

a. If samples cannot be shipped immediately as provided below, samples other than blood may be immediately frozen. Blood samples should be refrigerated, but not frozen.

b. All samples and documentation should be secured from unauthorized access pending delivery for transportation.

F. Information:

a. If the railroad has not already done so, please place the name of the subject at the top of the Control Form (STEP 1). You are requested to complete STEP 2 of the form, annotating it by writing the word "FATALITY," listing the samples provided, providing any further information under "Remarks" or at the bottom of the form. If it is necessary to transfer custody of the samples from the person taking the samples prior to preparing the box for shipment, please use the blocks provided in STEP 5 to document transfer of custody.

b. The railroad representative will also provide Accident Information Required for Post-Accident Toxicological Testing (49 CFR part 219), Form FRA 6180.73 (revised). Both forms should be placed in the shipping box when completed; but you may retain the designated medical facility copy of each form for your records.

G. Packing the shipping box:

a. Place urine bottles and blood tubes in the sponge liner in the individual kit, close the biohazard bag zipper, close the kit and apply the kit custody seal to the kit. You may use additional kits for each tissue sample, being careful to identify sample by tissue, name of deceased, and specimen set identification number. Apply kit security seals to individual kits and initial across all seals. Place all forms in the zip-lock bag and seal securely.

b. Place the bag in the shipping box. Do not put forms in with the specimens. Seal the shipping box with the seal provided and initial and date across the seal.

c. Affix the mailing label to the outside of the box.

H. Shipping the box:

a. The railroad must arrange to have the box shipped overnight air express or (if express service is unavailable) by air freight, prepaid, to FRA's designated laboratory. When possible, but without incurring delay, deliver the sealed shipping box directly to the express courier or the air freight representative.

b. If courier pickup is not immediately available at your facility, the railroad is required to transport the sealed shipping box to the nearest point of shipment via air express, air freight or equivalent means.

c. If the railroad receives the sealed shipping box to arrange shipment, please record under "Supplemental Information" on the Control Form, the name of the railroad official taking custody.

I. Other:

FRA requests that the person taking the samples annotate the Control Form under "Supplemental Information" if additional toxicological analysis will be undertaken with respect to the fatality. FRA reports are available to the coroner or medical examiner on request.

Issued in Washington, D.C., on April 11, 2001.

S. Mark Lindsey,

Acting Deputy Administrator, Federal Railroad Administration.

[FR Doc. 01-9413 Filed 4-27-01; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 382

[Docket No. FMCSA-2000-8456]

RIN 2126-AA58

Controlled Substances and Alcohol Use and Testing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: The Department of Transportation published a revision of its drug and alcohol testing procedures regulations on December 19, 2000. Consequently, the FMCSA is proposing to amend its controlled substances and alcohol testing regulations to ensure consistency with DOT's revised testing procedures and to avoid duplication. In addition, the FMCSA is proposing to amend its drug and alcohol testing regulations to update outdated provisions and clarify existing rules.

DATES: You must submit comments on or before June 14, 2001.

ADDRESSES: You can mail or hand deliver written comments to the US Department of Transportation, Docket Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001, or submit on-line at <http://dmses.dot.gov/submit>. You must include the docket number that appears in the heading of this document in your comment. You can examine and copy all comments from 9 a.m. to 5 p.m. e.t., Monday through Friday, except Federal holidays. If you want notification of receipt of comments, please include a self-addressed, stamped envelope or postcard, or after submitting comments electronically, print the acknowledgment page.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Rodgers, Transportation Specialist, MC-ECE, (202) 366-4016, or Mr. Michael Falk, Attorney-Advisor, MC-CC, (202) 366-0834, FMCSA, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 8:30 a.m. to 5:00 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The Department of Transportation published a comprehensive revision to the drug and alcohol testing procedural rules (49 CFR Part 40) (December 19, 2000, 65 FR 79462). The new Part 40 makes numerous changes regarding the way that drug and alcohol testing will be conducted in the future. The majority of the changes in the rule will become effective August 1, 2001. However, some changes will become effective prior to August 1, 2001.

Part 40 is one element of a One-DOT set of regulations designed to deter and detect the use of illegal drugs and the misuse of alcohol by employees performing safety-sensitive transportation functions. It is important that the six DOT agency rules that cover specific transportation industries be consistent with the revised Part 40, to avoid duplication, conflict, or confusion among DOT regulatory requirements. Therefore, we are proposing to amend our drug and alcohol testing regulations to conform with Part 40.

Background

In this NPRM, the FMCSA proposes changes that would conform its drug and alcohol testing regulations (49 CFR Part 382) to the revised DOT procedures for transportation workplace drug and alcohol testing programs (49 CFR Part 40) published on December 19, 2000 (65 FR 79462).

The FMCSA proposes to delete from part 382 provisions that are also covered in the new part 40. Motor carrier employers and employees affected by part 382 have always been required to read and adhere *both* part 382 and part 40 to comply with the FMCSA's drug and alcohol testing requirements. Referring the reader directly to part 40 instead of duplicating part 40 rule text in part 382 would promote both drafting economy and consistency of interpretation. This NPRM proposes to delete from part 382 regulatory text regarding referral, evaluation and treatment requirements; follow-up testing; inquiries for alcohol and controlled substances information from previous employers; and substance abuse professionals. Instead, the regulations would reference the appropriate provisions of part 40 which deal with these issues.

Although the primary purpose of this NPRM is to conform part 382 with the new part 40, FMCSA would also delete outdated rule text references (e.g., past implementation dates and reporting requirements) that can currently be found throughout part 382. This includes replacing references to the Federal Highway Administration with

the Federal Motor Carrier Safety Administration.

For ease of reference, FMCSA is publishing part 382 in its entirety with the proposed amendments discussed below. FMCSA intends to time publication of the final rule so that its conforming changes to part 382 become effective concurrently with most of part 40 on August 1, 2001.

Subpart A—General

Section 382.107 Definitions

The following definitions have been added or modified in part 382 in order to conform to the definitions in revised part 40:

Confirmation or confirmatory test

Confirmed drug test

Consortium/Third party administrator

Controlled substances

Designated employer representative (DER)

Employer

Refuse to submit

Screening test (or initial test)

Stand-down

Section 382.115 Starting Date for Testing Programs

The starting date for testing programs has been modified to reflect that all implementation dates have elapsed. This section now requires all motor carriers, both domestic and foreign to implement the testing program requirements when they begin operating commercial motor vehicles in the United States. The implementation dates for large foreign employers and small foreign employers have been removed.

Section 382.117 Public Interest Exclusion

This section has been included to ensure consistency with 49 CFR Part 40, subpart R. In an attempt to protect the public interest, and transportation employers and employees, the Department is incorporating the public interest exclusion (PIE) into its regulations. The FMCSA has included this section to inform motor carriers subject to the controlled substances and alcohol testing regulations that they may not use a service agent who has had a PIE issued against it. The Department uses public interest exclusions to exclude service agents who are in serious noncompliance with the drug and alcohol testing regulations from participating in DOT's drug and alcohol testing program.

