

## Chapter 14 - Drug and Alcohol

Transit systems are subject to various regulations relating to substance abuse. Operating safe public transportation systems is important. Transit systems are required to establish a drug abuse and alcohol misuse program and ensure that operators and employees follow established policies. This chapter describes requirements for drug and alcohol testing programs. For additional information, FTA has developed a Best Practices Manual: FTA Drug and Alcohol Testing Program that can be accessed at: <https://transit-safety.fta.dot.gov/DrugAndAlcohol/publications/DocumentInfo.aspx?docid=62>

### Background

Since 1991, the FTA has had regulations prohibiting drug use and alcohol misuse by transit employees and required transit agencies to test for prohibited drug use and alcohol misuse. The rule covering both is titled, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations", is found in [49 CFR Part 655](#).

The US Department of Transportation (US DOT) issued [49 CFR Part 40](#), "Procedures for Transportation Workplace Drug and Alcohol Testing Programs," prescribing specimen collection and testing methods to be followed under the testing programs for all modal administrations.

### Applicability

FTA's rule, [49 CFR Part 655](#), applies to all employers receiving FTA funds either directly or indirectly, as well as contractors providing transit services using FTA funded vehicles. A drug- and alcohol-testing program must also be implemented under the applicable US DOT rules. (Although the FTA rules do not apply to the Section 5310 program, all Section 5310 recipients in Iowa are subject to the FTA drug and alcohol program testing rules because they also receive Section 5311 or 5339 FTA funding.)

Maintenance contractors to transit systems in urbanized areas with a population of 200,000 or greater are also required to have a FTA-compliant testing program in place, unless they only perform maintenance on an ad hoc or one-time basis. Maintenance contractors to transit systems in areas with a population less than 200,000 are exempt.

Taxicab owner-operators, and/or their employees are required to comply with the US DOT drug and alcohol testing requirements if a transit system, or its contractor, has entered into a contract with one or more entities to provide taxi service. However, the drug and alcohol testing rules do not apply to taxicab owner-operators, and/or their employees, that accept a transit systems' subsidized voucher, if the rider can choose from a variety of taxicab operators.

Volunteers are exempt from the drug and alcohol program rules if they do not receive compensation in excess of the actual personal expenses incurred while performing the volunteer service and/or are not required to hold a commercial driver's license to operate the vehicle.

Employers are responsible for meeting all applicable requirements and following procedures of 49 CFR Part 40. Employers are also responsible for all actions of their officials, representatives and agents (including service agents) in carrying out the requirements of the DOT agency regulations.

### Preemption of State and Local Laws

49 CFR Part 655 preempts any state or local law, rule, regulation, or order to the extent that:

1. Compliance with both the state or local requirement and any requirement in Part 655 is not possible; or
2. Compliance with the state or local requirement is an obstacle to the accomplishment and execution of any requirement in Part 655.

## **Anti-drug and Alcohol Misuse Testing Program and Policies**

Employers are required to formally adopt a drug and alcohol testing program and policy that meets the requirements of 49 CFR Parts 40 and 655. An employer must have an anti-drug and alcohol misuse testing program in place by the date the employer begins operations. This program must include:

- a statement describing the employer's policy on prohibited drug use and alcohol misuse in the workplace, including the associated consequences;
- an education and training program;
- a testing program; and
- procedures for referring a covered employee who has a verified positive drug test result or an alcohol concentration of 0.04 or greater to a Substance Abuse Professional (SAP), consistent with 49 CFR Part 40.

**Policy** – The employer's policy must be written to apply to all employees who perform safety-sensitive functions. The policy must also apply to applicants being hired to perform safety sensitive functions, and existing employees being transferred to positions that will perform safety sensitive functions. This requirement also applies to any contract employee or independent contractor that performs safety-sensitive service on the transit system's behalf, or uses any FTA funded public transit vehicles. Employers may adopt other testing requirements under their own local authority. However, these requirements must be specifically identified as such in the drug-and alcohol-testing program and policy.

The policy must include each of the required elements identified in Part 655.15. A model policy can be found on FTA's website <https://transit-safety.fta.dot.gov/DrugAndAlcohol/Tools/PolicyBuilder/CreatePolicy.aspx>. Any employer that chooses not to use the model policy will need to make sure they are covering all aspects of the FTA rule.

