

List of Subjects in 49 CFR Parts 383 and 384

Commercial driver's license, Commercial motor vehicles, Highways and roads, Motor carriers, Motor vehicle safety, and Railroad-highway grade crossing.

Issued: February 23, 1998.

Kenneth R. Wykle,

Administrator, Federal Highway Administration.

In consideration of the foregoing, the FHWA hereby proposes to amend Title 49, Code of Federal Regulations, Chapter III, as set forth below.

PART 383—[AMENDED]

1. The authority citation for 49 CFR Part 383 is revised to read as follows:

Authority: 49 U.S.C. 31136, 31301 *et seq.*, and 31502; and 49 CFR 1.48.

2. Section 383.37 is revised to read as follows:

§ 383.37 Employer responsibilities.

No employer may knowingly allow, require, permit, or authorize a driver to operate a CMV in the United States:

(a) During any period in which the driver has a CMV driver's license suspended, revoked, or canceled by a State, has lost the right to operate a CMV in a State, or has been disqualified from operating a CMV;

(b) During any period in which the driver has more than one CMV driver's license, except during the 10-day period beginning on the date such driver is issued a driver's license;

(c) During any period in which the driver, or the CMV he or she is driving, or the motor carrier operation, is subject to an out-of-service order; or

(d) In violation of a law or regulation pertaining to railroad-highway grade crossings.

3. In § 383.51, paragraph (e) is redesignated as paragraph (f), and a new paragraph (e) is added to read as follows:

§ 383.51 Disqualification of drivers.

* * * * *

(e) *Disqualification for railroad-highway grade crossing violation—(1) General rule.* A driver who is convicted of operating a CMV in violation of a law or regulation pertaining to railroad-highway grade crossings must be disqualified for the period of time specified in paragraph (e)(2) of this section.

(2) *Duration of disqualification for railroad-highway grade crossing violation—(i) First violation.* A driver must be disqualified for not less than 60 days, if the driver is convicted of a first

violation of a railroad-highway grade crossing violation.

(ii) *Second or subsequent violation.* A driver must be disqualified for not less than 120 days, if during any 3-year period, the driver is convicted of a second or subsequent railroad-highway grade crossing violation in separate incidents.

(f) * * *

4. Section 383.53 is amended by adding a new paragraph (c) to read as follows:

§ 383.53 Penalties.

* * * * *

(c) *Special penalties pertaining to railroad-highway grade crossing violations.* An employer who is convicted of a violation of § 383.37(d) must be subject to a civil penalty of not more than \$10,000.

PART 384—[AMENDED]

5. The authority citation for 49 CFR Part 384 continues to read as follows:

Authority: 49 U.S.C. 31136, 31301 *et seq.*, and 31502; and 49 CFR 1.48.

6. Part 384 is amended by adding § 384.223 to read as follows:

§ 384.223 Railroad-highway grade crossing violation.

The State must have and enforce laws and/or regulations applicable to CMV drivers and their employers, as defined in § 383.5 of this title, which meet the minimum requirements of §§ 383.37(d), 383.51(e), and 383.53(c) of this title.

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DEPARTMENT OF TRANSPORTATION**Federal Transit Administration****49 CFR Parts 653 and 654**

[Docket No. FTA-98-3474]

RIN 2132-AA61

“Maintenance” Under Definition of Safety-Sensitive Functions in Drug and Alcohol Rules

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: In response to a letter from an attorney representing a large transit system, the Federal Transit Administration (FTA) proposes to require drug and alcohol testing of all maintenance workers, including those engaged in engine, revenue service vehicle, and parts rebuilding and overhaul. This change would eliminate

the distinction between maintenance workers involved in on-going, daily maintenance and repair work and those who, on a routine basis, perform rebuilding and overhauling work.

DATES: Comments on this proposed rule must be submitted by June 1, 1998.

ADDRESSES: Written comments must refer to the docket number appearing above and must be submitted to the United States Department of Transportation, Central Dockets Office, PL-401, 400 Seventh Street SW., Washington, DC 20590. All comments received will be available for inspection at the above address from 10 a.m. to 5 p.m., Monday through Friday, except Federal holidays. Those desiring the agency to acknowledge receipt of their comments should include a self-addressed stamped postcard with their comments.

FOR FURTHER INFORMATION: For program issues: Judy Meade, Director of the Office of Safety and Security (202) 366-2896 (telephone) or (202) 366-7951 (fax). For legal issues: Michael Connelly, Office of the Chief Counsel (202) 366-4011 (telephone) or (202) 366-3809 (fax). Electronic access to this and other rules may be obtained through FTA's Transit Safety Bulletin Board at 1-800-231-2061, or through the FTA World Wide Web home page at <http://www.fta.dot.gov>; both services are available seven days a week.