Section 382.119 Stand-Down Waiver Provision

This section has been added to include the stand-down waiver

provision contained in 49 CFR Part 40. Section 40.21 maintains the departmental policy of prohibiting employers from standing an employee down, that is, removing the employee from safety-sensitive service after the medical review officer (MRO) has received a laboratory report of either a confirmed positive test result, adulterated test result, or substituted test result before the result has been verified by the MRO. The new section 40.21(d) authorizes each Administrator (or his or her designee) to waive this prohibition if doing so would effectively enhance safety while protecting employee fairness and confidentiality. Therefore, the new § 382.119 stand-down waiver provision outlines the procedures for applying for a waiver to the FMCSA. The FMCSA would review petitions for a waiver and decide to grant or deny the petition based on the requirements established in § 40.21.

Section 382.217 Actual Knowledge

The FMCSA is proposing to add a new section to the regulations to clarify the term "actual knowledge." Published regulatory guidance previously provided by the FMCSA indicates that actual knowledge may result from the employer's direct observation of the employee, the driver's previous employer(s), the employee's admission of alcohol use, or other occurrences. Some entities believe the reference to an employee's admission or other occurrences are too ambiguous and prevents an employee from coming forward to self-identify that a drug or alcohol problem exists. Since our primary purpose is to deter alcohol misuse or controlled substance use, we encourage employers to have self-identification programs. As a result, we propose to include in the regulations language similar to that in the regulatory guidance, but have provided an exception in proposed § 382.219.

Section 382.219 Employee Admission of Alcohol and Controlled Substances Use

This section has been developed to allow employers to establish self-identification programs that permit employees to self-identify without DOT consequences. The self-identification program does not allow employees to self-identify in order to avoid DOT testing. The program must prohibit employers from taking adverse actions against an employee making a voluntary admission. Lastly, the program must preserve the intent of the controlled substance and alcohol testing regulations by ensuring that problem drivers are removed from safety-

sensitive positions until the employee has successfully completed an educational or treatment program, as determined by a qualified substance abuse professional.

Section 382.301 Pre-employment Testing

Since mandatory pre-employment alcohol testing has been suspended as a result of a court decision and subsequent legislation, the FMCSA would eliminate paragraphs (b), (b)(1), (b)(2) and (e), which address pre-employment alcohol testing. Paragraphs (c) and (d) would be redesignated as paragraphs (b) and (c), respectively. The FMCSA would permit, but not require, employers to conduct pre-employment alcohol testing. If an employer chooses to conduct pre-employment alcohol testing, the employer would have to do so in accordance with 49 CFR part 40 and the proposed new paragraph (d) of this section.

Section 382.303 Post-Accident Testing

This section has been modified to include changes, deletions and updates to the post accident testing requirements. In many instances, motor carriers have conducted either alcohol or controlled substances tests, instead of conducting both tests as required by the regulations. Consequently, we are proposing to modify paragraph (a), which requires an employer to test for alcohol and controlled substances following an occurrence involving a commercial motor vehicle. The change removes controlled substances from paragraph (a) and places the post-accident controlled substances testing requirements in the proposed redesignated paragraph (b). The table previously codified as paragraph (a)(3) is proposed to be redesignated as paragraph (c). The requirements in paragraphs (b)(2) and (b)(3) of the current regulations are obsolete. Therefore, the FMCSA is proposing to delete these paragraphs, which required that certain information be submitted to the FHWA by March 15, 1996, March 15, 1997, and March 15, 1998. Other paragraphs in this section will be redesignated to accommodate the proposed changes.

Section 382.305 Random Testing

Currently, the random testing regulations require the Administrator to annually publish a Federal Register notice of the minimum annual percentage rates for random alcohol and controlled substances testing. The FMCSA is proposing to revise its random testing regulations to require the Administrator to publish notice of

the minimum annual percentage rates for random testing only in the event of a change in the annual percentage rates.

The FMCSA is seeking comments on the random testing regulations related to motor carriers testing at the applicable rates. Motor carriers may either administer their own random testing programs or rely on consortia/third party administrators (C/TPAs) to provide that service. There appears to be rising concern over how to calculate the testing rates when the motor carrier is in a consortium, especially if the consortium is not testing at the minimum rates, but the motor carrier is. The agency seeks comment whether the regulations codified in § 382.305(j) are sufficiently clear, or do they need clarification?

Section 382.307 Reasonable Suspicion Testing

The FMCSA is proposing to remove the regulatory test in 382.307(e)(2) requiring employers to submit MIS reports from March 15 1996 through March 15, 1998 respectively. This section will be renumbered accordingly to adjust for the deletion of this paragraph.

Section 382.309 Return-to-Duty Testing

The FMCSA is proposing to remove the regulatory text regarding return-to-duty testing requirements from part 382 in order to avoid potential duplication and inconsistency with the requirements in part 40. Please refer to the Common Preamble, Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to the Department of Transportation Final Rule, published elsewhere in this issue of the **Federal Register**.

Section 382.311 Follow-Up Testing

The FMCSA is proposing to remove the regulatory text regarding follow-up testing requirements from part 382 in order to avoid potential duplication and inconsistency with the requirements in part 40. Please refer to the Common Preamble, Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to 49 CFR Part 40, published elsewhere in this issue of the **Federal Register**.

Section 382.401 Retention of Records

The FMCSA is proposing that employers maintain semi-annual laboratory statistical summaries of urinalysis instead of quarterly summaries, to be consistent with the new part § 40.111(a).

Section 382.403 Reporting of Results in a Management Information System

The FMCSA is proposing to amend the reporting requirements in paragraphs (c)(8) and (d)(5) to include substituted or adulterated specimens. This would be consistent with part 40 and will provide clarifying information on positive drug test results that are accounted for in the MIS reports.

Section 382.405 Access to Facilities and Records

The FMCSA is proposing to amend the requirements in paragraph (g) regarding disclosure of information arising from a positive DOT drug or alcohol test or refusal to test also include disclosure of adulterated and substituted test results, consistent with § 40.323(a)(1). Additionally, this section allows an employer to disclose information in criminal or civil actions as provided in § 40.323(a)(2).

Section 382.407 Medical Review Officer Notifications to the Employer

The FMCSA is proposing to remove the regulatory text regarding requirements for medical review officer notifications to the employer from part 382 in order to avoid potential duplication and inconsistency with the requirements of part 40. Please refer to the Common Preamble, Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to 49 CFR Part 40, published elsewhere in this issue of the **Federal Register**.

Section 382.409 Medical Review Officer Record Retention for Controlled Substances

This section requires the medical review officer to maintain dated records and employer notifications for a period of time. The FMCSA proposes to amend paragraphs (a),(b) and (c) to include third party administrators within this requirement since part 40 now permits third party administrators to transmit the MRO's findings to the employer.