Actions that will be taken on the part of the employer in any instance where, under FTA rules, an employee has a verified positive drug test result, a confirmed alcohol test result of 0.04 or greater, or refused to submit to a test, must be formalized and included in the employer's substance abuse policy. Consequences for testing violations under local authority should also be addressed in this same policy.

While listing the Medical Review Officer (MRO) and Substance Abuse Professional (SAP) in the agency's drug and alcohol testing policy is not required, it is considered a best practice so employees know the names of the individuals performing those duties.

**Safety-sensitive functions** – A safety-sensitive function is any duty related to operating, maintaining, or controlling the movement of any transit revenue vehicle (even if not in revenue service), carrying firearms (by security personnel only), or operating any equipment for which a commercial driver license (CDL) is required.

Although the FTA rule does not require maintenance contractors to include their employees in an FTA-compliant testing program if they provide maintenance service on only an ad hoc or one-time basis or if the only transit systems they contract with receive only 5311 funds or 5307 funds for areas under 200,000 population. All employees of transit systems using FTA funds, or their transit service contractors, who perform vehicle maintenance duties remain subject to the rule.

Although FTA's definition of safety-sensitive includes the term "dispatch," supporting language explains that different employers make differing use of the terms "dispatch" or "dispatcher," and that each employer must decide whether its employees, who may hold a title of dispatcher, actually control the movement of vehicles.

**Education and training** – The employer is required to distribute a copy of the formally adopted drug and alcohol program policy to each covered employee prior to the employee performing a safety-sensitive

function for the first time. The employee must also have access to the corresponding federal regulations. Employers must also distribute policies to representatives of applicable employee organizations.

All covered employees must undergo a minimum of 60 minutes of training on the signs and symptoms of prohibited drug use including the effects and consequences of drug use on personal health, safety, and the work environment. The FTA has created a [video](#) to fulfill this training obligation. In addition, employers are required to display and distribute to every covered employee, informational material and a community service hot-line telephone number for employee assistance, if available.

Supervisors, and any other person authorized by the employer to make reasonable suspicion determinations such as dispatchers or other employees who see drivers regularly, are required to receive at least 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use, and at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol use.

Per State of Iowa regulations for *private employers*, including non-profit corporations, supervisory personnel are required to attend, on an annual basis, a minimum of one hour of subsequent refresher training ([Iowa Law 730.5.9.h](#)). This rule does not apply to governmental employers, including 28E organizations.

**Drug testing program** – Employers are required to establish a testing program for prohibited drugs and drug metabolites in the following circumstances: pre-employment, post-accident, reasonable suspicion, random, and return-to-duty/follow up. The employer shall also ensure that the following drugs are tested for: marijuana, cocaine, opioids, amphetamines, and phencyclidine. Consumption of these products is prohibited at all times. A covered employee may be randomly tested for prohibited drug use anytime while on duty. Under the new rules, pre-employment testing modifications allow employers to hire applicants and assign them non-safety-sensitive duties pending receipt of a negative drug test. FTA also added a provision requiring pre-employment tests anytime a covered employee or applicant has not performed a safety-sensitive function within a 90-day period, if that person was also not in a random selection pool during the timeframe.

**Alcohol testing program** – Employers are also required to establish a program testing for alcohol in the following circumstances: post-accident, reasonable suspicion, random, and return-to-duty/follow-up. Pre-employment alcohol tests are allowed, but not required under the regulation. If an employer chooses to conduct pre-employment alcohol tests, the testing procedures defined in 49 CFR Part 40 must be followed. Employers shall prohibit a covered employee, while having an alcohol concentration of 0.04 or greater, from performing or continuing to perform a safety-sensitive function. A covered employee can only be randomly tested for alcohol misuse while the employee is performing safety-sensitive functions, just before the employee is to perform safety-sensitive functions, or just after the employee has ceased performing such functions.

