FTA Drug and Alcohol
REGULATION UPDATES
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Issue 82

Post-Accident Testing Thresholds

Post-accident drug and alcohol tests can only be done under FTA authority if the following thresholds are met:

- An individual dies;
- An individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident, and the employee's performance cannot be completely discounted as a contributing factor to the accident;
- A vehicle (including a non-transit vehicle) incurs disabling damage as the result of the occurrence, in which the public transportation vehicle involved is a bus, electric bus, van, or automobile, and is transported away from the scene by a tow truck or other vehicle, and the employee's performance cannot be completely discounted as a contributing factor to the accident; or
- A railcar, trolley car, trolley bus, or vessel is removed from operation, and the employee's performance cannot be completely discounted as a contributing factor to the accident.

Other criteria, such as the dollar amount of damages, law enforcement direction, or insurance agency requirements do not meet the thresholds for FTA post-accident testing. Employers may only conduct FTA post-accident testing if a situation meets one of the above criteria. Employers may set their own standards for post-accident testing, however, these tests are not FTA-authorized post-accident tests unless a threshold is met, and must be conducted under employer authority. It is critical the employee(s) responsible for determining whether to test documents the decision-making process for drug and alcohol testing records.

For more information about FTA post-accident testing, please visit the Tools and Resources page.

In this Issue

U.S.Department of Transportation
Federal Transit Administration

Random Testing Spread Requirements

49 CFR 655.45, which describes the requirements for DOT random testing, states that testing must be "spread reasonably throughout the calendar year" and "conducted at all times of day when safety-sensitive functions are performed."

Employees must be aware that they can be tested at any time of day, on any day of the week, and during any part of the year in which safety-sensitive work occurs. If testing is batched (i.e., if multiple employees are routinely sent for testing at the same time or on the same days) or otherwise performed in a predictable manner (e.g., testing is always completed within the first few days of the selection period), this critical deterrent effect is undermined.

A reasonable spread does not require a perfect distribution of tests across all days and hours. It is acceptable for more testing to occur during peak times. However, covered employers must try to conduct tests during off-peak times, such as early-morning and late-night hours, and - for employers with weekend operations - on Saturdays and Sundays as well.

Consortiums Must Meet Random Testing Rate Minimum Requirements

For DOT drug and alcohol testing, a consortium is typically a random testing pool consisting of all safety-sensitive employees for a group of DOT-covered employers. Only DOT-covered employees are permitted to be in this random pool. When in a consortium, it is not each individual employer that must test at or above the FTA minimum annual percentage rate for random drug and alcohol testing, but the consortium as a whole.

When participating in a DOT consortium, the employer must verify annually and maintain documentation that the consortium met or exceeded the minimum annual percentages established by FTA.

FTA's Post-Accident/Reasonable Suspicion Cards are Intended for Supervisors

FTA's Post-Accident and Reasonable Suspicion cards are available by mail in a limited capacity.

FTA created these cards as a way for transit employer staff to have easy access to FTA's requirements for reasonable suspicion and post accident testing. These cards are intended to be used to guide the decision-making process: post-accident cards should only be given to employees making post-accident testing decisions, and reasonable suspicion cards should only be given to supervisors and company officials authorized to make reasonable suspicion determinations.

Requests for physical cards will be filled based on the frequency an agency has ordered and by the number of personnel FTA estimates needing this resource, using information reported to the drug and alcohol Management Information System (MIS). FTA has a template available on its website for employers to download and print additional cards.

FMCSA Clearinghouse-II – Prohibited Drivers

As established by FR 2021-21928, State Driver's Licensing Agencies (SDLAs) must use Federal Motor Carrier Safety Administration (FMCSA) Clearinghouse information and downgrade licenses of all drivers with the Clearinghouse status of "prohibited" by removing their commercial driving privileges. All downgrading must be complete by November 18, 2024. SDLAs must also use the Clearinghouse information to determine reinstatement of commercial driving privileges.

How To Clear Your FTA Employee

FTA-covered employers with employees currently completing follow-up programs as a result of an FMCSA violation can ensure the Commercial Driver's Licences (CDLs) of those employees are not downgraded. Since FTA-covered employers do not access the Clearinghouse, you will need to provide protected copies of the Return-to-Duty (RTD) testing records (i.e., Alcohol Testing Forms (ATFs)/ Custody and Control Forms (CCFs) and Medical Review Officer (MRO)-verified results) to clearinghouse@dot.gov, for the records to be entered. Employees with a negative RTD test result in the Clearinghouse will not be subject to a downgrade.

