should provide a comprehensive paper trail that documents and supports all testing decisions and makes program oversight, administration, and production of annual reports easier. File management methods are discussed in Section 4.5 of the FTA "Best Practices Manual: FTA Drug and Alcohol Testing Program." Appendix B of the manual contains examples of forms and master logs used to document the various types of tests conducted.

http://transit-safety.fta.dot.gov/publications/order/singledoc.asp?docid=1162

Providing Modal Authority for the CCF

In DOT-regulated drug and alcohol testing, the employer is required to inform the employee of the federal agency (e.g., DOT) and modal authority (e.g., FTA) for the test. 49 CFR Part 655.17 Notice requirement states "before performing a drug or alcohol test under this part, each employer shall notify a covered employee that the test is required by this part. No employer shall falsely represent that a test is administered under this part."

The use of the Federal Drug Testing Custody and Control Form (CCF) or the U.S. DOT Alcohol Testing Form (ATF) represents to the employee that the test is required by the U.S. DOT, and the CCF requires the collector to mark the applicable federal testing authority (HHS, NRC or DOT) with a further mark to specify the DOT agency (FMCSA, FAA, FTA, FRA, PHMSA, USCG) in Step 1.

Per Section 40.14, the employer is required to provide the collector with information for the CCF, including the DOT Agency regulating the employee's safety-sensitive duties. Audits conducted over the last year have found that employers regularly fail to provide this information to their collectors. As a result, collectors often assume about the DOT agency and mark the wrong box (usually defaulting to FMCSA) or they simply omit agency information.

Section 40.209(b)(1) stipulates that not checking or incorrectly checking the federal authority or DOT agency errors in Step 1-D, as errors that must be "documented" (see Section 40.209(a)), but that do not require a corrective affidavit and will not result in the test being cancelled. However, the documentation requirement mandates that the employer must recognize these errors and make an effort to prevent them happening in the future.

Employers are expected to review their CCFs and ATFs for errors. The best method to correct these errors is to prevent them from occurring by following these steps:

1. Make sure that your notification form clearly states that your company is ordering the test as an FTA test, and that "FTA" is marked on the testing form.
2. When applicable, call your collection site and explain that all of your tests must be conducted as FTA tests.
3. Pre-mark each testing form (Step 1, Part D) with the DOT and FTA boxes checked.

If you do notice that the collection site has mismarked a test, contact them. While a letter of correction is not required by the FTA, you may want to have one from your vendor. Also inform your TPA or MRO that the test should be redesignated, and require corrective action from your vendors, i.e. a process to catch and correct this mistake in the future.

FTA Supports Reasonable Suspicion Testing

One of the prominent barriers to reasonable suspicion testing is the perceived inter-personal factor between a supervisor and the safety-sensitive employee reasonably suspected of being impaired. Supervisors often report feeling hesitant to refer a potentially impaired employee for reasonable suspicion testing because of the possibly uncomfortable dynamic that may exist between them after the test. In some cases, a lack of support can exist for supervisors from management, employees, and Union representation with threats of grievances, legal action, harassment complaints, and ostracism. All which provide a disincentive to initiate referrals for testing.

Part of the issue is the assumption that if a reasonable suspicion test result is negative, the supervisor did something wrong. This is fundamentally incorrect. The supervisor is not responsible for the outcome of the test, and once the employee is sent for the test and the circumstances are documented, the supervisor has fulfilled his or her requirements. As long as the supervisor is able to detail their suspicion of impairment (not necessarily specific substance use), the FTA considers those actions appropriate and the supervisor is fulfilling their responsibility to prevent a possibly impaired individual from performing safety-sensitive duties. A negative test result does not mean that the supervisor was wrong; it simply means that alcohol or the five substances for which the FTA tests were not the source of the suspected impairment.

If a supervisor or company official feels prevented from, or not supported for referring an employee for a reasonable suspicion test, it should be known that the FTA will support their decision to test, regardless of the test outcome. In disputes, grievances, arbitrations, discipline hearings, or suits, the FTA has and will defend the supervisor in his or her documented suspicion of impairment that leads to a test referral.

Do Not Double Report MIS Testing Results

Annual covered employee totals, drug and/or alcohol testing results and canceled tests should never be reported to FTA or any DOT agency more than once. Annual MIS submissions are used in determining minimum random testing rates for all DOT modes. Double reporting does occasionally occur. It is most common, in the following situations: an employer is regulated by more than one DOT agency, a contractor contracts with multiple FTA employers/grantees, and/or an employer is a recipient of multiple types of FTA funding (e.g., 5307 and 5311).

Employer Regulated by Multiple DOT Agencies

DOT instructions for completing the MIS collection form states "If you have employees, some of whom perform duties under one DOT agency (e.g., FMCSA) and others who perform duties under another DOT agency (e.g., FTA), enter only the number of those employees performing duties under the DOT agency for whom you are submitting the form" (in other words, submit separate results to each DOT agency).