**FTA Random Drug and Alcohol Testing Requirements** – FTA requires random drug and alcohol testing throughout the year for safety sensitive employees. Tests must be spread throughout the service times of day, days of week, weeks of month, and months of the year with the goal of not being predictable to the employees. Since January 1, 2019, the percentages of employees that must be randomly tested during the year are 50% for drug and 10% for alcohol. The transit employer may do the random selections themselves using a scientifically valid selection method or have a third-party administrator provide the selections every month, quarter, or some other specified time period. The public transit agency should work to find drug and alcohol testing sites who can conduct tests during all hours when public transit is in operation.

#### **FTA Post-Accident Testing Requirements**

A DOT post-accident test must be performed when there is an occurrence associated with the operation of a mass transit vehicle, if as a result:

1. An individual dies (must test); or

Unless the transit employee's performance can be *completely discounted* as a contributing factor to the accident:

2. An individual suffers bodily injury and immediately receives medical attention away from the scene of the accident; or
3. A vehicle (including non-transit vehicle) incurs disabling damage as the result of the occurrence and a vehicle is transported away from the scene by a tow truck or other vehicle; or
4. The mass transit vehicle is removed from operation.

Who to test:

1. Covered employee operating the mass transit vehicle, unless the transit employee's performance can be *completely discounted* as a contributing factor to the accident; and/or
2. Other covered employees who could have contributed to the accident.

Time limitations for post-accident testing:

- Employee must remain readily available for testing
- Alcohol and drug testing must begin as soon as practicable following the accident
- Do alcohol test first, if possible
  - If not done within **2 hours** of accident, document why
  - If not done within **8 hours** of accident, cease attempts and document why
- Complete alcohol test before starting the drug test
- Do drug test as soon as possible after the alcohol test
  - If not done within **32 hours**, cease attempts and document why

### **Service Agents**

Employers may use a service agent to carry out drug and alcohol testing program tasks; however, employers remain accountable for compliance. Although employers are not required to have active monitoring responsibilities with respect to service agents, they may ask to see documentation from service agents, who are obligated to provide it, as a means to make sure service agents meet regulatory qualifications. All agreements and arrangements, whether written or unwritten, between employers and service agents are deemed, as a matter of law, to require compliance with all applicable provisions of 49 CFR Part 40 and 49 CFR Part 655. Violations are subject to sanctions by the US DOT. Good faith use of a service agent is not a defense in any enforcement action initiated by FTA in which an employer's alleged noncompliance with the federal rules may have resulted from a service agent's conduct.

Part 40 rules expanded training requirements for collection sites, Medical Review Officers (MROs), Breath Alcohol Technicians (BATs), Screening Test Technicians (STT), and Substance Abuse Professionals (SAPs). It is the responsibility of the employer to verify that these individuals have met the training requirements.

Collection site preparation and processes were expanded to protect the security and integrity of the collection process. Current specimen collection personnel must receive qualification training and demonstrate proficiency. New collectors must complete the training prior to performing collection functions. Refresher and error correction training is also required.

**Medical Review Officers (MROs)** – A licensed physician (medical doctor or doctor of osteopath) is responsible for receiving laboratory results. MROs must have knowledge of substance abuse disorders and have appropriate medical training to interpret and evaluate an individual's confirmed positive test result. MROs are required to take formal training and must pass an examination administered by a nationally recognized MRO professional certification board. Twelve hours of continuing education must be completed every three years. New MROs must meet the qualification training requirements before MRO functions can be performed.

**Breath Alcohol Technician (BAT)/Screening Test Technician (STT)** – These service agents are required to undergo qualification training, as well and demonstrate proficiency of equipment operation and complete refresher and error correction training when required.

**Substance Abuse Professionals (SAPs)** – An SAP is a licensed physician, licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor with knowledge and experience of treatment of substance abuse. SAPs must receive qualification training and complete an examination by a nationally recognized professional organization. They are also required to complete 12 hours of continuing education every three years.

