

# FTA Drug and Alcohol REGULATION UPDATES

July 2022

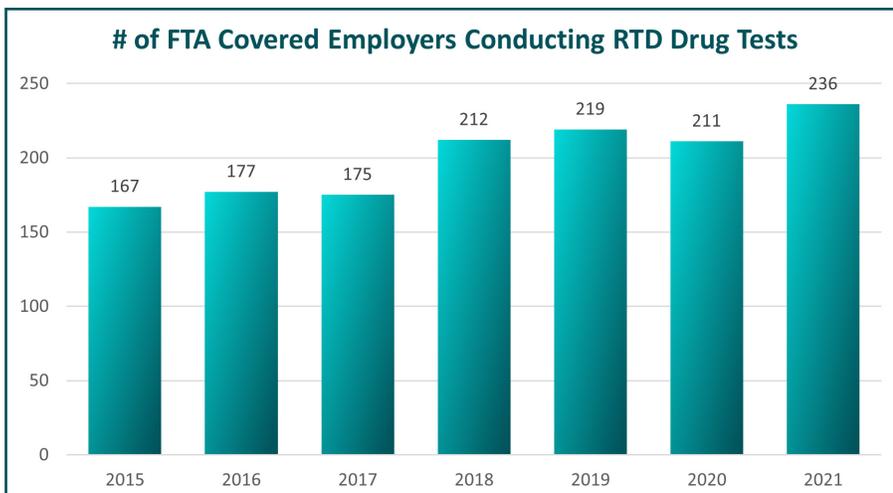
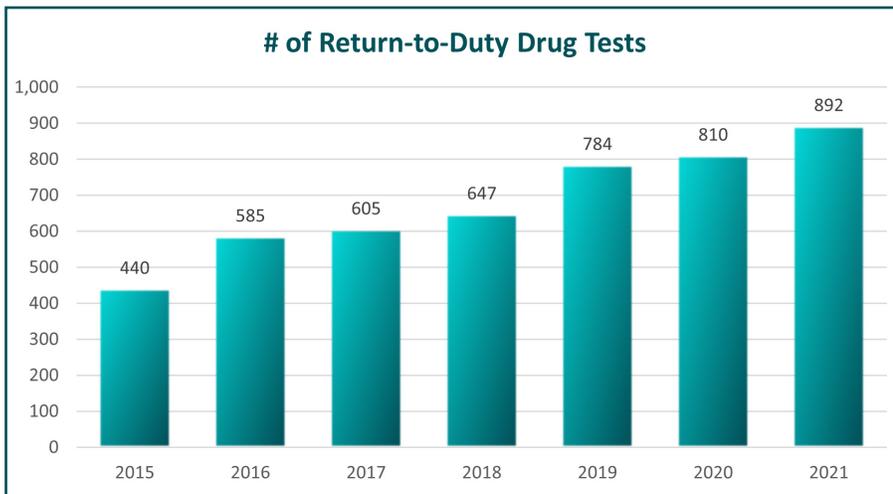
Issue 75

## Preliminary Management Information System (MIS) Results

An analysis of calendar year 2021 MIS reports submitted to FTA has provided useful information on trends with DOT drug testing by

FTA-covered employers.

One of the potentially telling statistics (shown graphically left) is the increase in both the number of Return-to-Duty (RTD) tests conducted and the number of FTA-covered employers performing this type of test. This data indicates a trend toward a “second-chance” policy versus a “zero tolerance”/termination policy following a DOT drug violation. The 2021 MIS also shows the drug positive rate for pre-employment testing is at its highest level since 2015 at 3.83 percent.



## State & Local Legislation Prohibiting Testing for Marijuana Does Not Apply to DOT Employers

Recently, some states and local governments have passed legislation prohibiting employers from testing for marijuana. FTA employers are reminded that state and local legislative initiatives

have no bearing on DOT-regulated testing programs. Marijuana is still a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-

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U.S. Department of Transportation  
Federal Transit Administration

sensitive employee subject to drug testing under 49 CFR Part 40 and Part 655 to use marijuana.

# Operators of Revenue Service Vehicles on Transit or Private Property Are Covered

One of the safety-sensitive functions defined by 49 CFR § 655.4 is “operating a revenue service vehicle, including when not in revenue service”. A revenue service vehicle is a vehicle used to provide transit services (i.e., carry passengers), even when no fare is collected. Operation “when not in revenue service” includes running time, deadheading, driver training, etc., and includes operation of the revenue vehicle on private or transit property. Some examples of operating a revenue service vehicle on private or transit property include moving buses in the yard, through the bus wash, or on a test track. The operator of the revenue service vehicle at these



times is performing a safety-sensitive function and is thus subject to 49 CFR Part 655.

## Cancelled Random Tests Do Not Count Toward Minimum Requirements

As defined in 49 CFR § 40.3, a cancelled test is “a drug or alcohol test that has a problem identified that cannot be or has not been corrected, or which [49 CFR Part 40] otherwise requires to be cancelled. A cancelled test is neither a positive nor a negative test.” Per 49 CFR §§ 40.207(b) and 40.273(b), a cancelled test does not count toward compliance with DOT requirements, which means the test cannot be used to meet the minimum random testing rate for drugs or alcohol.