Additional Resources

FMCSA Clearinghouse - Frequently Asked Questions (dot.gov)

Checklist - Drug & Alcohol Clearinghouse: Countdown to Clearinghouse - II (dot.gov)

Is a Negative Dilute Just Another Negative?

The regulations in 49 CFR 40.197 discuss what happens when an employer receives a report of a dilute urine specimen, including the actions the employer may or must take.

One type of negative dilute requires the MRO to direct an employer to send the donor back for an immediate recollection under direct observation, per 49 CFR 40.197(b). This would be noted on the MRO's verification report or Copy 2 of the CCF.

For the other type of negative dilute, the employer's action depends on their policy. The employer must choose how to proceed, and either send the donor for an unobserved retest or accept the negative test result. 49 CFR 40.197(b)(2)(ii) requires the employer "treat all employees the same," and to "inform your employees in advance of your decisions on these matters." Therefore, the employer's decisions must be clearly stated in the FTA drug and alcohol policy.

The employer may also establish different policies for different types of testing (e.g., conduct retests in pre-employment situations but not in random test situations). Again, this must be stated in the policy, and complied with whenever a negative dilute specimen is reported.

When the employer chooses to conduct a second test, the second test would be the test of record. Remember, no more than one retest is allowed, and documentation of all testing must be maintained.

Collectors Must Allow Three Hours for an Employee to Provide a Urine Specimen

When an employee does not provide enough urine to permit a drug test (i.e., 45 mL of urine in a single void), the collector is required by 49 CFR 40.193 to provide another opportunity to the employee to do so. The collector must discard the insufficient specimen, unless the specimen is out of temperature range or shows signs of tampering, and the "shy bladder" collection process begins. During this process, the employee is urged to drink up to 40 ounces of fluids, distributed reasonably through a period of up to three hours.

The collector must afford the employee a full three hours, if needed, to provide a specimen. The collector is not allowed to terminate the collection early because the collection site is closing, and all collectors are leaving. The employee must not be asked to return later or on another date to complete the collection. Note, it is permissible for one collector to turn the process over to another collector to complete the collection. See the article "*Can Two Collectors Be Involved in a Shy Bladder Collection?*" in Issue 79 for more details.

Collection Site Refusal Determinations

Under 49 CFR 40.355(i), the employer is the sole decision-maker in determining whether an employee's behavior at the collection site constitutes a drug or alcohol test refusal.

There may be rare instances where evidence satisfactorily excuses the employee's conduct that would otherwise result in a refusal determination. For example, an employee is waiting at the collection for a drug test to begin and receives a phone call that a family member has been in a severe accident. The employee then contacts the Designated Employer Representative (DER) and requests to leave the collection site to go provide necessary support to their family. Although an employee's failure to remain at the collection site until the drug test is complete would usually be deemed a refusal to test per 49 CFR 40.191(a)(2), in this instance, the employer may determine that the employee is permitted to leave the site even though they have already reported for the test.

When making refusal determinations, FTA recommends that employers take the entirety of circumstances into account. If the employer determines there is not a refusal, this decision must be documented in detail and maintained with drug and alcohol testing records.

Note, an MRO's drug test refusal determination or an evaluating physician's refusal determination for an employee's insufficient breath specimen is final and is not subject to employer review.

Employers Must Ask Applicants if They Failed or Refused a DOT Pre-Employment Test in the Previous Two Years

49 CFR 40.25 requires all employers to check DOT drug and alcohol testing records of employees they are intending to have perform safety-sensitive positions. FTA auditors have observed that while many employers perform the required elements of 40.25(a)-(i), employers often fail to meet the requirements of subsection, 40.25(j). 49 CFR 40.25(j) requires employers to ask each applicant whether they have tested positive or refused to test on any DOT pre-employment drug or alcohol tests administered by a covered employer within the previous two years. This record check must also be performed whenever an existing non-safety-sensitive employee is transferring to a safety-sensitive position. FTA has a compliant form available on its website, which can be used to meet this requirement.