Section 382.411 Employer Notifications

Paragraphs (b) and (c) has been modified to replace the term designated management official with designated employer representative. In addition, we propose to amend paragraph (c) to require the designated employer representative to immediately notify the medical review officer that the driver has been notified to contact the medical review officer within 72 hours, in order to be consistent with § 40.131.

Section 382.413 Inquiries for Alcohol and Controlled Substances Information from Previous Employers

The FMCSA is proposing to remove the regulatory text regarding requirements for inquiries for alcohol and controlled substances information from previous employers from Part 382 in order to avoid potential duplication and inconsistency with Part 40. Please refer to the Common Preamble, Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to 49 CFR Part 40, published elsewhere in this issue of the **Federal Register**.

Section 382.507 Penalties

The FMCSA is proposing to add a provision stating that an employer who violates the requirements of part 40 will be subject to the penalties in 49 U.S.C. 521(b). This is a clarification of existing law. Section 382.105 makes the provisions of Part 40 applicable to employers and a violation of part 40 is treated like a violation of part 382 for enforcement purposes.

Section 382.605 Referral, Evaluation, and Treatment

The FMCSA is proposing to remove the regulatory text regarding the requirements for referral, evaluation, and treatment from Part 382 in order to avoid potential duplication and inconsistency with the requirements of Part 40. Please refer to the Common Preamble, Transportation Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to 49 CFR Part 40, published elsewhere in this issue of the **Federal Register**.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

These proposed rules have been designated as non-significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. They are non-significant because they merely make changes to conform to the revised 49 CFR part 40, which has already been subject to extensive comment and analysis, or seek to remove obsolete provisions or clarify existing law. The proposed changes would not have any incremental economic impacts on their own. The economic impacts of the underlying part 40 changes were analyzed in connection with the part 40 rulemaking.

Regulatory Flexibility Act

Because these proposals have no incremental economic impacts, the FMCSA certifies, under the Regulatory Flexibility Act, that these proposals, if adopted, would not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999. The FMCSA has determined this proposed rule would not have a substantial direct effect on, or sufficient federalism implications for, the States, nor would it limit the policymaking discretion of the States.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FMCSA has determined that there are no new requirements for information collection associated with this proposed rule. All the information collection requirements of part 40 have been analyzed and approved by OMB. These proposed rules would impose no information collection requirements that have not already been reviewed in the context of the part 40 rulemaking, so no further Paperwork Reduction Act review is necessary.

Unfunded Mandates Reform Act

This proposed rule would not impose a Federal mandate resulting in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (2 U.S.C. 1531 *et seq.*).

Executive Order 12988 (Civil Justice Reform)

This proposed action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this proposal under Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks". This proposed rule would not be economically significant and would not concern an environmental risk to health or safety that would disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The FMCSA certifies that this proposed rule has no taking implications under the Fifth Amendment or Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

National Environmental Policy Act

The agency has analyzed this proposal for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have an adverse effect on the quality of the environment.

List of Subjects in 49 CFR Part 382

Administrative practice and procedure, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Highway safety, Motor carriers, Penalties, Reporting and recordkeeping requirements, Safety, Transportation.

Accordingly, the FMCSA proposes to revise Part 382 of 49 CFR to read as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING**Subpart A—General**

- Sec.
- 382.101 Purpose 382.103 Applicability.
 - 382.105 Testing procedures.
 - 382.107 Definitions.
 - 382.109 Preemption of State and local laws.
 - 382.111 Other requirements imposed by employers.
 - 382.113 Requirements for notice.
 - 382.115 Starting date for testing programs
 - 382.117 Public interest exclusion.
 - 382.119 Stand-down waiver provision.

Subpart B—Prohibitions

- 382.201 Alcohol concentration.
- 382.205 On-duty use.
- 382.207 Pre-duty use.
- 382.209 Use following an accident.
- 382.211 Refusal to submit to a required alcohol or controlled substances test.
- 382.213 Controlled substances use.
- 382.215 Controlled substances testing.
- 382.217 Actual knowledge.
- 382.219 Employee admission of alcohol and controlled substances use.

Subpart C—Tests Required

- 382.301 Pre-employment testing.
- 382.303 Post-accident testing.

- 382.305 Random testing.
- 382.307 Reasonable suspicion testing.
- 382.309 Return-to-duty testing.
- 382.311 Follow-up testing.

Subpart D—Handling of Test Results, Record Retention, and Confidentiality

- 382.401 Retention of records.
- 382.403 Reporting of results in a management information system.
- 382.405 Access to facilities and records.
- 382.407 Medical review officer notifications to the employer.
- 382.409 Medical review officer record retention for controlled substances.
- 382.411 Employer notifications.
- 382.413 Inquiries for alcohol and controlled substances information from previous employers.

Subpart E—Consequences for Drivers Engaging in Substance Use-Related Conduct

- 382.501 Removal from safety-sensitive function.
- 382.503 Required evaluation and testing.
- 382.505 Other alcohol-related conduct.
- 382.507 Penalties.

Subpart F—Alcohol Misuse and Controlled Substances Use Information, Training, and Referral

- 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.
- 382.603 Training for supervisors.
- 382.605 Referral, evaluation, and treatment.

Authority: 49 U.S.C. 31133, 31136, 31301 *et seq.*, 31502; and 49 CFR 1.73.

Subpart A—General**§ 382.101 Purpose.**

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

§ 382.103 Applicability.

(a) This part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and is subject to:

- (1) The commercial driver's license requirements of part 383 of this subchapter;
- (2) The Licencia Federal de Conductor (Mexico) requirements; or
- (3) The commercial driver's license requirements of the Canadian National Safety Code.

(b) An employer who employs himself/herself as a driver must comply with both the requirements in this part that apply to employers and the requirements in this part that apply to drivers. An employer who employs only himself/herself as a driver shall implement a random alcohol and controlled substances testing program of

two or more covered employees in the random testing selection pool.

(c) The exceptions contained in § 390.3(f) of this subchapter do not apply to this part. The employers and drivers identified in § 390.3(f) of this subchapter must comply with the requirements of this part, unless otherwise specifically provided in paragraph (d) of this section.

(d) *Exceptions.* This part shall not apply to employers and their drivers:

(1) Required to comply with the alcohol and/or controlled substances testing requirements of parts 653 and 655 of this title (Federal Transit Administration alcohol and controlled substances testing regulations); or

(2) Who a State must waive from the requirements of part 383 of this subchapter. These individuals include active duty military personnel; members of the reserves; and members of the national guard on active duty, including personnel on full-time national guard duty, personnel on part-time national guard training and national guard military technicians (civilians who are required to wear military uniforms), and active duty U.S. Coast Guard personnel; or

(3) Who a State has, at its discretion, exempted from the requirements of part 383 of this subchapter. These individuals may be:

(i) Operators of a farm vehicle which is:

(A) Controlled and operated by a farmer;

(B) Used to transport either agricultural products, farm machinery, farm supplies, or both to or from a farm;

(C) Not used in the operations of a common or contract motor carrier; and

(D) Used within 241 kilometers (150 miles) of the farmer's farm.