**Consortia/Third Party Administrators (C/TPAs)** – The rules allow an employer's drug and alcohol testing program to be outsourced to any organization that provides or coordinates a variety of drug and alcohol testing services to employers. 49 CFR Part 40 incorporated public interest exclusions (PIE) million lives in a way we're going the way to with tangible consequences to protect employers and employees from serious misconduct by a C/TPA's or service agents. PTT suggests that the obligation to comply with Parts 40 and 655 be included in the contractual language between the employer and the C/TPA. Employers can contract out drug and alcohol testing program functions; however, the employer remains responsible for ensuring compliance. An employee's consent is not required for a C/TPA or other service agent to receive and maintain records concerning US DOT drug and alcohol testing programs, including positive, negative, and refusal to test individual test results.

#### **Proper use of the Custody and Control Form (CCF) and the Alcohol Testing Form (ATF)**

It is the employer's responsibility to ensure that the collection sites, conducting FTA required testing on their behalf, are using the most current Federal Drug Testing [Custody and Control Form](#) (CCF) and the [Alcohol Testing Form](#) (ATF). These multi-part forms can only be used for FTA required tests and cannot be used for tests conducted only under local authority. Use of these forms for a non-federal test is prohibited and may result in a US DOT enforcement action.

Transit agencies must closely monitor the collection sites' use of the CCFs and ATFs. For example, the custody and control seals must not be dated and initialed prior to removal from the CCF, as this is only to be done after they have been affixed to the bottles. To check for this, examine the employer's copy for a faint shadow, imprint, or traces of carbon ink of a date or the employee's initials. Also, because these forms are to be used for federal drug and alcohol testing only, and the federal testing authority for transit agencies is the Federal Transit Administration (FTA), the forms should be reviewed to ensure the "FTA" box is checked rather than "FMCSA" or some other federal agency.

#### **Drug and Alcohol Background Checks of New-Hires**

Employers are required to obtain written consent from applicants, or employees transferring into a safety-sensitive position, to obtain specific information from any US DOT regulated employer of the applicant, or employee, during any period within the two years prior to the date of the employee's application or transfer. Any applicant or employee that refuses to provide this written consent shall not be permitted to perform safety-sensitive functions. Information requested shall consist of the following:

1. alcohol tests with a result of 0.04 or higher alcohol concentration;
2. verified positive drug tests;
3. refusals to be tested (including adulterated or substituted drug test results);
4. other violations of US DOT agency drug and alcohol testing regulations;
5. and with respect to any employee who violated a US DOT drug and alcohol regulation, documentation of the employee's successful completion of US DOT return-to-duty requirements (including follow-up tests).

Information concerning an applicant who has tested positive on a pre-employment test must be requested of the applicant directly if unavailable from the employer. The employer is required to ask the applicant or employee whether he/she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied for, but did not obtain,

safety-sensitive transportation work covered by US DOT agency drug and alcohol testing rules during the past two years. The employer shall not allow any applicant or employee acknowledging that he/she had a positive test, or refused to test, to perform a safety-sensitive function unless the applicant or employee documents successful completion of the full regimen of the return-to-duty/follow-up testing process.

### **Confidentiality and Release of Information**

In order to protect the employees' privacy, specific written consent must be obtained for any release of test results or medical information to a third party. However, in any legal action related to an employee, (e.g. lawsuit, grievance, or administrative proceeding) resulting from a positive drug or alcohol test, or a refusal to test (including, but not limited to, adulterated or substituted test results), the employer may release employee test information without the employee's consent. These proceedings also include a criminal or civil action resulting from an employee's performance of safety-sensitive duties. Release of this information to the court system, once criminal or civil charges have been made, is allowed. Employers must immediately notify the employee in writing of any release of information authorized by 49 CFR Part 40 or Part 655. Blanket releases of information are not allowed under any circumstances. Third party administrators and service agents must follow the same confidentiality regulations with respect to the use, release of information, and records retention requirements applicable to employers.

### **Administrative Requirements**

BATs and MROs, etc. are required to maintain their own training records. There is no federal requirement for an employer to have a signed agreement among all service agents. Service agents are, however, responsible for meeting the employer's need to comply with FTA requirements and must produce within two days any information or records the employer is asked to produce by FTA, PTT, or a transit system in the case of service providers.

**Access to Records** – All employers doing FTA-required drug and alcohol testing must permit access by the US DOT to all facilities utilized and records compiled in complying with the requirements of 49 CFR Parts 40 and 655. They must also disclose information regarding drug and alcohol testing to the National Transportation Safety Board (NTSB) when requested in relation to any accident under investigation by NTSB.

