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(h) This amendment becomes effective on May 25, 1995.

Issued in Burlington, Massachusetts, on May 1, 1995.

James C. Jones,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

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Federal Aviation Administration

14 CFR Part 121

[Docket No. 27065; Amendment 121-237]

RIN 2120-AE43

Federal Railroad Administration

49 CFR Part 219

[Docket No. RSOR-6]

RIN 2130-AA81

Federal Highway Administration

49 CFR Part 382

[Docket No. MC-116, MC-92-19, MC-92-23]

RIN 2125-AA79, 2125-AC85, 2125-AD06

Federal Transit Administration

49 CFR Part 654

[Docket No. 92-I]

RIN 2132-AA38

Suspension of Pre-employment Alcohol Testing Requirement

AGENCIES: Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, DOT.

ACTION: Final rule.

SUMMARY: The United States Court of Appeals for the Fourth Circuit recently issued a decision that vacated the pre-employment alcohol testing requirements of the Federal Highway Administration's alcohol testing rule. The Court remanded this provision to the agency for further proceedings consistent with its opinion. While the pre-employment alcohol testing requirements of the Federal Transit Administration, Federal Railroad

Administration, and Federal Aviation Administration were not before the Court in the case, the rationale of the Court's decision applies to these requirements as well. For these reasons, the Department is suspending the pre-employment alcohol testing requirements of each of the four operating administrations until further notice.

DATES: This rule is effective May 10, 1995, except for the amendment 49 CFR 382.301 which is effective May 1, 1995.

FOR FURTHER INFORMATION CONTACT: For general questions, the Office of General Counsel (202-366-9306). For questions regarding a specific operating administration, please call the following people: FTA—Judy Meade (202) 366-2896, FRA—Lamar Allen (202) 366-0127, FHWA—Office of Motor Carrier Research and Standards (202) 366-1790, FAA—Bill McAndrew (202) 366-6710.

SUPPLEMENTARY INFORMATION: In its April 5, 1995, decision in *American Trucking Associations, Inc. v. FHWA*, the U.S. Court of Appeals for the Fourth Circuit vacated the FHWA's pre-employment alcohol testing rule and remanded it to the agency for further rulemaking consistent with its opinion. The rule implemented the Omnibus Transportation Employee Testing Act of 1991, which required pre-employment testing "for use, in violation of law or Federal regulation, of alcohol or a controlled substance." The rule required commercial motor vehicle employers to administer pre-employment tests to a new driver. The test could occur at any time up to the performance of the driver's first safety-sensitive activity and thus permitted administration of the test either before or after the driver was hired. In vacating and remanding the rule, the court made the following key findings:

- Giving employers the option of conducting "pre-hire" pre-employment tests did not satisfy the Act's requirement of testing for alcohol use "in violation of law or Federal regulation" since alcohol consumption prior to a job application is generally not illegal.

- If the agency believes that "pre-employment" testing also means "pre-activity" testing, then it should require the driver to be tested before the performance of each safety-sensitive activity, not just his first.

- The agency's explanation to the court that "pre-activity" testing was permitted in order to reconcile the Act's pre-employment testing requirement with its reference to unlawful alcohol use was not supported by the rulemaking record.

- On remand, the agency should consider whether "pre-employment" could reasonably mean anything other than "pre-hire." The court noted that it likely did not. The agency should also determine whether Congress intended pre-employment alcohol testing to apply only to the small group of drivers for whom prehire alcohol use might be illegal and estimate how many job applicants will fall into this group.

- The court rejected ATA's alternative argument that FHWA had the statutory authority to waive all drivers from the pre-employment alcohol testing requirement and agreed with FHWA that such an all-encompassing waiver would effectively repeal the requirement and would thus be impermissibly broad.

This decision did not vacate the pre-employment alcohol testing regulations of the other modes, which were not before the court, but these regulations are based on parallel statutory language, and the rationale of the court's decision applies to them as well.

Because the Court's decision has vacated FHWA's pre-employment alcohol testing rule and created substantial uncertainty about the legal validity of the other operating administration's rules, the Department has decided to suspend all four pre-employment alcohol testing rules at this time. This suspension will be until further notice. Following its consideration of the issues involved on remand from the Court, the Department will decide what course of action to follow (e.g., withdrawal or amendment of the requirements, consistent with the Court's opinion). Such action would be taken through the rulemaking process.