SUPPLEMENTARY INFORMATION:**I. Background**

On February 5, 1994, FTA issued 49 CFR parts 653 and 654, requiring recipients of certain categories of FTA funding to test safety-sensitive employees for the use of five prohibited drugs, and for the misuse of alcohol. The rules defined safety-sensitive employees to include, among others, workers who maintain revenue service vehicles or equipment used in revenue service.

In a series of interpretive letters dating from 1994, the FTA refined the definition of safety-sensitive maintenance workers, in effect creating two distinct classes of employees. On the one hand were those engaged in on-going and routine repair and maintenance of revenue service vehicles and equipment. On the other hand were those performing what the FTA has historically considered less routine maintenance such as the overhaul and rebuilding of engines, parts, and vehicles. The basis for the FTA's view lay in the rules' preambles (59 FR 7535 (alcohol) and 59 FR 7575 (drugs)), which noted that “only mechanics who repair (revenue service) vehicles or

perform routine maintenance are the types of maintenance workers covered by the rules." The FTA focused on routine maintenance, and excluded from coverage those workers performing other-than-routine repair service.

On September 3, 1996, John Goldstein, President of the Amalgamated Transit Union, Local 998, Milwaukee, Wisconsin, sought clarification of FTA policy on random testing of employees performing less routine maintenance, i.e., overhauling and rebuilding engines. He noted that contract workers at the Milwaukee County Transit System who did such work were not being randomly tested, while employees of the transit agency performing the same work were subject to testing.

On March 26, 1997, the FTA, in keeping with previous interpretations, informed Goldstein that no worker performing less than routine maintenance was subject to testing under FTA rules, regardless for whom they worked. According to FTA's previously-issued interpretive letters, the rules applied only to those safety-sensitive employees performing routine, day-to-day maintenance work.

In response to the FTA's March 26, 1997, letter to Goldstein, Gregg Formella, attorney for the Milwaukee Transport Services, Inc., requested that FTA reconsider its position regarding the two categories of maintenance worker testing. Mr. Formella's letter, and that from Mr. Goldstein, pointed out that the transit system has repair maintenance units dedicated solely to rebuilding and overhaul. While individual revenue service vehicles are overhauled and rebuilt only occasionally (i.e., on a less routine basis), the employees who work on those vehicles do so on an on-going, daily basis. The work load is constant; a revenue service vehicle is always being overhauled or rebuilt.

Mr. Formella also pointed out that the **Federal Register** preambles upon which the FTA had relied in its letters of interpretation involved a distinction, not between routine repair maintenance and less routine repair maintenance, but rather between all repair maintenance and cleaning maintenance; in that context, the use of the word "routine" is superfluous.

Finally, Mr. Formella's letter suggests that rebuilding and overhaul repair maintenance is no less important than daily maintenance, and that in the interest of safety, no exception should be extended.

II. FTA's Response

The FTA proposes to adopt Mr. Formella's suggestion that all revenue service repair maintenance workers be subject to FTA's drug and alcohol testing requirements, including random testing. Such a proposal would eliminate considerable confusion over what constitutes routine and less routine maintenance work.

A closer review of the history of the rules, and specifically that portion of the preamble upon which the FTA relied when creating the two categories of repair maintenance workers, is instructive. When the regulations were first proposed in 1992, some commenters were concerned that considering as safety-sensitive any employee who "maintain(s) a revenue service vehicle" might be too broad; the commenters were concerned that employees who clean such vehicles might also fall under the definition of safety-sensitive maintenance. In 1994, when the final rules were promulgated, the FTA used that opportunity to note that only mechanics, and not cleaning crews, would be subject to the rules' coverage. Significantly, we noted that the rules applied to all mechanics "who repair vehicles." Also, in the rules' preambles (59 FR 7584 (drugs) and 59 FR 7544 (alcohol)), we noted that "(m)aintaining a revenue service vehicle includes any act which repairs, provides upkeep to a vehicle, or any other process which keeps the vehicle operational"—a definition which, in retrospect, surely includes employees who rebuild and overhaul engines, parts, and revenue service vehicles.

In a November 2, 1994, letter to the New York City Transit Authority, the FTA stressed that the routine and on-going nature of the maintenance work was a "key criterion" in determining when the rules applied. The FTA stated that because rebuilding and overhauling parts, engines, and revenue service vehicles were done on only an occasional basis, the rules ought not apply.

However, experience over the last four years has shown, in fact, that some workers who overhaul and rebuild do so on a regular, on-going basis. In light of this new understanding, the FTA has re-evaluated its earlier position to consider whether overhauling and rebuilding engines, parts, and vehicles that is performed routinely should be included in the rules. While overhaul and rebuilding is not performed every day on each piece of equipment, the workers who do such work do so daily and on a routine basis. We seek comment on changing the interpretation of

"maintaining a revenue service vehicle or equipment used in revenue service" to include overhauling and rebuilding engines, parts, and revenue service vehicles.