Contracted transit service providers must permit access to these facilities and records by the transit system(s) which provide them with FTA funding or FTA-funded vehicles, in order for the transit system to carry out their responsibility for overseeing compliance. The same applies to maintenance contractors, if covered by the FTA rule.

All transit systems that are sub-recipients of statewide FTA grants or that possess or use vehicles purchased under such grants, and all their contractors that are subject to the FTA rule, must also permit access to these facilities and records by PTT, in order for PTT to carry out its oversight responsibilities as the direct recipient of such grants.

A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the covered employee's use of prohibited drugs or misuse of alcohol, including any records pertaining to his or her drug or alcohol tests, with the exception of a SAP's recommended follow-up testing schedule. Records shall be provided promptly to employees and shall not be contingent upon the employer's receipt of payment for the production of these records.

An employer may disclose an employee's records to the employee or a decision-maker in a lawsuit, grievance, or other administrative or legal proceeding arising from the results of a drug or alcohol test conducted under the authority of 49 CFR Part 655 (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the covered employee).

An employer shall release information regarding a covered employee's record as directed by the specific, written consent of the employee authorizing release of the information to the identified person.

Records shall be made available to a subsequent employer upon receipt of a written request from a covered employee. Subsequent disclosure by the employer is permitted only as expressly authorized by the terms of the covered employee's request.

**Record retention** – Each record must be kept for a specified minimum period of time as measured from the date of the creation of the record. Each employer shall maintain the records in accordance with the following schedule:

- **Five years:**
  - Records of covered employee alcohol test results indicating an alcohol concentration of 0.02 or greater;
  - Records of covered employee verified positive drug test results;
  - Documentation of refusals to take required alcohol and/or drug tests (including substituted or adulterated drug test results);
  - Covered employees referrals to the SAP, and SAP reports;
  - All follow-up tests and schedules for follow-up tests; and
  - Copies of annual drug and alcohol Management Information System (MIS) reports submitted to PTT or FTA.
- **Three years:**
  - Records of information obtained from previous employers under 49 CFR Part 40.25 concerning drug and alcohol test results of employees.
- **Two years:**
  - Records of the inspection, maintenance, and calibration of Evidential Breath Testing (EBT) devices; and
  - Records related to the collection process and employee training. (PTT recommends employee training records be maintained for the duration of employment of the employee.)
- **One Year:**
  - Records of negative and cancelled drug or alcohol test results, or alcohol test results with a concentration of less than 0.02.

Employers must maintain this information in a secure location with controlled access. A service agent may maintain these records for the employer. However, the employer must ensure that records are available at the principle place of business within two days of a request. The following specific records must be maintained:

1. Records related to the collection process:
  - Collection logbooks, if used.
  - Documents relating to the random selection process
  - Documents generated in connection with decisions to administer reasonable suspicion drug or alcohol tests.
  - Documents generated in connection with decisions on post-accident drug and alcohol testing. (Employers must document the testing decision and the decision-making process for each accident. The documentation of the decision not to test is just as important as the documentation of the decision to test.)
  - MRO documents verifying existence of a medical explanation of the inability of a covered employee to provide an adequate urine or breath sample.
2. Records related to test results:
  - The employer's copy of the custody and control form.
  - Documents related to the refusal of any covered employee to submit to a test required by 49 CFR Part 655.
  - Documents presented by a covered employee to dispute the results of a test administered under 49 CFR Part 655.
3. Records related to referral and return to duty and follow-up testing:

- Records concerning a covered employee's entry into and completion of the treatment program recommended by the substance abuse professional.
4. Records relating to employee training:
    - Training materials on drug use awareness and alcohol misuse, including a copy of the employer's policy on prohibited drug use and alcohol misuse.
    - Names of covered employees attending training on prohibited drug use and alcohol misuse and the dates and times of such training.
    - Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for drug and alcohol testing based on reasonable suspicion.
    - Certification that any training conducted under this part complies with the requirements for such training.
  5. Annual Drug and Alcohol MIS reports
    - Copies of Drug and Alcohol MIS reports that were submitted to PTT or FTA.