As a result of this action, large employers regulated by FHWA are not required to do pre-employment alcohol testing. Employers regulated by FTA, FAA, and FRA who have begun testing are not required to continue pre-employment alcohol testing. Employers who are scheduled to begin pre-employment alcohol testing at a later date (e.g., January 1, 1996) will not be required to do so. Any employer may conduct pre-employment alcohol testing under its own authority. Because of the Court's decision and this suspension, employers who wish to continue such testing may not claim a basis in Federal law or regulation for doing so, however. We would also emphasize that this action applies only to pre-employment alcohol testing. Drug testing, and other types of alcohol tests, are not affected.

As announced by Secretary of Transportation Federico Pena before the Court's decision was issued, the Department is sending a proposed bill to

Congress that would make pre-employment alcohol testing discretionary with employers. This legislation is based on the Administration's policy of eliminating regulations that are unnecessary or too costly and burdensome. It would clarify that employers are not required to conduct such testing, but have the option of doing so under the authority of Federal law.

Regulatory Process Matters

DOT Regulatory Policies and Procedures

The final rule is considered to be a nonsignificant rulemaking under DOT Regulatory Policies and Procedures, 44 FR 11034. It also is a nonsignificant rule for purposes of Executive Order 12886. The Department estimated, at the time it issued its final alcohol testing rules in February 1994, that pre-employment alcohol testing in the four operating administrations would cost approximately \$28 million per year. Suspending the rules will proportionally save these expenditures during the period the suspension is in effect.

Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Immediate Effectiveness and Issuance Without Prior Notice and Comment

Because it is necessary for the Department immediately to implement the Court's decision, because the Department does not have any discretion with respect to compliance with this decision, and because the Department must promptly resolve any legal uncertainty over the validity of pre-employment alcohol testing the decision has created, the Department finds that there is good cause to make this rule effective immediately. For the same reasons, the Department finds that prior notice and public comment would be impracticable, unnecessary, and contrary to the public interest.

FAA

List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Aircraft pilots, Airmen, Airplanes, Air transportation, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

For the reasons set out in the preamble, the Federal Aviation Administration amends 14 CFR part 121, as follows:

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

1. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1485, and 1502 (revised Pub. L. 102–143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

2. In Appendix J, Sec. III, subsection A (“Pre-employment”) is suspended as of May 10, 1995.

Issued in Washington, DC on May 3, 1995.

David R. Hinson,
Administrator, Federal Aviation Administration.

FRA

List of Subjects in 49 CFR Part 219

Alcohol and drug abuse, Railroad safety, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, FRA amends 49 CFR Part 219, as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

1. The authority for part 219 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20111, 20112, 20113, 20140, 21301, 21304; Pub. L. 103–272 (July 5, 1994); and 49 CFR 1.49(m).

2. In § 219.501, paragraph (f) is added to read as follows:

§ 219.501 Pre-employment tests.

* * * * *

(f) Notwithstanding any other provisions of this subpart, all provisions and requirements in this section pertaining to preemployment testing for alcohol are suspended as of May 10, 1995.

Issued in Washington, DC on May 3, 1995.

Jolene M. Molitoris,
Administrator, Federal Railroad Administration.

FHWA

List of Subjects in 49 CFR Part 382

Alcohol and drug abuse, Highway safety, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the FHWA amends 49 CFR Part 382, as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

1. The authority for part 382 continues to read as follows:

Authority: 49 U.S.C. 31306; 49 U.S.C. app. 31201 et. seq.; 49 U.S.C. 31502; 49 CFR 1.48.

2. In § 382.301, paragraph (e) is added to read as follows:

§ 382.301 Pre-employment testing.

(e) Notwithstanding any other provisions of this subpart, all provisions and requirements in this section pertaining to preemployment testing for alcohol are suspended as of May 1, 1995.

Issued in Washington, DC on May 3, 1995.

Rodney Slater,
Administrator, Federal Highway Administration.

FTA

List of Subjects in 49 CFR Part 654

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

For the reasons set out in the preamble, the Federal Transit Administration amends 49 CFR 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.

2. Section 654.31 is suspended as of May 10, 1995.

Issued in Washington, DC on May 3, 1995.

Gordon J. Linton,
Administrator, Federal Transit Administration.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 5

Delegations of Authority to the Commissioner of Food and Drugs

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the regulations for delegations of authority