

other covered employees, the employer must determine whether that employee contributed to the accident, using the best information available at the time of the decision.

#### Random Testing Rate

On December 2, 1994, FTA changed section 653.47 by, among other things, adopting a performance-based random drug testing rate. For more information on these changes, see 59 FR 62217-62231.

#### Certification of Compliance

On October 12, 1994, the FTA published a **Federal Register** Notice, at 59 FR 51793, entitled "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements." In the Notice, FTA compiled a complete listing and the full text of the certifications and assurances necessary to receive financial assistance from the Federal Transit Administration. Instead of submitting a variety of certifications and assurances with each grant application, the grant applicant and its attorney certify compliance with all of the certifications and assurances relevant to any and all grants for which the grant applicant wishes to apply in fiscal year 1995 by signing the single Signature Page, attached to the Notice at 59 FR 51813. The Notice, which will be updated and republished annually for use in future fiscal years, includes a certification of compliance with the FTA drug and alcohol testing program. Accordingly, we are deleting as unnecessary the sample certification in the rule.

#### Retention of Records

The preamble discussion of this topic contained an error; specifically, it stated in Subpart E, paragraph A, at 59 FR 7587, that "[t]he rule provides three separate record retention periods for different types of records—five years, three years, and one year." Actually, records must be retained for either five years, two years, or one year. The regulatory text, however, is accurate, and remains unchanged.

#### Executive Order 12612

We inadvertently stated in this paragraph, at 59 FR 7589, that FTA was not preempting Indian tribal law. Elsewhere in the preamble, however, we discussed this issue at length and concluded that FTA is preempting Indian tribal law under the standard developed by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). There is a comprehensive discussion of

this issue in the **Federal Register**, published on February 15, 1994, at 59 FR 7541, 7549, and 7581.

#### List of Subjects in Part 653

Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety and Transportation.

For the reasons set forth in the preamble, the FTA amends Title 49, Code of Federal Regulations, part 653 as follows:

1. The authority for part 653 continues to read as follows:

**Authority:** 49 U.S.C. 5331; 49 CFR 1.51.

#### PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

##### § 653.5 [Amended]

a. Paragraph (b) of § 653.5 is amended by removing "part 219" and adding "parts 219 and 382, as appropriate".

2. The note to § 653.5 is amended by changing the phrase "and 6" to the phrase "and 16".

##### § 653.7 [Amended]

3. In § 653.7, the definition of *accident* is amended in paragraph (3) by removing the period at the end of the first sentence and adding a semicolon; and by removing the second and third sentences.

4. The definition of *large operator* is amended by adding the word "urbanized" after the word "an" and before the word "area".

5. The definition of *safety-sensitive function* is amended in paragraph (4) by adding the words "section 3 funding and is in an area of less than 50,000 in population or" after the word "receives" and before the word "section".

6. The definition of *small operator* is amended by removing the words "in an area" and adding in their place the words "in a nonurbanized area or in an urbanized area."

7. The definition of *vehicle* is amended by adding the words "or for ancillary services" after the word "transportation" and before the period.

8. In § 653.7 a new definition following the definition of "covered employee" is added as follows:

##### § 653.7 [Definitions]

\* \* \* \* \*

*Disabling damage* means damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusion*. Damage to motor vehicles that could have been driven,

but would have been further damaged if so driven.

##### (2) Exclusions.

(i) Damage which can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlamp or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers which makes them inoperative.

\* \* \* \* \*

##### § 653.13 [Amended]

9. Section 653.13(a) is amended by adding the word "primarily" after the word "operating" and before the word "in" and by adding the word "urbanized" after the word "an" and before the word "area".

10. Section 653.13(b) is amended by removing the words "operating in an area" and adding in their place the words "operating primarily in a nonurbanized area or in an urbanized area".

##### § 653.37 [Amended]

11. Section 653.37(a) is amended by adding the word "or" after the word "result" and before the word "refuses".

##### § 653.43 [Amended]

12. Section 653.43(c) is redesignated as § 653.65, *Supervisor acting as collection site person*, in subpart D.

##### § 653.45 [Amended]

13. Section 653.45(a)(1) is amended by removing the phrase "on duty in" and adding in its place the word "operating".

14. Section 653.45(a)(2)(i) is amended by removing the phrase "on duty in" and adding the word "operating" in its place.

15. Section 653.45(a)(2)(ii) is amended by removing the phrase "on duty in" and adding the word "operating" in its place.