For more details, see the article “*Responding to a 40.25 Request for Testing Information*” in [Issue 63](#) of the Regulations Updates newsletter.

## Previous Employers Must Respond to Requests for DOT Testing Information

When an employer receives a request for information about an employee’s DOT drug and alcohol testing history from a prospective employer, they are required by 49 CFR § 40.25 to respond if the employee has consented to the release of the information. The consent must include the employee’s wet signature, and it must be specific to the employee and to the previous employer.

The employer must immediately and confidentially provide the information specified in § 40.25(b). This includes alcohol tests with a result of 0.04 or higher, verified positive drug

tests, refusals to be tested, other violations of DOT agency drug and alcohol testing regulations, and, if applicable, documentation of the applicant’s successful completion of DOT return-to-duty requirements.

As the previous employer, the employer must maintain a written record of the information released, including the date, the party to whom it was released, and a summary of the information provided. This documentation must be maintained for at least three years.

# What Happens When a Collector Finds Items Used to “Beat” A Drug Test?

49 CFR § 40.61 requires the urine collector to direct the employee to empty their pockets and display the contents to ensure no items are present which could be used to adulterate the specimen. If the collector finds any material that could be used to tamper

with the specimen, the collector must determine if it was brought to the collection site with the intent to alter the specimen. If so, the collector must conduct the collection using direct observation procedures. Alternatively, if the item appears to be inadvertently

brought to the collection site (e.g., eye drops), the item must be secured until the collection process is complete. In this case, a normal (i.e., unobserved) collection is conducted.

## CBD is Not Regulated and May Generate a THC Positive

Cannabidiol (CBD) is a chemical from the cannabis plant that is different from and does not contain tetrahydrocannabinol (THC). However, CBD is not a regulated substance, and thus products claiming to contain CBD only have not been evaluated or regulated by a Federal agency. Therefore, the product may contain levels of THC that could generate a positive drug test. Using a CBD product is not a justification for excusing a positive drug test, and procedures for drug positives should follow as usual.



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## Grantee’s Access to Records when Maintained by a Third-Party Administrator (TPA)

TPAs must meet the DOT requirements of 49 CFR § 40.349, which allows them to receive and maintain records concerning DOT drug and alcohol testing programs on behalf of covered employers. However, FTA-covered employers must be allowed access to these

records immediately upon request. Employee consent is not required to transfer these records, and the TPA may not charge a fee for the release of the records, outside of a reasonable administrative cost of conducting the transfer. Section 40.349 further states

services agents, including TPAs, are required to ensure these records can be made available to the employer within two business days when a DOT agency representative requests records from the employer.

# Dedicated Employer Representative (DER) Must Remove Employee from Safety-Sensitive Functions While Awaiting Split Specimen Test Results

After the Medical Review Officer (MRO) has notified the employee of their verified positive drug test or refusal to test because of adulteration or substitution, 49 CFR § 40.171 allows the employee 72 hours from the time of notification to request a test of the split specimen. Even with the request to test the split specimen,

the MRO still must immediately report the verified result of the primary specimen to the DER. Reporting of the result is not delayed pending the employee's decision about the split specimen test or pending the reconfirmation result from the laboratory.

An employer who receives a verified positive, adulterated,

or substituted drug test result is required by 49 CFR § 40.23 to immediately remove the employee involved from performing safety-sensitive functions. The employer must take this action upon receiving the initial report of the verified test result and must not wait to receive the result of a split specimen test.

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## Obtaining Contractor Records

An article in [Issue 71](#), “*Get Drug and Alcohol Management Information System (MIS) Data Before Contract Terminates*,” stresses the regulatory obligation of FTA grant recipients to ensure they have received all FTA-authorized drug and alcohol testing results performed in the previous calendar year from all FTA covered safety-sensitive contractors. What should FTA grantees do to ensure this

information is received if they have a contract coming to an end or a contract unexpectedly expires? A best practice to help obtain records from FTA-covered safety-sensitive contractors is to add language to the contract stating FTA-authorized drug and alcohol testing records must be submitted monthly or specify this information be submitted as part of a final deliverable at contract closeout. Sending reminders to

the contractor prior to the contract expiration date is also a helpful way to ensure grantees get the required information.

FTA covered safety-sensitive contractors are subject to the same records retention requirements as all other FTA-covered employers and must retain their records as specified in 49 CFR § 655.71, even after the specific contract has expired.

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## Drug and Alcohol Substance Abuse Trainings Available

Free FTA sponsored drug and alcohol training sessions provide essential information to facilitate covered employers' compliance with the drug and alcohol testing regulations (49 CFR Part 655 and Part 40). FTA provides these one-day trainings at a host site, and they are open to the public. Trainings are led by the FTA Drug and Alcohol Program and Audit Team Members. For those unable to travel or host, virtual sessions will continue to be offered. For a schedule of upcoming trainings and to register, please visit the training [website](#). If you are interested in hosting a training session, contact the FTA Drug and Alcohol Project Office at [fta.damis@dot.gov](mailto:fta.damis@dot.gov) or 617-494-6336 for more information.