### **Reporting of Results in Management Information System (MIS)**

Each recipient shall annually prepare and maintain a summary of the results of its anti-drug and alcohol misuse testing programs performed under 49 CFR Part 655 during the previous calendar year. Drug Testing Management Information System (MIS) Data Collection Forms and Alcohol Testing Management Information System (MIS) Data Collection Forms are required to be completed for drug and alcohol testing data concerning all employees covered under FTA rules. These reports are required to be submitted by small urban and regional transit systems, and their contractors, to PTT by February 15 each calendar year, covering the preceding calendar year's activities.

The employer is responsible for ensuring the accuracy and timeliness of each report submitted by the consortium, or third-party service provider acting on the recipient or employer's behalf. The transit system is responsible for ensuring the accuracy and timeliness of each MIS report submitted by their contractors and forwarding them, along with their own MIS reports, to PTT. PTT will submit the reports, upon request, to FTA's Office of Safety and Security, or its designated agent by March 15th. Although large urban transit systems must complete MIS reporting each year, they are only required to submit their MIS reports when requested to do so by FTA. Those reports are submitted directly to FTA's Office of Safety and Security, or its designated agents by March 15th. Employers are required to use the "EZ" Data Collection Forms if there were no positive test results for the reporting year. Long forms must be used if any covered employee tested positive for any of the five illegal drugs, or if there was a positive alcohol test, per 49 CFR Part 655. These forms can be obtained through the FTA Safety and Security [website](#).

In a few cases, an employer is able to complete a "[Certification of Safety-Sensitive Employee Function](#)", rather than completing MIS reports and submitting them to PTT. This certification allows an employer to specifically identify which employees devoted less than 50% of the time he/she was employed during the calendar year performing safety-sensitive duties on services funded either directly or indirectly with federal transit funds or utilizing FTA funded vehicles. The employees identified are considered to be subject only to FMCSA drug and alcohol testing requirements.

### **Certifying Compliance**

Subrecipients of FTA Section 5310/5311 funds must certify compliance with FTA's drug and alcohol testing regulations annually as a condition of receiving federal transit funds. A model certification form can be found in [Chapter 6](#). Small urban and regional transit systems must submit their certification to the PTT by February 15 each year. Large urban transit systems (Section 5307 recipients) must provide PTT with a copy of their annual certification submitted directly to FTA, or complete and submit a certification form included in [Chapter 6](#) to PTT by March 15 each year. Failure to certify compliance with 49 CFR Part 655 may result in the suspension of a subrecipients eligibility for Federal funding. Recipients of FTA funding are subject to criminal sanctions and fines for false statements or misrepresentations under 18 USC 1001.



PTT, as the direct grantee, shall ensure that the subrecipients of funds under 49 USC 5339, 5310/5311 or 23 USC 103(e)(4) comply with 49 CFR Part 655. PTT shall certify to FTA compliance on behalf of its 49 USC 5339, 5310/5311, or 23 USC 103(e)(4) subrecipients, as applicable.

Certifications must be authorized by the employer's governing board or other authorizing official, and must be signed by an authorized person.

Recipients will be ineligible for further FTA financial assistance if the recipient fails to establish and implement an anti-drug and alcohol misuse program in accordance with 49 CFR Part 655.

### **Drug and Alcohol Regulation Updates**

FTA's Office of Safety and Security provides drug and alcohol regulation updates free of charge. To receive notices of the latest newsletter postings visit the FTA Drug and Alcohol Regulation Updates [website](#).

Questions concerning your drug and alcohol program should be directed to the PTT, for Section 5310/5311 recipients and their contractors. Other Iowa transit systems may also request technical assistance from PTT concerning their drug and alcohol testing program or policies. Answers to interpretation questions by the US DOT, Office of Drug and Alcohol Policy and Compliance (ODAPC), can be found on their website at <http://www.dot.gov/ost/dapc>. ODAPC and the Office of General Counsel (OCG) are the only official and authoritative interpreters concerning the provisions of 49 CFR Part 40.