*Appendix A to Part 653 [Removed and Reserved]*

16. Appendix A to Part 653, Sample Certification of Compliance, is removed and reserved.

Date Issued: February 27, 1995.

**Gordon J. Linton,**  
*Administrator.*

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**DEPARTMENT OF TRANSPORTATION****Federal Transit Administration****49 CFR Part 654**

[Docket No. 92-I]

RIN 2132-AA38

**Prevention of Alcohol Misuse in Transit Operations**

**AGENCY:** Federal Transit Administration, DOT.

**ACTION:** Final rule; technical amendments.

**SUMMARY:** The Federal Transit Administration (FTA) is making some minor and technical amendments to its alcohol rule to correct a citation, add words that inadvertently had been omitted, and clarify portions of the preamble discussion of the rule. This rule is intended to clarify the existing rule.

**DATES:** This rule is effective March 6, 1995.

**FOR FURTHER INFORMATION CONTACT:** Nancy M. Zaczek, Attorney for Legislation/Rulemakings, Office of the Chief Counsel, Federal Transit Administration, 400 7th Street SW., Washington, DC 20590; 202-366-4011. Information may also be obtained from Judy Meade or Rhonda Crawley of the Office of Safety and Security, Federal Transit Administration, same address; 202-366-2896.

**SUPPLEMENTARY INFORMATION:** FTA recipients and other interested parties may access this rule through the FTA's Transit Safety and Security Bulletin Board using a microcomputer and a modem. The telephone number for the Bulletin Board is 1-800-231-2061. The Bulletin Board is a user-friendly, menu-driven system with information accessible seven days a week, twenty-four hours a day. Once registration is completed, interested parties may access this and other regulations.

To obtain additional information regarding access to the Bulletin Board, please contact the Operator, at (617) 494-2108, or leave a message on the Message Board of the Bulletin Board.

The FTA is making the following technical amendments to its alcohol rule.

**Applicability—Commuter Railroads and CDL Holders**

The applicability provision, section 654.3, clarifies which Department of Transportation (DOT) drug and alcohol testing program covers Commercial Drivers License (CDL) holders who work for commuter railroads. Three DOT

agencies are involved in this issue: FTA, which funds commuter railroads; the Federal Railroad Administration (FRA), which regulates railroads, including commuter railroads; and the Federal Highway Administration (FHWA), which requires CDL holders to be tested for prohibited drugs and the misuse of alcohol. Under the FTA's final rule, to avoid jurisdictional problems, commuter railroads that receive FTA funds are to comply with FRA's drug and alcohol regulation. Because the FRA regulation only covers hours-of-service employees, however, there remains a question as to which agency's drug and alcohol program covers CDL holders who work for a commuter railroad. This rule clarifies that FHWA's regulation covers such CDL holders.

We also note that the FRA hours-of-service classification system does not include the same kinds of workers covered under FTA's rules; for example, armed security personnel are covered by FTA's rules but not FRA's. Because FTA in its existing rule has delegated its authority to require commuter railroads to implement a drug and alcohol testing program to FRA, commuter railroad workers who are not safety-sensitive under FRA's rule are not subject to testing, even though they would be if they were subject to FTA's rules.

Also, section 654.3 is changed to correct a citation error in a reference to the regulations of the United States Coast Guard. The citation should read 33 CFR part 95 and 46 CFR parts 4, 5, and 16.

**Definitions**

The definition of the term "disabling damage" is changed to be consistent with the definition used by the Federal Highway Administration, and is now defined independently of the term "accident."

The definition of "large operator" is changed to add the word "urbanized," which inadvertently was omitted. Thus, a large operator operates primarily in an urbanized area of 200,000 or more in population.

A parallel change is made to the definition of "small operator," which operates primarily in a nonurbanized area or in an urbanized area of less than 200,000 in population. These changes are consistent with the way the Federal Transit Administration administers its grant programs.

The definition of "safety-sensitive function" is changed, at subsection (4), to clarify that the rule excludes from coverage maintenance contractors working for recipients or small operators primarily serving an area of less than 50,000 in population,

regardless of whether they receive section 18 or section 3 funding.