(ii) Firefighters or other persons who operate commercial motor vehicles which are necessary for the preservation of life or property or the execution of emergency governmental functions, are equipped with audible and visual signals, and are not subject to normal traffic regulation.

§ 382.105 Testing procedures.

Each employer shall ensure that all alcohol or controlled substances testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol or controlled substances testing are made applicable to employers by this part.

§ 382.107 Definitions.

Words or phrases used in this part are defined in §§ 386.2 and 390.5 of this subchapter, and § 40.3 of this title, except as provided in this section—

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part.

Alcohol use means the drinking or swallowing of any beverage, liquid mixture or preparation (including any medication), containing alcohol.

Commerce means:

(1) Any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States; and

(2) Trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.

Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the vehicle—

(1) Has a gross combination weight rating of 11,794 or more kilograms (26,001 or more pounds) inclusive of a towed unit with a gross vehicle weight rating of more than of 4,536 kilograms (10,000 pounds); or

(2) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 or more pounds); or

(3) Is designed to transport 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR Part 172, subpart F).

Confirmation (or confirmatory) drug test means a second analytical procedure performed on a urine specimen to identify and quantify the presence of a specific drug or drug metabolite.

Confirmation (or confirmatory) validity test means a second test performed on a urine specimen to further support a validity test result.

Confirmed drug test means a confirmation test result received by an MRO from a laboratory.

Consortium/Third party administrator (C/TPA) means a service agent that provides or coordinates one or more drug and/or alcohol testing services to DOT-regulated employers. C/TPAs typically provide or coordinate the provision of a number of such services and perform administrative tasks concerning the operation of the

employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members (e.g., having a combined random testing pool). C/TPAs are not "employers" for purposes of this part.

Controlled substances mean those substances identified in § 40.85 of this title.

Designated employer representative (DER) is an individual identified by the employer as able to receive communications and test results from service agents and who is authorized to take immediate actions to remove employees from safety-sensitive duties and to make required decisions in the testing and evaluation processes. The individual must be an employee of the company. Service agents cannot serve as DERs.

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) *Inclusions.* 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) Headlight or taillight damage.

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

DOT Agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol and/or drug testing (14 CFR parts 61, 63, 65, 121, and 135; 49 CFR parts 199, 219, 382, 653 and 654), in accordance with Part 40 of this title.

Driver means any person who operates a commercial motor vehicle. This includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors who are either directly employed by or under lease to an employer or who operate a commercial motor vehicle at the direction of or with the consent of an employer.

Employer means an entity employing one or more employees (including an individual who is self-employed) that is subject to DOT agency regulations requiring compliance with this part. The

term, as used in these regulations, refers to the entity responsible for overall implementation of DOT drug and alcohol program requirements, as well as those individuals employed by the entity who take personnel actions resulting from violations of this part and any applicable DOT agency regulations. Service agents are not employers for the purposes of this part.

Licensed medical practitioner means a person who is licensed, certified, and/or registered, in accordance with applicable Federal, State, local, or foreign laws and regulations, to prescribe controlled substances and other drugs.

Performing (a safety-sensitive function) means a driver is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform any safety-sensitive functions.

Positive rate means the number of positive results for random controlled substances tests conducted under this part plus the number of refusals of random controlled substances tests required by this part, divided by the total of random controlled substances tests conducted under this part plus the number of refusals of random tests required by this part.

Refuse to submit (to an alcohol or controlled substances test) means that a driver:

(1) Fails to show up for any test within a reasonable time after being directed to do so by the employer or to remain at the testing site until the testing process is complete. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see § 40.61(a) of this title);

(2) Fails to provide a urine specimen for any drug test required by this part;

(3) In the case of a directly observed or monitored collection in a drug test, fails to permit the observation or monitoring of the provision of a specimen (§§ 40.67(k) and 40.69(g) of this title);

(4) Fails to provide a sufficient amount of urine when directed, unless it has been determined, through a required medical evaluation, that there was an adequate medical explanation for the failure (see § 40.193(d)(2) of this title);

(5) Fails or declines to take a second test the employer has directed following a negative dilute result (see § 40.197(g) of this title);

(6) Fails to undergo an additional medical examination, as directed by the MRO as part of the verification process, or as directed by the DER concerning

the evaluation as part of the “shy bladder” procedures in part 40, subpart I, of this title; or

(7) Fails to cooperate (e.g., leaves the test site before the collection process is completed, refuses to empty pockets) with any part of the testing process.

Safety-sensitive function means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:

(1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;

(2) All time inspecting equipment as required by §§ 392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All time spent at the driving controls of a commercial motor vehicle in operation;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of § 393.76 of this subchapter);

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

Screening test (or initial test) means:

(1) In drug testing, a test to eliminate “negative” urine specimens from further analysis or to identify a specimen that requires additional testing for the presence of drugs.

(2) In alcohol testing, an analytical procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath or saliva specimen.

Stand-down means the practice of temporarily removing an employee from the performance of safety-sensitive functions based only on a report from a laboratory to the MRO of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test results.

Violation rate means the number of drivers (as reported under § 382.305) found during random tests given under

this part to have an alcohol concentration of 0.04 or greater, plus the number of drivers who refuse a random test required by this part, divided by the total reported number of drivers in the industry given random alcohol tests under this part plus the total reported number of drivers in the industry who refuse a random test required by this part.

§ 382.109 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement in this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees, employers, or the general public.

§ 382.111 Other requirements imposed by employers.

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of drivers, with respect to the use of alcohol, or the use of controlled substances, including authority and rights with respect to testing and rehabilitation.

§ 382.113 Requirement for notice.

Before performing an alcohol or controlled substances test under this part, each employer shall notify a driver that the alcohol or controlled substances test is required by this part. No employer shall falsely represent that a test is administered under this part.

§ 382.115 Starting date for testing programs.

(a) All domestic-domiciled employers must implement the requirements of this part on the date the employer begins commercial motor vehicle operations.

(b) All foreign-domiciled employers must implement the requirements of this part on the date the employer begins commercial motor vehicle operations in the United States.

§ 382.117 Public interest exclusion.

No employer shall use the services of a service agent who is subject to a

public interest exclusion in accordance with 49 CFR part 40, subpart R.

§ 382.119 Stand-down waiver provision.

(a) An employer subject to this part who seeks a waiver from the prohibition against standing down an employee before the MRO has completed the verification process shall follow the procedures in 49 CFR 40.21. The employer must send a written request which includes all of the information required by that section to the Federal Motor Carrier Safety Administrator (or the Administrator's designee), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

(b) The final decision whether to grant or deny the application for a waiver will be made by the Administrator or the Administrator's designee.

(c) After a decision is signed by the Administrator or the Administrator's designee, the employer will be sent a copy of the decision, which will include the terms and conditions for the waiver or the reason for denying the application for a waiver.