Collection Sites and DER Information

It is important that collection sites are always aware of who to contact when direction is needed or when employer action must be taken. For this reason, DOT establishes at 49 CFR 40.14 and 49 CFR 40.36 a requirement for the employer to ensure for each collection that the collection site has the contact information for the employer's DER.

Collection site personnel must be able to contact a DER for assistance at any time safety-sensitive functions are being performed and tests are being conducted. 49 CFR 40.40(c)(2) requires the CCF to have the contact name and telephone numbersfor the DER. (This information may be preprinted on the CCF.) Employers and collection sites must ensure the DER information is accurate on the CCFs for each collection; as such it is essential these forms are updated promptly when applicable (e.g., when the DER leaves the position and is replaced by a new individual).

When Can Employers Be Their Own Collector?

Employers may seek to lessen the logistical and operational difficulties of performing compliant drug and alcohol testing by conducting collections themselves. DOT-covered employers may serve as their own collector for DOT drug and alcohol testing, provided they comply with specific guidelines and adhere to limitations.

First, any individual who performs these tests must meet the prerequisite training requirements: a urine collector must meet the requirements of 49 CFR 40.33, an oral fluid collector must meet the requirements of 49 CFR 40.35, and a breath alcohol technician (BAT) must meet the requirements of 49 CFR 40.213.

Once an individual has been properly trained, collections may be performed on site (or at any other location), provided a suitable testing facility is available that meets the requirements of 49 CFR 40.42, 49 CFR 40.47, and/or 49 CFR 40.221.

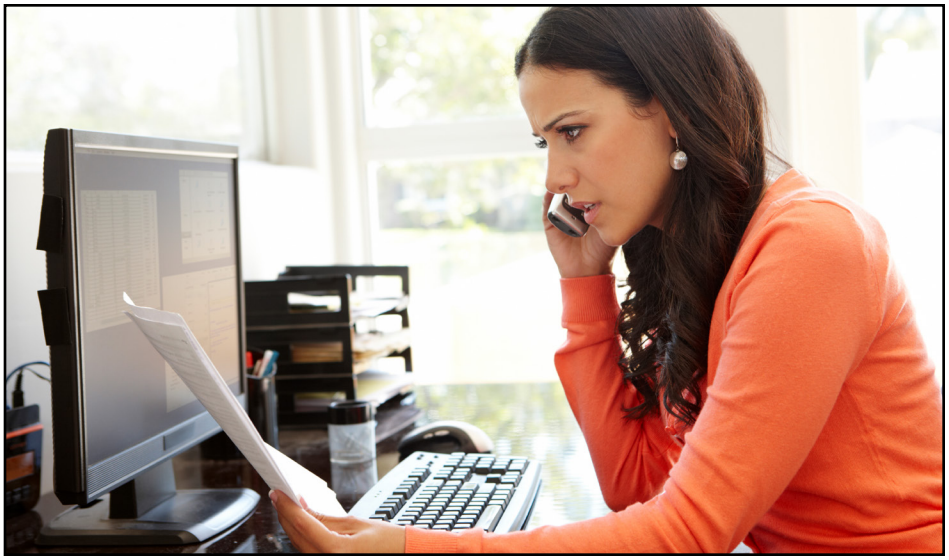
To avoid a conflict of interest, a direct supervisor may not serve as the collector for an employee over whom they have direct authority. Furthermore, no employee who is subject to DOT testing may act as the collector for a coworker and no employee may serve as their own collector. Finally, a collector must not be a relative or close personal friend of the employee being tested.

Given these requirements, a best practice is to assign a dedicated individual, or an individual from another department, for the collector role.

What are the Employer's Next Steps when the MRO Cancels a Drug Test?

A DOT drug test can be cancelled only by the MRO for the following reasons:

- A specimen has been reported to the MRO as an "invalid result" (49 CFR 40.159)
- A specimen has been reported to the MRO as "rejected for testing" (49 CFR 40.161)
- A split specimen fails to reconfirm the primary specimen results or was not available for testing (49 CFR 40.187)
- The MRO determines that a fatal flaw or uncorrected correctable flaw exists on the CCF (49 CFR 40.83, 49 CFR 40.199, and 49 CFR 40.201)
- The MRO, after consulting with an examining physician, has determined there is an acceptable medical explanation of the employee's failure to provide a sufficient specimen (49 CFR 40.193(d)(1))



When the DER receives a cancelled result from the MRO, the result will include the reason the test was cancelled, if an immediate recollection under direct observation is required, or a statement that no further action is needed unless a negative test result is required (i.e., pre-employment, return-to-duty, or follow-up tests).