The definition of "vehicle" is changed to add, in the category of "mass transit vehicle," certain vehicles used not only for mass transportation, but also for services ancillary to mass transportation. The definition of a mass transit vehicle thus now includes not only buses and vans, but also non-revenue service commercial motor vehicles and vehicles used by armed security personnel.

**Starting Date for Alcohol Testing Programs**

Section 654.15 makes a conforming change in the implementation section of the rule to reflect the addition of the word "urbanized" to the definition of large operator.

**Post-Accident Testing**

Sections 654.33(a)(1), (a)(2)(i), and (a)(2)(ii) are amended to change the phrase "on duty in," to "operating." The provision, as drafted, required the testing of any safety-sensitive employee on duty in a revenue vehicle when an accident occurred. The rule, however, was not meant to use the same standard for both vehicle operators and other covered employees who happen to be in the vehicle at the time of the accident. Thus, the mass transit vehicle operator must be tested if an accident has occurred and he or she has received a citation from a State or local law enforcement official. (In a Notice of Proposed Rulemaking published in the **Federal Register** on February 6, 1995, at 60 FR 7169, the FTA seeks comment on whether this citation requirement should be deleted.) We note that to test other covered employees the employer must determine whether that employee contributed to the accident, using the best information available at the time of the decision.

**Supervisor Acting as a Breath Alcohol Technician**

Section 654.45 is added to include a prohibition against the supervisor acting as the Breath Alcohol Technician for covered employees under his or her direct supervision. In the final drug rule, published on the same day as the final alcohol rule, we prohibited a supervisor from acting as the collection site person. It was always our intent for the two rules, which cover the same employers and employees, to be as similar as possible, and this omission was unintentional. We now correct that omission.

### Random Testing

The preamble discussion of random testing at 59 FR 7546 contained an error; we stated that "an employer must include a refusal to submit to a test as a result of 0.02 or greater." The phrase "0.02 or greater," however, should read "0.04 or greater." The regulatory text, however, is accurate, and is not changed by this technical amendment.

### Random Testing Rate

Section 654.35(c)(1) is changed to conform the alcohol rule to the amendment to the drug rule published in the **Federal Register** on December 2, 1994, at 59 FR 62218, 62231. Specifically, the Administrator may decrease the random testing rate from 25 percent to 10 percent if the two initial years of data indicate that the violation rate for the entire transit industry is less than 0.5 percent. This means that the Administrator will use two years of data from large operators, which start testing a year before small operators, and one year of data for small operators to determine the initial violation rate for the entire transit industry. This change affects only the initial two years of the alcohol testing program.

Also, FTA is adding three new paragraphs inadvertently omitted from its rule, but included in the rules published by the Federal Aviation Administration, the Federal Railroad Administration, and the Federal Highway Administration on February 15, 1994, at 59 FR 7391-92, 7464, and 7509. (To be codified at Appendix J to part 121 (III)(C)(10), (III)(C)(11)(a), (III)(C)(11)(b); 49 CFR 219.608 (e), (f)(1), and (f)(2); and 49 CFR 382.305 (j), (k)(1), and (k)(2).) Moreover, FTA made the same change to its drug rule on December 2, 1994, in a rule published in the **Federal Register** at 59 FR 62217, 62231.

These new paragraphs, (j), (k)(1), and (k)(2) address situations in which a covered employee is subject to the alcohol testing regulations of more than one Department of Transportation (DOT) agency. Paragraph (j) directs the employer to apply the random testing rate of the DOT agency that regulates more than 50 percent of a covered employee's function.

When an employer has employees regulated by different DOT agencies, paragraphs (k)(1) and (k)(2) allow an employer to establish separate pools for employees based on the rate set by the DOT agency regulating them, or to establish one pool for all its employees, but randomly test them at the highest minimum rate set by another DOT agency.

### Certification of Compliance

On October 12, 1994, the FTA published a **Federal Register** Notice, at 59 FR 51793, entitled "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements." In the Notice, FTA compiled a complete listing and the full text of the certifications and assurances necessary to receive financial assistance from the Federal Transit Administration. Instead of submitting a variety of certifications and assurances with each grant application, the grant applicant and its attorney certify compliance with all of the certifications and assurances relevant to any and all grants for which the grant applicant wishes to apply in fiscal year 1995 by signing the single Signature Page, attached to the Notice, at 59 FR 51813. The Notice, which will be updated and republished annually for use in future fiscal years, includes a certification of compliance with the FTA drug and alcohol testing program. Accordingly, we are deleting as unnecessary the sample certifications in the rule.