(d) Questions regarding waiver applications should be directed to the Office of Enforcement and Compliance, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. The telephone number is (202) 366-5720.

Subpart B—Prohibitions

§ 382.201 Alcohol concentration.

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No employer having actual knowledge that a driver has an alcohol concentration of 0.04 or greater shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.205 On-duty use.

No driver shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a driver is using alcohol while performing safety-sensitive functions shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.207 Pre-duty use.

No driver shall perform safety-sensitive functions within four hours after using alcohol. No employer having actual knowledge that a driver has used alcohol within four hours shall permit a driver to perform or continue to perform safety-sensitive functions.

§ 382.209 Use following an accident.

No driver required to take a post-accident alcohol test under § 382.303 shall use alcohol for eight hours following the accident, or until he/she undergoes a post-accident alcohol test, whichever occurs first.

§ 382.211 Refusal to submit to a required alcohol or controlled substances test.

No driver shall refuse to submit to a post-accident alcohol or controlled substances test required under § 382.303, a random alcohol or controlled substances test required under § 382.305, a reasonable suspicion alcohol or controlled substances test required under § 382.307, or a follow-up alcohol or controlled substances test required under § 382.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

§ 382.213 Controlled substances use.

(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in § 382.107, who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

(b) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

(c) An employer may require a driver to inform the employer of any therapeutic drug use.

§ 382.215 Controlled substances testing.

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive or has adulterated or substituted a test specimen for controlled substances. No employer having actual knowledge that a driver has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.217 Actual knowledge.

For the purposes of this subpart, an employer can obtain actual knowledge that a driver has used alcohol or controlled substances based on the employer's direct observation of the employee, information provided by the driver's previous employer(s), a traffic citation for driving a CMV while under

the influence of alcohol or controlled substances or an employee's admission of alcohol or controlled substances use, except as provided in § 382.219.

§ 382.219 Employee admission of alcohol and controlled substances use.

(a) Employees who admit to alcohol misuse or controlled substances use are not subject to the referral, evaluation and treatment requirements of this part and part 40 of this title, provided that:

(1) The admission is in accordance with a written employer-established voluntary self-identification program or policy which meets the requirements of paragraph (b) of this section;

(2) The driver does not self-identify in order to avoid testing under the requirements of this part;

(3) The driver makes the admission of alcohol misuse or controlled substances use before performing a safety sensitive function; and

(4) The driver does not perform a safety sensitive function until the employer is satisfied that the employee has been evaluated and has successfully completed education or treatment requirements in accordance with the self-identification program guidelines.

(b) A qualified voluntary self-identification program or policy must contain the following elements:

(1) It must prohibit the employer from taking adverse action against an employee making a voluntary admission of alcohol misuse or controlled substances use within the parameters of the program or policy and paragraph (a) of this section;

(2) It must allow the employee sufficient opportunity to seek evaluation, education or treatment to establish control over the employee's drug or alcohol problem; and

(3) It must permit the employee to return to safety sensitive duties only upon successful completion of an educational or treatment program, as determined by a substance abuse professional.

Subpart C—Tests Required

§ 382.301 Pre-employment testing.

(a) Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for controlled substances as a condition prior to being used, unless the employer uses the exception in paragraph (b) of this section. No employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the employer has received a controlled substances test result from the MRO or C/TPA indicating a verified negative test result for that driver.

(b) An employer is not required to administer a controlled substances test required by paragraph (a) of this section if:

(1) The driver has participated in a controlled substances testing program that meets the requirements of this part within the previous 30 days; and

(2) While participating in that program, either—

(i) Was tested for controlled substances within the past 6 months (from the date of application with the employer), or

(ii) Participated in the random controlled substances testing program for the previous 12 months (from the date of application with the employer); and

(3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substances use rule of another DOT agency within the previous six months.

(c)(1) An employer who exercises the exception in paragraph (b) of this section shall contact the controlled substances testing program(s) in which the driver participates or participated and shall obtain and retain from the testing program(s) the following information:

(i) Name(s) and address(es) of the program(s).

(ii) Verification that the driver participates or participated in the program(s).

(iii) Verification that the program(s) conforms to part 40 of this title.

(iv) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.

(v) The date the driver was last tested for controlled substances.

(vi) The results of any tests taken within the previous six months and any other violations of subpart B of this part.

(2) An employer who uses, but does not employ, a driver more than once a

year to operate commercial motor vehicles must obtain the information in paragraph (c)(1) of this section at least once every six months. The records prepared under this paragraph shall be maintained in accordance with § 382.401. If the employer cannot verify that the driver is participating in a controlled substances testing program in accordance with this part and part 40 of this title, the employer shall conduct a pre-employment controlled substances test.

(d) An employer may, but is not required to, conduct pre-employment alcohol testing under this part. If an employer chooses to conduct pre-employment alcohol testing, it must comply with the following requirements:

(1) It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(2) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).

(3) It must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(4) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of part 40 of this title.

(5) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

§ 382.303 Post-accident testing.

(a) As soon as practicable following an occurrence involving a commercial

motor vehicle operating on a public road in commerce, each employer shall test for alcohol for each surviving driver:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(b) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each surviving driver:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or (2) Who receives a citation under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(c) The following table notes when a post-accident test is required to be conducted by paragraphs (a)(1), (a)(2), (b)(1), and (b)(2) of this section:

TABLE FOR § 382.303(a) AND (b)

Type of accident involved	Citation issued to the CMV driver	Test must be performed by employer
i. Human fatality	Yes	Yes.
	No	Yes.
ii. Bodily injury with immediate medical treatment away from the scene.	Yes	Yes.
	No	No.
iii. Disabling damage to any motor vehicle requiring tow away.	Yes	Yes.
	No	No.

(d)(1) *Alcohol tests.* If a test required by this section is not administered

within two hours following the accident, the employer shall prepare

and maintain on file a record stating the reasons the test was not promptly

administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FMCSA upon request.

(2) *Controlled substance tests.* If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FMCSA upon request.

(e) A driver who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.

(f) An employer shall provide drivers with necessary post-accident information, procedures and instructions, prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this section.

(g)(1) The results of a breath or blood test for the use of alcohol, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local alcohol testing requirements, and that the results of the tests are obtained by the employer.

(2) The results of a urine test for the use of controlled substances, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local controlled substances testing requirements, and that the results of the tests are obtained by the employer.

(h) *Exception.* This section does not apply to:

(1) An occurrence involving only boarding or alighting from a stationary motor vehicle; or

(2) An occurrence involving only the loading or unloading of cargo; or

(3) An occurrence in the course of the operation of a passenger car or a multipurpose passenger vehicle (as

defined in § 571.3 of this title) by an employer unless the motor vehicle is transporting passengers for hire or hazardous materials of a type and quantity that require the motor vehicle to be marked or placarded in accordance with § 177.823 of this title.

§ 382.305 Random testing.