### **Motor Carrier Regulations**

The Federal Motor Carrier Safety Administration (FMCSA) rules ([49 CFR Part 382](#)) and US DOT's 49 CFR Part 40 apply to private over-the-road or charter bus operators, school bus operators, and human service agencies that provide their own transportation, if no FTA financial support or FTA-funded vehicles are involved.

The only time FMCSA rules concerning drug and alcohol testing would apply to an employer receiving FTA funds, either directly or indirectly, would be if a significant portion of the workforce spends more time driving for services that are not FTA funded or counted toward FTA funding. In this case, the employer can have two separate testing programs. An analysis of an employee's time spent on safety sensitive functions versus non-FTA funded driving duties requiring a CDL, would determine in the which testing program the employee is placed. Those employees with a majority of FTA funded duties must be in an FTA compliant program, while those employees spending the majority of time on non-FTA-funded CDL related duties would be in a FMCSA compliant program. Click [here](#) for a sample certification.

An example of this might be an intercity bus carrier that received Section 5311(f) funding. Although most of their employees may be covered by FMCSA drug- and alcohol-testing rules, one or more of their employees may be subject to FTA drug- and alcohol-testing rules. In these cases, either a separate random testing pool can be maintained for the employees subject to FTA testing rules, or all employees may be combined in the same random testing pool provided the testing rate is the same, or the higher of the two rates published in the federal register for the calendar year is used. FTA's pre-employment, post-accident testing rules, training and education, etc. must be followed for any employee subject to FTA's 49 CFR Part 655 rules rather than FMCSA's 49 CFR Part 382 rules.

### **Drug-Free Workplace Act of 1988**

As part of omnibus anti-drug legislation, Congress enacted the "[Drug-Free Workplace Act of 1988](#)". The act requires federal grantees to certify that they maintain a drug-free workplace. This includes any transit system or subcontractor whose agency receives any direct federal funding for any of their agency's programs. The drug-free workplace regulations cover the block grant programs as well as entitlement programs.

The regulations apply only to primary grantees. All transit systems that are direct recipients of Section 5307 funding or Section 5339, or other direct federal funding must comply with the regulation. Transit

systems and/or their subcontractors, that do not receive direct federal transit grants, but whose agencies receive other direct federal funding, (e.g. Head Start funding), must also comply. This includes agencies that are part of a city or county that receives any federal funding directly. The recipients of pass-through funds only are not required to make drug-free workplace certifications. (Technical assistance, loans, loan guarantees, direct appropriations or veterans' benefits to individuals are not considered grants.)

Grantees must publish a written policy (e.g. as part of a personnel policy or manual) that informs all of their employees that the unlawful possession, distribution or manufacturing of a controlled substance in the workplace is prohibited. The statement must identify the sites of the performance of the grant and the penalties to be imposed on employees who violate the grantee's drug-free workplace policy. Transit systems and/or their subcontractors that must comply with this regulation may incorporate the rules into their drug abuse and alcohol misuse program and policy. Transit systems that choose to address the drug-free workplace regulations separately are encouraged to include a reference in their drug and alcohol policy stating the need to comply with the drug-free workplace regulations and where additional information may be obtained.

Grantees must also establish a drug-free awareness program to inform employees of the dangers of drug abuse in the workplace, the grantee's policy of maintaining a drug-free workplace, and any available drug rehabilitation and employee assistance programs. Grantees are not required to provide or pay for drug rehabilitation programs.

All employees must be given the drug-free workplace policy and informed that they must comply with the policy as a condition of employment. Temporary personnel and consultants who are on the grantee's payroll are also included. The policy must include a requirement that employees notify the grantee of any "criminal drug statute conviction for a violation occurring in the workplace" within five days of the conviction. The federal granting agency must be notified within 10 days after the grantee receives notice of such a conviction. Within 30 days of notice of an employee's conviction for a drug violation in the workplace, a grantee must either take appropriate personnel action against the employee, which can include termination, or require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program that is approved by a federal, state or local health, or law enforcement.

False statements in the certification or failure to make a good faith effort to comply with the drug-free workplace regulations are subject to federal sanctions. These sanctions include: suspension of payments under a grant; suspension or termination of a grant; and suspension or debarment from federally assisted activities. Debarments for non-compliance cannot exceed five years. The law authorizes three-year debarments for other violations.