# Prescription Medication Cannot Be Verified Solely Using Photographs

When an MRO receives a laboratory-confirmed non-negative drug test result, they must conduct a verification

interview with the employee. If the employee asserts the presence of a drug or drug metabolite in their specimen results from

taking prescription medication (i.e., a legally valid prescription consistent with the Controlled Substances Act), 49 CFR § 40.191 requires the MRO to review and take all reasonable and necessary steps to verify the authenticity of all medical records the employee provides. With the advancement of photography manipulation software easily available, it is important that the MRO speaks with the pharmacy and does not simply rely on a photograph of the prescription label. The MRO also may contact the employee's physician or other relevant medical personnel for further information.



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## Finding a Qualified Substance Abuse Professional (SAP)

Under 49 CFR §§ 40.291, 40.293, and 40.301, the SAP must conduct a face-to-face assessment and evaluation of an employee who has violated DOT drug and alcohol regulations. However, the Office of Drug and Alcohol Policy and Compliance (ODAPC) provided [guidance](#) allowing SAPs to conduct a remote “face-to-face” evaluation and assessment. This policy is currently in effect and has been extended through December 31, 2022.

Despite this flexibility, some FTA-covered employers continue to have difficulties identifying a qualified SAP. Neither the DOT,

FTA, nor any other DOT operating administration maintain a list of qualified SAPs.

To find a qualified SAP, DOT and FTA offer the following recommendations:

- Search the internet using terms such as “DOT qualified SAP” or “DOT and SAP”.
- Contact certification organizations, who may provide a list of SAPs qualified through their organization. ODAPC publishes a list of [certification organizations](#) who have met the requirements in § 40.283 to obtain recognition for

the SAP credentials for its members.

- Contact other local area employers who are covered under DOT regulations. They are allowed to provide contact information for the SAPs they use.
- Obtain an in-house SAP by ensuring a current employee with the appropriate credentials meets the requirements of § 40.281. However, the SAP may not be a direct supervisor of an employee receiving their SAP services.

# Step 1 of the Custody and Control Form (CCF) - Collection Site Address

FTA auditors are frequently asked “What address should be used in Step 1 of the CCF for the collection site?” ODAPC has stated in the [§ 40.45 Q&A](#), the collection site address recorded on the CCF should reflect the location where the actual collection takes place. This means if the collection takes place offsite in a clinic or onsite at a transit

facility, this is the address that should be used, as opposed to a collection company’s corporate or main office address. If collections

are done using a mobile collector or at an accident location, the collector should include the location of the collection.

STEP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE	
A. Employer Name, Address, I.D. No. ABC Transit Company 448 Stanley Ave Cambridge, MA 02142 PH: 617-223-6732 FX: 617-223-7823	B. MRO Name, Address, Phone No. and F Dr. Fred M. Cook MRO & Associates 1388 Maple Ave Kooskia, ID 83539 Ph: 208-123-2421 FX: 20
C. Donor SSN, Employee I.D., or CDL State and No. <u>431361</u>	
D. Specify Testing Authority: <input type="checkbox"/> HHS <input type="checkbox"/> NRC Specify DOT Agency: <input type="checkbox"/> FMCSA <input type="checkbox"/> FAA <input type="checkbox"/> FRA <input checked="" type="checkbox"/> FTA	
E. Reason for Test: <input type="checkbox"/> Pre-employment <input type="checkbox"/> Random <input type="checkbox"/> Reasonable Suspicion/Cause <input checked="" type="checkbox"/> Post Accident <input type="checkbox"/> Return to Duty <input type="checkbox"/> Follow	
F. Drug Tests to be Performed: <input checked="" type="checkbox"/> THC, COC, PCP, OPI, AMP <input type="checkbox"/> THC & COC Only <input type="checkbox"/> Other (specify) _____	
G. Collection Site Address: MAC Doc Health 448 Stanley Ave Cambridge MA 02142	Collector Contact Info: Phone <u>617-</u> Fax <u>617-</u> Other _____

## What Will the MRO Report to the DER When There Is a Laboratory Positive, Adulterated, or Substituted Test Result?

The MRO must not inform the employer about an employee's laboratory confirmed positive, adulterated, or substituted test result until the MRO verifies the test result with the employee.

The employee has the burden of proof to show a legitimate medical explanation exists. If the MRO, after discussing the test result with the employee, determines there is a legitimate medical explanation, the MRO will report to the employer the test result as negative. If the MRO determines there is no legitimate medical explanation for the test result, the MRO will verify the test result as positive, identifying the drug(s) for which the test was positive, or as a refusal to test because of adulteration or substitution.

49 CFR § 40.327 requires the MRO to report an employee’s medication use to the employer if the MRO determines in their reasonable medical judgement that the employee’s continued performance of safety-sensitive functions is likely to pose a significant safety risk. The MRO may report this information even if the MRO verifies the drug test result as negative (49 CFR 40.137(e)(4)).

### Regulation Updates

Produced By:  
Federal Transit Administration  
Office of Transit Safety & Oversight  
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

*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.*