(a) Every employer shall comply with the requirements of this section. Every driver shall submit to random alcohol and controlled substance testing as required in this section.

(b)(1) Except as provided in paragraphs (c) through (e) of this section, the minimum annual percentage rate for random alcohol testing shall be 10 percent of the average number of driver positions.

(2) Except as provided in paragraphs (f) through (h) of this section, the minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.

(c) The FMCSA Administrator's decision to increase or decrease the minimum annual percentage rate for alcohol testing is based on the reported violation rate for the entire industry. All information used for this determination is drawn from the alcohol management information system reports required by § 382.403. In order to ensure reliability of the data, the FMCSA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. In the event of a change in the annual percentage rate, the FMCSA Administrator will publish in the **Federal Register** the new minimum annual percentage rate for random alcohol testing of drivers. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication in the **Federal Register**.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the FMCSA Administrator may lower this rate to 10 percent of all driver positions if the FMCSA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the FMCSA Administrator may lower this rate to 25 percent of all driver positions if the FMCSA Administrator determines that

the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(e)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all driver positions.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of § 382.403 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent for all driver positions.

(f) The FMCSA Administrator's decision to increase or decrease the minimum annual percentage rate for controlled substances testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the controlled substances management information system reports required by § 382.403. In order to ensure reliability of the data, the FMCSA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. In the event of a change in the annual percentage rate, the FMCSA Administrator will publish in the **Federal Register** the new minimum annual percentage rate for controlled substances testing of drivers. The new minimum annual percentage rate for random controlled substances testing will be applicable starting January 1 of the calendar year following publication in the **Federal Register**.

(g) When the minimum annual percentage rate for random controlled substances testing is 50 percent, the FMCSA Administrator may lower this rate to 25 percent of all driver positions if the FMCSA Administrator determines that the data received under the reporting requirements of § 382.403 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent.

(h) When the minimum annual percentage rate for random controlled

substances testing is 25 percent, and the data received under the reporting requirements of § 382.403 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random controlled substances testing to 50 percent of all driver positions.

(i) The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each driver shall have an equal chance of being tested each time selections are made.

(j) The employer shall randomly select a sufficient number of drivers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol and controlled substances testing determined by the FMCSA Administrator. If the employer conducts random testing for alcohol and/or controlled substances through a C/TPA, the number of drivers to be tested may be calculated for each individual employer or may be based on the total number of drivers covered by the C/TPA who are subject to random alcohol and/or controlled substances testing at the same minimum annual percentage rate under this part or any DOT alcohol or controlled substances random testing rule may be calculated for the employer.

(k) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced and that the dates for administering random alcohol and controlled substances tests are spread reasonably throughout the calendar year.

(l) Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(m) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive

functions, or just after the driver has ceased performing such functions.

(n) If a given driver is subject to random alcohol or controlled substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the driver's function.

(o) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances 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.

§ 382.307 Reasonable suspicion testing.

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

(b) An employer shall require a driver to submit to a controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning controlled substances. The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver. The observations may include indications of the chronic and withdrawal effects of controlled substances.

(c) The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with § 382.603. The person who makes

the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

(d) Alcohol testing is authorized by this section only if the observations required by paragraph (a) of this section are made during, just preceding, or just after the period of the work day that the driver is required to be in compliance with this part. A driver may be directed by the employer to only undergo reasonable suspicion testing while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(e)(1) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (a) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (a) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(2) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or

(ii) Twenty four hours have elapsed following the determination under paragraph (a) of this section that there is reasonable suspicion to believe that the driver has violated the prohibitions in this part concerning the use of alcohol.

(3) Except as provided in paragraph (e)(2) of this section, no employer shall take any action under this part against a driver based solely on the driver's behavior and appearance, with respect to alcohol use, in the absence of an alcohol test. This does not prohibit an employer with independent authority of this part from taking any action otherwise consistent with law.

(f) A written record shall be made of the observations leading to a controlled substance reasonable suspicion test, and signed by the supervisor or company

official who made the observations, within 24 hours of the observed behavior or before the results of the controlled substances test are released, whichever is earlier.

§ 382.309 Return-to-duty testing.

The requirements for return-to-duty testing must be performed in accordance with 49 CFR part 40, Subpart O.

§ 382.311 Follow-up testing.

The requirements for following-up testing must be performed in accordance with 49 CFR part 40, Subpart O.

Subpart D—Handling of Test Results, Record Retention, and Confidentiality

§ 382.401 Retention of records.

(a) *General requirement.* Each employer shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years.* The following records shall be maintained for a minimum of five years:

- (i) Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater,
- (ii) Records of driver verified positive controlled substances test results,
- (iii) Documentation of refusals to take required alcohol and/or controlled substances tests,
- (iv) Driver evaluation and referrals,
- (v) Calibration documentation,
- (vi) Records related to the administration of the alcohol and controlled substances testing programs, and

(vii) A copy of each annual calendar year summary required by § 382.403.

(2) *Two years.* Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices).

(3) *One year.* Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.

(4) *Indefinite period.* Records related to the education and training of breath alcohol technicians, screening test technicians, supervisors, and drivers shall be maintained by the employer while the individual performs the functions which require the training and for two years after ceasing to perform those functions.

(c) *Types of records.* The following specific types of records shall be

maintained. "Documents generated" are documents that may have to be prepared under a requirement of this part. If the record is required to be prepared, it must be maintained.

(1) Records related to the collection process:

- (i) Collection logbooks, if used;
- (ii) Documents relating to the random selection process;
- (iii) Calibration documentation for evidential breath testing devices;
- (iv) Documentation of breath alcohol technician training;
- (v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests;
- (vi) Documents generated in connection with decisions on post-accident tests;
- (vii) Documents verifying existence of a medical explanation of the inability of a driver to provide adequate breath or to provide a urine specimen for testing; and
- (viii) Consolidated annual calendar year summaries as required by § 382.403.

(2) Records related to a driver's test results:

- (i) The employer's copy of the alcohol test form, including the results of the test;
- (ii) The employer's copy of the controlled substances test chain of custody and control form;
- (iii) Documents sent by the MRO to the employer, including those required by part 40, subpart G, of this title;
- (iv) Documents related to the refusal of any driver to submit to an alcohol or controlled substances test required by this part;
- (v) Documents presented by a driver to dispute the result of an alcohol or controlled substances test administered under this part; and
- (vi) Documents generated in connection with verifications of prior employers' alcohol or controlled substances test results that the employer:

(A) Must obtain in connection with the exception contained in § 382.301, and

(B) Must obtain as required by § 382.413.

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a driver's need for assistance; and

(ii) Records concerning a driver's compliance with recommendations of the substance abuse professional.

(5) Records related to education and training:

(i) Materials on alcohol misuse and controlled substance use awareness, including a copy of the employer's policy on alcohol misuse and controlled substance use;

(ii) Documentation of compliance with the requirements of § 382.601, including the driver's signed receipt of education materials;

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol and/or controlled substances testing based on reasonable suspicion;

(iv) Documentation of training for breath alcohol technicians as required by § 40.213(a) of this title; and

(v) Certification that any training conducted under this part complies with the requirements for such training.