Additionally, the instructions state "If you have covered employees who perform multi-DOT agency functions (e.g., an employee drives a commercial motor vehicle covered under FMCSA and the same employee operates a revenue service vehicle covered by FTA), count the employee only on the MIS report for the DOT agency regulating more than 50 percent of the employee's safety-sensitive functions." This is common in municipalities that have a transit division and a public works division.

FTA covered employees who may perform functions covered under multiple employee categories (e.g., a revenue vehicle operator who also dispatches) would be reported only under the employee category for which they performed the majority of their safety-sensitive functions.

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Contractors Working for Multiple FTA Employers/Grantees

Contractors who perform safety-sensitive functions for more than one FTA grantee follow similar guidelines as the employers who perform functions for more than one DOT agency as shown above. If, as a contractor, you have employees who perform safety-sensitive duties as part of a contract with various FTA grantees, enter only the number of those employees performing duties under each FTA grantee for whom you are submitting a MIS form. In this case, you are required to submit separate MIS forms, one for each contract.

Additionally, if you have individual covered employees who perform safety-sensitive functions for multiple FTA grantees, count each employee only once on the MIS report for the FTA grantee for which they are providing more than 50 percent of the employee's safety-sensitive function.

Employer Receives Multiple Types of FTA Funding

Increasingly, FTA covered employers receive multiple types of FTA funding. In this case, the FTA grantee should submit a single MIS report directly to FTA, as an FTA direct recipient.

Note: If the grantee is also a subrecipient of 5311 funds and is requested by the state DOT to submit a separate MIS so that the state can meet its obligation and show oversight, contact the FTA Drug and Alcohol Project Office and a reporting remedy will be provided.

The goal is to submit accurate information and to submit it only once.

If you require further clarification, please call or e-mail the FTA Drug and Alcohol Project Office at (617) 494-6336 or FTA.DAMIS@dot.gov

Best Practice: Provide Updated DER Information Before Each Collection

A Designated Employer Representative (DER) is defined in §40.3 as "an employee authorized by the employer to take immediate action(s) to remove employees from safety-sensitive duties, or cause employees to be removed from these covered duties, and to make required decisions in the testing and evaluation processes." Historically, the FTA has used the term DAPM (Drug and Alcohol Program Manager) to mean the same as DER. Employers must provide urine specimen collectors and Breath Alcohol Technicians (BATs) with the name and telephone number of the appropriate DER to contact should there be any problem or issues that arise during the testing process requiring an employer representative (i.e., test refusal, adulterated specimen, insufficient volume, BAC ≥0.02, etc.).

49 CFR Part 40 lists information that may be preprinted on the Custody and Control Form (CCF) and the Alcohol Testing Form (ATF) but does not include DER name and contact information. The employer should identify a DER for each unique testing event and provide the collector/BAT with contact information to ensure they have immediate access to the DER. Different DERs may be identified for different testing events depending on the time, day, and location of the testing event and the availability of potential DERs. Transit employers may have a primary DER, but during times this individual is unavailable, another employer representative must be designated as the point of contact for the testing event.

Employer names and phone numbers frequently change and master contact lists can be out-of-date. The designated contact representative may also be unavailable. This can result in the collector/BAT scrambling to find a point of contact to call at the transit employer, which may result in delays and, in some cases, release of confidential information to inappropriate employer personnel. In instances where multiple contacts are listed, the collector/BAT may call others on the list until someone answers. The person who is finally contacted may have little or no knowledge of the employee or testing event and may be ill-prepared to address the issue at hand. By providing up-to-date contact information for employer representatives that are prepared to deal with that particular testing event and any possible issues, these unnecessary delays and subsequent negative consequences can be avoided.

Since §40.14 requires employers to ensure that collectors have basic information for each collection they perform, a best practice is to provide collector/BATs with an updated form or notification prior to every testing event that lists all of the information that employers are required to provide, including the DER names and contact information unique to that testing event.

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

Employers: Save Copies of Your MIS Submissions for Your Records!

According to 49 CRR Part 655.71 Retention of Records (b)(1) copies of annual MIS reports submitted to FTA must be maintained for five years by the FTA-covered employer. When you are filing your MIS report each year, please create and maintain a copy.

Employers are not able to go back into the MIS reporting system for past years, so please be cognizant of this requirement. Often, employers call the FTA Drug and Alcohol Project Office if they are having an FTA Drug and Alcohol Compliance Audit or Triennial Review because they did not retain copies. Requests to the FTA for old MIS reports do not meet record retention requirements.

Also, note, that §655.71(a) General Requirement states that you must maintain MIS records in a secure location with controlled access.