### Retention of Records

The preamble discussion of this topic contained an error; specifically, it stated in the Section-by-Section Analysis, Subpart D, paragraph A, at 59 FR 7546 that "[t]he rule provides three separate record retention periods for different types of records—five years, three years, and one year." Actually, records must be retained for either five years, two years, or one year. The regulatory text, however, is accurate, and remains unchanged.

### List of Subjects in Part 654

Alcohol testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set forth in the preamble, the Federal Transit Administration amends Title 49, Code of Federal Regulations, part 654 as follows:

### PART 654—PREVENTION OF ALCOHOL MISUSE IN TRANSIT OPERATIONS

1. The authority for part 654 continues to read as follows:

**Authority:** 49 U.S.C. 5331; 49 CFR 1.51.

#### § 654.3 [Amended]

1a. Paragraph (b) of § 654.3 is amended by removing "part 219" and adding in its place "parts 219 and 382, as appropriate".

2. The note to § 654.3 is amended by removing the phrase "and 6" and adding in its place the phrase "and 16".

#### § 654.7 [Amended]

3. In § 654.7, the definition of *accident* is amended in paragraph (3) by removing the period at the end of the first sentence and adding a semicolon; and by removing the remaining text in paragraph (3).

4. The definition of *large operator* is amended by adding the word "urbanized" after the word "an" and before the word "area".

5. The definition of *safety-sensitive function* is amended in paragraph (4) by adding the words "section 3 funding and is in an area of less than 50,000 in population or" after the word "receives" and before the word "section".

6. The definition of *small operator* is amended by removing the words "in an area" and adding in their place the words "in a nonurbanized area or in an urbanized area."

7. The definition of *vehicle* is amended by adding the words "or for ancillary services" after the word "transportation" and before the period.

8. In § 654.7 a new definition following the definition of "covered employee" is added as follows:

#### § 654.7 Definitions.

\* \* \* \* \*

*Disabling damage* means damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusion*. Damage to motor vehicles that could have been driven, but would have been further damaged if so driven.

(2) *Exclusions*.

(i) Damage which can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlamp or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers which makes them inoperative.

#### § 654.15 [Amended]

9. Section 654.15(a) is amended by adding the word "primarily" after the word "operating" and before the word "in" and by adding the word "urbanized" after the word "an" and before the word "area".

10. Section 654.15(b) is amended by removing the words "operating in an area" and adding in their place the words "operating primarily in a nonurbanized area or in an urbanized area".

**§ 654.33 [Amended]**

11. Section 654.33(a)(1) is amended by removing the phrase "on duty in" and adding the word "operating" in its place.

12. Section 654.33(a)(2)(i) is amended by removing the phrase "on duty in" and adding the word "operating" in its place.

13. Section 654.33(a)(2)(ii) is amended by removing the phrase "on duty in" and adding the word "operating" in its place.

14. In § 654.35, paragraph (c)(1) is revised and paragraphs (j) and (k) are added to read as follows:

**§ 654.35 Random testing.**

\* \* \* \* \*

(c)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 654.53 for two consecutive calendar years indicate that

the violation rate is less than 0.5 percent. However, after the initial two years of testing by large transit operators and the initial first year of testing by small transit operators, the Administrator may lower the rate the following calendar year, if the combined violation rate is less than 0.5 percent and is in the interests of safety.

\* \* \* \* \*

(j) If a given covered employee is subject to random alcohol testing under the alcohol testing rules of more than one DOT agency for the same employer, the covered employee shall be subject to random alcohol testing at the minimum annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the covered employee's function.

(k) If an employer is required to conduct random alcohol testing under the alcohol testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same

required minimum annual percentage rate; or

(2) Randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject.

15. Section 654.45 is added to subpart C to read as follows:

**§ 654.45 Supervisor acting as Breath Alcohol Technician.**

An employer shall not permit a direct supervisor of an employee to serve as the breath alcohol technician for an alcohol test of the employee.

*Appendix A to Part 654—[Removed and Reserved]*

16. Appendix A to Part 654—Sample Certifications of Compliance is removed and reserved.

Issued: February 27, 1995.

**Gordon J. Linton,**

*Administrator.*

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