(6) Administrative records related to alcohol and controlled substances testing:

(i) Agreements with collection site facilities, laboratories, breath alcohol technicians, screening test technicians, medical review officers, consortia, and third party service providers;

(ii) Names and positions of officials and their role in the employer's alcohol and controlled substances testing program(s);

(iii) Semi-annual laboratory statistical summaries of urinalysis required by § 40.111(a) of this title; and

(iv) The employer's alcohol and controlled substances testing policy and procedures.

(d) *Location of records.* All records required by this part shall be maintained as required by § 390.31 of this subchapter and shall be made available for inspection at the employer's principal place of business within two business days after a request has been made by an authorized representative of the Federal Motor Carrier Safety Administration.

(e) *OMB control number.* (1) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2126-0012.

(2) The information collection requirements of this part are found in the following sections: Sections 382.105, 382.113, 382.301, 382.303, 382.305, 382.307, 382.401, 382.403, 382.405, 382.409, 382.411, 382.601, 382.603.

§ 382.403 Reporting of results in a management information system.

(a) An employer shall prepare and maintain a summary of the results of its

alcohol and controlled substances testing programs performed under this part during the previous calendar year, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(b) If an employer is notified, during the month of January, of a request by the Federal Motor Carrier Safety Administration to report the employer's annual calendar year summary information, the employer shall prepare and submit the report to the FMCSA by March 15 of that year. The employer shall ensure that the annual summary report is accurate and received by March 15 at the location that the FMCSA specifies in its request. The report shall be in the form and manner prescribed by the FMCSA in its request. When the report is submitted to the FMCSA by mail or electronic transmission, the information requested shall be typed, except for the signature of the certifying official. Each employer shall ensure the accuracy and timeliness of each report submitted by the employer or a consortium.

(c) *Detailed summary.* Each annual calendar year summary that contains information on a verified positive controlled substances test result, an alcohol screening test result of 0.02 or greater, or any other violation of the alcohol misuse provisions of subpart B of this part shall include the following informational elements:

(1) Number of drivers subject to this part;

(2) Number of drivers subject to testing under the alcohol misuse or controlled substances use rules of more than one DOT agency, identified by each agency;

(3) Number of urine specimens collected by type of test (e.g., pre-employment, random, reasonable suspicion, post-accident);

(4) Number of positives verified by a MRO by type of test, and type of controlled substance;

(5) Number of negative controlled substance tests verified by a MRO by type of test;

(6) Number of persons denied a position as a driver following a pre-employment verified positive controlled substances test and/or a pre-employment alcohol test that indicates an alcohol concentration of 0.04 or greater;

(7) Number of drivers with tests verified positive by a medical review officer for multiple controlled substances;

(8) Number of drivers who refused to submit to an alcohol or controlled

substances test required under this subpart, including those who submitted substituted or adulterated specimens;

(9)(i) Number of supervisors who have received required alcohol training during the reporting period; and

(ii) Number of supervisors who have received required controlled substances training during the reporting period;

(10)(i) Number of screening alcohol tests by type of test; and

(ii) Number of confirmation alcohol tests, by type of test;

(11) Number of confirmation alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04, by type of test;

(12) Number of confirmation alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test;

(13) Number of drivers who were returned to duty (having complied with the recommendations of a substance abuse professional as described in § 382.503 and part 40, subpart O, of this title), in this reporting period, who previously:

(i) Had a verified positive controlled substance test result, or

(ii) Engaged in prohibited alcohol misuse under the provisions of this part;

(14) Number of drivers who were administered alcohol and drug tests at the same time, with both a verified positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater; and

(15) Number of drivers who were found to have violated any non-testing prohibitions of subpart B of this part, and any action taken in response to the violation.

(d) *Short summary.* Each employer's annual calendar year summary that contains only negative controlled substance test results, alcohol screening test results of less than 0.02, and does not contain any other violations of subpart B of this part, may prepare and submit, as required by paragraph (b) of this section, either a standard report form containing all the information elements specified in paragraph (c) of this section, or an "EZ" report form. The "EZ" report shall include the following information elements:

(1) Number of drivers subject to this part;

(2) Number of drivers subject to testing under the alcohol misuse or controlled substance use rules of more than one DOT agency, identified by each agency;

(3) Number of urine specimens collected by type of test (e.g., pre-employment, random, reasonable suspicion, post-accident);

(4) Number of negatives verified by a medical review officer by type of test;

(5) Number of drivers who refused to submit to an alcohol or controlled substances test required under this subpart, including those who submitted substituted or adulterated specimens;

(6)(i) Number of supervisors who have received required alcohol training during the reporting period; and

(ii) Number of supervisors who have received required controlled substances training during the reporting period;

(7) Number of screen alcohol tests by type of test; and

(8) Number of drivers who were returned to duty (having complied with the recommendations of a substance abuse professional as described in § 382.503 and part 40, subpart O, of this title), in this reporting period, who previously:

(i) Had a verified positive controlled substance test result, or

(ii) Engaged in prohibited alcohol misuse under the provisions of this part.

(e) Each employer that is subject to more than one DOT agency alcohol or controlled substances rule shall identify each driver covered by the regulations of more than one DOT agency. The identification will be by the total number of covered functions. Prior to conducting any alcohol or controlled substances test on a driver subject to the rules of more than one DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(f) A C/TPA may prepare annual calendar year summaries and reports on behalf of individual employers for purposes of compliance with this section. However, each employer shall sign and submit such a report and shall remain responsible for ensuring the accuracy and timeliness of each report prepared on its behalf by a C/TPA.

§ 382.405 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this section, no employer shall release driver information that is contained in records required to be maintained under § 382.401.

(b) A driver is entitled, upon written request, to obtain copies of any records pertaining to the driver's use of alcohol or controlled substances, including any records pertaining to his or her alcohol or controlled substances tests. The employer shall promptly provide the records requested by the driver. Access to a driver's records shall not be contingent upon payment for records other than those specifically requested.

(c) Each employer shall permit access to all facilities utilized in complying

with the requirements of this part to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(d) Each employer shall make available copies of all results for employer alcohol and/or controlled substances testing conducted under this part and any other information pertaining to the employer's alcohol misuse and/or controlled substances use prevention program, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's administration of a post-accident alcohol and/or controlled substance test administered following the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of a written request from a driver. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the driver's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a driver to the decision maker in a lawsuit, grievance, or administrative proceeding initiated by or on behalf of the individual, and arising from a positive DOT drug or alcohol test or a refusal to test (including, but not limited to, adulterated or substituted test results) of this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the driver.) Additionally, an employer may disclose information in criminal or civil actions in accordance with § 40.323(a)(2) of this title.