49 CFR 40.207 details the effects of a cancelled test, and that a cancelled test is neither a positive nor a negative result. The employer **must not** attach the consequences of a positive test or other violation of a DOT drug testing regulation (e.g., removal from a safety-sensitive position) to a cancelled test. A cancelled test must not be used for the purposes of a negative test to authorize the employee to perform safety-sensitive functions (i.e., in the case of a pre-employment, return-to-duty, or follow-up test). A new test must occur in each of these testing categories. Additionally, an employer must not direct a recollection for an employee because a test has been cancelled, except as listed above when a negative test is required (i.e., in the case of a pre-employment, return-to-duty, or follow-up test) or as directed by the MRO as stated in 49 CFR 40.159(a)(5) and 49 CFR 40.187(b)(2), (c)(1), and (e).

FTA sometimes finds employers incorrectly report missed tests as "cancelled tests" on the annual MIS report. A missed test occurs, for example, when an applicant is sent for pre-employment testing, but leaves the collection site before the test commences. While this missed test should not be reported in MIS as a completed test, it is also not a 'cancelled' test, and must not be reported as such.

A cancelled test does not count towards the number of tests needed to meet the employer's minimum testing rates and would be counted in the "Cancelled Results" column on the annual MIS submission. Additionally, a cancelled DOT test does not provide a valid basis to conduct a non-DOT test (i.e., a test under company authority).

If the DER receives a cancelled result and is unsure on how to proceed, the MRO can provide further guidance or the DER should contact the FTA Drug and Alcohol Project Office for assistance at fta.damis@dot.gov or 617-494-6336.

Ask the Experts

Am I allowed to remove an employee from safety-sensitive functions pending a reasonable suspicion drug test result?

It depends. If you wish to remove the employee after the reasonable suspicion test, you may do so as long as this is clearly stated in the employer's FTA drug and alcohol policy and every employee is treated the same. If you have reasonable suspicion that your employee has used prohibited drugs, it is best practice to remove them from performing safety-sensitive functions until you receive their verified test result.

Can I discipline an employee after a confirmed alcohol test result of 0.02 or greater but less than 0.04?

When an employee has a confirmed alcohol test result that is 0.02 or greater but less than 0.04, 49 CFR 655.35(a) requires the employer to immediately remove the employee from performing safety-sensitive functions until the employee's next regularly scheduled shift (but not less than 8 hours following the test), or until the employee has an alcohol test result of less than 0.02.

49 CFR 655.35(b) prohibits the employer from taking any other action against the employee under DOT/FTA authority. This means you must not provide the employee with a list of SAPs if the alcohol test result is less than 0.04. The employer is, however, permitted to discipline the employee under its own company authority, as stated in their policy.

An employee who had a DOT violation has returned but for "light duty" only, due to an injury, so no safety-sensitive functions will be performed. Can I send the employee for follow-up testing?

No. 49 CFR 40.307(d) requires the SAP to direct that the employee be subject to a minimum of six unannounced follow-up tests in the first twelve months of **safety-sensitive duty following the employee's return to safety-sensitive functions**. Therefore, the employee must not be subject to any follow-up testing until they return to the performance of safety-sensitive functions.

The specimen leaked in transit; do I send the employee for another collection?

It depends. When a drug test is cancelled because the specimen leaked in transit, as an employer, you must not direct a recollection for an employee unless:

- A negative test is required to authorize the employee to perform safety-sensitive functions (i.e., in the case of a pre-employment, return-to-duty, or follow-up test). (See 49 CFR 40.207.)
- A split specimen is not available for testing because it leaked in transit, and the MRO has directed you to ensure an immediate recollection of another specimen from the employee under direct observation. (See 49 CFR 40.187.)

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. Employers should refer to applicable regulations, 49 CFR Part 655 and Part 40 for Drug and Alcohol Program requirements.

Regulation Updates

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