In addition, there is now reason to believe that repair maintenance personnel experience greater substance abuse problems than other categories of safety-sensitive workers. Statistics provided by the transit industry, as summarized in the Drug and Alcohol Testing Results, 1995 Annual Report (FTA-MA-18X018-97-1; DOT-VNTSC-FTA-97-2, available from the FTA Office of Safety and Security) indicate that, for both drugs and alcohol, the revenue vehicle and equipment maintenance personnel had the highest percentage of random and reasonable suspicion positives:

“3.2.2. Random Drug Test Results * * * In addition, within the random testing category, one job category (revenue vehicle and equipment maintenance) consistently had the highest percentage of positive drug test results.

3.3 Results of Drug Tests Presented by Employee Category * * *

The category with the highest percentage of positive results was revenue vehicle and equipment maintenance with 2.05.

3.11 Comparison of Transit System and Contractor Positive Random Drug Test Results * * * In four out of five job categories, contractors had a higher percentage of positive random drug test results than did transit systems * * * The largest differential was in revenue vehicle and equipment maintenance category, where contractors had 2.99 percent positive and transit systems had 2.01 percent positive.

4.2.2 Random Alcohol Test Results * * * For random alcohol tests, the revenue vehicle and equipment maintenance employee category had the highest percentage of positive alcohol test results.”

The 1996 data (soon to be available in the FTA's 1996 drug and alcohol testing results annual report) reinforce this view. These statistics demonstrate the need to be all-inclusive when testing employees who perform maintenance functions.

There is great similarity between the actual job functions of employees performing on-going repairs, and those working exclusively on engine, parts, and vehicle overhaul and rebuilding. In retrospect, any distinction between the two categories is an artificial construct, and there now appears no basis to treat them differently. To consider all safety-sensitive repair maintenance employees as falling under the regulations' rubric is consistent, and pro-safety. In larger systems, the workers in each of these two categories are generally drawn from the same technical pool, with the same skills and responsibilities. In smaller

systems, the employees who perform the on-going maintenance may often be the same people rebuilding and overhauling.

This proposal is intended to apply to all transit systems, their contractors that perform safety-sensitive functions, and all maintenance repair employees; it is not meant to be limited to those transit systems with units dedicated to engine, parts, and vehicle overhaul and rebuilding. Such an inclusive view is consistent with the regulatory intent to test all safety-sensitive repair maintenance workers in the interest of public safety.

Nothing in this proposal is intended to affect the present exemption of repair maintenance workers of newly manufactured equipment or equipment under the manufacturer's warranty, the exemption extended to contractors of section 5311 (formerly section 18) systems, or contractors of section 5309 (formerly section 3) recipients in an area under 50,000 in population.

III. Regulatory Analyses and Notices

This is not a significant rule under Executive Order 12866 or under the Department's Regulatory Policies and Procedures. There are no significant Federalism implications to warrant preparation of a Federalism Assessment. The Regulatory Impact Analysis used for the original 1994 rules assumed that all maintenance workers would be randomly tested for drug and alcohol misuse. In 1994, the FTA created a limited exemption from testing for safety-sensitive workers who performed "less routine" maintenance such as rebuilding and overhauling engines, parts, and revenue service vehicles. We now propose to eliminate that exemption, and restore all maintenance

workers to the original assumption (i.e., that all safety-sensitive workers would be tested). Therefore, the Department certifies that this rule will not have a significant economic impact on a substantial number of transit systems; this rule will merely restore maintenance workers who overhaul and rebuild engines, parts, and revenue service vehicles to the pool of safety-sensitive workers to be randomly tested. This rule does not contain new information collection requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520. This is not an unfunded mandate because this rule, if adopted, would cost State, local, and tribal governments less than \$100 million annually.

List of Subjects in 49 CFR Parts 653 and 654

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

For the reasons set forth in the preamble, FTA proposes to amend Title 49 Code of Federal Regulations, part 653 and 654 as follows:

PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

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

Authority: 49 U.S.C. 5331, 49 CFR 1.51.

§ 653.7 [Amended]

2. Section 653.7 is amended by adding the definition of safety-sensitive function to read as follows:

* * * * *

Safety-sensitive function means any of the following duties: Maintaining (including on-going repairs and overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service, unless the recipient receives section 5309 (formerly section 3) funding, is in an area less than 50,000 in population, and contracts out such services, or section 5311 (formerly section 18) funding and contracts out such services.

* * * * *

PART 654—PREVENTION OF ALCOHOL MISUSE IN TRANSIT OPERATIONS

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

Authority: 49 U.S.C. 5331, 49 CFR 1.52.

§ 654.7 [Amended]

2. Section 654.7 is amended by adding the definition of safety-sensitive function to read as follows:

* * * * *

Safety-sensitive function means any of the following duties: Maintaining (including on-going repairs and overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service, unless the recipient receives section 5309 (formerly section 3) funding, is in an area less than 50,000 in population, and contracts out such services, or section 5311 (formerly section 18) funding and contracts out such services.

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Issued on: February 25, 1998.

Gordon J. Linton,

Administrator.

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