(h) An employer shall release information regarding a driver's records as directed by the specific, written consent of the driver authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

§ 382.407 Medical review officer notifications to the employer.

Medical review officers shall report the results of controlled substances tests to employers in accordance with the requirements of part 40, subpart G, of this title.

§ 382.409 Medical review officer record retention for controlled substances.

(a) A medical review officer or third party administrator shall maintain all dated records and notifications, identified by individual, for a minimum of five years for verified positive controlled substances test results.

(b) A medical review officer or third party administrator shall maintain all dated records and notifications, identified by individual, for a minimum of one year for negative and canceled controlled substances test results.

(c) No person may obtain the individual controlled substances test results retained by a medical review officer or third party administrator, and no medical review officer or third party administrator shall release the individual controlled substances test results of any driver to any person, without first obtaining a specific, written authorization from the tested driver. Nothing in this paragraph (c) shall prohibit a medical review officer or third party administrator from releasing, to the employer or to officials of the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances testing program under this part, the information delineated in part 40, Subpart G, of this title.

§ 382.411 Employer notifications.

(a) An employer shall notify a driver of the results of a pre-employment controlled substances test conducted under this part, if the driver requests such results within 60 calendar days of being notified of the disposition of the employment application. An employer shall notify a driver of the results of random, reasonable suspicion and post-accident tests for controlled substances conducted under this part if the test results are verified positive. The employer shall also inform the driver which controlled substance or substances were verified as positive.

(b) The designated employer representative shall make reasonable efforts to contact and request each driver who submitted a specimen under the employer's program, regardless of the driver's employment status, to contact and discuss the results of the controlled substances test with a medical review officer who has been unable to contact the driver.

(c) The designated employer representative shall immediately notify the medical review officer that the driver has been notified to contact the medical review officer within 72 hours.

§ 382.413 Inquiries for alcohol and controlled substances information from previous employers.

Employers shall request alcohol and controlled substances information from previous employers in accordance with the requirements of part 40, subpart B, of this title.

Subpart E—Consequences for Drivers Engaging in Substance Use-Related Conduct

§ 382.501 Removal from safety-sensitive function.

(a) Except as provided in subpart F of this part, no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subpart B of this part or an alcohol or controlled substances rule of another DOT agency.

(b) No employer shall permit any driver to perform safety-sensitive functions, including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section.

(c) For purposes of this subpart, commercial motor vehicle means a commercial motor vehicle in commerce as defined in § 382.107, and a commercial motor vehicle in interstate commerce as defined in part 390 of this subchapter.

§ 382.503 Required evaluation and testing.

No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of part 40, subpart O, of this title. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of part 40, subpart O, of this title.

§ 382.505 Other alcohol-related conduct.

(a) No driver tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for an employer, including driving a commercial motor vehicle, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until the start of the driver's next regularly scheduled duty period, but not less than 24 hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall

take any action under this part against a driver based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

§ 382.507 Penalties.

Any employer or driver who violates the requirements of this part shall be subject to the penalty provisions of 49 U.S.C. 521(b). In addition, any employer or driver who violates the requirements of 49 CFR part 40 shall be subject to the penalty provisions of 49 U.S.C. 521(b).

Subpart F—Alcohol Misuse and Controlled Substances Use Information, Training, and Referral

§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.

(a) *General requirements.* Each employer shall provide educational materials that explain the requirements of this part and the employer's policies and procedures with respect to meeting these requirements.

(1) The employer shall ensure that a copy of these materials is distributed to each driver prior to the start of alcohol and controlled substances testing under this part and to each driver subsequently hired or transferred into a position requiring driving a commercial motor vehicle.

(2) Each employer shall provide written notice to representatives of employee organizations of the availability of this information.

(b) *Required content.* The materials to be made available to drivers shall include detailed discussion of at least the following:

- (1) The identity of the person designated by the employer to answer driver questions about the materials;
- (2) The categories of drivers who are subject to the provisions of this part;
- (3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the work day the driver is required to be in compliance with this part;
- (4) Specific information concerning driver conduct that is prohibited by this part;
- (5) The circumstances under which a driver will be tested for alcohol and/or controlled substances under this part, including post-accident testing under § 382.303(d);

(6) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the driver and the integrity of the testing processes, safeguard the validity of the

test results, and ensure that those results are attributed to the correct driver, including post-accident information, procedures and instructions required by § 382.303(d);

(7) The requirement that a driver submit to alcohol and controlled substances tests administered in accordance with this part;

(8) An explanation of what constitutes a refusal to submit to an alcohol or controlled substances test and the attendant consequences;

(9) The consequences for drivers found to have violated subpart B of this part, including the requirement that the driver be removed immediately from safety-sensitive functions, and the procedures under part 40, subpart O, of this title;

(10) The consequences for drivers found to have an alcohol concentration of 0.02 or greater but less than 0.04;

(11) Information concerning the effects of alcohol and controlled substances use on an individual's health, work, and personal life; signs and symptoms of an alcohol or a controlled substances problem (the driver's or a co-worker's); and available methods of intervening when an alcohol or a controlled substances problem is suspected, including confrontation, referral to any employee assistance program and or referral to management.

(c) *Optional provision.* The materials supplied to drivers may also include information on additional employer policies with respect to the use of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level, that are based on the employer's authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

(d) *Certificate of receipt.* Each employer shall ensure that each driver is required to sign a statement certifying that he or she has received a copy of these materials described in this section. Each employer shall maintain the original of the signed certificate and may provide a copy of the certificate to the driver.

§ 382.603 Training for supervisors.

Each employer shall ensure that all persons designated to supervise drivers receive at least 60 minutes of training on alcohol misuse and receive at least an additional 60 minutes of training on controlled substances use. The training will be used by the supervisors to determine whether reasonable suspicion exists to require a driver to undergo

testing under § 382.307. The training shall include the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances.

§ 382.605 Referral, evaluation, and treatment.

The requirements for referral, evaluation, and treatment must be performed in accordance with 49 CFR part 40, subpart O.

Date Issued: March 16, 2001.

Julie Anna Cirillo,

Acting Deputy Administrator, Federal Motor Carrier Safety Administration.

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Parts 653, 654, and 655

[Docket No. FTA-2000-8513]

RIN 2132-AA71

Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations

AGENCY: Federal Transit Administration, Department of Transportation.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Federal Transit Administration (FTA) proposes to combine its drug and alcohol testing regulations. FTA believes this action will make the rules more "user-friendly" and easier to understand. Also, the new rule will take into account the guidance that FTA has issued in the past several years, including technical assistance, letters of interpretation, audit findings, newsletters, training classes, safety seminars, and public speaking engagements. In addition, this NPRM conforms FTA's rule to the Department of Transportation's (DOT) revised drug and alcohol testing rule published on December 19, 2000.

DATES: Comments on this proposed rule must be submitted by June 14, 2001.

ADDRESSES: Written comments must refer to the docket number appearing above and must be submitted to the United States Department of Transportation (U.S. DOT), Central Docket 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